IUCN Academy of Environmental Law eJournal

A Word from the Editors

Welcome to the 9th issue of the IUCN Academy of Environmental Law Journal.

War. Casualties. Destruction. It is undeniable that the world has become more involved in armed conflict and warfare. At the time of writing, only ten countries in the world are not directly or indirectly involved in war.[1] Whilst the imagery of warfare is typically associated with large scale nation-to-nation battles, more often than not, modern combat is typified by domestic conflict between factions within a sovereign state.[2]

There is no doubt that the images of contemporary conflicts such as the Syrian civil war, the Yemeni crisis and the genocide against the Rohingya in Myanmar evokes a powerful reaction regardless of one's own view of the efficacy of war. Yet despite this imagery, the environmental impacts and legacy of armed conflict for survivors remains a silent casualty. The scale and severity of environmental destruction that is associated with warfare remains largely ignored with survivors inheriting a world with no foreseeable prosperity or means to secure a living.

Institutions, decision-makers and development partners play a critical role in preventing further ecological damage and conflict associated with a mismanagement of natural resources. This issue of the IUCNAEL Journal takes a closer look at the environmental cost and legacy of armed conflict and explores practical solutions in how law and policy can be harnessed to promote peace and a sustainable future for communities affected by war. This issue continues the discussion from IUCN's 15th Annual Colloquium titled *Stories of the World We Want and the Law as a Pathway* which considered further intersecting issues including

[1] Adam Withnall, 'Global Peace Index 2016: There are now only 10 countries in the world that are actually free from conflict' (The Independent, 8 June 2016). Available at: https://www.independent.co.uk/news/world/politics/global-peace-index-2016-there-are-now-only-10-countries-in-the-world-that-are-not-at-war-a7069816.html

[2] Institute for Economics and Peace, *Global Peace Index 2016* (IEP, 2016) 33.

threats to national security associated with climate change, inclusive development and food security challenges.

In keeping with the spirit of this issue, Grant Dawson examines the environmental protections that are embedded within the international chemical weapons framework, namely the Chemical Weapons Convention (CWC), and its application in the destruction of chemical weapons in Libya. In his article 'The operation of the Chemical Weapons Convention as a multilateral environmental instrument', Dawson considers the complementarity of the Chemical Weapons Convention with multilateral environmental agreements to consider how the safe destruction of chemical weapons can be achieved. Given the shared aspiration to continue disarmament to promote peace, Dawson's analysis on Libya provides an illustration of the challenges for host countries and the viability of transporting chemical weapons across the globe to secure destruction sites.

Warfare uses an extensive amount of energy and armed forces are often required to quickly establish secure infrastructure to conduct operations. But what is the legacy of this infrastructure? What happens to this inventory during the transition to peace and how can local communities utilise this equipment to secure a more sustainable future? David Grinlinton in his article 'Opportunities for sustainable energy in conflict zones: The role of international organisations and military forces' takes a closer look in how occupying forces can promote renewable energy and allow local communities to leverage this infrastructure during de-escalation and post conflict reconstruction. By examining the Bamyan Provincial Reconstruction Team in Afghanistan as a case study, Grinlinton explores the effectiveness of existing policies and practices in achieving long term sustainability in the energy sector.

National security also plays a significant role in the effectiveness of environmental protections in nations that already have an established legal framework for conservation and land use planning. Noriko Okubo takes a look at what's occurring in Japan, where a series of controversial national security projects have challenged the efficacy of domestic environmental protection laws and participation rights of local communities. Specifically, 'Judicial control over national security projects: Critical analysis of the Okinawa dugong cases from the viewpoint of Principle 10' examines the construction of the Henoko air base and how the resulting litigation have detrimentally impacted on the rights of local communities enshrined in instruments such as the Aarhus Convention. Okubo's contribution provides a timely reminder that the machinery of warfare can have a lasting impact on nations during peacetime and that projects conducted under national security interests must balance ecological conservation and effective participation by the community.

Finally, Elaine Hsiao in her article 'Nomoscaping peace in times of conflict: A case study of the Greater Virunga Transboundary Collaboration' explores how protected areas can play a critical role in building peace, particularly in areas where conflict is associated with control over natural resources including megafauna. Hsiao's article discusses innovative govern-ance structures which govern the Albertine Rift in Uganda and how peace is supported through formalised treaty instruments and plural conflict resolution mechanisms. Despite such institutions and practices primarily concerning environmental conservation, 'Nomoscaping peace in times of conflict' provides an illustrative example of how environ-mental conservation can build long lasting partnerships to promote peace.

Despite the scale of environmental damage created by warfare in the modern era, these submissions provide hope that the environmental impact of warfare can be addressed and, further, that conservation can be utilised to shape and build long lasting peace. This issue explores and delves into the intertwined and complementary relationship between sustain-ability and peace, and we trust that this issue continues the conversation of how law and institutional practices can be harnessed to build the future that we want.

Elsewhere in this issue we are pleased to present Country and Region Reports spanning five continents. As ever, these reports provide a unique opportunity to make connections and find parallels in environmental law across jurisdictions as well as providing updates in legislative, case law and policy developments. In a year in which the problem of plastic pollution appears to have broken into the public consciousness, reports this year examine recent legislative developments to tackle to tackle single use plastic, notably as plastic bags from the progressive ban introduced in Kenya, to the application of EU law in Italy as well as developments in the Czech Republic. As ever, climate change, and particularly adapta-tion and responding to the consequences of climate change, feature prominently, from with-drawal from the Paris Agreement and legislative changes in the US to adaptation in Belgian cities and Austria's first climate change lawsuit. Additionally, the significance of constitu-tional arrangements and the public law aspects of environmental protection are highlighted in reports from Spain, the Bahamas, the US, France and others. Reports from the EU, New Zealand and Bangladesh further pick up developments in core areas of environmental law including, respectively, the polluter pays principle, planning and conservation, and the pro-tection of biodiversity.

This issue also features two thought provoking insight pieces. The first addresses the phe-nomena of children's lawsuits against climate change. In this piece Mrinalini Shinde high-lights the history and rise of these cases with a particular focus on *Juliana v. United States* as well as a suite of cases from multiple jurisdictions that have been heard in recent years. In the second piece Ritu Dhingra and Balwinder Singh examine the dramatic decline in

house sparrow populations in India and use this case study to reflect on the utility of the current approach to categorization of species under the IUCN Red List model, as a means of conserving both individual species and the biodiversity upon which all species rely. The issue concludes with a Book Review by Imtiaz Ahmed Sajal who reviews *The Paris Agreement: Climate Change, Solidarity, and Human Rights, by* Judith Blau. The book, and this review, is timely both in following the implications of the Paris Agreement and, given current political turns, its conceptualisation of solidarity as a mean to achieve the goals of the Agreement.

We hope that readers of this issue will find the contributions challenging and informative. We thank both our contributors and the Editorial Team for their efforts in publishing another issue of the Journal. Special thanks is due to Professor Benjamin Richardson for his work in bringing together contributions from the workshop of the 15th Colloquium.

Opi Outhwaite and Shawkat Alam

Substantive articles	***The Operation of the Chemical Weapons Convention as a Multilateral Environmental Instrument in the Mission to Remove and Destroy The Reminder of Lybia's Chemical Weapons Stockpile*** *Grant Dawson*
	Opportunities for sustainable energy in conflict zones: The role of international organisations and military forces *David Grinlinton*
	Judicial Control Over National Security Projects: Critical Analysis of the Okinawa Dugong Cases From the Viewpoint of Principle 10 *Noriko Okubo*
	Nomoscaping Peace in Times of Conflict: A Case Study of the Greater Virunga Transboundary Collaboration (GVTC) *Elaine Hsiao*
Country Reports	**Austria** *Birgit Hollaus*
	The Bahamas *Andrew Smith, Nyanne Olander, Shanae Petty and Monique Millar* *with Lisa Benjamin*
	Bangladesh *Imtiaz Ahmed Sajal*
	Belgium Anemoon Soete

	Czech Republic *Milan Damohorsky & Petra Humlickova*
	European Union *Samvel Varvaštian*
	France Adrien Bodart
	Italy *Carmine Petteruti*
	Kenya Collins Odote
	Spain *Laura Presicce*
	New Zealand *Trevor Daya-Winterbottom*
	USA *Robert Percival*
Insights	**A Rise in Children's Lawsuits Against Climate Change** *Mrinalini Shinde*
	House Sparrow Populations and Local Protection of Biodiversity *Ritu Dhingra and Balwinder Singh*

Book Reviews	**Judith Blau, The Paris Agreement: Climate Change, Solidarity, and Human Rights (review)** *Imtiaz Ahmed Sajal*

The Operation of the Chemical Weapons Convention as a Multilateral Environmental Instrument in the Mission to Remove and destroy the remainder of Libya's Chemical Weapons Stockpile

Grant Dawson*

The Architecture of the Libya Operation

When Libya acceded to the Chemical Weapons Convention (CWC or Convention) in 2004,[3] it possessed a significant amount of Gaddafi-era chemical weapons that now were subject to declaration, storage, and destruction under the detailed provisions of the Convention. After several years of efforts by Libya, the international community, and the Organisation for the Prohibition of Chemical Weapons (OPCW), the remainder in 2016 to be destroyed was approximately 500 metric tons of toxic industrial chemicals, which were precursors of chemical weapons, such as mustard gas.[4] In late 2015, concerns about the precursors falling into the hands of non-state actors increased when ISIS struck a checkpoint about 45 miles from Ruwagha, where the facility storing the chemicals, called the 'tank farm', was located.[5] Libya had also notified the Executive Council of the OPCW that there were environmental risks in connection with the

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[3] The Libyan Arab Jamahiriya (Libya) deposited its instrument of accession to the CWC on 6 January 2004, making 5 February 2004 the entry into force date by operation of Article XXI(2) of the Convention. OPCW (Note by the Technical Secretariat), 'Status of Participation in the Chemical Weapons Convention as at 6 January 2004' (19 January 2004) S/395/2004.

[4] M Ryan and G Jaffe, 'As ISIS Closed In, A Race to Remove Chemical-weapon Precursors in Libya' *The Washington Post* (Washington D.C. 13 September 2016) <https://www.washingtonpost.com/world/national-security/as-isis-closed-in-a-race-to-remove-chemical-weapon-precursors-in-libya/2016/09/13/85094326-78f7-11e6-beac-57a4a412e93a_story.html?utm_term=.c32454925e0d> accessed 9 June 2017 (Ryan & Jaffe, As ISIS Closed In); OPCW Press Release, 'OPCW Expresses Concern over Chemical Weapons Stockpiles in Libya' (6 May 2011); OPCW (Executive Council), 'Report of the Fifty-Second Meeting of the Executive Council' (27 July 2016) EC-M-52/2, para. 3.6.

[5] Ryan & Jaffe, As ISIS Closed In.

chemicals being stored at the tank farm.[6] In February 2016, Libya requested its fellow States Parties to the CWC to assist it with the transportation and destruction of its remaining chemical weapons outside of the country.[7] In May 2016, another check-point, this time only one mile from the tank farm, was attacked.[8] In mid-July, Libya informed the OPCW that it had successfully transported the remaining chemical weapons from the tank farm to the Libyan port of Misrata and requested the assistance of the OPCW and the international community in transporting the chemicals outside of Libya on an expedited basis to a specialised waste treatment facility for destruction.[9]

On 20 July 2016, the OPCW Executive Council adopted a decision requesting the OPCW Director-General—within seven days—to assist Libya in developing a modified plan of destruction to be considered by the Council, along with recommendations for the expeditious transport, storage, and destruction of the remaining chemical weapons.[10] On 22 July, the United Nations Security Council authorised Member States of the United Nations to acquire, control, transport, transfer, and destroy the chemical weapons in order to ensure the elimination of Libya's chemical weapons stockpile in the soonest and safest manner.[11] In several subsequent decisions, the OPCW Executive Council decided that the chemicals would be removed by Libya within the shortest time possible (and by no later than 8 September 2016),[12] reviewed the destruction plan,[13] and approved the agreement between the OPCW and the Federal Republic of Germany that governed the destruction of the chemical weapons at a specialised

[6] OPCW (Decision of the Executive Council), 'Destruction of Libya's Remaining Chemical Weapons Stockpile' (24 February 2016) EC-M-51/DEC.1, preambular para. 5.
[7] Statement of the United States of America to the OPCW Executive Council (24 February 2016).
[8] Ryan & Jaffe, As ISIS Closed In.
[9] OPCW (Decision of the Executive Council), 'Destruction of Libya's Remaining Chemical Weapons' (20 July 2016) EC-M-52/DEC.1; OPCW Press Release, 'Libya's Remaining Chemical Weapon Precursors Arrive Safely and Securely at German Facility for Destruction' (8 September 2016) (8 September OPCW Press Release); OPCW (Executive Council, Note by the Director-General), 'Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (19 August 2016) EC-M-53/DG.1, paras 5–6.
[10] OPCW (Decision of the Executive Council), 'Destruction of Libya's Remaining Chemical Weapons' (20 July 2016) EC-M-52/DEC.1, operative para. 2.
[11] UNSC Res 2298 (22 July 2016) UN Doc S/RES/2298, operative para. 3.
[12] OPCW (Decision of the Executive Council), 'Detailed Requirements for the Destruction of Libya's Remaining Category 2 Chemical Weapons' (27 July 2016) EC-M-52/DEC.2, operative para. 2.
[13] OPCW (Decision of the Executive Council), 'Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (26 August 2016) EC-M-53/DEC.1.

destruction facility (GEKA) in Münster, Germany, as well as the OCPW's verification of the destruction.[14]

On 27 August 2016, the remainder of Libya's chemical weapons stockpile was removed from the country by a civil Danish merchant ship, the DFDS *Ark Futura*, escorted by military vessels from the United Kingdom, Denmark, and Spain. By 8 September 2016, the chemicals had been unloaded at the port of Bremen and then transported to GEKA in Münster.[15] In addition to the efforts of Libya, the United States, Denmark, the United Kingdom, and Germany, the multi-lateral operation—coordinated by the OPCW—involved logistical, diplomatic, and financial contributions from Canada, Italy, Malta, Finland, France, Belgium, the Netherlands, and Spain.[16] In November and December 2016, the Technical Secretariat of the OPCW informed the States Parties of the Executive Council that destruction of the chemical weapons was underway using environmentally safe technologies, under the on-site verification of OPCW inspectors.[17] In January 2018, the OPCW announced the completion of the destruction of the remainder of Libya's chemical weapons stockpile.[18] Finally, the Technical Secretariat of the OPCW has reported that it is working with the European Union on a plan to implement an environmental clean-up of the Ruwagha area, where the chemical weapons were previously stored.[19]

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[14] OPCW (Decision of the Executive Council), 'Arrangement between the Organisation for the Prohibition of Chemical Weapons and the Government of Germany Governing On-site Inspections at the Gesellschaft zur Entsorgung von Chemischen Kampfstoffen und Rüstungsaltlasten MBH (GEKA MBH) Münster, and at the Port of Disembarkation in Germany' (26 August 2016) EC-M-53/DEC.2.

[15] 'Libya Chemical Weapons: Components Leave for Europe' BBC (London 31 August 2016) <http://www.bbc.com/news/world-africa-37234680> accessed 9 June 2017; OPCW Press Release, 'Libya's Remaining Chemical Weapon Precursors Successfully Removed' (31 August 2016); 8 September OPCW Press Release.

[16] 8 September OPCW Press Release.

[17] OPCW (Executive Council, Report by the Director-General), 'Status of the Implementation of the Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (21 November 2016) EC-84/DG.3, paras 3–6; OPCW (Executive Council, Report by the Director-General), 'Status of the Implementation of the Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (21 December 2016) EC-84/DG.5, paras 3–6.

[18] OPCW Press Release, 'OPCW Director-General Praises Complete Destruction of Libya's Chemical Weapon Stockpile' (11 January 2018) <https://www.opcw.org/news/article/opcw-director-general-praises-complete-destruction-of-libyas-chemical-weapon-stockpile/> accessed 19 May 2018.

[19] OPCW (Executive Council, Report by the Director-General), 'Status of the Implementation of the Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (21 December 2016) EC-84/DG.5, para. 11; OPCW Press Release, 'Libya's Remaining Chemical Weapon Precursors Successfully Removed' (31 August 2016).

The aim of the present article is to analyse the unconventional application of the CWC[20] and applicable multilateral environmental instruments to the successful operation to disarm, in an environmentally responsible manner, the Gaddafi-era chemical weapons programme of Libya. In doing so, the interplay of these international treaties will be addressed. The thesis presented is that the CWC, which is traditionally and primarily viewed as a disarmament treaty, in fact operates in a number of contexts to oblige States Parties to protect the environment during the storage, transport, and destruction of chemical weapons. This thesis was recently tested by the Libya operation. The relevant provisions of the CWC will be explored, along with relevant portions of the Convention's *travaux préparatoires* and applicable multilateral environmental instruments. Finally, some remarks are offered regarding the convergence of security, environmental law, and sustainable development during the Libya operation.

The Chemical Weapons Convention as a Multilateral Environmental Agreement

The CWC is commonly considered a treaty about chemical weapon disarmament and non-proliferation, which indeed it is. However, it is also important to note that there are a number of provisions of the CWC that regulate the storage, transport, and destruction of chemical weapons in an environmentally safe manner; and, the Convention prohibits certain destruction methodologies, such as dumping in any body of water, land burial, or open-pit burning. Bearing this in mind, it should be considered that the CWC includes integral legal provisions regarding the protection of the environment in the context of these twin aims of disarmament and non-proliferation. A reading of the CWC that does not acknowledge the central importance of its environmental law provisions fails to account for the historical, political, and legal forces that were at play during the long development of the treaty. As stated by Australia during the negotiation of the Convention in the United Nations Conference on Disarmament:

> *'[t]he destruction of chemical weapons is not just a political and security objective; it is also an environmental objective'*.[21]

[20] The Convention was opened for signature in 1993 and entered into force in 1997. See Organisation for the Prohibition of Chemical Weapons, *OPCW: The Legal Texts* (3rd edn Asser Press, The Hague 2014), p. 3.

[21] 'Final record of the Five Hundred and Eighty-Sixth Plenary Meeting' (7 March 1991) CV/PV.586 (Book 41). The numerous and complex records from 1969–1992 of the United Nations Conference on Disarmament (and its predecessors) relating to the drafting and negotiation of the CWC have been

The CWC and its detailed Annex on Implementation and Verification (Verification Annex) were drafted against the default premise that the destruction of chemical stockpiles had to be accomplished in a manner consistent with applicable environmental laws. This observation is based on an analysis of several provisions that regulate the storage, transport, and destruction of chemical weapons in an environmentally safe manner. The concern of the drafters of the CWC for safeguarding the environment can also be discerned in the extensive discussions (*travaux préparatoires*) in the United Nations Conference on Disarmament that led to environmental legal norms being mainstreamed into the CWC verification regime.

The work of States in the United Nations Conference on Disarmament in drafting and negotiating the CWC reflects concerns over the impact that the destruction of chemical weapons would have on the environment, as well as with measures to mitigate that impact. An example of this notion was Australia's stated position that:

> *'the destruction of existing chemical weapons should be carried out in a way that is environmentally safe and that the provisions of the convention should be developed to make clear our collective commitment to such environmentally safe procedures'*.[22]

Since the mid-1990s, the United Nations General Assembly has emphasised the importance of the observance of environmental norms in the preparation and implementation of disarmament agreements.[23]

The outcome of the negotiations conducted between States in the United Nations Conference on Disarmament was what we now know as the text of the CWC and its Annexes. Article IV of the Convention regulates the manner in which States are to destroy any chemical weapons they may possess on their territory or in a place under their jurisdiction or control. Paragraph 10 of that Article provides that:

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compiled into a multi-volume set by Canada's Arms Control and Disarmament Division of External Affairs and International Trade (located in Ottawa, Canada). Hereinafter, these documents will be referred to as 'CWC *Travaux Préparatoires*', with the document reference of the Conference on Disarmament.

[22] CWC *Travaux Préparatoires*, 'Final record of the Five Hundred and Eighty-Sixth Plenary Meeting' (7 March 1991) CV/PV.586 (Book 41).

[23] UNGA, 'Resolution on the Observance of Environmental Norms in the Drafting and Implementation of Agreements on Disarmament and Arms Control' (2 December 2008) A/RES/63/51.

> *'[e]ach State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions'* (emphasis added).

This language, 'highest priority', closely mirrors language used by the (former) Union of Soviet Socialist Republics and the United States in documents in the Conference on Disarmament that related to the development of a bilateral disarmament agreement for the destruction of both countries' chemical weapons stockpiles, pending the negotiation and conclusion of a multilateral convention on the same subject.[24]

The Convention does not simply deal with environmental safeguards in a general manner, but rather requires possessor States to disclose, in their general plans for destruction[25] and in their detailed plans for destruction,[26] the measures that will be taken in order to ensure the safety of the destruction operation and the compliance with national environmental laws. Commentators have explained that paragraph 10

> *'underlines the importance of safety and security during all operations related to chemical weapons, and the fact that the Convention negotiators wanted to reassure workers and communities, as well as OPCW inspectors, that no major public health and environmental damage would follow from chemical weapons disarmament.'*[27]

Paragraph 10 also requires a State to disclose to its fellow States Parties the steps it intends to take to protect the environment during the destruction or conversion of its chemical weapons production facilities, noting that the detailed plans for destruction will be made available, under paragraph 2(b)(i) of the Confidentiality Annex of the CWC, to the other States for their review.[28] The decision of the drafters of the CWC is significant because other priorities could have been set and environmental considerations could have been subordinated to the speedy destruction of chemical weapons;

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[24] CWC *Travaux Préparatoires* (United States), 'Final Record of the Five Hundred and Fifty-Fourth Plenary Meeting' (24 April 1990) CD/PV.554 (Book 33); CWC *Travaux Préparatoires* (USSR), 'Environmental aspects of the destruction of chemical weapons (An approach proposed by Soviet experts)' (7 October 1991) Chemical Weapons Working Papers of the *Ad Hoc* Committee on Chemical Weapons 1991 CD/CW/WP.368 (Book 47).

[25] CWC, Verification Annex, Part IV(A), para. 6(e); see W Krutzsch, E Myjer, R Trapp, J Herbach (eds), *The Chemical Weapons Convention*, *A Commentary* (Oxford University Press, Oxford 2014) ('2014 Commentary'), p. 145.

[26] CWC, Verification Annex, Part IV(A), paras 31(j), 32; see 2014 Commentary, p. 145.

[27] 2014 Commentary, p. 145.

[28] See 2014 Commentary, p. 145.

however, in the end, protection of the environment prevailed. The fact that possessor States are required to disclose their general and detailed plans for destruction also serves an important check and balance in ensuring that the destruction of chemical weapons remains consistent with domestic environmental protection standards and obligations under the CWC.

Part IV(A)(20) of the Verification Annex details that the Executive Council plays a crucial role in reviewing plans for destruction of chemical weapons in order to assess their conformity with the order of destruction and provides the Council with the ability to consult with any State Party whose plan does not conform, with the objective of bringing the plan into conformity. Paragraph 56 of Part IV(A) of the Verification Annex further provides that (a) agreed detailed plans for verification must be submitted to the Council for review, (b) the Council shall review such plans with a view to approving them, and (c) such review shall be completed not less than 180 days before the destruction period begins.

Looking at these provisions from the perspective of how they have been put into practice in the CWC's short history, numerous destruction plans have already been reviewed. This serves as an important institutional safeguard to ensure that destruction plans consider the environmental safeguards prescribed under the CWC and domestic environmental protection legislation of possessor States.

In relation to specific environmental standards prescribed under the CWC, Article V regulates the destruction of chemical weapon production facilities or, alternatively, their conversion into facilities used for industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes. Paragraph 11 provides that:

> *'[e]ach State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions'* (emphasis added).

This provision mirrors Article IV, paragraph 10, and requires transparency between States

> *'in order to assure that the obligation to provide safety for people and to protect the environment will be complied with'*.[29]

In the event that the applicable national standards are found to be wanting, there is an opportunity for fellow States Parties to request necessary adjustments in those environmental standards,[30] pursuant to Article VII, paragraph 1, which states that:

> *'[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention'.*

Finally, in a decision taken by the Conference of the OPCW States Parties at its first session, States were encouraged to complete the primary decontamination of their chemical weapons production facilities as part of their closure and inactivation measures. The purpose of these procedures was to avoid potential environmental contamination.[31]

Turning to Article VII of the CWC, entitled, 'National Implementation Measures', paragraph 3 of that Article provides that:

> *'[e]ach State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard'* (emphasis added).

Commentators have observed that one of the ways in which States Parties could implement the obligation to protect the environment during the destruction of chemical weapons is the exchange of technological expertise on environmental regulatory measures; and, in fact, this had already commenced during the negotiation phase of the CWC.[32] Article VII, paragraph 3 could also be interpreted to mean that a possessor State's fellow States Parties will review that State's national environmental standards to ensure that they are being complied with during the destruction operations.[33] After World War II and prior to the adoption of the CWC, the three disposal methodologies

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[29] 2014 Commentary, p. 171.
[30] W Krutzsch and R Trapp, *A Commentary on the Chemical Weapons Convention* (Martinus Nijhoff Publishers, Leiden 1994) ('1994 Commentary'), p. 92; see 2014 Commentary, pp. 145, 171.
[31] OPCW (Decision of the Conference of States Parties), 'Primary Decontamination of the Chemical Weapons Production Facility' (16 May 1997) C-I/DEC.23, preambular para. 3.
[32] 1994 Commentary, p. 119.
[33] 1994 Commentary, p. 75.

used were land burial, open pit burning, and dumping in large bodies of water, for example in coastal seas and the oceans. One of the primary aims of the CWC was to alter the *status quo* in this regard by prohibiting these common forms of disposal of chemical weapons. The States Parties that drafted and adopted the CWC stated, in paragraph 12 of Part IV(A) of the Verification Annex of the Convention, that:

> *"'[d]estruction of chemical weapons" means a process by which chemicals are converted in an essentially irreversible way to a form unsuitable for production of chemical weapons, and which in an irreversible manner renders munitions and other devices unusable as such'.*

The States Parties are then prohibited, in the very next paragraph, from resorting to certain methods by which chemical weapons, in the past, were rendered unsuitable for production into chemical weapons. Thus, Part IV(A) of the Verification Annex of the CWC, at paragraph 13, stipulates that:

> *'[e]ach State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: dumping in any body of water, land burial or open-pit burning. It shall destroy chemical weapons only at specifically designated and appropriately designed and equipped facilities'* (emphasis added).

As stated by Canada in a working paper prepared during the negotiations in the UN Conference of Disarmament, land burial and dumping at sea were, by that time, precluded due to public concern and advances that had been made in the environmental sciences.[34] The large number of States Parties that ratified the CWC voluntarily bound themselves to these prohibitions and, in doing so, advanced the status of these international environmental law norms. However, the foregoing prohibitions are prospective and not retrospective. Article III, paragraph 2, and Article IV, paragraph 17, of the CWC make it clear that chemical weapons buried on a State's territory before 1 January 1977 and those dumped at sea before 1 January 1985 are not subject to the declaration and destruction requirements of the Convention.[35]

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[34] CWC *Travaux Préparatoires*, 'Disposal of Chemical Agents' (3 April 1981) CD/173 (Book 5). See also CWC *Travaux Préparatoires* (Italy), 'Working Paper on some problems concerning prohibition of chemical weapons' (8 July 1971) CCD/335 (Book 4) (stating that the destruction of large chemical weapons stocks by dumping into the ocean was unthinkable); CWC *Travaux Préparatoires* (Canada), 'Destruction and disposal of Canadian stocks of World War II Mustard Agent' (16 July 1974) CCD/434 (Book 4) (stating that dumping chemical weapons (mustard agents) in the ocean was unacceptable); CWC *Travaux Préparatoires* (Indonesia and The Netherlands), 'Working Document: Destruction of about 45 tons of mustard agent at Batujajar, West-Java, Indonesia' (31 March 1982) CD/270 (Book 2) (stating that dumping chemical weapons in the ocean was considered unacceptable).

[35] 1994 Commentary, p. 343, note 19.

In the context of the requirement only to destroy chemical weapons at specifically designated and appropriately designed and equipped facilities (Part IV(A) of the Verification Annex of the CWC, paragraph 13), a possessor State must obtain (among other things), for each of its chemical weapons destruction facilities, the environmental permits required for the destruction operations to be conducted there, pursuant to paragraph 32 of Part IV(A) of the Verification Annex of the Convention. This requirement is yet another check on a State Party aimed at ensuring that the appropriate domestic environmental regulations are being followed.

An example of this requirement in action—and a demonstration of how this provision of the CWC was respected in difficult circumstances—was the multi-year delays in the remaining two chemical weapons destruction facilities in the United States, whose operations were suspended for many years, while the necessary environmental permits were being obtained. National legislation was adopted mandating that the Department of Defence consider alternatives to incineration of its remaining chemical weapons stockpiles. After a process that involved local environmental groups and the development of formal environmental impact statements, the Department of Defence selected neutralisation followed by biotreatment as the official chemical weapons disposal method for the Colorado stockpile and neutralisation followed by supercritical water oxidation for the Kentucky stockpile.[36] This process is consistent not only with paragraph 32 of Part IV(A) of the Verification Annex of the CWC, but also with the position of the United States, taken during the negotiation of the CWC in the UN Conference on Disarmament, that chemical demilitarisation had to comply with existing environmental and safety regulation and standards, including the National Environmental Policy Act (NEPA), the Resource Conservation and Recovery Act (RCRA), the Toxic Substance Control Act (TSCA), the Clean Air Act (CAA), and State Air Quality Regulations.[37]

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[36] See Program Executive Office, 'Assembled Chemical Weapons Alternatives, Program Timeline' <https://www.peoacwa.army.mil/about-peo-acwa/program-timeline/> accessed 3 April 2017; OPCW, 'Destruction Technologies' <https://www.opcw.org/our-work/demilitarisation/destruction-technologies/> accessed 3 April 2017.

[37] CWC *Travaux Préparatoires* (United States of America), 'U.S. Chemical Weapons (CW) Destruction Safety and Environmental Requirements (Presented at the meeting of the Technical Experts on CW Destruction, Geneva, 7–11 October 1991)', Working Papers of the *Ad Hoc* Committee on Chemical Weapons 1992 (14 February 1992) CD/CW/WP.383 (Book 51).

The provisions of the CWC discussed above were not general legal platitudes floating above the Libya operation; rather, they were detailed, rigorous legal requirements that were actively embedded into the implementation of the packaging, transport, and destruction of the chemical weapons throughout the international endeavour. This is demonstrated by comparing the requirements of the Convention with the relevant legal documents that regulated the operation. The detailed destruction plan for the remainder of the Libyan chemical weapons—which was submitted by the OPCW Technical Secretariat for review by the OPCW Executive Council—recalled paragraph 13 of Part IV(A) of the Verification Annex of the CWC and confirmed that none of the prohibited destruction methodologies would be employed. The plan also assured the members of the Executive Council that the chemicals were being packed and transported in accordance with relevant safety and environmental standards, such as the International Maritime Dangerous Goods (IMDG) Code, and recalled paragraph 10 of Article IV of the CWC—which requires States to assign the highest priority to protecting the environment and to the transportation and destruction of chemical weapons in accordance with national standards for safety and emissions.[38] Compliance with the IMDG Code, and the legally mandatory nature thereof, is analysed further in the next section.

Moreover, the combined facility agreement and agreed detailed plan for verification in relation to the GEKA destruction facility in Germany—which was approved by the Executive Council and concluded between the OPCW and Germany—recalled paragraph 10 of Article IV of the CWC and stipulated that the destruction operation would be conducted in accordance with applicable German national and local environmental laws and regulations.[39] The combined agreement also disclosed the scientific and engineering details of the destruction operation; and, the exact destruction methodologies (incineration through a cutting-edge plasma arc system followed by a neutralisation hydrolysis system) were chosen in order to ensure compliance with German and

[38] OPCW (Executive Council, Note by the Director-General), 'Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya' (19 August 2016) EC-M-53/DG.1, paras 5–7, 12–13, 16; OPCW (Decision of the Executive Council), 'Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya, EC-M-53/DEC.1, 26 August 2016.

[39] Id., preambular para. 5, Section 2(1).

European Union environmental regulations.[40] In addition to the transparency of the approach of the OPCW and its States Parties (these documents are publicly available on the OPCW website), the foregoing analytic comparison of the relevant provisions of the Convention with the technical requirements of the facility agreement regulating the destruction of Libyan chemical weapons demonstrates the deontological compliance of the relevant stakeholders with the binding environmental legal provisions of the CWC.

A quicker, cheaper, and simpler way to dispose of Libya's remaining chemical weapons would have been to simply upend the old storage tanks and allow the chemicals to seep into the desert sands around the tank farm in Ruwagha. However, this would not have been consistent with the CWC's requirement that the highest priority be given to the protection of the environment under Article IV, paragraph 10. Commentators have observed that:

> *'[w]hile [environmental] standards and practices vary from country to country, the OPCW has consistently emphasized that the top priority in chemical weapons destruction processes was not to meet schedules and deadlines, but rather to protect people and the environment'.*[41]

This observation was borne out not only in theory, but also in practice, during the Libya operation.

The Applicability of Other Multilateral Environmental Agreements to the Libya Removal Operation

There are other multilateral environmental agreements with possible relevance to the Libya removal operation. Some of the most potentially relevant examples are discussed below.

The United Nations Convention on the Law of the Sea (UNCLOS) obliges States to prevent, reduce, and control pollution of the marine environment due to dumping. The Convention was signed in 1982 and entered into force in 1994. Article 210 of

[40] OPCW (Decision of the Executive Council), 'Arrangement between the Organisation for the Prohibition of Chemical Weapons and the Government of Germany Governing On-site Inspections at the Gesellschaft zur Entsorgung von Chemischen Kampfstoffen und Rüstungsaltlasten MBH (GEKA MBH) Münster, and at the Port of Disembarkation in Germany' (26 August 2016) EC-M-53/DEC.2, Annex, paras 25–41.
[41] 2014 Commentary, p. 145.

UNCLOS—which is located in Part XII ('Protection and Preservation of the Marine Environment'), Section 5 ('International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment'), and which is entitled 'Pollution by dumping'—requires States to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment by dumping (paragraph 1) and to take other measures as may be necessary to prevent, reduce, and control such pollution (paragraph 2). Article 211, entitled 'Pollution from vessels', establishes detailed requirements upon States to adopt international rules and standards to prevent, reduce, and control pollution of the marine environment from vessels and to minimise the threat of accidents that could cause pollution of the marine environment. Article 211 is considered a rule of reference that bridges UNCLOS's general provisions to more specific international standards, such as the IMDG Code, in order to allow for technological innovation and to foster uniformity.

The States that were parties to UNCLOS and were participating in the multi-national endeavour to remove Libya's remaining chemical weapons were under a positive legal obligation to find solutions on how to deal with the remainder of Libya's chemical weapons stockpile that did not include dumping the materials into the ocean.[42] UNCLOS's requirement that States prevent the pollution of the marine environment due to dumping is fully consistent with and reflected in the CWC's categorical prohibition on dumping chemical weapons in any body of water as a destruction methodology and the requirement that States may only destroy chemical weapons at specifically designated and appropriately designed and equipped facilities, pursuant to Part IV(A), paragraph 13, of the Verification Annex of the CWC.[43] It was therefore not even a legal option to dump the Libyan chemical weapons either on the ground or in the sea.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter—otherwise known as the London Convention—was adopted in 1972 and

[42] Denmark, the United Kingdom, and Spain—the States providing the bulk of the maritime personnel and materiel for the removal operation—are parties to UNCLOS. See —, 'United Nations Convention on the Law of the Sea' (List of Parties) < https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en > accessed 3 April 2017.

[43] See A Lott, 'Pollution of the Marine Environment by Dumping: Legal Framework Applicable to Dumped Chemical Weapons and Nuclear Waste in the Arctic Ocean' (2015) Nordic Environmental Law Journal 1, pp. 57–69, 62.

entered into force in 1975.[44] The Convention essentially prohibits the dumping in the sea of substances that are expressly listed in the Convention. This Convention is of high relevance to the Libya operation: Article IV(1)(a) provides that the Contracting Parties shall prohibit the dumping of any wastes or other matter in whatever form or condition that are, *inter alia*, included in Annex I. Paragraph 7 of Annex I specifically lists the following substances that are prohibited from being dumped at sea:

> *'[m]aterials in whatever form (e.g. solids, liquids, semi-liquids, gases or in a living state) produced for biological and chemical warfare'* (emphasis added).

Article V of the London Convention provides to the Contracting Parties the possibility of dumping prohibited substances in the ocean when it is necessary to secure the safety of human life, if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur. With the threat of ISIS coming into possession of precursors of chemical weapons stored at Ruwagha, it could conceivably have been argued that sea dumping of the chemicals was the lesser of the two evils; however, once the decision was made to remove the chemicals from the territory of Libya and once they were loaded onto the Danish *Arc Futura* for transport to Germany, this danger would have been past. In any case, none of the official documents released by the OPCW indicates that the possibility of dumping the chemicals into the Mediterranean or North Seas was ever considered as an option. On the contrary, the States Parties to the CWC and the OPCW Technical Secretariat seemed to operate on the assumption that dumping (either on land or at sea) was not an option and that environmentally safe disposal in an appropriately designed and equipped facility was the only destruction methodology to be considered.

In 1996, States adopted a protocol to the London Convention that embraced a different approach to the prohibition against dumping materials in the sea: instead of only prohibiting specifically identified substances (like in the London Convention), the Protocol prohibits the dumping at sea of *any and all* materials, unless that substance is listed as being permissible for purposes of dumping. Moreover, even a substance that is

[44] Denmark, the United Kingdom, and Spain are parties to the London Convention and Protocol. See —, 'Status of Conventions' <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> accessed 3 April 2017.

allowed to be dumped in the sea requires a permit by the entity performing the dumping. The Protocol entered into force in 2006 and is intended to eventually replace the London Convention.[45] The Protocol—when read together with the London Convention—expresses a taboo on dumping chemical warfare agents in the sea; and, the CWC's categorical legal interdiction on the dumping of chemical weapons in any body of water as a destruction methodology further augments the international legal norm that enjoined the dumping of the Libyan chemical weapons into the Mediterranean or North Seas.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was, in part, a response to the dumping of foreign toxic waste in the territories of developing nations.[46] The Convention—which was adopted in 1989 and entered into force in 1992—aims to reduce the production of hazardous waste, to manage the disposal of such waste in an environmentally sound manner, and to regulate the transboundary movement of hazardous waste.[47] This aim is clearly reflected in Article 4 of the Basel Convention, entitled 'General Obligations'. Article 4(2)(d) mandates that States Parties shall take appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes; furthermore, such movement must be conducted in a manner that protects human health and the environment.

A threshold question raised by a comparison of the Libya operation with the treaty obligations set forth in the Basel Convention is whether the Libya chemical weapons being transported could be considered 'waste' or 'hazardous waste'. Paragraph 1 of Article 2 ('Definitions') provides the following definition of 'wastes': 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'. Paragraph 1(a) of Article 1 states that

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[45] See 1996 Protocol to the London Convention 1972 (adopted 7 November 1996, entered into force 24 March 2006) (1997) 36 ILM 1 (London Protocol), Article 23.

[46] Denmark, the United Kingdom, and Spain are parties to the Basel Convention. See —, 'Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal' <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> accessed 3 April 2017.

[47] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 126 (Basel Convention), preambular paras 7, 19–20.

the following wastes subject to transboundary movement shall be 'hazardous wastes' for the purposes of the Convention:

> *'[w]astes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III'.*

Since the Libyan precursor chemicals seem to fall into categories contained in Annex I and to possess the characteristics of hazardous substanses listed in Annex III, the Basel Convention probably was applicable to the removal operation. Accordingly, the OPCW and the States Parties participating in the Libya operation adhered to accepted international standards for the transport of dangerous goods, *i.e.*, international maritime dangerous goods (IMDG) standards.[48] IMDG standards are maintained and updated by the International Maritime Organization. Other multilateral environmental instruments are referred to in the IMDG Code. The main objective of the International Convention for the Safety of Life at Sea (1974), as amended (SOLAS), is to specify minimum standards for the construction, equipment, and operation of ships; and, Chapter VII requires compliance with the IMDG Code. The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) aims to prevent pollution of the marine environment by ships from their operation or from accidental causes; and, Annex III requires compliance with the IMDG Code.[49]

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[48] Cf. Basel Convention, Article 4(7)(b) (providing that States Parties shall '[r]equire that hazardous wastes and other wastes that are to be the subject of a transboundary movement be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and that due account is taken of relevant internationally recognized practices') and (c) (providing that States Parties shall '[r]equire that hazardous wastes and other wastes be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal').

[49] See —, 'IMDG Code' <http://www.imo.org/en/Publications/IMDGCode/Pages/Default.aspx> accessed 5 June 2017; —, International Convention for the Safety of Life at Sea (SOLAS), 1974' (Summary) <http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas),-1974.aspx> accessed 5 June 2017; —, International Convention for the Prevention of Pollution from Ships (MARPOL)' (Summary) <http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx> accessed 5 June 2017. Denmark, the United Kingdom, and Spain are parties to SOLAS and MARPOL. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) has not come into force yet. There are other international conventions that may be relevant to the Libyan removal operation, such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants; however, due to space constraints, they are not dealt with herein.

As can be discerned from the above analysis, disposing of the Libyan chemical weapons in the Mediterranean or North Seas was not a legal option available to the States Parties participating in the multi-national removal and destruction operation. Such a destruction methodology was prohibited not only by the CWC, but also by UNCLOS and the London Convention and Protocol. In devising an approach to the transport and destruction of the chemical weapons that was in-line with such environmental treaties, the States taking part in the Libya operation were also adhering to the UN General Assembly's call for all States to fully contribute, through their actions, to ensuring compliance with relevant environmental norms in the implementation of treaties and conventions on disarmament to which they are parties.[50]

The Convergence of Security, Environmental Law, and Sustainable Development During the Libya Operation

In conducting the Libya operation, the OPCW and the participating States Parties were able to draw upon the legal, financial, diplomatic, and logistical experience gained from the removal operation conducted in the Syrian Arab Republic from 2013 to 2015. A lesson learned exercise conducted by the OPCW in relation to the Syria operation indicated that environmental groups in areas bordering the Mediterranean Sea had expressed concerns over the multi-national maritime transportation of the Syrian chemical weapons and the possible environmental impacts. The report of the lessons learned exercise recommended that, in future contingency operations, the OPCW invest more effort in working with States, media, and civil society to proactively provide information and background material pertaining to such operations.[51] During the Libya operation, the OPCW heeded this lesson and issued press releases through its public website in order to keep media and civil society informed of the steps that were being taken, including measures to protect the environment during the operation.[52]

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[50] UNGA, 'Resolution on the Observance of Environmental Norms in the Drafting and Implementation of Agreements on Disarmament and Arms Control' (2 December 2008) UN Doc A/RES/63/51.
[51] Ralf Trapp, Report, Lessons Learned from the OPCW Mission in Syria, Submitted to the Director-General of the Technical Secretariat of the OPCW, 16 December 2015, paras 96, 118 <https://www.opcw.org/fileadmin/OPCW/PDF/Lessons_learned_from_the_OPCW_Mission_in_Syria.pdf> accessed 17 May 2018.
[52] See <https://www.opcw.org/special-sections/libya/press-releases/> accessed 17 May 2018.

The operation was an example of international institutions working in an effective manner to deliver a tangible security benefit for the people of Libya, the region, and the entire planet. Although such removal operations are not the norm, it is significant that the international community can organise such contingency missions when they are needed and that they can be carried out in a way that balances security and environmental considerations. A convergence between security, environmental law, and sustainable development can also be discerned in such operations. The relationship between the work of the OPCW and the concept of sustainable development is clearly set out in Our Common Future, also known as the Brundtland Report, which was published in 1987 by the United Nations World Commission on Environment and Development. The Commission's mandate included re-examining critical issues of environment and development with a view towards strengthening international cooperation in these areas. The Report defined the concept of sustainable development as development that meets the needs of the present while also enhancing the potential of future generations to meet their own needs.[53] The Brundtland Report identified armed conflict and arms competition as barriers to sustainable development because they make significant claims on material resources that could otherwise be directed towards combatting poverty.[54] The Report specifically highlighted the dangerous and environmentally unpredictable consequences of biological and chemical weapons and emphasised that further efforts were necessary to strengthen the existing regimes in this regard; the Report advised States to supplement the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare with an agreement prohibiting the production and stockpiling of chemical weapons.[55] This recommendation was implemented when the CWC was adopted in 1993 and entered into force in 1997. There is therefore a direct and causal link between the very origins of sustainable development and chemical disarmament.

One of the impetuses for the Libya removal operation in the summer of 2016 was the crescive concern that the Libyan chemical weapons would fall into the hands of non-state actors. Terrorism not only jeopardises peace and security but also can have devastating effects on human rights, the economy, and the environment. The Office

[53] World Commission on Environment and Development, *Our Common Future* (Oxford University Press, Oxford; New York, 1987) ('Brundtland Report'), Chapter 2, paras 1, 15.
[54] Id., Chapter 11, para. 16.
[55] Id., Chapter 11, para. 22.

of the United Nations High Commissioner for Human Rights has emphasised that terrorism destabilises States and governments, undermines civil society, and threatens both economic and social development. Terrorism also threatens international relations and impedes cooperation between States, including cooperation for development; is linked to transnational organised crime, including trafficking in biological and chemical materials; and has dramatic environmental effects, including damage to settlements, rural areas, and communication networks.[56] Acts of terrorism will be particularly devastating for small, fragile, or less developed States, which lack the fiscal capabilities to limit their macroeconomic impacts and which may in many cases be unable to take decisive and effective security measures to restore confidence and speed recovery.[57] For all of these reasons, the prevention of terrorism is vital to creating an environment that is conducive to sustainable development. The removal of the remainder of Libya's chemical weapons stockpile helps to ensure that the fear of chemical weapons attacks will not feature in the context of Libya's sustainable development efforts.

The Brundtland Report identified disarmament as being vital for sustainable development; however, despite the recommendations made in the Report, global military spending continues to increase, not only in developed countries, but also in many developing ones.[58] Governments that allocate large portions of their budgets to the development of weapons must often divert resources away from basic amenities and development goals in order to do so.[59] Resources are finite, and the more spent on the production of chemical weapons, the less spent on improving the quality of human life. The 'brain drain' on the scientific community should also be mentioned, in that the more scientists who spend their careers building weapons, the fewer there are who devote their professional expertise to the development of technologies for new energy

[56] See Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 32, 'Human Rights, Terrorism, and Counter-terrorism' (December 2007) DPI/2439/B-Rev.2, pp. 7–8; A Mannion, 'The Environmental Impact of War & Terrorism' (2003) University of Reading Geographical Paper No. 169, p. 2.
[57] W Enders & T Sandler, 'Economic Consequences of Terrorism in Developed and Developing Countries: An Overview, Terrorism, Economic Development, and Political Openness' (2008) 17, pp. 2, 18.
[58] S Atapattu, 'Sustainable Development and Terrorism: International Linkages and a Case Study of Sri Lanka' (2006) William & Mary Environmental Law and Policy Review 30(2), p. 7.
[59] United Nations Office for Disarmament Affairs, 'Applying a Disarmament Lens to Gender, Human Rights, Development, Security, Education and Communication: Six Essays' (2012) Civil Society and Disarmament, p. 5.

sources, the improvement of human health and agricultural productivity, and the restoration of the planet's damaged ecosystems.[60] Disarmament places constraints upon the tools of violent conflict and promotes transparency, builds confidence, deescalates conflict, and reduces tensions between parties—thus providing space for development and progress.[61]

Conclusion

The international community has made significant progress since the days following the World Wars when it was considered legally permissible to destroy chemical weapons through open-pit burning, land burial, and dumping at sea. It has been in the context of the United Nations Conference on Disarmament (and its predecessors) that environmental legal norms were mainstreamed into the text of the CWC; and, the OPCW and the UN continue to work together, when necessary, to ensure that chemical weapons are destroyed without adverse effects to the ecosystem. A variety of legal instruments had to be taken into consideration when States and the OPCW were deciding upon the legal framework under which to complete the chemical disarmament of the Gaddafi-era chemical weapons programme of Libya in an environmentally responsible manner. The CWC operated not only as a disarmament and non-proliferation treaty, but also as a multilateral environmental agreement. A number of provisions of the Convention that regulate the storage, transport, and destruction of chemical weapons in an environmentally safe manner and the Convention's prohibition on certain destruction methodologies, such as dumping in any body of water, provided a legal framework for the protection of the atmospheric, terrestrial, and marine environment during the packaging, storage, transport, and destruction of the remainder of Libya's chemical weapons. In addition, some of the applicable international environmental legal norms emanated from other multilateral environmental instruments that were not necessarily created to regulate the destruction of chemical weapons, such as UNCLOS and the London Convention and Protocol. The OPCW was willing and able to apply these legal instruments in an innovative manner to a neoteric situation,

[60] Brundtland Report, Chapter 11, paras 27–28.
[61] See Transcript of a video produced by the United Nations Office of Disarmament Affairs in 2016, Disarmament and Sustainable Development, <https://video.un-arm.org/intl-day.mp4> accessed 23 February 2017.

and the legal approach that was devised and implemented has the potential to serve as a model for future disarmament operations. In a time of fiscal austerity and amid serious security concerns, environmental considerations were not subordinated;[62] rather, the environment was placed first, as the highest priority.

The participation of States in the Libyan operation—including the planned environmental clean-up of the site where the chemicals were stored—can be analysed in terms of a cost-benefit analysis that weighed a multitude of factors, such as peace, security, the environment, and development. The short-term costs of chemical disarmament can be high: the global cost of demilitarising the planet's chemical weapons arsenals from the 1990s onwards, including the prodigious stockpiles that have been destroyed in the United States of America and the Russian Federation, has been estimated in the billions of dollars. However, if a different temporal perspective is taken, and one extends the cost scrutiny to a mid- to long-term horizon, chemical disarmament unlocks vast pools of resources that can be employed to reverse environmental degradation, restore ecosystems, and develop methods of managing the finite resources of the planet in a sustainable and responsible manner. Financial expenditures in the area of disarmament are therefore potentially long-term and high-yield investments in our planetary ecosystem.

[62] During the drafting of the CWC in the United Nations Conference on Disarmament, the United Kingdom of Great Britain and Northern Ireland commented that safety and environmental acceptability cannot be considered in isolation and that the safest and most expedient disposal method may not necessarily be the most environmentally friendly. CWC *Travaux Préparatoires*, (United Kingdom of Great Britain and Northern Ireland), 'Destruction of CW stocks, weapons and associated plant (for the meeting on Technical Aspects of CW Destruction (7–11 October 1991)' (21 October 1991) Chemical Weapons Working Papers of the *Ad Hoc* Committee On Chemical Weapons 1991 CD/CW/WP.373 (Book 47).

OPPORTUNITIES FOR SUSTAINABLE ENERGY IN CONFLICT ZONES: The role of International Organisations and Military Forces

David Grinlinton*

Introduction

Reliable and secure sources of energy are critical in the successful conduct of peacekeeping operations (PKOs), and post-conflict reconstruction. International organisations (IOs) such as the UN, and/or military forces are usually the 'first responders' in such crises. They must generally be self-sufficient for their energy needs, and/or establish secure and reliable local energy sources for their own immediate and on-going operations. They are often also providers of emergency energy services to support the preservation of life, property, infrastructure services, and the re-establishment of local security and rule of law functions pending recovery and re-establishment of those capabilities by the civil power/host nation.

Intervention in conflict zones by IOs and military forces is highly dependent upon large quantities of fuel for vehicles and operational plant, and to generate electricity for camps and field bases often using portable generating equipment. Where local infrastructure has been severely damaged or incapacitated, emergency fuel supplies and generation facilities must often be established. Such facilities are usually temporary, expensive, rely primarily upon liquid fossil fuels, require secure supply lines, and are not designed for long-term sustainability. These energy requirements have significant environmental impacts, including ground, vegetation and habitat disturbance from the infrastructure required to transport, store and distribute fuel; increased greenhouse gas emissions from its transport and use; and localised pollution to water and air through discharges and accidental spills of hydrocarbons and their by-products.

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Following immediate intervention and stabilisation operations, a longer-term presence of international IOs, NGOs, and in some cases multinational and/or coalition military and civil agencies, may be required, both for on-going peace-keeping and peace-building operations, and to facilitate the law and governance conditions for longer-term reconstruction. This phase provides great opportunities for integrating more sustainable and secure renewable energy alternatives to the energy infrastructure that existed before the conflict.[63] The greater use of renewable energy during recovery and reconstruction, and encouragement of a longer-term transition from fossil fuels to renewable sources of energy, also contributes to the achievement of the UN's sustainable development goals (SDGs) and to meeting climate change obligations where applicable. Access to energy services is also a fundamental issue in regard to human rights, and distributed and accessible renewable energy networks have great potential in this context. The rebuilding of energy infrastructure and the transition to renewable energy also provide opportunities for reintegration of former combatants and dissident elements into society through disarmament, demobilisation and reintegration (DDR) initiatives. On the other side of the equation, such initiatives carry certain economic and security risks, as new energy infrastructure development funded or facilitated by overseas nations, IOs and NGOs can become a target by disaffected insurgent forces and terrorist organisations.

This paper will examine the benefits, detriments, opportunities and risks in utilising renewable energy through IO and military involvements in conflict and post-conflict stabilisation operations and reconstruction, and as a long-term contributor to increased security and functionality of the energy infrastructure in post-conflict zones. The primary focus will be on generation of electricity, although this may provide opportunities in the longer-term for greater use of renewable electricity in agricultural and industrial processes, and in the electrification of transport networks. A case study of the experiences and

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[63] For an excellent discussion of energy issues in war-affected African nations, see Anke Hoeffler, *Challenges of Infrastructure Rehabilitation and Reconstruction In War-affected Economies* (African Development Bank, Economic Research Papers No 48) (CSAE Oxford University, Oxford, 1991), esp para 4.3. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157630-EN-ERP-48.PDF> accessed 23 May 2018.

contributions of military forces and IOs in implementing renewable energy projects in Afghanistan is included.

Opportunities for Greater Use of Renewable Energy in Peacekeeping Operations and Post-Conflict Reconstruction

Opportunities for greater use of sustainable energy in conflict and post-conflict environments can be divided into three broad areas. First, meeting the logistical and operational requirements of IOs and military forces in conducting their missions; secondly, mitigating the environmental externalities of the use of traditional fossil fuels in supporting and conducting operations; and thirdly, the role of renewable energy in promoting longer-term ecological sustainability, contributing to the UN's SDGs, addressing climate change, responding to human rights challenges in regard to access to energy, and contributing to economic development in the peace building and post-conflict reconstruction phase.

Operational and Logistical Considerations

Intervention and stabilization operations in conflict zones require fast, mobile and flexible transport methods for personnel and materiel. Emergency responses usually rely heavily on air transport, including fast response light fixed-wing and rotor craft in the early stages of response, heavy lift air-drops of equipment and supplies, and where airfields exist, landing zones, storage and distribution facilities. Road transport is also used for personnel and materiel, and where coastal access with port or offload options is available in the conflict zone, heavy lift sea transport is an option for vehicles, machinery and heavy plant. All of these methods of transportation require extensive use of fossil fuels. A 2009 study found that the UN had a total climate footprint of approximately 1.75 million tons of CO2 equivalent emissions per year, which is similar to the climate footprint of the City of London. PKOs contributed over 56% of that figure.[64] Its air fleet of over 250 aircraft accounted for 46% of its

[64] UNEP, *Greening the Blue Helmets: Environment , Natural Resources and UN Peacekeeping Operations* (UN: Nairobi, 2012), pp 8 and 27.

peacekeeping climate footprint, and with over 17,000 vehicles road transportation accounted for 26%.[65] Similarly, a Canadian study found that over the period 2008-2011 54% of the energy usage of expeditionary Canadian Armed Forces was aviation fuel.[66] A 2006 study by the US military showed that fuel made up 70% of all tonnage shipped to base camps and remote bases.[67] These figures are concerning, but as yet there is no viable alternative to fossil fuels to power the methods required for rapid transportation of personnel and materiel to conflict zones. Nevertheless, more efficient deployment and management of aircraft and vehicles is an area of development with significant savings being achieved through enhanced flight planning, fuel efficiency standards in procurement of aircraft and vehicles, and operational procedures relating to matters such as idle time, speed limits and driver education.[68] Some experimental work has also been done with the use of more fuel-efficient vehicles, electric vehicles and unmanned platforms for reconnaissance and light transport in conflict zones.[69]

The UN study referred to above also noted that power generation comprised 26% of the PKO climate footprint.[70] This is an area where there is opportunity for greater efficiencies and cost savings as there are renewable and alternative energy solutions readily available for many of the power generation requirements of forward operating bases and camps.[71] However, the uncertainty of the duration of intervention operations has made it difficult to make a sound financial case for establishing effective renewable energy alternatives to fossil

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65 UNEP, Moving towards a climate neutral UN: The UN system's footprint and efforts to reduce it (UNEP: Nairobi, 2009).

66 Paul Labbé, Ahmed Ghanmi and Gisele Amow, *Evidence base for the development of an enduring DND/CAF Operational Energy Strategy (DOES)* (Defence Research and Development Canada (DRDC) Scientific Report DRDC-RDDC-2014-R65 December 2014) (DRDC, Ottawa 2014) <http://cradpdf.drdc-rddc.gc.ca/PDFS/unc197/p800726_A1b.pdf> accessed 23 May 2018.

67 US Army Environmental Policy Institute, *Sustain the mission project: Resource costing and cost-benefit analysis* (US Army Environmental Policy Institute, Arlington, VA 2006) at 31.

68 UNEP (n. 2) 27.

69 Ibid. 27-28.

70 UNEP (n. 3).

71 UNEP (n. 2) 27-30. See also "Ruggedized, Clean Power for Military and Intelligence", the website of the now defunct Skybuilt Power company that supplied portable renewable energy solutions to the US Department of Defense and the CIA <http://archive.is/epOH> accessed 23 May 2018.

fuels as the lead-time required for such expenditure to produce greater efficiencies and cost savings may be several years.[72] Recent innovations, including modularizing combined solar and battery storage generating equipment in easily transportable containerized or trailerable units, provide more cost-effective solutions that can be re-used in other missions, ameliorating, to some extent, the cost-benefit challenges.[73] In addition to these technical and financial challenges, procurement arrangements and supply chains and procedures are largely based on established procedures and a mindset oriented towards the continued use of fossil fuels. A significant cultural change is required by those in charge of procurement, engineering and operational planning to accommodate alternative and renewable energy options.

In terms of security and risk analysis, greater use of renewable and alternative energy production on operational missions reduces the need to transport large quantities of fuel, thus reducing cost and threats to convoys and personnel.[74] The more of a mission's energy requirements that can be sourced locally, or from renewable sources, the greater the resilience of the mission in cases where conflict and armed attacks threaten road, air and sea transport of materiel and fuel. Smaller and more portable units for production of energy from solar and wind sources, with diesel backup, can also allow a more distributed network for electricity production in a larger-scale PKO or reconstruction mission, providing greater resistance of the system to armed attack, sabotage, technical failure and theft.[75]

Reducing and Mitigating Environmental Externalities

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72 UNEP, ibid. 29.

73 See, for example, the deployment by the Canadian Armed Forces of a portable combined solar and wind generating unit: Government of Canada, National Defence and the Canadian Armed Forces, 'First Renewable Energy Mini-electric Power Station' (article by Lucy Ellis) 30 April 2014 <http://www.forces.gc.ca/en/news/article.page?doc=first-renewable-energy-mini-electric-power-station/humd3dga> accessed 23 May 2018.

74 See Gordon D. Kuntz, *Use of Renewable Energy in Contingency Operations* (Army Environmental Policy Institute and US Army War College Research Paper) (AEP & USAWC, Arlington, VA 2007) 15-16, & 19-20.

75 See H Zerriffi, H Dowlatabadi and N Strachan, 'Electricity and Conflict: Advantages of a Distributed System' (January-February 2002) *The Electricity Journal* 55, although the article discussed the advantages of distributed natural gas-fired units.

Reducing the environmental externalities of operational activities is a significant benefit from the greater use of renewable and alternative energy. The 2006 US Army study referred to above calculated that 6 litres of fuel were required to transport 1 litre of fuel to its destination.[76] While these figures may differ with the type of mission, the mode of transport, and the types of vehicles and aircraft and their uses, there is undoubtedly a significant multiplier of GHG emissions for every unit of fuel that is used by IOs or military forces in a conflict zone. These emissions could be reduced dramatically with greater use of renewable energy. GHG emissions of vehicles and aircraft "in theatre" can also be reduced through greater efficiency in their scheduling, operational deployment and methods of use, but apart from some limited uses for electric vehicles in bases for light tasks, there are few practical opportunities for major reductions in vehicle emissions. Existing systems are available for utilising solar and wind energy for powering communication and IT equipment, and for contributing to plant operation and battery storage in camps and bases. Thermal solar water heating is another well-established means of reducing dependence on fossil fuels and thus GHG emissions. There are opportunities for much greater use of these systems on operations.

Localised land and water pollution from spillages of fossil fuels and from domestic waste produced in camps and bases can be reduced or mitigated by greater use of renewable energy. Obviously reduced use of fossil fuels reduces the potential for spillages. Waste can also be used to produce biogas to fuel some of the energy requirements of camps and bases.

Assisting in Development and a More Sustainable Energy Infrastructure

PKO and conflict interventions can also provide opportunities for economic development including improving energy security and providing employment. Often a conflict zone will have lost much of its energy infrastructure, and/or the infrastructure will be outdated and unreliable. IOs and military forces can play a significant role in assisting the construction of new infrastructure, and

[76] US Army (n. 5).

preparing local communities to maintain such infrastructure on an ongoing basis once the assisting organisations have withdrawn.

IOs and military forces will often create a significant energy generation and distribution structure for their own uses, and in emergency or crisis situations, for local communities. When the intervention or mission is over, much of this infrastructure may be removed, written off, or left as a legacy for the local community. Where renewable and more sustainable energy infrastructure has been introduced there is an opportunity to assist the local community by integrating that infrastructure into the local energy system, and to increase the level of renewable energy supply.

It is not enough, however, to leave a legacy of infrastructure and plant. Post-conflict zones are littered with the non-functioning detritus of well-meaning 'gifts' of departed IOs and military occupation forces, often creating environmental problems of their own. Such 'legacy donations' must therefore include sufficient training of local people, provision of ongoing spare parts and equipment to allow maintenance and continued functionality until these systems can be sustained by the local authorities or government agencies themselves, and undertakings by the responsible local authorities and communities that they will support the existing developments, and continue to improve and increase the integration of more sustainable energy options into their infrastructure.

Another downside of such legacy infrastructure is that it can be a target for continued aggression and armed attack by dissidents, terrorists and other disaffected elements. It can also be a target for theft as some items of equipment will have a saleable value for local communities, which will often be severely impoverished and politically unstable following extended periods of conflict.

At a higher level of abstraction, the development of renewable energy alternatives to fossil fuels, particularly in terms of energy generation, can contribute towards environmental and human rights objectives. The military forces comprising PKOs are subject both to their own country's laws and international undertakings, and so are bound to observe and further these objectives during operations in PKOs. If they comprise a UN, NATO or other recognized coalition operation they will also be bound by the rules that apply to member states

through those organisations. Finally, PKOs are often undertaken at the request of the government (or governments) in the conflict zone, and any 'Status of Forces Agreement' (SOFA) or 'Status of Mission Agreement' (SOMA) will usually require compliance with the host nation's laws, which may include obligations under international agreements, and domestic laws regarding energy, environmental, and human rights matters.

The UN's SDGs are subscribed to by most of the world's nations, including many that have suffered recent natural disasters and conflict. Renewable energy networks directly feed into Goals 7 (affordable and clean energy), 11 (sustainable cities and communities), and 13 (climate action), as well as indirectly into goals such as 1 (no poverty) and 3 (good health and wellbeing).[77] Many conflicted countries are also signatories to the Paris Agreement, [78] and previous climate change agreements such as the United Nations Framework Convention on Climate Change (UNFCCC).[79] Renewable energy developments also contribute to meeting those obligations, which are generally pushed to one side during periods of conflict.

The development of accessible, affordable and sustainable renewable energy networks in the longer-term reconstruction post-conflict phase can have great potential in addressing access to energy services, which some argue is a basic human right.[80]

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77 See UNDP, "Sustainable Development Goals", at http://www.undp.org/content/undp/en/home/sustainable-development-goals.html

78 Conference of the Parties to the UNFCCC on its twenty-first session FCCC/CP/2015/10/Add.1, Decision 1/CP.21 (Paris, 12 December 2015)

79 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC]. As of May 2017, the UNFCCC had 197 parties.

80 See generally, Adrian Bradbrook and Judith Gardam, "Placing access to energy services within a human rights framework" (2006) 28(2) *Human Rights Quarterly* 389. On the specific issues of small-scale renewable energy projects in developing and post-conflict countries, see Julie Terrapon-Pfaff, et al, "A cross-sectional review: Impacts and sustainability of small-scale renewable energy projects in developing countries" (2014) 40 *Renewable and Sustainable Energy Reviews* 1-10. On the more general issue of human rights and environmental justice, see Anna Grear "Human Rights and the Environment: a tale of ambivalence and hope" in in DE Fisher (ed) *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar, Cheltenham, UK, 2016), ch 6, and Richard P Hiskes *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, New York, 2008).

Policies and Practices of the UN, NATO and Military Organisations for Integrating the Greater Use of Renewable Energy in Operations

The United Nations

The United Nations has produced a number of recent policies and instruments dealing with environmental protection and ecologically sustainable development. For example, Principle 24 of the Rio Declaration provides:[81]

> *Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.*

In a 2009 report, the United Nations Environment Programme (UNEP) (Now renamed UN Environment) made a number of recommendations for integrating environmental and natural resource considerations into PKOs and conflict prevention, including strategies for improved natural resource and environmental management.[82] The report recognized that access to energy can be both a cause and a consequence of conflict, and sustainable energy development should be encouraged in peace building efforts.

In June 2009 the UN Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS) released their *Environmental Policy for UN Field Missions*.[83] This policy is still operative, and provides minimum operating standards and appropriate consideration where actions impact on the environment, including in the context of water, energy, waste, wildlife and cultural and historic sites. The following year member states approved a *Global Field Support Strategy*,[84] which has led to improvements in the speed and functionality of PKO deployments, and in water and waste management, energy efficiency

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81 UN, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

82 UNEP, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UNEP, Nairobi 2009) 5.

83 UN DPKO and UN DFS, *Environmental Policy for UN Field Missions* (UN, New York 2009).

84 UNGA, *Report of the Secretary General: Global field support strategy* (A/64/633) (UN, New York 2010).

and the encouragement of renewable energy and low-carbon technologies in camp design.[85]

In 2012 UNEP released *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*.[86] This report focused primarily on water, energy and waste, and reviewed the environmental management protocols through the various stages of PKOs from pre-deployment planning, through deployment, to camp closure and analysis of lessons learned.

In a 2014 report the Expert Panel on Technology and Innovation in UN Peacekeeping made a number of observations and recommendations on energy matters, including (paraphrased):[87]

- Alternate energies should be integrated across all aspects of field operations;
- A standing energy requirements board be established;
- Additional alternatives to fossil fuels should be identified and field tested;
- Alternative energy technologies should be aggressively applied;
- DFS should conduct an overview of energy saving and conservation technologies, and introduce these into every mission where possible;
- Where operationally practicable, DFS should place limits on fuel consumption, and provide alternate energy backup sources.

It should be remembered, however, that renewable energy innovations and new technologies are often experimental, and require increased expenditure and specialized technical skills to implement and maintain. Many nations that contribute to UN operations will not have the capacity to advance these initiatives unless financial and/or technical support is provided.

NATO

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85 UNEP (n. 2) 8, and examples given at 27-30. See also UN, *Performance Peacekeeping: Final Report of the Expert Panel on Technology and Innovation in UN Peacekeeping* (IN, NY 2014) 38-41 <http://www.performancepeacekeeping.org/offline/download.pdf> accessed 23 May 2018.

86 UNEP (n. 2).

87 UN, *Performance Peacekeeping* (n. 23) 18.

NATO has also become increasingly interested in the use of renewable and alternative energy sources in its operational deployments. The *Joint NATO Doctrine For Environmental Protection During NATO-Led Military Activities* requires commanders to understand how NATO-led military activities affect the environment, and to engage in environmental planning as an essential process to ensure environmental protection.[88] In relation to energy, commanders are required to achieve greater efficiencies by incorporating best available techniques in energy supply and management (including renewables), and to ensure personnel are educated on energy conservation matters.[89]

In 2013 NATO's Science and Technology Committee released a draft report focusing on reducing the use of fossil fuels, addressing sustainability issues, and addressing security dimensions including the transport of fuel through conflict zones.[90] *Resolution 407* of the NATO Parliamentary Assembly incorporates those considerations by urging members to (paraphrased):[91]

- increase research on improving military energy efficiency;
- create coherent national policies on military energy efficiency;
- build greater energy consumption accountability within their militaries;
- reduce military energy demands at installations and in operations;
- devise strategies aimed at diversifying energy supplies, and prioritise renewable energy sources;
- use off-the-shelf solutions where possible;

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88 NATO/OTAN, *Nato Standard AJEPP-4, Joint NATO Doctrine For Environmental Protection During NATO-Led Military Activities* (Edition A Version 1 May 2014) (NATO, Brussels 2014) at para 1.2 <nso.nato.int/nso/zPublic/ap/AJEPP-4%20EDA%20V1%20E.pdf> accessed 20 July 2017. Other NATO documents concerned with environmental protection can be found at <http://www.natolibguides.info/Environment/NATO-Documents> accessed 23 May 2018.

89 NATO/OTAN, ibid. esp paras 2.2, 2 a., b., c. and g., 5.2.1 and 5.2.2 b.

90 NATO Parliamentary Assembly, Science and Technology Committee, *New Energy Ideas for NATO Militaries: Building Accountability, Reducing Demand, Securing Supply, Draft Report* (Osman Bak, Rapporteur) (NATO, Brussels, Belgium 2013).

91 NATO Parliamentary Assembly, *Resolution 407 on New Energy Ideas For Nato Militaries: Building Accountability, Reducing Demand, Securing Supply*, Adopted 14 October 2013, 200 STC 13 E rev. 1 bis <http://www.natolibguides.info/ld.php?content_id=1675684> accessed 23 May 2018.

- ensure political support for NATO 'Smart Energy' initiatives;
- institutionalise current Smart Energy initiatives;
- ensure NATO-owned assets and installations are energy efficient;
- avoid duplication of NATO and EU activities and strengthen NATO co-operation with the EU in the area of military energy efficiency; and,
- strengthen NATO's political dialogue and technical co-operation with partner countries on issues of military energy efficiency.

Coalition and Independent Military Forces

A number of countries that deploy coalition and independent military forces to conflict zones have also increasingly addressed sustainable energy and environmental issues in policies and strategies. A full analysis is beyond the scope of this paper, but some examples include:

- United States: *Energy Security Implementation Strategy* (2008); a *Sustainability Campaign Plan* (2010),[92] the "Net Zero" initiative,[93] and the US Department of Defense *Operational Energy Strategy*; [94]
- Canada: *Defence Environmental Strategy*,[95] and DND/CAF *Operational Energy Strategy*;[96]

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92 See Institute of Land Warfare, Association of the United States Army (AUSA), *US Army Energy Security and Sustainability: Vital to National Defense* (AUSA, Arlington, Va. 2011) 6.

93 Described as a "holistic strategy for managing existing energy, water and solid waste programs through a reduction of the overall consumption of resources to an effective rate of zero": Kristine Kingery, Elizabeth Keysar, and Caroline Harrover, "The Net Zero Initiative" (2014) *The Military Engineer* 84, 85 <http://themilitaryengineer.com/index.php/tme-articles/tme-magazine-online/item/396-the-net-zero-initiative> accessed 23 May 2018.

94 US DoD, *2016 Operational Energy Strategy* (DoD, Washington, D.C. 2016) <http://www.acq.osd.mil/eie/Downloads/OE/2016%20OE%20Strategy_WEBd.pdf> accessed 23 May 2018.

95 Canada, Department of National Defence, *Defence Environmental Strategy: A Plan for Ensuring Sustainable Military Operations* (Canada, DNS, Ottawa 2013). Includes brief mentions of energy efficiency in procurement of military equipment, reducing energy use through building design and education, and investigating the greater use of alternatives to fossil fuels. <http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/defence-environmental-strategy_en_v7_small.pdf> accessed 23 May 2018. See also A Ghanmi, "Modelling and Analysis of Canadian Forces Operational Energy Demand", in *Proceedings of International Conference on Operations Research* 11, (Istanbul, Turkey, 2013).

96 See Labbé, Ghanmi and Amow (n. 4), for discussion of the development of this Strategy.

- United Kingdom: *Sustainable Development Strategy: A Sub-Strategy of the Strategy for Defence 2011 – 2030*;[97]
- Australia: *Defence Estate Energy Strategy 2014-2019*;[98] and
- New Zealand: The *Defence Force Order 23/2007*, which includes a strong statement of commitment to sustainability principles in NZDF policy, business and operational principles.[99]

Legal and Policy Implications of Renewable Energy Initiatives in Post-conflict PKOs, Contingency Operations and Reconstruction Efforts

Legitimacy of Contingency and Peacekeeping Interventions

Contingency and peacekeeping operations during hostilities, and post-conflict, may be authorized in a number of different ways. In most cases such operations will involve external military forces occupying the sovereign territory of one or more states. The legitimacy of the activities of occupying forces must be considered, including in the context of energy:

- building and maintaining infrastructure;
- importation, storage and transportation of fuel; and
- generation, storage and reticulation of electricity.

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97 UK MoD, *Sustainable Development Strategy: A Sub-Strategy of the Strategy for Defence 2011 – 2030* (UK MoD, London 2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27615/20110527SDStrategyPUBLISHED.pdf> accessed 23 May 2018. The *Strategy* includes *inter alia*: reducing reliance on fossil fuel in-theatre; addressing climate change issues; saving costs through reduced energy, fuel and water use, and producing less waste.

98 Australian Government, Department of Defence, *Defence Estate Energy Strategy 2014-2019* (Australia DoD, Canberra 2014) esp at 6-8 <http://www.defence.gov.au/estatemanagement/governance/Policy/Environment/EnergyEfficiency/Docs/DefenceEstateEnergyStrategyV2May14.pdf> accessed 23 May 2018. The *Strategy* includes *inter alia*: Reducing fuel usage of Naval vessels; more energy efficient flight paths for RAAF assets; procuring more energy efficient military platforms; and improving efficiency of use, greater use of biofuels and renewable energy at operational and deployed bases.

99 NZDF, *Defence Force Order 23/2007* (available on request). The *Order* includes principles of sustainable resource use and conservation, reduction of GHG emissions, protection of ecosystems, and minimization of waste. These principles apply to all NZDF functions, activities and operations within New Zealand and overseas on deployed missions.

The principle of sovereignty recognises that any state has "exclusive legislative, judicial and executive jurisdiction over activities on its territory".[100]

While non-intervention in the domestic affairs of other states is a fundamental principle of international law,[101] the international community generally accepts that there are circumstances where intervention may be warranted. A state may, for example, invite another state or group of states, or an international organisation, to provide assistance within its sovereign territory. The right of self-defence against armed aggression by a neighbouring state is another situation where intervention is justified. Emergency situations such as genocide, major crises where there is large scale loss of life and human suffering and domestic authorities are unable to cope, or where there is an extreme breach of fundamental human rights, may justify a properly constituted intervention – whether provided by one country or a grouping of countries.[102] The UN Charter recognises this with Art. 1 authorising collective action of member states for "prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace …"

Article 2.7 allows an exception to the non-intervention principle in the case of enforcement measures under Chapter VII operations, which may include sanctions and armed intervention to restore or maintain international peace and security. Such operations are usually conducted pursuant to a United Nations Security Council (UNSC) Resolution, without which most nations are unwilling to intervene. Where a UNSC Resolution cannot be secured, the UN General Assembly (UNGA) can authorise intervention, but situations where this has occurred are rare. An early example is the military intervention in Korea from 1950-1953, which was authorised by the UNGA's 'Uniting for Peace

[100] See Alexandre Kiss and Dinah Shelton *Guide to International Environmental Law* (Martinus Nijhoff, Leiden, The Netherlands 2007) 11.

[101] See UNGA, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI, Art. 2.4.

[102] See, e.g., Patrick Macklem, "Humanitarianism Intervention and the Distribution of Sovereignty in international Law" (2008) 22(4) *Ethics and International Affairs* 369, Ramesh Thakur, "Law, Legitimacy and United Nations" (2010) 11 *Melbourne Journal of International Law* 1, and Janne Matlary, "The legitimacy of military intervention: How important is a UN mandate?" (2004) 3(2) *Journal of Military Ethics* 129.

Resolution'. Since then 'Emergency Special Sessions' of the UNGA under the 'Uniting for Peace' process have been convened a further ten times.[103]

Assuming there is legitimate authorisation for a contingency operation or PKO, the legal and policy issues that arise in relation to environmental issues, and specifically the integration of renewable energy, play out at different levels. A UNSC Resolution outlines the nature and purpose of an intervention and usually gives some specific direction on the powers and obligations of the forces deployed. NATO-led interventions may be conducted pursuant to a UNSC Resolution, or not. If the latter, it will be primarily governed by NATO's own constitution and policies. If it is a non-UN and non-NATO intervention by an individual state or a coalition, it may still be undertaken pursuant to a UNSC Resolution. If not, it may be subject to an invitation and agreement with the host nation. There may also be some regional agreement authorising intervention. If there is no supra-national authorisation, nor any bi-lateral or multi-lateral agreement, an intervention may be solely governed by principles of international law and the intervening state(s) own laws and policies.

UNSC-mandated Interventions

UNSC Resolutions have increasingly made reference to environmental and sustainability considerations. For example UNSC Resolution 1704 authorising the establishment of the UN Mission in Timor-Leste (UNMIT) called on the UN and development partners to "continue providing resources and assistance for … projects towards sustainable and long-term development in Timor-Leste…".[104] Later UNSC Resolutions extending the term of UNMIT have repeated and extended references to sustainability.[105] Another example is the

[103] UN General Assembly, *Resolution 377(V)* (1950), A/RES/377 (1950), Adopted by the General Assembly at its 302nd Plenary Meeting on 3 November 1950. The Uniting for Peace resolution has been invoked 10 further times after the Korean crisis to resolve Security Council deadlocks: see Dag Hammarskjöld Library, General Assembly – Quick Links, "Resolutions adopted by the General Assembly - Emergency Special Sessions", <http://research.un.org/en/docs/ga/quick/emergency> accessed 4 September 2018.

[104] *UNSC Resolution 1704* (2006), S/RES/1704 (2006), Adopted by the Security Council at its 5516th meeting, on 25 August 2006.

[105] Eg, *UNSC Resolution 2037* (2012), S/RES/2037 (2012), Adopted by the Security Council at its 6721st meeting, on 23 February 2012, Cll. 2, 11 & 14.

UNSC Resolution 2344 extending the UN Mission to Afghanistan (UNAMA) until 2018, wherein stakeholders are urged to "…develop infrastructure, including infrastructural connectivity, energy supply, … with a view to promoting sustainable economic growth and the creation of jobs in Afghanistan and the region."[106] It should also be noted that UN member states who have signed and ratified international Treaties, agreements and other instruments such as the *Rio Declaration* and the *Framework Convention on Climate Change* will be bound under international law by obligations contained therein when conducting PKOs, contingency operations, and post-conflict reconstruction.

Some interventions may be accompanied by specific agreements providing for cooperation and friendship between the host nation and the intervening state(s), including assistance with economic development. This is the case of the *Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq*.[107] It provides in Section V for "Economic and Energy Cooperation", although the focus is primarily on rebuilding Iraq's electricity, oil and gas sector. Section VI encourages the protection, preservation, improvement and development of Iraq's environment, including regional and international environmental cooperation. These measures could together facilitate movement towards cleaner and more efficient use of energy, and introduction of renewable energy technologies in infrastructure reconstruction and development.

NATO-led Interventions

Whether or not a NATO-led intervention is pursuant to a UNSC resolution, there will normally be an agreement between NATO and the recognised government authorising the intervention. Where a government is acting unlawfully such as to pose a serious threat to NATO members and/or civilian populations,

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[106] *UNSC Resolution 2344* (2017), S/RES/2344 (2017), Adopted by the Security Council at its 7902nd meeting, on 17 March 2017, Cl. 34.

[107] Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, in force 1 January 2009 <http://www.usf-iraq.com/wp-content/uploads/2012/12/security-agreement-2.pdf> accessed 23 May 2018.

or is seriously dysfunctional, unidentifiable, or non-existent, such operations will be conducted in accordance with NATO's constitution and principles for intervention.[108] In NATO operations the organisation's standards and doctrine apply, including the *Joint NATO Doctrine For Environmental Protection During NATO-Led Military Activities,*[109] and NATO Parliamentary Assembly *Resolution 407*, which includes specific provisions to encourage greater energy efficiency and renewable energy on operations.[110]

There are also normally agreements between the host nation and the various participating nations. These usually take the form of "Status of Forces Agreements" (SOFAs) or "Status of Mission Agreements" (SOMAs). These may contain powers and obligations in relation to environmental and energy matters, both in the context of the host nation's environmental and energy regulations and infrastructure, and also in the context of the operational rules and procedures of the NATO force.[111]

Coordination with relevant local authorities is often required, and this provides an opportunity for NATO forces to implement energy initiatives, and to influence government authorities to consider more efficient energy sources including renewable energy options.

Such agreements usually allow the occupying forces to import equipment, plant and materiel into the conflict zone, and to dispose of such items locally at the end of mission. This also provides the opportunity to leave behind energy efficient vehicles and electricity generation plant on departure, and to assist with education and training in their use and maintenance.

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[108] See Art. 5 of the *North Atlantic Treaty 1949*, 34 UNTS 243; 43 AJILs 159 (authority for individual and collective self-defence). Non-Article 5 operations have been conducted in non-NATO member countries in order to prevent a conflict from spreading and destabilizing member or partner countries. These are usually pursuant to a UNSC Resolution.

[109] NATO/OTAN (n. 26), esp at paras 1.2, 2.2, and 2 a., b., c. and g.

[110] NATO Parliamentary Assembly (n. 29).

[111] See for example, the "Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan dated 30 September 2014" <http://www.nato.int/cps/es/natohq/official_texts_116072.htm?selectedLocale=en> accessed 23 May 2018. Provisions relevent to the environment, energy and infrastructure are found in Arts. 5.6, 7.2, and 10.1.

Non-NATO Military and Coalition Interventions

Non-NATO military and coalition operations may be undertaken pursuant to a UNSC Resolution, and/or pursuant to an invitation directly from the government of the host nation. They may also be conducted pursuant to a regional agreement amongst the intervening states,[112] or simply at the will of the intervening state or states. In most cases, whether there is a UN or NATO-led mission pursuant to a UNSC Resolution, and/or by invitation of the host nation, there will be something in the nature of SOFA or SOMA. Generally these follow the NATO SOFA model discussed above, but will be individually tailored for the particular circumstances of the intervention.

The specific arrangements facilitating New Zealand's contributions to Operation Enduring Freedom (OEF) and the NATO Non-Article 5 International Security Assistance Force (ISAF) Operation in Afghanistan will be briefly examined in the Case Study below. It provides an interesting example of how energy efficiency and renewable energy initiatives have been introduced, both in the context of the operational activities of the deployed forces, and in the legacy and on-going post-conflict initiatives to support the integration of renewable energy in those countries.

Sustainable Energy in Afghanistan: A Case Study of Bamyan

A number of government agencies, IOs and NGOs are involved in furthering post-conflict sustainable energy initiatives in Afghanistan, and they operate under a number of international and national legal mandates and polices. It should be noted that Afghanistan has adopted the UN SDGs, and is an active contributor to the High-level Political Forum on sustainable development.[113]

[112] For example, the Regional Assistance Mission to the Solomon Islands (RAMSI).
[113] UN, *Sustainable Development Knowledge Platform* "Afghanistan – Voluntary National Review 2017" https://sustainabledevelopment.un.org/memberstates/afghanistan accessed 23 May 2018.

Afghanistan is also a signatory to the Paris Agreement on Climate Change, [114] and has submitted its Intended Nationally Determined Contribution (INDC) under the UNFCC.[115]

This section will briefly review the historical background of conflict in Afghanistan, and the basis of intervention in Afghanistan by the NATO-led ISAF and the UN. It will then examine relevant provisions in the NATO SOFAs, and other national SOFAs, and the interface with Afghan national law and policies relating to sustainable energy. Operational green policies and the practices of coalition forces and other intervening agencies will be discussed, and their contribution to community-based renewable energy projects examined. Finally, this section will focus on the Bamyan Province, which has enjoyed some ongoing success in the development of sustainable energy projects during New Zealand's command of the Bamyan Provincial Reconstruction Team from 2003 as part of the ISAF mission, and following withdrawal of the bulk of NZ forces in 2012. While providing secure and sustainable sources of energy in Afghanistan is a major contribution to ensuring an enduring peace and the possibility of more equitable social and economic development, it also poses significant logistical, financial and security challenges.[116]

Background

Occupying a strategic position astride ancient trading routes from Southern and Eastern Asia to Europe and the Middle East, Afghanistan has long been the scene of religious, cultural and territorial tension and conflict.[117] Following the

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[114] Islamic Republic of Afghanistan, Permanent Mission of Afghanistan to the United Nations in New York, *Press Release* "Afghanistan signs the Paris Agreement on climate change" (25 April 2016) < http://afghanistan-un.org/2016/04/afghanistan-signs-the-paris-agreement-on-climate-change/> accessed 23 May 2018.

[115] Islamic Republic of Afghanistan, *Intended Nationally Determined Contribution. Submission to the United Nations Framework Convention on Climate Change* (21 September 2015) < http://www4.unfccc.int/ndcregistry/PublishedDocuments/Afghanistan%20First/INDC_AFG_20150927_FINAL.pdf> accessed 23 May 2018.

[116] See Peter Meisen, Rural Electrification in Afghanistan: How do we electrify the villages of Afghanistan? (Global Energy Network Institute: San Diego, Cal., March 2008).

[117] M G Weinbaum, N H Dupree et al, "Afghanistan" in Encyclopædia Britannica (Web version), Encyclopædia Britannica Inc. <https://www.britannica.com/place/Afghanistan/Civil-war-communist-phase-1978-92> accessed 23 May 2018.

ousting of the Taliban from power in late 2001, an interim government supported by a US-led coalition was installed and later in 2001 the *Bonn Agreement*[118] authorized an International Security Assistance Force (ISAF) to support Afghan Authorities to maintain security.[119]

In 2003 NATO, ostensibly acting under Chapter VII (Art. 51), and Chapter VIII (Arts. 52 and 53) of the North Atlantic Treaty, took command of ISAF. A number of NATO members, and non-NATO partners (such as Australia and New Zealand), contributed to ISAF operations, including establishing Provincial Reconstruction Teams (PRTs) to provide regional security, support law and order, assist with reconstruction and encourage economic development.[120] Elections were held in 2005 and the first elected government for 30 years led by Hamid Karzai took power.

ISAF continued to provide security and to assist with re-establishing law and governance until December 2014, at which time Afghan security forces and institutions took primary responsibility for security. From 2015 NATO has continued to have a presence under a new NATO-led mission, "Resolute Support", which trains and assists Afghan security forces. A "NATO-Afghanistan Enduring Partnership" provides the framework for political support and economic development assistance. A number of UN organisations, including the UN Assistance to Afghanistan (UNAMA) mission,[121] and the UNDP,[122] provide on-going development assistance.

Legal Basis of Intervention in Afghanistan – UNSC Resolutions and the NATO-led ISAF

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[118] UN, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 5 December 2001, United Nations Security Council Document 1154. Annex I - International Security Force S/2001/1154 (2001) <http://www.un.org/ga/search/view_doc.asp?symbol=S/2001/1154> accessed 23 May 2018.

[119] See also UNSC, S/RES/1386 (2001), Adopted by the Security Council at its 4443rd meeting, on 20 December 2001.

[120] NATO, "NATO and Afghanistan" <http://www.nato.int/cps/en/natohq/topics_8189.htm> accessed 23 May 2018.

[121] See <https://unama.unmissions.org/> accessed 23 May 2018.

[122] See <http://www.af.undp.org> accessed 23 May 2018.

UNSC Resolutions

The original UNSC Resolution 1386 in 2001 focused primarily on re-establishing and maintaining security and law and order in Kabul. Resolution 1510 in 2003 extended this mandate throughout Afghanistan, and NATO took command of ISAF on 11 August 2003.[123] Successive UNSC Resolutions did not contain any specific mandate for ISAF or other UN-mandated forces to directly advance sustainable energy, focusing rather on security and governance matters, and providing the foundations for economic growth and stability. From 2012 UNSC Resolutions started to incorporate support for objectives such as increasing foreign investment for infrastructure development including "energy supply … [to promote] … sustainable economic growth".[124] Following the *Bonn Agreement* of 2001, the Interim Authority, Transitional Authority and occupying forces authorised under a UNSC Resolution remained subject to existing Afghan laws and regulations, so far as those laws and regulations were not inconsistent with the *Agreement*.

Status of Forces Agreements (SOFAs)

OEF was facilitated through a number of exchanges of diplomatic notes, signed agreements, and "joint declarations" mainly on security matters.[125] As is usually the case coalition personnel enjoyed immunity from criminal prosecution

[123] NATO (n. 58).

[124] See, e.g., UN, S/RES/2041 (2012), Adopted by the Security Council at its 6738th meeting, on 22 March 2012, r. 20, and UN, S/RES/2344 (2017), Adopted by the Security Council at its 7902nd meeting, on 17 March 2017, r. 34.

[125] US Govt., 112th Congress, 1st Session, Bill H.R. 651 "To require the President to seek to negotiate and enter into a bilateral status of forces agreement with the Government of the Islamic Republic of Afghanistan", SEC. 2. FINDINGS. (6) <https://www.congress.gov/bill/112th-congress/house-bill/651/text> accessed 23 May 2018.

by Afghan authorities, and immunity from civil and administrative jurisdiction provided the acts in question were undertaken in the course of official duties.[126]

In 2014 the US and Afghanistan signed a *Security and Defense Cooperation Agreement*[127] which provides, *inter alia*, that US military forces and civilian members of the US Department of Defense must "respect the Constitution and laws of Afghanistan".[128] Although neither sustainable development nor renewable energy is specifically addressed, the 2014 agreement does require US forces to respect Afghan environmental and health and safety laws.[129]

The current NATO SOFA is in similar terms, including requiring NATO forces and personnel to respect Afghan environmental laws and international agreements,[130] although they contain no specific encouragement of sustainable energy development. Arguably such environmental provisions require compliance with Afghan laws regulating atmospheric GHG emissions, other pollution regulation, and regulations controlling disposal of waste, provided the actions resulting in breaches were not unavoidable consequences of achieving the mission.

The Contribution of Occupying Forces to Greater Use of Sustainable Energy

Occupying Forces Own Operations

As discussed above, many individual countries contributing to OEF and the NATO mission in Afghanistan have introduced more sustainable and environmentally friendly approaches in their own bases and operational procedures.

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[126] R Chuck Mason, Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? (Congressional Research Services: Washington, D.C.,15 March 2012) at 7-8. <https://fas.org/sgp/crs/natsec/RL34531.pdf> accessed 23 May 2018.

[127] *Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States Of America*, done at Kabul, 30th September 2014 <http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf> accessed 23 May 2018.

[128] Ibid. Art. 3. 1

[129] Ibid. Art. 7. 6. See also Arts. 8.1 and 9.2.

[130] *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on The Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan*, done at Kabul 30 September 2014, Arts. 4.1, 4.2. 5.6, 6.1 and 7.2. <http://mfa.gov.af/Content/files/SOFA%20ENGLISH.pdf> accessed 23 May 2018.

For the most part, however, specific encouragement of sustainable energy projects in Afghanistan has not been a high priority for deployed military forces except to the extent that security and logistical support is provided for an IO or NGO project, and/or there is specific NATO or national funding allocated to undertake such projects.

Legacy "Gifts" and "Graveyards"

Occupying forces often install renewable energy systems and networks for their own operations, and sometimes on a larger scale to assist with the re-establishment of security, restoration of damaged infrastructure, and encouragement of economic recovery in local communities. Under most SOFAs and intervention assistance arrangements, if these installations are directly necessary to conduct the mission, they are generally exempt from compliance with local laws, standards and permitting requirements. At the end of the mission such installations are often left as a "legacy" gift to assist the reconstruction efforts of government and local communities. As they are no longer necessary for the conduct of the mission, they arguably become fully subject to the laws and regulations of the host nation. Thus, close attention needs to be given to compliance with permitting requirements, ensuring any property rights necessary for the location of plant and installations have been acquired, and providing for their ongoing maintenance and management so they do not simply become a "legacy graveyard".

Ultimately, however, such ongoing operation, management and maintenance of energy systems and networks must be fully resumed by the host nation in order to secure its long-term sustainability and viability. In order to achieve this, post-conflict reconstruction must be supported by efforts to build the host nations capacity to look after and maintain this infrastructure. To this extent, occupying forces can play a key role in providing associated capacity building by promoting knowledge transfer to local communities and industries so they can undertake their own maintenance work and develop a domestic sustainable energy market.

UN and NATO Operations

As already discussed, the UN, NATO and a number of contributing nations have been very active in "greening" their peacekeeping and post-conflict operations. More sustainable practices in respect of energy, water use and waste have been progressively applied to their operations in Afghanistan, both by way of internal operating procedures and policies, and in their interactions with Afghan authorities and contractors. These interactions can result in more sustainable local practices in relation to the use of natural resources and environmental protection. For example, where local contractors are used for the provision of fresh water or waste disposal for an operating or forward base, the contract may be made conditional upon sustainable practices and procedures, and minimizing adverse environmental impacts. Compliance can be ensured by regular audits and testing by the base engineers and environmental officers.

UN organisations have been involved in directly promoting economic development in association with the government of Afghanistan, and in some cases have initiated and/or implemented sustainable energy projects. For example, UNAMA was established by the UNSC in March 2002 at the request of the Afghanistan government.[131] The latest renewal of its mandate in 2017 includes reference to infrastructural connectivity and energy supply as elements to promote sustainable economic growth.[132] As part of its remit UNAMA has supported renewable energy projects in Afghanistan including partnering with government agencies, and supporting projects undertaken by local NGOs such as the Aga Khan Development Network, and local communities.[133] UNAMA is also committed to addressing climate change, and encouraging efforts in Afghanistan towards this end

[131] UNSC, S/RES/1401 (2002), Adopted by the Security Council at its 4501st meeting, on 28 March 2002.

[132] UNSC, S/RES/2344 (2017), Adopted by the Security Council at its 7902nd meeting, on 17 March 2017, r. 34.

[133] See, e.g., UNAMA, "Clean and Green: Renewable Energy for Afghanistan", 16 May 2009 <https://unama.unmissions.org/clean-and-green-renewable-energy-afghanistan> accessed 23 May 2018. See also UNAMA, "Solar Panels and Modernized Electric Bill Payments Boost Power in Kandahar", 29 July 2010 <https://unama.unmissions.org/solar-panels-and-modernized-electric-bill-payments-boost-power-kandahar> accessed 23 May 2018.

The United Nations Development Programme (UNDP) has also been active in assisting with economic development in Afghanistan.[134] Its "Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) are of particular relevance in advancing sustainable energy in Afghanistan. A number of renewable energy initiatives have been supported by UNDP, including hydro, solar, wind and biomass. One recent UNDP initiative, in association with the Afghan Ministry of Rural Rehabilitation and Development, is the Afghanistan Sustainable Energy for Rural Development project. The project allocates $US50,000,000 over 4 years from 2016 to 2019 to bring renewable and more sustainable energy to 200 communities comprising around 50,000 people.[135]

The United Nations High Commissioner for Refugees has also been involved in renewable energy development as part of resettlement efforts for displaced persons.[136]

Ongoing post-conflict projects and development

A feature of the peace-making and post-conflict reconstruction of Afghanistan has been the involvement of a number of countries, through their overseas development assistance agencies, in assisting communities with economic development including energy projects. The Government of Afghanistan has also introduced institutional and policy measures to drive further development.[137] Overseas benefactors, including government agencies and IOs such as the United States Agency for International Development (USAID),[138] the UK Department for International Development (DFID), Australia's AusAID, New

[134] See UNDP, "UNDP in Afghanistan" <http://www.af.undp.org> accessed 23 May 2018.
[135] UNDP, "Afghanistan Sustainable Energy for Rural Development (ASERD)" <http://www.af.undp.org/content/afghanistan/en/home/operations/projects/poverty_reduction/ASERD.html> accessed 23 May 2018.
[136] UNHCR, "Wind power project helps Afghan refugees rebuild lives in shattered village" <http://www.unhcr.org/afr/news/latest/2015/7/55b78b526/wind-power-project-helps-afghan-refugees-rebuild-lives-shattered-village.html> accessed 23 May 2018.
[137] For a comprehensive and current review of institutional, legal and policy developments, see Ahmad M Ershad, "Institutional and Policy Assessment of Renewable Energy Sector in Afghanistan" (2017) *Journal of Renewable Energy* 1.
[138] See, e.g., USAID, "Powering Up Afghanistan", (January/February 2014) *Frontlines: Energy/Infrastructure* < https://2012-2017.usaid.gov/news-information/frontlines/energy-infrastructure/powering-afghanistan > accessed 23 May 2018.

Zealand's NZAID, Canada's International Development Agency (CIDA) (now merged into the Department of Foreign Affairs), the World Bank, and the Asian Development Bank (ADB)[139] have also funded renewable energy development in Afghanistan. One success story is the development of renewable energy in the Bamyan province.

Renewable Energy in Bamyan

Although not a Member of NATO, New Zealand is one of its global partners, and in that capacity joined the ISAF mission in Afghanistan in late 2001. One of its major contributions was command of the Bamyan Provincial Reconstruction Team (NZPRT) from September 2003 until the end of 2012. The NZPRT had responsibility for assisting with security, advancing law and governance, and facilitating reconstruction and economic development in the Bamyan province, which has a population of 425,500 people spread over 14,125 km^2. The NZPRT was manned by between 100 and 180 mostly military personnel with some police and – in the latter stages of the mission – some civilian subject matter experts. Each 6-monthly rotation included a team of military engineers, planners, communicators, and staff officers with responsibility for advancing development projects, and managing the expenditure of NZAID and some USAID funding. While sustainable energy was not a focus until towards the end of the mission, many other development and infrastructure projects were implemented, including water wells, roads and bridges, schools, police training and building of checkpoints and bases, and security support for local government and other agencies operating in the area. Over the mission the NZ Defence Force spent almost $NZ300 million operationally, and the NZ government over $NZ80.36 million on development projects.[140]

During its mission a number of small-scale micro-hydro developments were piloted at the village level, largely through the efforts of private NGOs and with some assistance from UNDP, USAID and the New Zealand government. Some

[139] See ADB, *Technical Assistance Report: Islamic Republic of Afghanistan: Renewable Energy Development, Project No: 47266-01* (ADB, December 2014).

[140] New Zealand Defence Force, "Chief of Defence Force: Bamyan Mission Accomplished" <http://www.nzdf.mil.nz/news/media-releases/2013/20130405-codbma.htm> accessed 23 May 2018.

rooftop solar power was also installed. These developments were largely ad hoc, and with little consideration of the longer-term sustainment and maintenance of the installations when the benefactors and coalition forces had left the country. Other recent developments have been progressed with cooperative efforts between Afghan government agencies, the World Bank and other external funding agencies.[141]

Bamyan's Solar Energy Project

A project that was conceived towards the end of New Zealand's PRT mission, and completed after the NZPRT had left, was a solar power development near to Bamyan town.[142] Situated at a significant elevation of over 2,500 metres with cold clear skies for much of the time, the conditions in the Bamyan Valley are very good for solar photovoltaic energy. NETcon International (later to become Infratec) partnered with Sustainable Energy Services International to secure a $NZ18,600,000 contract to supply off-grid power to 2,490 homes in the Bamyan Valley.[143] The funding came from New Zealand Agency for International Development (NZAID), which had also provided development funds for the NZPRT to expend throughout its mission. In this case the development was to be a legacy "gift" to support the livelihoods and development of the people in the area.[144]

The project as built comprises a total of 1.05 MW of power spread amongst five solar "farms" of 30kW-400kW capacity. The network covers a number of villages, including Bamyan town, Haiderabad, Mullagulum, Dragon Valley and Nawabad town. The reticulation network comprises some 345 poles to carry a

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141 For example, UNDP, "Micro-hydro lights up homes and lives in Afghanistan" <http://www.undp.org/content/undp/en/home/ourwork/ourstories/micro-hydro-brings-energy-to-afghanistan.html> accessed 23 May 2018.

142 Note that the provincial capital of Bamyan province in Afghanistan is spelled variously as Bamyan, Bamiyan and Bamian. Spellings used in the footnotes in this section follow the various spellings in the references that are cited.

143 NZ Govt., "Press Release: First stage of Bamyan energy project complete" https://www.beehive.govt.nz/release/first-stage-bamyan-energy-project-complete accessed 23 May 2018. See also Sustainable Energy Services International, "Bamyan 1.05 MW Solar PV" http://www.sesinter.com/our-projects/afghanistan/bamyan-solar-project/ accessed 20 July 2017.

144 See Infratec, "Bamyan Renewable Energy Project, Afghanistan", (6 January 2016) <https://www.infratec.co.nz/projects/bamyan-renewable-energy-project,-afghanistan> accessed 23 May 2018.

21kV system, and another 264 poles for the 400V system servicing 2,490 households. As well as building the physical infrastructure, the development included assisting with the setting up and capacity building of an independent state-owned utility company – Da Afghanistan Breshna Sherkat (DABS) – to ensure ongoing operation and maintenance will continue after the develop funding and NZAID support finishes.

Critically, the Project was further supported by a range of capacity building activities, which allowed the infrastructure to be self-sustaining and promote a green energy industry within Afghanistan. To this extent, USAID reports that DABS engineers provided ongoing support and training to local professionals and community groups, including how to install and maintain existing infrastructure, making customer connections to the grid, and supporting administrative practices such as maintaining an accurate accounting system.[145]

In addition, ownership and management of the system was transferred to DABS following construction. One of the keys to the financial success of the development is the use of a "pay as you go" system, which requires consumers to purchase credits in advance of use, rather than in arrears. This system faced some public resistance initially, but appears now accepted by the community as it has resulted in lower cost and more reliable electricity.[146]

USAID has identified the following risks to the long-term viability of the development:[147]

- Potential lack of qualified support staff, both commercially and inside DABS (link is external)
- Potential lack of support from Kabul DABS to respond to the needs of the Bamyan DABS office
- Reduced consumer support if the system is not reliable

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[145] See USAID, 'Bamiyan Renewable Energy Program' (US Government, 2018) <https://www.usaid.gov/energy/mini-grids/case-studies/afghanistan-hydropower> accessed 27 August 2018.

[146] See Robert Foster, Tony Woods and Ian Hoffbeck, "Bamiyan 1 MWp Solar Mini-Grid (Afghanistan)", *Conference Proceedings - Solar World Congress 2015*, (Daegu, Korea, 08 – 12 November 2015) https://www.researchgate.net/publication/283915024_Bamiyan_1_MWp_Solar_Mini-Grid_Afghanistan, accessed 23 May 2018. See also USAID (n 83).

[147] USAID, (n. 83).

- Lack of adequate funds to perform scheduled maintenance, replace parts and/or upgrade the system
- Employee theft
- Theft of system components (as of 2017, theft of components has not been a problem for this program)
- Over-subscription of electricity services, inducing system failure
- Encroachment of the ongoing conflict in Afghanistan to the area

This list is also relevant to many renewable energy projects in post-conflict and post-disaster regions.

In summary, the Bamyan solar development is considered a significant success, and provides a model for implementing small-scale, localized sustainable energy developments combining offshore funding and technical expertise with local support through labour and employment, training, and capacity building leading to local ownership and ongoing management. It is subject to ongoing risks and threats to its viability, but methods to avoid or mitigate such risks have been addressed in the design, management and funding of the system.

Conclusions

This paper has explored the opportunities for renewable energy in PKOs and post-conflict reconstruction, including in the operations of contributing agencies and forces, and in assisting longer-term rebuilding and redevelopment. The latter includes matters such as security of supply, alleviating intra-generational and human rights inequities, avoiding or minimising short and long-term environmental damage (including addressing climate change), and contributing to the UN's SDGs.

It is evident that the 'greening' of the policies and practices of UN, NATO and military organisations involved in PKOs has made considerable progress in recent years. The application of International obligations - including specific UNSC resolutions, relevant international instruments (such as the UNFCCC and the Paris Agreement), and the UN's SDGs – have also had a significant influence in how PKOs are conducted on the ground.

IOs and military forces involved in delivering PKOs are bound not only by the conditions in any UNSCR that authorizes such interventions and/or any coalition agreement(s), but also by their own policies, laws and operational doctrine. It is often overlooked that they are also usually bound - through SOFAs and SOMAs with the host nation - by the host nation's laws and its own international undertakings relating to environmental protection, sustainability and addressing climate change. These obligations must be respected, and if possible facilitated, by those organisations and forces engaged in PKOs.

Once operations are being scaled down and ultimately withdrawn, materiel and energy infrastructure that has been left behind can cause environmental problems. These legacy 'gifts' often use fossil fuels and may not be the most environmentally friendly systems available as speed and low-cost are dominant considerations in setting up what were initially intended as temporary systems. Such 'gifts' can very quickly become 'graveyards' unless serious and effective steps are taken before and during the PKO withdrawal to equip the host nation with the ongoing technical, financial and management capacity to sustain them into the future.

The case study of Afghanistan, and particularly the Bamyan region, is instructive. Politically Afghanistan has assented to the UN's SDGs, and is also a signatory to the UNFCCC and is an active participant in the Paris Agreement. It has encouraged, and been benefitted from, a number of UN and other renewable energy projects, including hydro, micro-hydro, wind and solar. However, some of the energy systems put in place by many of the organisations and military forces engaged in peacekeeping and peace-making operations in Afghanistan have been fuelled by oil and intended for a temporary 'life of mission' endurance. Left behind for local use they quickly decay, and their efficiency declines with increasing land, groundwater and atmospheric pollution. Ultimately the equipment fails through lack of funding and/or technical expertise, and is abandoned to decay and release further pollutants.

The solar energy development adjacent to Bamyan town in Afghanistan provides one bright light of success. The development was a 'legacy gift' from the New Zealand government following 12 years of providing security and capacity building for the Bamyan Province. It was funded initially by a significant up-front grant, and has received some ongoing support, but is now largely self-sustaining. The gift incorporated an integrated process of local training and capacity building from management and accounting/charging policies, through to engineering and ongoing maintenance. The Bamyan development provides a useful model for addressing sustainable development considerations, including social development (including human rights issues), economic development and environmental protection, including contributing to SDGs and efforts to address climate change.

In summary, the key factors for successful renewable energy developments in post-conflict PKO and reconstruction include:

- Sufficient funding not only for the initial construction and commissioning of the development, but also ongoing maintenance and replacement of equipment;
- Significant investment in technical and management training and capacity building in the local community;
- Investment by, and a sense of "ownership" of, the local community and relevant government agencies;
- Ongoing attention to safety of operation and security from attack, vandalism and theft; and
- Long-term financial support and self-sustainment through appropriate management, financial and engineering systems.

GLOSSARY:

ADB	Asian Development Bank
AusAID	Australian Agency for International Development
CIDA	Canadian International Development Agency (now merged into the Department of Foreign Affairs)
DABS	Da Afghanistan Breshna Sherkat
DDR	Disarmament, demobilisation and reintegration
DFID	Department for International Development (UK)
DFS	Department of Field Support (UN Department of Peacekeeping Operations)
DPKO	Department of Peacekeeping Operations (UN)
EU	European Union
GHGs	Greenhouse gas emissions
IOs	International organisations
ISAF	International Security Assistance Force (NATO-led security assistance mission to Afghanistan)
IT	Information technology
NATO	North Atlantic Treaty Organisation
NGOs	Non-governmental organisations
NZAID	New Zealand Agency for International Development
OEF	Operation Enduring Freedom
PKOs	Peace-keeping operations
PRTs	Provincial Reconstruction Teams
SDGs	Sustainable development goals (UN)
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNSC	United Nations Security Council
USAID	United States Agency for International Development

JUDICIAL CONTROL OVER NATIONAL SECURITY PROJECTS: Critical Analysis of the Okinawa Dugong Cases from the Viewpoint of Principle 10

Noriko Okubo*

Introduction

Oura Bay in Henoko, Okinawa Prefecture, is the northernmost sensitive habitat of the critically endangered Okinawa dugong, which has been declared a "national monument" under Japanese law. Japan and the United States (US) have planned to construct a US Air Base facility on this ecologically sensitive coastland. This project involves an agreement between the governments of Japan and the US to relocate the Futenma Air Base from the residential area of Ginowan City in Okinawa, to the less inhabited coastal area near Nago City.

The vast majority of people in Okinawa have continued to oppose the construction plan in Henoko, and requested the base relocate elsewhere. Individuals and environmental nongovernmental organizations (NGOs) contesting this project have taken a series of actions in both Japanese and US courts. Okinawa Prefecture also took a negative stance toward the land reclamation project, leading to several suits between the State and Okinawa Prefecture. Despite persistent local opposition, the Japanese Government began landfill operations in this area on April 25, 2017.

The aim of this paper is to analyse the two primary Okinawa dugong cases that were heard in Japanese courts. It describes the difficulties in challenging decisions concerning national security and discusses how to secure access to justice in this field.

First, the background and the history of the construction of the Henoko Air Base will be introduced. There is the lack of accountability as to why the base must be relocated to Henoko, even if one accepts the necessity of relocating the Futenma Airbase to eliminate the dangers it poses. While the Japanese Constitution guarantees the local autonomy of prefectures and municipalities of the area, it is doubtful whether the State has taken due

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account of the opinion of Okinawa Prefecture and Nago City. In addition, the community and the public did not have a proper opportunity to participate in the decision-making process.

Second, the Henoko environmental impact assessment (EIA) law case will be described. Local people filed suit against the State of Japan to challenge the Henoko EIA. The plaintiffs pointed out the various procedural defects. However, the court did not admit the participation right in the EIA for the public concerned. This case shows that access to justice is not appropriately guaranteed in the field of the environment.

Third, the Henoko reclamation case will be explained. In this case, the State of Japan filed suit against the Okinawan governor who had the competence to approve the reclamation. The Supreme Court admitted the wide discretion of administration and decided the case in favour of the State. It shows that the court avoided an intensive judicial review of the decision.

Finally, the Henoko case will be critically analysed from the viewpoint of Principle 10 of *the 1992 Rio Declaration*[148]and discussed how to improve the legal system to secure environmental rule of law in the field of national security.

Relocation of the Futenma Air Base and the Reclamation Plan

Okinawa prefecture is the southernmost prefecture in Japan, and Okinawa Island is the largest of the Ryukyu Islands, an archipelago that stretches from Japan's southern island of Kyushu to Taiwan. 74% of all US military bases located in Japan are concentrated in Okinawa, and 18% of the terrestrial area is occupied by US military bases.[149]

It was back in 1996 that Japan and the US agreed that the Futenma Base should be

[148] Declaration of the United Nations Conference on Environment and Development, adopted on 13 June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).
[149] See < http://www.pref.okinawa.jp/site/chijiko/kichitai/579.html > last accessed on 10 May 2017.

closed and the site returned to Japan.[150] The Special Action Committee on Okinawa (SACO) was established by the Japanese and US Governments in the face of surging Okinawan opposition to the bases, sparked by the September 1995 rape of a schoolgirl by three US soldiers. *The SACO Agreement* called to close all US facilities located south of the Kadena Air Base, including Futenma. At a later date, relocation to Henoko became a condition to close Futenma.

The new military installation is known as the Henoko Air Base or Futenma Replacement Facility. The Henoko Air Base will be a sea-based facility and is to be built partly adjacent to an existing facility known as Camp Schwab in the Henoko area. According to the agreement, the US is responsible for the design and operation of the Henoko Air Base, while Japan is responsible for its construction.

Oura Bay, in the Henoko area, is home to 3097 marine species and 5853 terrestrial species, including 1995 plant species and 3858 animal species, 374 of which are designated as "important" species.[151] A wide range of topography supports different ecosystems in this area, including mangrove forests, tidelands, sea glass beds, sandy areas, mud flats, and coral reefs. They are important roosting and feeding grounds for the Okinawa dugong, a species that was declared a "national monument" under the *Act on Protection of Cultural Properties*[152] and is classified as "critically endangered" by the Japanese Ministry of the Environment.[153]

The value of the natural environment of Oura Bay is recognized and protected by the following strategy and plans based on Japanese law:

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[150] See < http://www.mofa.go.jp/region/n-america/us/security/seco.html > last accessed on 12 July 2017.
[151] Third Party Commission for the Approval Process for the Construction of Henoko Air Base, Review Report (in Japanese), 2015.
[152] Act No.214 of 1950.
[153] See Red List 2017 of the Ministry of the Environment< http://www.env.go.jp/press/files/jp/105449.pdf > last accessed on 12 July 2017.

• The "*Okinawa Strategy*" is based on *the Convention on Biological Diversity*[154];

• The "*Ryukyu Archipelago Coastal Preservation Basic Plan"*[155] and *"Coastal Conservation Area "* is based on *the Coast Act*[156];

• The *"Nago City Land Use Plan"*[157] is based on *the City Planning Law*[158];

• The *"Nago City Landscape Plan"*[159] is based on *the Landscape Law*[160]; and

• The designation of *"Assessment Rank I"* for the coastal area of Henoko and Oura Bay follows *the Guidelines on the Conservation of the Natural Environment of Okinawa Prefectural Government*.[161] This area is also included on the Ministry of the Environment's list of Japan's top 500 important wetlands.[162]

Much of Oura Bay's wildlife is listed on *the International Union for Conservation of Nature and Natural Resources (IUCN) Red List of Threatened Species*, and recognized as requiring conservation measures. *IUCN Recommendation 2.7*[163] and *Recommendation 3.114*[164] urged the Japanese Government to conduct a proper EIA for its plan to construct the Henoko Air Base in the dugong's habitat, while calling for the establishment of a protected area for the dugong.

Individuals and environmental NGOs contesting this decision have taken a series of actions in Japanese courts, which will be described in detail in the next section. In addition, three Okinawa citizens, along with Japanese and American environmental groups filed

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[154] See < http://www.pref.okinawa.jp/site/kankyo/shizen/hogo/documents/400bd_okinawa_senryaku_all.pdf> last accessed on 12 July 2017.
[155] Act No. 101 of 1956.
[156] See < http://www.pref.okinawa.jp/site/doboku/kaibo/kaigan/documents/honpen.pdf > last accessed on 12 July 2017.
[157] See < http://www.pref.okinawa.jp/site/doboku/toshimono/kikaku/documents/nagomp-4.pdf > last accessed on 12 July 2017.
[158] Act No. 100 of 1968.
[159] See < http://www.city.nago.okinawa.jp/DAT/LIB/WEB/1/20130701kkankkaku.pdf > last accessed on 12 July 2017.
[160] Act No. 110 of 2004.
[161] See < http://www.pref.okinawa.jp/kankyoseibi/koukyokanyo/ritti/pdf3/sankou1.pdf#search=%27%E6%B2%96%E7%B8%84%E7%9C%8C+%E8%87%AA%E7%84%B6%E7%92%B0%E5%A2%83+%E4%BF%9D%E5%85%A8+%E3%83%A9%E3%83%B3%E3%82%AF%27 > last accessed on 12 July 2017.
[162] See < http://www.env.go.jp/nature/important_wetland/pdf/jwetlist2804v3.pdf > last accessed on 12 July 2017.
[163] IUCN Recommendation 2.72 (Amman, 2000).
[164] IUCN Recommendation 3.114 (Bangkok, 2004).

the first lawsuit[165] against then-Secretary of Defense Donald Rumsfeld in a US federal court to protect the dugongs that frequent the waters near Henoko.[166]

Although the Japanese and US governments withdrew the previous construction plan in September 2005, they proposed in May 2006 a new plan to construct the Futenma Relocation Facility in almost the same area as the previous plan.

According to *the Japanese EIA Law*[167] and the Public Land Reclamation Law[168], it was a prerequisite for the Japanese Government to perform an EIA prior to construction and to obtain approval for land reclamation by the Okinawa governor. On December 28, 2011, the Okinawa Defense Bureau (ODB) submitted an environmental impact statement (EIS) to the governor for a base in the Henoko area.

Former Governor Nakaima Hirokazu initially took a negative stance toward the land reclamation project and attempted to move the base out of Okinawa. However, on December 27, 2013, he made a sudden turn at the very end of his tenure as governor and approved reclamation of the land off the coast of Henoko under heavy pressure from the central government. By law, Okinawa receives financial support each year from the central government for various public works projects to stimulate the local economy. Thus, the central government has a large say in how the funds are spent.

The Okinawa Prefectural Assembly passed a resolution on January 10, 2014 calling for the resignation of Governor Nakaima for his approval of the reclamation project. Inamine Susumu, an anti-base construction candidate, decisively won Nago Mayor's election on

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[165] See Earthjustice, Protecting the Endangered Dugong from a Proposed Military Airbase < http://earthjustice.org/our_work/cases/2003/okinawa-dugong-proposed-airbase > last accessed on 12 July 2017; Center for Biological Diversity, Saving the Okinawa Dugong < http://www.biologicaldiversity.org/species/mammals/Okinawa_dugong/ > last accessed on 12 July 2017.
[166] *Dugong v. Rumsfeld,* 2005 WL 522106 (N.D. Cal. March 2, 2005), Okinawa Dugong Case I. See also S. Stec, translation by Jinen Kita, Application of International Best Practice Related to SDG 16: The UNEP Bali Guidelines on Rio Principle 10 (in Japanese), Review of Administrative Law, No.18 (2017), pp.38-41.
[167] Act No. 81 of 1997.
[168] Act No. 57 of 1921.

January 17, 2014, securing his second term and Nago City's anti-construction position.

The vast majority of people in Okinawa have continued to oppose the construction plan. According to the result of the telephone polls conducted by the Ryukyu Shimpo on May 9, 2017, 74% of the people of Okinawa opposed the construction plan. Only 18% supported construction. [169] These numbers have remained constant for approximately 20 years. The sit-in protest at Henoko Tent Village continues to this day, with people visiting the village.[170] People have been participating in "sit-in on the water" protests in canoes and small boats. Rallies and gatherings opposing construction have been held in various parts of Okinawa, under the slogan of "All Okinawa". In addition, some individuals have filed lawsuit against Okinawa Prefecture claiming that the governor's approval of the reclamation project breached the Public Land Reclamation Law. They demanded that Governor Nakaima revoke his approval.

Finally, in November 2014, the current Okinawa governor, Onaga Takeshi, won a victory against Nakaima on a campaign promise of halting construction at Henoko. He established a Third Party Commission for the Approval Process for the Construction of Henoko Air Base (Third Party Commission) that consisted of six legal and scientific experts for the purpose of reviewing the procedural grounds for the former governor's approval of the reclamation project. On July 16, 2015, the commission published a report over 100 pages long concluding that Nakaima's approval for the reclamation project was legally flawed. On October 13, 2015, Governor Onaga revoked his predecessor's approval based on the commission's findings.[171]

On October 14, in response, the Japanese Government, determined to proceed with construction, insisted that the land reclamation was legal. This led to several lawsuits between the State and Okinawa Prefecture, as will be described in more detail below.

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[169] See < http://english.ryukyushimpo.jp/2017/05/13/26958/ > last accessed on 12 July 2017.

[170] H.Yosikawa, Urgent Situation at Okinawa's Henoko and Oura Bay: Base Construction Started on Camp Schwab, available at < http://apjjf.org/-Hideki-Yoshikawa/4799/article.html> last accessed on 12 July 2017.

[171] Third Party Commission, ibid.

The EIA Law Case

The Japanese EIA Law

The Japanese EIA Law[172] sets forth 13 types of projects that are subject to an EIA, including the construction of roads, dams, railways, airports, and power plants (Article 2). Among these, large-scale projects that could have serious impacts on the environment are categorized as "Class-1" projects, such as the reclamation of more than 50 ha, for which the EIA procedure is mandatory. Projects ranked below Class-1 in scale are grouped as "Class-2" projects, such as the reclamation of 40-50 ha, for which the EIA procedure is required on a case-by-case basis (screening). In addition, local governments have their own EIA systems that are applicable to smaller projects not specified in *the EIA Law*. Reclamation for the construction of the Henoko Air Base is a Class-1 project; thus, the EIA procedure is obligatory.

According to the current *EIA Law*, first, the project proponent compiles a Document on Primary Environmental Impact Consideration in the early stages of planning for the project location, scale, and other factors. This step was introduced through an amendment of *the EIA Law* in 2011 (Articles 3.2-3.10).[173] The purpose of the Primary Environmental Impact Consideration is to take into account environmental factors at an earlier stage when there are more alternatives available, such as alternatives for location selection.[174] However, this process was not applied to the reclamation project in Henoko because the Henoko EIA was initiated before the effective date of this amendment.

Second, the project proponent prepares the "scoping document," a blueprint for the EIA design, that describes the assessment method (scoping), and then conducts a survey,

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[172] See Ministry of the Environment, Environmental Impact Assessment in Japan, 2012, available at < https://www.env.go.jp/en/policy/assess/pamph.pdf#search=%27Environmental+Impact+Assessment+in+Japan%27 > last accessed on 12 July 2017; N. Okubo, The Development of the Japanese Legal System for Public Participation in Land Use and Environmental Matters, Land Use Policy 52（2016）, pp.498-550.

[173] Act No. 27 of April 27, 2011.

[174] See N. Asano, Kankyo-eikyo-hyokaho no Kaisei to Kongo no Kadai (in Japanese), Journal of Environmental Law and Policy 14 (2011), pp.3-13.

forecast, and evaluation of the environmental impacts (Articles 5-10). The project proponent in the Henoko case is the State, the ODB.

Third, the project proponent prepares the draft EIS that describes the assessment results. Finally, the EIS is sent to the competent authority for the project (the Okinawa governor in the Henoko case), as well as to the Minister of the Environment. The project proponent takes into account their opinions and sends the final EIS to the competent agency (Articles 14-24).

The EIA procedures conclude with public notification of the final EIS. The competent agency is required to consider the results of the EIA and decide whether to approve the project (Article 33). As mentioned above, the former governor approved the reclamation in Henoko and the current governor revoked it.

During the EIA process, not only the prefectural governor and the municipal mayors, but also any member of the public can submit an opinion during the scoping and the drafting EIA stages. During the scoping and drafting stages, *the EIA Law* only requires a briefing session on the project to be performed (Articles 7-2 and 17). In other words, public hearings are not mandatory. The public is only able to submit an opinion in writing. To bypass this situation, many local governments impose public hearings through the local EIA ordinances that require a public hearing to be held prior to submitting the written opinions of the local government under the national EIA procedure.

The Okinawa governor has two roles in the Henoko case: on the one hand, the governor of the relevant area and on the other, the authority to approve or reject the project. The Department of Environmental and Community Affairs of Okinawa Prefecture was responsible to make the comment as the affected Prefecture to the Henoko EIA conducted by the State. Additionally, the Department of the Seashore Disaster Prevention Division of the Department of Civil Engineering and Construction of Okinawa Prefecture initiated a review of the application, which was carried out by the Okinawa governor.

Crucial Points of the Henoko EIA and the Judgment

As mentioned above, individuals and NGOs filed a lawsuit in a US court against the US Department of Defense (DOD). On January 23, 2008, the US Federal District Court (for the Northern District of California) made an important decision in ruling that the DOD was obligated under section 402 of the *National Historic Preservation Act* to "take into account" the impacts on the Okinawa dugong that would result from the construction and use of the Henoko Air Base.[175] The DOD initially took the position that these obligations would be satisfied by Japan's EIA. Therefore, it was crucial to review the contents of the EIS regarding the Okinawa dugong and to clarify whether the quality was sufficient to satisfy the obligations.

622 plaintiffs living in the Henoko district of Nago City filed suit against the State of Japan to challenge the Henoko EIA on various grounds, demanding a declaratory judgment that the State was obligated to conduct another EIA on the construction of the Henoko Air Base. One focus of the lawsuit was whether local residents had a right to express their opinions during the EIA process for the planned construction of the Henoko Air Base. The plaintiffs claimed that they were deprived of their right to express their opinions because the State, more precisely the ODB, hid key information concerning the EIA and/or did not release crucial information about the construction plan in a timely manner, thus breaching *the EIA Law*. [176]

There were two crucial issues involved.[177] First, the ODB officially began its EIA in August 2007 with the submission of the Scoping Document. However, the ODB had already begun to conduct a study on coral and the dugongs as well as geotechnical investigations offshore of Henoko in 2004 with numerous borings. The plaintiffs alleged that this was prior to the official EIA process and such surveys would have damaged the offshore coral and had negative impacts on the behavior of the Okinawa dugong.

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[175] *Okinawa Dugong v. Gates,* 543 F.Supp. 1082 (N.D. Cal. 2008) (Okinawa Dugong II).
[176] See also Third Party Commission, ibid., p.112.
[177] S.Kunitoshi, Japan's Illegal Environmental Impact Assessment of the Henoko Base, available at < http://apjjf.org/2012/10/9/Sakurai-Kunitoshi/3701/article.html > last accessed on 12 July 2017. See also Okinawa governor's comment to the Henoko scoping <http://www.pref.okinawa.jp/site/kankyo/seisaku/hy-oka/tetsuzuki/documents/iken-50.pdf > last accessed on 12 July 2017.

In its Draft Environmental Impact Statement (DEIS) submitted in April 2009, the ODB reported that there were three dugongs near Okinawa Island. However, the ODB concluded that they were not observed in the Sea of Henoko during the ODB study conducted in the period August 2007 through April 2009 and that they generally lived offshore of Kayoh and Kouri, which was approximately 6 km from Henoko. Thus, the ODB concluded that the impact of the project on the two individual offshore areas as well as on the Okinawa dugong would be negligible.

Plaintiffs insisted that it was likely the dugongs were simply avoiding the disturbance in the Sea of Henoko caused by the massive pre-EIA study and landing drills. They argued that this made it very difficult to know what the situation would have been like without the project. They also argued that it contravened the public's right of participation because *the EIA Law* demands a public opinion hearing during the scoping stage, before any large-scale study is conducted, and the public had no opportunity to participate before this pre-EIA study.

The prefectural Department of Environmental and Community Affairs in Okinawa submitted a document containing more than 500 questions on environmental conservation and mitigation measures, including those for dugong protection,[178] in response to the ODB's DEIS. In spite of this, the ODB responded to very few of the questions.

After the submission of the DEIS in April 2009, the ODB conducted additional studies in the Sea of Henoko to collect more information and observed one dugong swimming offshore of Henoko in 2010.[179] However, the ODB maintained the claim it made in the DEIS that the impact of the project on existing dugongs as well as on the survival of the dugong population would be negligible. Again, the plaintiffs had no opportunity to express their opinions on this additional survey and on the information regarding the dugong.

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[178] Okinawa governor's comment to the Henoko DEIA < http://www.pref.okinawa.jp/site/kankyo/seisaku/hyoka/tetsuzuki/documents/iken-50.pdf > last accessed on 12 July 2017.
[179] One dugong was also observed in this area on the same day as the seabed surveys commenced, before landfill operations began in 2014.

The second issue was the significantly late inclusion of information concerning the basing of MV-22 Ospreys in Henoko. Local residents had been worried about this because this type of aircraft had been experiencing frequent accidents since its development stage.[180] During the scoping and DEIS phases of the EIA, plaintiffs insisted that the deployment of the Ospreys had to be included in the assessment because a plan to deploy the Ospreys was presumed to be in place. The Okinawa governor also requested that "aircraft that are planned to be deployed in the future also be considered." Then, on June 6, 2011, as the deadline for the final EIA statement approached, the State announced to the Okinawa governor that Ospreys would be deployed to Futenma in 2012.

As mentioned above, *the EIA Law* provides for public participation during the first two stages of the process, but not during the final stage. Through the scoping and DEIS stages, the type of aircraft to be deployed to Henoko was the CH-46, but it was switched to the Osprey in the final assessment stage. With the switch to the Ospreys in the final EIS, the estimated noise levels at all 15 of the survey locations in the assessment were revised to increased levels. The plaintiffs insisted that their participation rights were infringed because they had no opportunity to express their opinions about this significant change.

The defendant, the State, insisted that public participation in the EIA process did not guarantee any procedural rights. Rather, it was merely considered a method to collect environmental information for the sake of making better decisions. [181]

On February 20, 2013, the Naha District Court ruled that the environmental assessment process was intended simply to collect information from residents, rejecting the plaintiffs' claim that residents have the right to express their opinions. It confirmed that any procedural defect regarding public participation is not regarded as grounds for the admission of

[180] On December 13, 2016, an Osprey in fact crashed off Okinawa.
[181] N. Okubo, ibid., pp.498-550.

legal interest to demand a declaratory judgment for those who submitted their opinions.[182] Moreover, the Naha Branch of the Fukuoka High Court[183] as well as the Supreme Court[184] denied an appeal by the residents.

The Reclamation Law Case

The *Public Waters Reclamation Law* regulates the legal requirements and procedures for the reclamation of public waters. Article 2 obligates a project proponent for reclamation to obtain a license from the prefectural governor. When the proponent is the State, as in the Henoko case, it is necessary for the State to obtain approval from the governor rather than a license for land reclamation. Article 4 stipulates the legal requirements for both a license and approval. Notably, Articles 4.1.1 through 4.1.3 requires that land reclamation shall: (1) constitute appropriate and rational use of national land; (2) "take adequate consideration of environmental conservation and disaster prevention"; and (3) "not violate any law-based plans made by a local public entity regarding land use or environmental conservation."

As mentioned above, after the current Okinawa governor, Onaga, won a landslide victory against Nakaima in November 2014, he revoked former Governor Nakaima's approval for the reclamation project. This decision was supported by a report on the findings of a third-party commission.[185]

The commission reviewed the entire process of approval and its legality in detail based on the *Public Waters Reclamation Law*. It examined two primary issues. The first was the necessity, or lack thereof, of reclaiming land and the other was whether the present

[182] Shoumu Geppo, vol 60, nr 1, p 1.
[183] Judgment of the Naha Branch of the Fukuoka High Court on 27 May 2014, LEX/DB25504223.
[184] Judgment of the Supreme Court on 26 December 2014, LEX/DB25505635.
[185] Third Party Commission, ibid.

reclamation plan met the necessary review criteria for reclaiming land. The committee issued a report in 2015.

The report alleged that there was no logical explanation as to why the base must be relocated to Henoko, even if one accepts the necessity of relocating the Futenma Airbase to eliminate the dangers it poses. It also reviewed whether effective and appropriate measures for environmental conservation could realistically be implemented. Upon weighing the military and environmental benefits against each other, the commission concluded that reclamation to build the Henoko Air Base, despite the risk of destroying something of great environmental value, was neither appropriate nor rational. Finally, it concluded that from a legal perspective, the land reclamation approval process was legally flawed, including the defect of the EIA.[186]

The revocation of the reclamation approval by Governor Nakaima in 2015 led the national government to take countermeasures against Okinawa Prefecture.[187] Thus, the dispute was moved to the courts. There have been several suits between the State and Okinawa Prefecture, as will be described in detail below.

First, in November 2015, the State filed an official objection with the Minister of Land, Infrastructure, Transport and Tourism (MLITT), which is responsible for overseeing issues related to the Public Waters Reclamation based on the *Administrative Complaint Review Act*.[188] The State asked that the execution of the governor's order be suspended, and that nullification ultimately be overridden. The MLITT admitted the claim and ordered the suspension of the effects of the nullification. Okinawa Prefecture countersued the central government in December, seeking to halt the landfill operations.

[186] Third Party Commission, ibid., pp.130-131.
[187] T.Igarashi/S.Aritza, Reclamation, Licensing, and the Law: Japan's Courts Take Up the Henoko Base Issue, 2016, available at < http://apjjf.org/2016/01/2-Igarashi.html > last accessed on 12 July 2017.
[188] Act No.68 of 2014.

Second, the MLITT filed a mandamus action against the Okinawa governor, claiming there were no legal flaws regarding approval of the reclamation project and requested revocation of the nullification. According to the *Local Autonomy Act*,[189] the competent minister has the authority to intervene in the affairs of the local government, especially for various forms of statutory entrusted affairs, including approval for the reclamation (Articles 245-245.9). A mandamus action is the strongest form of such intervention.

In March, the State and Okinawa Prefecture reached a court-mediated settlement that obligated both sides to drop their lawsuits against each other and the State to suspend its work at Henoko. Both sides were required to hold more talks and to work together to seek a solution. However, it was just three days after the settlement, on March 7, that the minister, without any substantial consultation with the Okinawa governor, exercised another form of intervention, namely, indication for the rectification of the governor's nullification of reclamation approval.

If a local government has any objection to such an intervention, it can file for a review by the Central-Local Government Dispute Management Council, the third-party panel formed under the Ministry of Internal Affairs and Communications.[190] Governor Onaga filed for the review on March 23, 2016. The council avoided ruling on the legality of the minster's indication to Onaga and recommended resolving the problem through "sincere consultations" between the central and Okinawa governments on June 20, 2016.[191]

However, the dispute was brought back to the courtroom when the government filed a new action for a declaration of illegality of inaction against the governor based on Article 251.7 of the *Local Autonomy Act* on July 22, 2016. The Naha Branch of the Fukuoka High Court essentially supported the national government's position and ruled on September 16, 2016 that it was illegal for Onaga to revoke the reclamation approval issued by his

[189] Act No.67 of 1947.
[190] Art. 250-13 of the Local Autonomy Act.
[191] The recommendation on June 20, 2016 of the Central-Local Government Dispute Management Council < http://www.soumu.go.jp/menu_news/s-news/02gyosei01_03000274.html > last accessed on 12 July 2017.

predecessor. According to the judgment, even taking into account the desire of Okinawans who were seeking reductions in the base facilities and who saw the reclamation as unprofitable, there was nothing lacking in the requirements for reclamation approval. Therefore, there was nothing illegal about the previous governor's approval. For that reason, cancellation could not be upheld.

On December 20, 2016, the Supreme Court ruled in favor of the national government regarding the construction of the Henoko Air Base, without holding a hearing.[192] It admitted the High Court's decision that the revocation of the approval was illegal if the original approval was illegal at the time the approval was issued.

Article 30 of the *Administrative Case Litigation Law* stipulates that the court may revoke an original administrative disposition made by an administrative agency at its discretion only in cases where the disposition has been made outside the scope of the agency's discretionary power or through an abuse of such power. According to case law, judicial review of whether the execution of discretion constitutes an overreach or abuse of discretionary power must investigate whether any factor in making the decision, such as choices or steps in the decision-making process, lacked rationality. Only in instances where the judiciary finds the decision lacking important foundational aspects or finds the decision significantly lacking in appropriateness in light of social norms, will the decision be determined an illegal overreach or abuse of discretionary power.

The Supreme Court ruled that a reclamation approval is a discretionary act by a governor, requiring the comprehensive consideration of various aspects, such as the purpose and public nature of the reclamation, and the *Public Waters Reclamation Law* requires that reclamation constitutes an appropriate and rational use of national land. The approval was not illegal because the decision did not lack important foundational aspects, nor did it obviously lack appropriateness in light of social norms. The Supreme Court also decided that the former governor's approval based on "special knowledge" was not illegal from the viewpoint of environmental conservation. However, the Supreme Court did not give

[192] Judgment of the Supreme Court on 20 December 2016, LEX/DB25448341.

further explanation of the nature and the content of special knowledge.

The Supreme Court did not say that this case involved a political question or was beyond the scope of judicial review. Instead, it ruled on the case as a typical reclamation case; however, it gave extremely broad discretion to the governor to determine reclamation approval. It brings up the question whether the Supreme Court could have considered reviewing an Administration's decision, whose object lies within the governor's discretionary power, even in the case the former governor rejected the approval in the Henoko case. Additionally, this judgment could have serious adverse effects on other pending reclamation cases.

On December 26, 2016, Governor Onaga revoked his nullification of the approval of former Governor Nakaima. However, Governor Onaga indicated he will continue his efforts to prevent construction of the Henoko Air Base. Other measures Onaga could take include refusing to approve any changes in the construction plan, which must be submitted and approved by the governor. And Okinawa Prefecture filed civil lawsuit demanding injunction against the State. While the Naha District Court rejected the case on March 23, 2018, Okinawa Prefecture appealed to the High Court.

The Okinawa Dugong Cases and Rio Principle 10

Principle 10 of *the 1992 Rio Declaration* states that environmental issues are best handled with the participation of all concerned citizens at the relevant level. Public participation is essential for the promotion of sustainable development. It contributes to the protection of the right to live in a healthy environment as a basic human right. It is also an important instrument of "environmental democracy."[193] In order to accelerate action in terms of implementing Principle 10, the United Nations Economic Commission for Europe on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* was adopted in 1998 in the Danish city of Aarhus and hence is

[193] S. Stec, EU Enlargement, Neighbourhood Policy and Environmental Democracy, in: The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law, Europa Law Publishing, 2011, pp.35-54.

known as *the Aarhus Convention*. It requires parties to guarantee the procedural rights of access to information, public participation in decision-making, and access to justice. The governing ccouncil of the United Nations Environment Programme (now renamed UN Environment) adopted *the Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters* (*the Bali Guidelines*) on February 26, 2010 in order to promote Principle 10. Like the Convention, these Guidelines have three pillars that are now the global standard. Although Japan is not a party to the *Aarhus Convention* and the *Bali Guidelines* are not legally binding, Japan should still promote Principle 10 and respect the *Bali Guidelines*. However, the Okinawa dugong cases show that the current Japanese legal system and praxis are not consistent with the global standard.

Access to Information

The Aarhus Convention and *the Bali Guidelines* require a system that enables the public to request and receive environmental information from public authorities.[194]
The ***Act on Access to Information Held by Administrative Organs***[195] provides anyone with the right to request information that is in the possession of national government organs in Japan. As set forth in one of the principles, the administrative organ is obliged to disclose all records requested. Although there are seven categories of exceptions to the disclosure principle, such as personal information and national security information (Article 5), the administration shall segregate as much as possible the non-disclosure and confidential information from that which is public and provide access to the latter (Article 6).

However, in the planning process of the construction of the Henoko Air Base, the then Defense Facilities Administration Agency refused to disclose the name of the experts who gave technical advice on the on-site environmental and geological investigation methods. The reason provided was that it was personal information. Although the administration must disclose the names of public officials, including members of official councils, the

[194] Article 4 of the Aarhus Convention and Guidelines 1-3 of the Bali Guidelines.
[195] Act No.42 of 1999.

agency insisted that the experts were expressing their personal opinions, and therefore, the information of the experts had to be protected as personal information. The requester filed suit against the State, asking for a revocation of the original decision and for the agency to disclose the information. However, the Naha District Court rejected the claim.[196] There are several defects with raising a personal information protection claim to defend against requests for expert opinions and other information which informs project decisions. The new *Protection of Personal Information Act*, which came into force on 30 May 2017, defines personal information as data that can identify an individual.[197] Regarding expert opinions, the case has not been clearly articulated in how it may identify particular individuals, or more importantly, how the opinions cannot be transformed (by redaction or otherwise) which could allow access to information without the risk of identifying the individual.

The plaintiffs alleged that it is impossible to review the scientific appropriateness of the EIA methods without knowing who was providing the advice. It seems difficult to justify the judgment because any special knowledge provided for a public purpose should not be regarded as personal data. As this case shows, the public had only limited access to information regarding the construction of the Henoko Air Base.

Nevertheless, the lack of transparency of expert opinions can be addressed through various mechanisms. An effective method includes requiring proponents to develop joint reports for projects, where proponents and objectors can identify the areas of potential contention and agreed facts to improve decision making and conciliation.[198] By requiring joint reports for high profile projects, not only does it promote public participation, parties can have increased access to the information that can shape project decisions and develop community consensus.

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196 Judgment of the Naha District Court on 2 February 2006, LEX/DB28111266.

197 See Kensaku Takase, 'GDRP matchup: Japan's Act on the Protection of Personal Information' (iapp, 2018). Available at: https://iapp.org/news/a/gdpr-matchup-japans-act-on-the-protection-of-personal-information/ Accessed 20 August 2018.

198 See Rosemary Lyster, Zada Lipman, Nicola Franklin, Graeme Wiffen and Linda Pearson, *Environmental and Planning Law in NSW* (Federation Press, 3rd edition, 2012) 49.

Public Participation in Decision-making

The *Aarhus Convention* as well as the *Bali Guidelines* require the provision of public participation opportunities during three phases: participation in decisions on specific permits (Article 6), participation concerning plans and policies (Article 7), and participation during the preparation of executive regulations (Article 8).[199]

With regard to participation during the preparation of executive regulations, the general provisions for public comment in the *Administrative Procedure Act*[200] (Articles 39-43) are basically applied to all cases. In contrast, there is no provision for public participation in making plans concerning national security and defence. Additionally, because a strategic environmental assessment (SEA) has not yet been introduced in Japan, the public had no opportunity to express opinions about the Henoko Air Base during this phase. The EIA procedure is the core of public participation in the decision-making process of granting specific permits. The *Aarhus Convention* gives the discretion to the Party to decide not to apply article 6 to the national security projects. However, *the EIA Law* in Japan does not admit such an exception. And there are several points in *the EIA Law* and its praxis that are not consistent with the global standard.

First, the *Aarhus Convention* and/or the *Bali Guidelines* require the provision of an opportunity for early public participation, when all options are open. However, in the case of the construction of the Henoko Air Base, the first public comment was carried out when there was no other option but for Henoko and the public did not know in detail why Henoko was chosen.

Second, the *Aarhus Convention* and the *Bali Guidelines* require the provision of opportunities for early and effective public participation as well as making all information relevant for decision-making available to the public concerned in a timely and effective manner.[201] In the case of the Henoko EIA, the public did not have an appropriate opportunity to

[199] Article 6-8 of the Aarhus Convention and Guidelines 8-13 of the Bali Guidelines.
[200] Act No.88 of 1993.
[201] Article 6 II of the Aarhus Convention and Guidelines 8 and 10 of the Bali Guidelines.

express opinions regarding the dugong investigation methods or deployment of the Ospreys. It was because the ODB began its pre-survey prior to the scoping procedures and provided information about the Ospreys only later during the public participation phase for the draft EIA. Such action by the ODB was both too early and too late to ensure effective participation. In addition, the ODB provided relevant information to the public only at its office in Okinawa. Although the revised *EIA Law* obligates a project proponent to post the information on the Internet, it was not illegal at that time to provide information only in its office. Thus, it was difficult for a wide range of the public to get relevant information appropriately and timely.

Third, the *Aarhus Convention* and/or the *Bali Guidelines* require that in the decision, "due account is taken of the outcome of the public participation" and the public is promptly informed of the text of the decision along with the reasons and considerations on which the decision is based.[202] According to *the EIA Law*, the project proponent should take into account comments not only from the governor and the mayor of the relevant area, but must also pay attention (*Haii* in Japanese) to comments from the public (Articles 10 III and 20 III). The project proponent must also respond to comments from both the public and the local government in the draft EIS and in the final EIS (Article 21 II). Additionally, the competent decision-making authority must take into account the results of the EIA together with other requirements based on the *Public Waters Reclamation Law* (Article 33).

In the Henoko case, even the former Okinawa governor, Nakaima, submitted critical comments to the ODB during the EIA process, saying that the project would inflict serious damage on the environment and that the measures proposed by the ODB would be not sufficient to protect or mitigate the impacts. Therefore, it was difficult for the public to understand why Nakaima suddenly gave his approval.[203] However, according to the *Administrative*

[202] Article 6 VIII and 6.9 of the Aarhus Convention and Guidelines 11 of the Bali Guidelines.
[203] Okinawa governor's comment to the Henoko final EIA < http://www.pref.okinawa.jp/kaigann-bousai/umetate/tijiiken-ume-tate.pdf#search=%27%E6%99%AE%E5%A4%A9%E9%96%93+%E7%92%B0%E5%A2%83%E5%BD%B1%E9%9F%BF%E8%A9%95%E4%BE%A1%E6%9B%B8+%E7%9F%A5%E4%BA%8B%E6%84%8F%E8%A6%8B%27 > last accessed on 12 July 2017.

Procedure Act, the decision-making authority is obligated to explain its reasoning to the applicant only in cases where permission is denied (Article 8). With regard to approval, there is no legal obligation to explain and to publicize the grounds for such approval.
Public participation in the EIA process is regarded as a procedural right in many countries, including Asian countries.[204] In contrast, the Japanese Government insists that public participation in the EIA process does not aim to guarantee any procedural rights. Rather, it is merely considered an opportunity to collect environmental information for the sake of making better decisions. As the judgments in the Okinawa dugong cases show, case law does not grant participation rights based on *the EIA Law*.

Access to Justice

The *Aarhus Convention* and the *Bali Guidelines* require that concerned members of the public have access to a review procedure and can challenge the substantive and procedural legality of any administrative decision.[205] Additionally, standing is interpreted broadly with a view toward effective access to justice. However, in Japan, due to the typical narrow interpretation of standing, many environmental cases have been dismissed without judgment, especially in the field of nature protection.[206] Until now environmental public interest litigation has not been introduced in Japan.

According to the *Administrative Case Litigation Act*,[207] there are two types of subjective administrative litigation: actions for the judicial review of administrative dispositions and public law-related actions. Actions for the judicial review of administrative dispositions are lawsuits to challenge administrative dispositions such as permits, and public law-related actions are lawsuits to challenge public law-related actions other than administrative dispositions. According to article 9 of *the Administrative Case Litigation Act*, a person who has a legally-protected interest has standing in cases asking for corrected administrative

[204] N.Okubo, Principle 10 and Developments in Asia, in: Konrad-Adenauer-Stiftung, Ltd., *Rule of Law for Good Environmental Governance*, 2015, pp.154-168.
[205] Article 9 II of the Aarhus Convention and Guidelines 16 of the Bali Guidelines.
[206] M.Bohm/N.Okubo, Die Klagebefugnis im deutschen und im japanischen Recht, DÖV 2007, pp.826-832.
[207] Act No. 139 of 1962.

dispositions. However, according to case law, a legally protected interest must be concrete and individualistic. In other words, local residents who have been contributing to the environmental protection of a certain area, typically do not have standing, except in cases where there is evidence of a concrete risk to health or property. Moreover, environmental NGOs have never been granted standing, except in cases concerning access to information. These limitations on access to justice and substantial review could also be considered reasons for the negligent or inefficient consideration of public comments.

In addition, access to justice must also be supported by preventing measures that make it cost prohibitive to initiate public interest environmental litigation. Where matters are brought before a judicial body in the public interest, developers are in a position to test how their project addresses wider social and environmental concerns and thus should bare a proportion of costs. This also reflects realities in that project developers are more resourced to resist challenges than often community based public interest groups or individuals who may have standing under the *Administrative Case Litigation Act*.

Conclusion

In the case of the Henoko EIA, the court confirmed that any procedural defect regarding public participation is not considered grounds for granting legal interest to demand a declaratory judgment to those who submitted their opinions. Thus, the Henoko EIA case makes clear the critical legal issues in Japan from the viewpoint of Principle 10 of the *1992 Rio Declaration*. It is especially necessary to ensure that the public concerned can challenge the substantive as well as procedural legality of any administrative decision and can initiate any type of public interest litigation such as citizen's suits and/or suits by NGOs. Currently, there is a clear international tendency, not only in developed countries but also in developing countries, to grant legal standing to NGOs in environmental matters. Moreover, lawsuits by NGOs have contributed to strengthening environmental rule of law.[208] In

[208] UNEP, Environmental Rule of Law: Critical to Sustainable Development; Issue Brief on Environmental Justice and SDGs <http://www.unep.org/delc/Portals/24151/Documents/issue-brief-environmental-justice-sdgs.pdf> last accessed on July 14, 2017. See also, HP of UNEP <http://www.unep.org/delc/worldcongress/Home/tabid/55710/Default.aspx> last accessed on July 14, 2017.

the Okinawa dugong cases, Japanese and US NGOs also filed suits in the US and won in Dugong Cases I and II.

However, it is not enough to expand legal standing. In the case of the revocation of the approval, the Supreme Court ruled that the approval of the former governor was made within his discretionary power and was not illegal. With regard to the requirement for consideration of environmental aspects, the court emphasized that approval was granted upon the special knowledge of the former Okinawa governor. However, he himself had criticized the Henoko EIA performed by the ODB and pointed out various defects. It seems that the Supreme Court avoided an intensive review of the decision. Instead, the review was merely a formality.

Therefore, it is also important to strengthen the effectiveness of judicial review. From this viewpoint, it is remarkable that more countries, including Asian countries, have recently established a specialized environmental court and/or have nominated expert judges from various relevant fields.[209] Although the Japanese Constitution prohibits establishing a specialized court, there are specialized alternative dispute resolution organizations in environmental matters, such as the Environmental Dispute Coordination Commission at the national level.[210] It would be worthwhile to discuss how to develop specialized organizations and procedural rules in accordance with the nature of environmental disputes.

Finally, how to ensure effective access to justice regarding decisions concerning national security and defence is not only a problem in Japan. After landfill operations began in 2014, concerned members of the public and NGOs filed another lawsuit in the US.[211] However, on February 13, 2015, the court issued an order dismissing the case with prejudice for

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[209] G. Pring and C. Pring, Environmental Courts & Tribunal: A Guide for Policy, 2016, available at < http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y> last accessed on July 14, 2017.
[210] See HP of Environmental Dispute Coordination Commission <http://www.soumu.go.jp/kouchoi/english/> last accessed on July 14, 2017.
[211] *Center for Biological Diversity v. Hagel,* No. C-03-4350 EMC (N.D. Cal., 13 Feb 2015) (*Okinawa Dugong III).*

lack of subject matter jurisdiction.[212] According to the judgment, the reason was that the court lacked the power to enjoin the construction of the Henoko Air Base consistently with American treaty obligations and in cooperation with the Japanese Government. The plaintiffs appealed to the Ninth Circuit Court of Appeals. On August 21, 2017, it affirmed that the claims did not present a political question and remanded the case to the district court.[213]

In Japan, the *State Redress Act*[214] is also applied to the air base cases. Article 2, Paragraph (1) of the *State Redress Act* sets forth provisions on State strict liability concerning defects in the establishment and management of public facilities. The Supreme Court has been awarding compensation for damages caused by noise from air bases in several cases.[215] In addition, local residents have filed administrative litigation seeking injunctive orders. Atsugi Air Base case is one of such recent cases. This Base, located in Kanagawa prefecture, has been used not only by the Self-Defense Force, but also by the U.S. Navy. On 21 May 2014, Yokohama District Court and Tokyo High Court ordered the Self-Defense Forces to cease flights between 10 p.m. and 6 a.m. to avoid noise pollution, except for emergency cases.[216] Although the Supreme Court quashed the High Court's decision and dismissed the plaintiff's claim, it did not say that this case involved a political question, and ruled on the case as a typical noise case.

According to Japanese case law, there are currently no legal measures available for the improvement of noise pollution caused by U.S. military aircraft, because U.S. military flights are not matters under the control of the Japanese government.[217] However, the national security issues are not political question in general. Its nature and the scope of judicial review should be scrutinized in each individual case.

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[212] N.D. Cal., 13 Feb 2015 (No. C-03-4350 EMC).
[213] No. 15-15695. D.C. No. 3:03-cv-04350 EMC.
[214] Act No. 125 of 1947.
[215] For example, Supreme Court 25 February 1993, Shomu Geppo Vol. 40, No. 3, 452; Supreme Court 8 December 2016, Hanreijiho No. 2325, 37.
[216] Yokohama District Court 21 May 2014, Hanreijiho No. 2277, 38 and Tokyo High Court 30 July 2015, Hanreijiho No. 2277, 13.
[217] Supreme Court 5 February 1993, Minshu Vol. 47, No. 2, 643.

NOMOSCAPING PEACE IN TIMES OF CONFLICT:
A Case Study of the Greater Virunga Transboundary Collaboration (GVTC)

Elaine C. Hsiao*

Abstract: Protected areas can play a variety of roles in the context of environmental security, conflict and peace processes. As resource-rich biodiversity hotspots, they may become the locus of natural resource conflicts or the resource 'bank' for armed groups trafficking natural resources to finance violent conflicts. They might become refuge for armed combatants, or perhaps even the sanctuary of endangered species fleeing armed conflicts. These 'wild spaces' offer different opportunities and challenges in the various stages of conflict, conflict transformation and peacebuilding. When insecurity or conflict involves international borders, the cross-border conservation areas become particularly salient.

Uganda is a land-locked East African nation with eight of its ten national parks sitting on conflict-afflicted international borders. In each of these border regions, park managers have collaborated with neighboring parks to protect natural resources. Geographically they are all part of the Albertine Rift and Great Rift Valley, one large-scale landscape that has been an ancient pathway for transcontinental elephant migration and cattle corridor for nomadic pastoralists - both increasingly challenged by land fragmentation and climate change. Understanding transboundary conservation on these borders can provide insight into how we can improve legal arrangements through transboundary conservation for peace.

Introduction

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Environment and Peace scholars suggest collaborative natural resources governance for conflict management and peace,[218] while environmentalists recommend transboundary conservation areas (TBCAs) as a win-win modality (e.g., parks for peace).[219] Political ecologists, however, point to the violences of conservation territoriality,[220] with protected areas and TBCAs increasingly criticized for their: (1) colonial or imperial origins, (2) neoliberal capitalist approach to conservation, (3) impacts on marginalized peoples (especially rural and indigenous) and (4) coercive practices or human rights abuses.[221] Protected areas (PAs) are susceptible to social and structural violence by nature of being bordered territories with distinct rules related to power, meaning/identity and access. They typically represent dominant systems of legal authority and in the case of TBCAs, they may represent jurisdictions divided between legal traditions obscuring customary systems.

Processes of bordering and norming, or the iterative creation and performance of legal meaning and rulemaking through spacemaking, is known as nomosphering.[222] In the Greater Virunga Landscape (GVL) between the Democratic Republic of Congo (DRC), Rwanda and Uganda, colonially nomosphered conservation injustices overlay and augment post-colonial political-economic and socio-ecological complexities that shape regional futures for peace and security. GVL demographics feature high population density, heavy natural resource dependency, extreme poverty and are consistently considered a risk to conservation and conflict.[223] In this context, TBCAs challenge ecological peacebuilding to evolve beyond generic theories of cooperation towards contemporary conflict resolution throughout its territories of practice.

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[218] Ken Conca, 'The Case for Environmental Peacemaking: Beyond Ecological (In)Security', *Environmental Peacemaking* (Woodrow Wilson Center Press 2002).
[219] Trevor Sandwith et al., Transboundary Protected Areas for Peace and Co-Operation (IUCN 2001).
[220] See George Holmes, 'Defining the Forest, Defending the Forest: Political Ecology, Territoriality and Resistance to a Protected Area in the Dominican Republic' (2014) 53 Geoforum 1.
[221] Dan Brockington, Rosaleen Duffy and Jim Igoe, *Nature Unbound: Conservation, Capitalism and the Future of Protected Areas* (Earthscan 2008); Mark Dowie, *Conservation Refugees: The Hundred-Year Conflict between Global Conservation and Native Peoples* (MIT Press 2009); Nancy Lee Peluso, 'Coercing Conservation: The Politics of State Resource Control' in Ronnie D Lipschutz and Ken Conca (eds), *The State and Social Power in Global Environmental Politics* (Columbia University Press 1993).
[222] Blomley, Nicholas, David Delaney and Ford, Richard T. (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell Publishers Ltd 2001).
[223] Ibid.

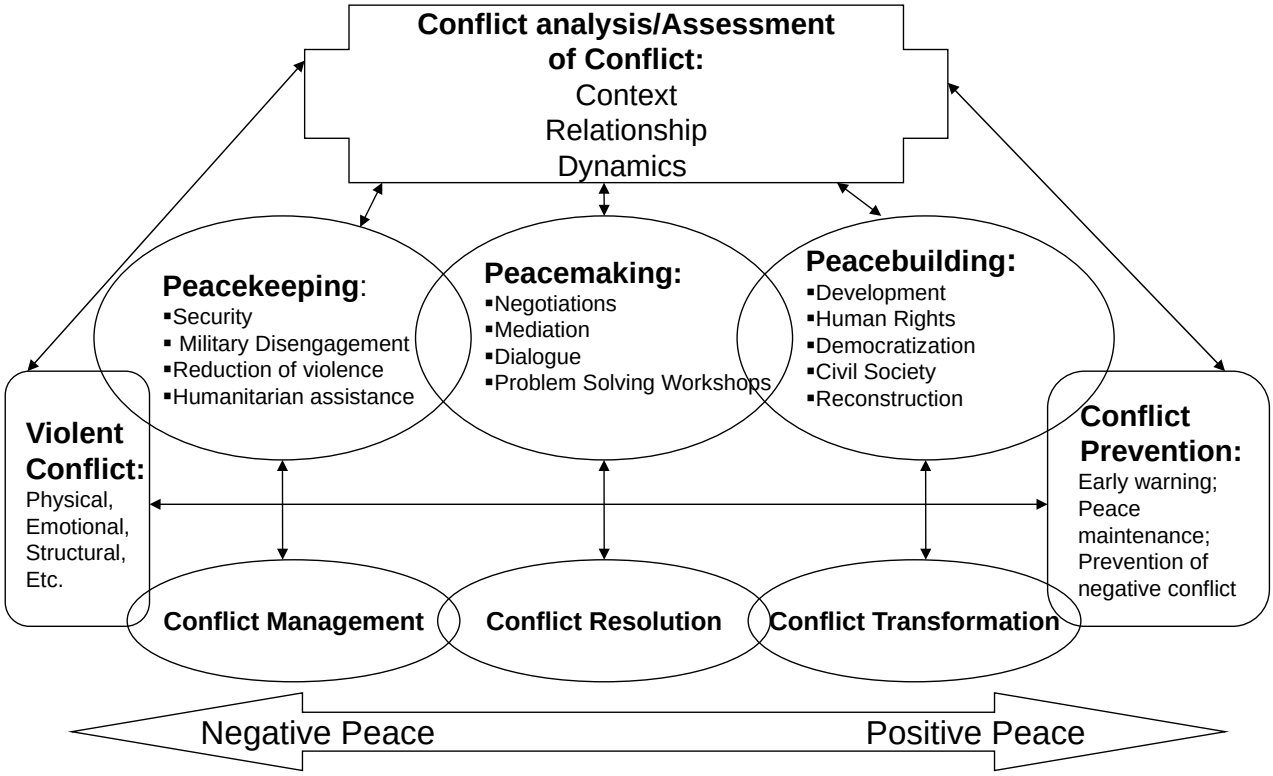
To understand how TBCAs can nomosphere peace during times of conflict, field research was conducted in the GVL from October 2010 – August 2011 and December 2016 – May 2017.[224] The first section of this article outlines the history of transboundary collaboration in the GVL, while the second section maps conflict resolution and peace in multilateral agreements. The third section discusses key findings, while arguing that nomosphering peace is not an automatic byproduct of transboundary conservation and, therefore, peace needs to be formalized and operationalized appropriately in TBCA agreements. The conclusion provides some lessons and recommendations from the GVL on how to improve TBCA agreements to better protect places for nature, people and peace.

Developing legal frameworks for unique borderlands: Nomoscaping Peace

Peace is most often understood through its counterparts, conflict and violence. Johan Galtung seminally described the definitions and relations between the three. Galtung describes conflict as the full articulation of: (1) *contradiction* – disagreement in values or interests; (2) *attitudes/assumptions* – cognitions and emotions towards each other, including themselves; and (3) *behavior* – actions, which can be destructive or constructive, even simultaneously.[225] Violence can be *direct* (personal, physical), *structural* (indirect, social injustice) or *cultural* (culture-based justification/legitimization).[226] Peace is not necessarily the absence of conflict; it ranges from conflict settlement or resolution (negative peace) to conflict transformation (positive peace) (see Figure 1 below).[227] International peace/conflict involves political relations and borders between States or territories, while social peace/conflict refers to interactions between individuals or identity-based groups. Ecological peace/conflict describes the relationship between humans and nature.

[224] Elaine C Hsiao, 'Water for Peace and Resilience in the Central Albertine Rift' (2015) 20 South African Journal of Environmental Law and Policy 65; Elaine C Hsiao and Cory Wilson, *Transcending Boundaries: Perspectives from the Central Albertine Rift* (2012) <https://vimeo.com/62257328>.
[225] Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (International Peace Research Institute 1996) 71–72.
[226] Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167, 171; Johan Galtung, 'Cultural Violence' (1990) 27 Journal of Peace Research 291, 291.
[227] Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (3rd edn, Polity Press 2011) 10.

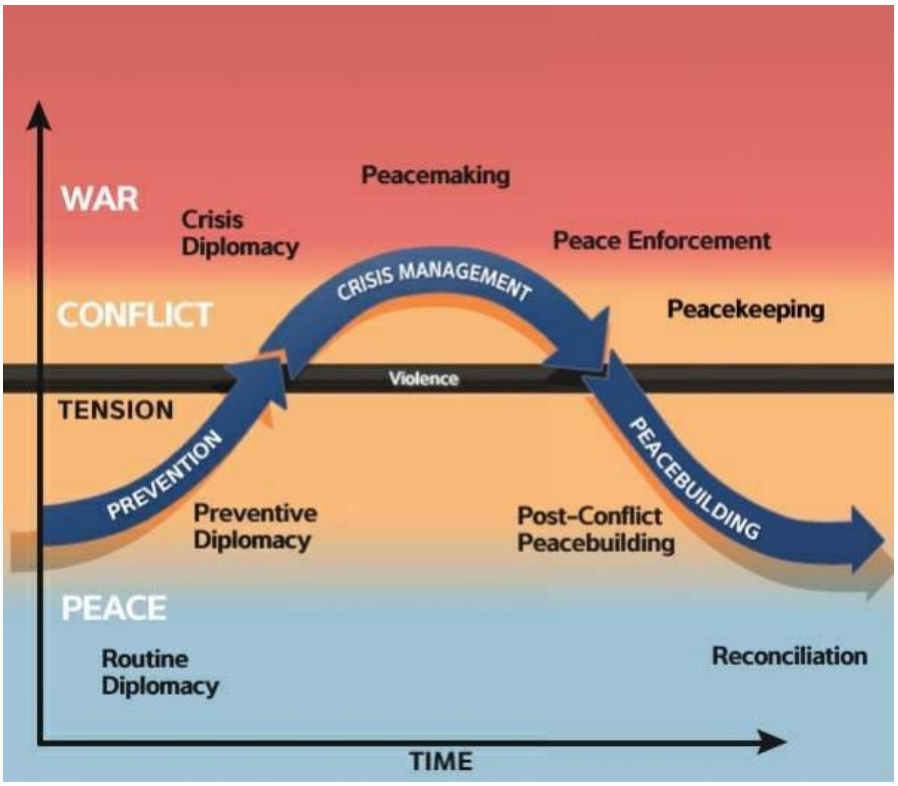
Figure 1. Overview of the Field of Peace and Conflict Studies



Developed by Dr. Amr Abdalla and the students of the course on Navigating Cultures for Peacebuilding. Eastern Mennonite University, Summer 2005.

Peace and conflict can be portrayed as a spectrum of dynamics, as illustrated by Dr. Abdalla et al. in Figure 1, or sometimes it is depicted as a curve (see Figure 2 below). Realistically, a conflict may feature multiple revelations of the conflict curve. Between some parties, there may be escalating tensions, while others perceive that their situation has de-escalated and is moving towards reconciliation; some may find themselves in extended periods of low-level conflict, while others oscillate between major armed conflict and temporary ceasefires. In the GVL, different conflicts and different conflict parties may identify themselves in different parts of the spectrum. Therefore, conflict resolution in cross-border landscapes requires multi-pronged and multi-scalar approaches that incorporate interventions for various stages of peace and conflict transformation.

Figure 2. Conflict Curve[228]



Transboundary conservation agreements provide a framework for cross-border governance, effectively producing their own nomos (an inhabited normative universe) and nomospheres ("cultural-material-environs" reciprocally constituted by the legal, physical, and socio-cultural).[229] When nomosphering is applied to a referent space, it becomes nomoscaping.[230] Critical studies of the socio-legal processes and impacts of nomosphering are known as nomospheric investigations (Delaney, 2010). The application of nomospheric investigations in land and/or sea-scapes for a particular purpose, in this case to strengthen peace and conflict resolution, contributes towards the objective of 'nomoscaping peace.' This article demonstrates

[228] Michael S Lund, 'Curve of Conflict' (*Curve of Conflict*, 2011- 2012) <https://www.usip.org/public--education/students/curve-conflict> accessed 24 May 2018.
[229] Robert M Cover, 'Forward: Nomos and Narrative' (1983) 97 Harvard Law Review 4; David Delaney, *Nomospheric Investigations: The Spatial, the Legal and the Pragmatics of World-Making* (Routledge 2010) 25.
[230] Delaney (n 12) 101.

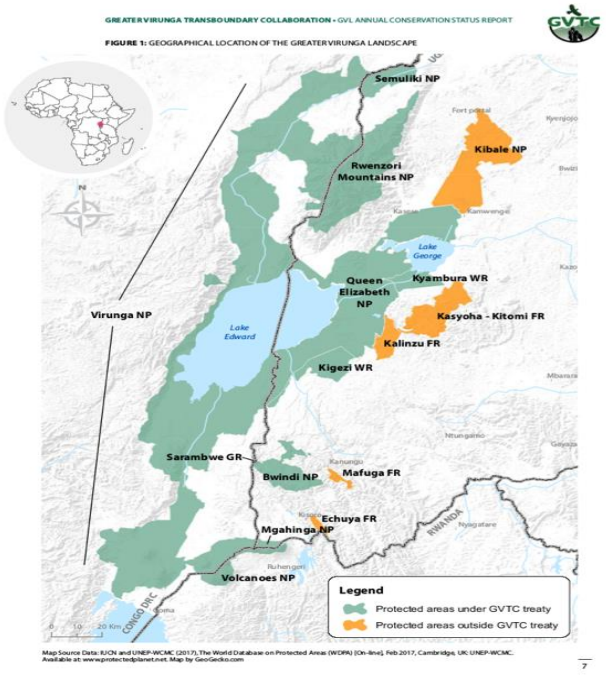
how the GVL, through its transboundary legal agreements, can nomoscape peace and conflict resolution, thereby transforming the violences of PAs situated in a conflict-afflicted borderland.

Violence in the Greater Virunga Landscape

As part of the Albertine Rift, the GVL has some of the highest occurrences of endemic mammal species (at least 34 endemic and 12 near-endemic) of any ecoregion in the world (Kityo, Plumptre, Kerbis Peterhans, Pilgrim, & Moyer, 2003, p. 23; Olson et al., 2001, p. 936).

Figure 3. Map of the Greater Virunga Landscape (GVL)

The PAs that form the GVL are critical biodiversity corridors for species diversity and dispersal throughout the Albertine Rift (Ayebare et al., 2013). These shared eco-unique borderlands of the DRC, Rwanda and Uganda, capture one of the most biodiverse regions of the world with one of the most violent histories. As Omeje and Redeker Hepner describe:



> "Despite its great potential for development – or perhaps because of it – a variety of complex political conflicts at least partly related to the construction of nation-state borders have plagued the African Great Lakes region: genocide in Rwanda; civil wars in Burundi, Democratic Republic of Congo (DRC), and Uganda; flawed democratic elections and violence in Kenya; ethnic hostilities and pastoral conflicts in most states; as well as boundary disputes, cross-border rebel incursions, and interest-driven political interventionism. […] Problems of child soldiering; proliferation of small arms and light weapons; sexual slavery, abduction, abuse, and torture of young girls and women in war zones by rebel fighters; refugees and internal displacement of persons; pastoral and communal violence; rebel and militia insurgencies; and epidemics like HIV/AIDS remain significant problems in different parts of the region. […] The natural resource endowments in the region have represented

liabilities as well as potential opportunities, as groups have vied for control over resources amid market pressures and the exigencies of neoliberal development and globalization paradigms." [231]

In the GVL, violence and conflicts have histories that relate to the creation and management of PAs and in return, impact negatively in many ways upon the PAs and transboundary conservation. To offer just one illustration of the challenges in the GVL as a place for nature and people in great need of peace is the story of the Basongora and Bakonzo in central and northern GVL.

The Basongora (pastoralists) and Bakonzo (cultivators) of the Semuliki Flats and savannah areas of Queen Elizabeth National Park (NP) (Uganda) and central Virunga NP (DRC) present the complexity and interconnectedness of international, social and ecological conflicts, violence and peace in the GVL. At the interface of colonial park gazettements and post-colonial enforcement, the Basongora still move with cattle through the landscape while the Bakonzo farm park peripheries. The Basongora lost nearly all their traditional land to gazettement of the two PAs.[232] In both Queen Elizabeth and Virunga NPs, the only way to remain inside park boundaries was to settle in designated fishing villages, but as pastoralists, this was not their primary traditional livelihood strategy.[233] Outside, the Basongora faced land conflicts with the Bakonzo or Protected Areas Authorities (PAAs) for violating laws against trespass, livestock watering and grazing.

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[231] Kenneth Omeje and Tricia Redeker Hepner (eds), *Conflict and Peacebuilding in the African Great Lakes Region* (Indiana University Press 2013) 1–2.
[232] Mohamed Matovu, 'Land Injustice for the Basongora' (*Minority Voices*, 2012) <http://www.minoritytvoices.org/news.php/en/1140/uganda-land-injustice-for-the-basongora> accessed 30 April 2017; Laura A Young and Korir Sing'Oei, 'Land, Livelihoods and Identities- Inter-Community Conflicts in East Africa' (Minority Rights Group International 2011) 22 <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-1076-Land-livelihoods-and-identities-Inter-community-conflicts-in-East-Africa.pdf> accessed 30 April 2017.
[233] Bamuturaki Musinguzi, 'Uganda's Minority Tribes Fight for Their Rights' *The East African* (Uganda, 14 April 2016).

In 2006/2007, 8,000 Basongora with over 50,000 cattle entered Virunga NP for water and pasture, but were pushed back into Queen Elizabeth NP.[234] Bakonzo, who lost their traditional lands when Rwenzori Mountains NP (Uganda) was gazetted, took advantage of the situation and encroached Queen Elizabeth NP as well.[235] Eventually, the PAAs of DRC and Uganda (the Institut Congolais pour la Conservation de la Nature (ICCN) and Uganda Wildlife Authority (UWA) respectively) met to discuss the problem of the Basongora pastoralists and disenfranchised Bakonzo who had settled inside their PAs, elevating the issue to Uganda's President Museveni and an inter-ministerial committee, which allegedly allocated the "encroachers" 30,000 hectares of land in Uganda.[236] Tenure of that land settlement remains insecure, as do relations between the Basongora and the Bakonzo, who interpreted the land settlement as another indication of President Museveni's favoritism for pastoralists (his own tribe, Bahima, are also cattle-keepers).[237]

The Bakonzo have been antagonistic to the central government in Uganda since colonial times, forming the Rwenzururu Movement against the British and later the National Army for the Liberation of Uganda (NALU) against President Museveni with the support of President Mobutu in DRC and President Daniel Arap Moi in Kenya.[238] Around 1995 in DRC, NALU members were introduced to the Khartoum government of Sudan, which was supplying the Interhamwe Hutu militia in Bunia.[239] Khartoum connected NALU with a coalition of disenfranchised Baganda anti-Museveni/NRM (National Resistance Movement) militias known as the Allied Democratic Forces (ADF).[240] This birthed the ADF-NALU, which terrorized the Rwenzori Mountains for years and is linked by INTERPOL to ivory and mineral trafficking amongst other environmental

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[234] Jerome Kule Bitswande, 'Kasese - a Tragic Conflict Rooted in Land, One Boy's Dream and a Family's Hope' *The Observer* (Kampala, Uganda, 3 March 2017) <http://allafrica.com/stories/201703030450.html> accessed 30 April 2017.
[235] ibid; Minority Rights Group, 'Uganda - Basongora' (*Minority Rights Group - Directory*) <http://minoritytights.org/minorities/basongora/> accessed 30 April 2017.
[236] Kule Bitswande (n 29).
[237] Ibid.
[238] Gérard Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (2nd edn, Hurst & Co, Ltd 2011) 82–83; Anna Reuss and Kristof Titeca, 'There Is New Violence in Western Uganda. Here's Why.' *The Washington Post* (29 November 2016) <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/29/what-is-happening-in-uganda/> accessed 30 April 2017.
[239] Prunier (n 33) 86–87.
[240] Ibid.

crimes.[241] In retaliation, President Museveni supported the creation of the Parti de Libération Congolais (PLC), an armed group mostly occupied with raiding Bakonzo across the border in Kasese, Uganda.[242]

In December 2016, antagonism between Bakonzo and President Museveni's regime flared into an armed siege of the Rwenzururu Palace in Kasese, the slaughter of royal guards and civilians, plus the arrest of Rwenzururu King Charles Wesley Mumbere.[243] President Museveni claimed they were mobilizing a secessionist movement armed by Banande tribespeople, who ironically form part of PLC.[244] In this conflict constellation, identity-based militias and their backers are linked across borders and are known to use PAs for shelter, food, medicine and profit, tying even the most oblivious and distant consumers of the North, South, East and West into a virulent web of violence and conflict.[245]

Transboundary conservation in the Greater Virunga Landscape (GVL)

Within this context, the GVL has a long history of formal and informal transboundary collaboration. Mountain gorilla research in the Virunga Massif began in 1959, leading to recognition that the last of this endangered species roam a colonially divided ecosystem that requires coordination amongst three nations to protect.[246] Organized antipoaching patrols and educational

[241] Christian Nellemann and others, 'The Rise of Environmental Crime - A Growing Threat to Natural Resources Peace, Development and Security' (United Nations Environment Programme and RHIPTO Rapid Response-Norwegian Center for Global Analyses 2016) UNEP & INTERPOL Rapid Response Assessment 71; Steven Hege and others, 'Letter Dated 12 October 2012 from the Group of Experts on the Democratic Republic of the Congo Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo' (Group of Experts on the Democratic Republic of the Congo (DRC) 2012) 23; INTERPOL-UN Environment, 'Strategic Report: Environment, Peace and Security - A Convergence of Threats' (2016) Strategic Report 58.
[242] Prunier (n 33) 83.
[243] Reuss and Titeca (n 33).
[244] Ibid.
[245] Hege and others (n 36) 3, 23; Resolution 2293 (2016) - The Situation Concerning the Democratic Republic of the Congo 2016 10.
[246] Johannes Refisch and Johann Jenson, 'Transboundary Collaboration in the Greater Virunga Landscape: From Gorilla Conservation to Conflict-Sensitive Transboundary Landscape Management' in Carl Bruch, Carroll Muffett and Sandra S Nichols (eds), *Governance, Natural Resources, and Post Conflict Peacebuilding*, vol 6 (1st edn, Routledge 2016) 831.

programs began in 1979 under the Mountain Gorilla Project in Rwanda. In 1991 this project by the African Wildlife Foundation (AWF), Flora and Fauna International (FFI) and the World Wildlife Fund (WWF) evolved into a transboundary initiative, the International Gorilla Conservation Programme (IGCP).[247] North of the Virunga Massif, the Wildlife Conservation Society (WCS) was supporting transboundary ranger patrols and research, providing a foundation to broaden collaboration to the Central Albertine Rift.[248]

The GVL consists of seven NPs – Virunga NP in DRC; Volcanoes NP in Rwanda; and Bwindi Impenetrable NP, Mgahinga Gorilla NP, Rwenzori Mountains NP, Semuliki NP and Queen Elizabeth NP in Uganda – Sarambwe Game Reserve (DRC), and Kigezi and Kyambura Wildlife Reserves (Uganda). It was first recognized in *the Trilateral Memorandum of Understanding on "The Collaborative Conservation of the Central Albertine Rift Transfrontier Protected Area Network,"* signed in January 2004 by the PAAs (ICCN in DRC, Office Rwandais du Tourisme et des Parcs Nationaux – ORTPN in Rwanda and UWA in Uganda).[249]

The 2004 MoU initiated a pattern of broadening participation and formal agreements. In October 2005 *the "Goma Declaration"* set out objectives for the Greater Virunga Transboundary Collaboration (GVTC) and established a Secretariat to implement it.[250] When the sole habituated gorilla group in Mgahinga NP (Uganda) crossed to Volcanoes NP (Rwanda), the PAAs negotiated a revenue sharing MoU that required the host country to split tourism revenues 50-50 with the habituating country so as to quell rumors that Rwanda was preventing the gorilla group from returning to Uganda in order to capture tourism profits.[251] Shortly after, the 2006-

[247] Maryke Gray and Eugène Rutagarama (eds), *20 Years of IGCP: Lessons Learned in Mountain Gorilla Conservation* (International Gorilla Conservation Programme 2011) i.
[248] Andrew J Plumptre, Deo Kujirakwinja and S Kobusingye, 'Transboundary Collaboration between Virunga Park, Democratic Republic of Congo and Queen Elizabeth, Rwenzori and Semuliki Parks, Uganda: Report of Transboundary Meeting 20-21st June 2003' (UWA, ICCN, WCS 2003) Report of Transboundary Meeting.
[249] Trilateral Memorandum of Understanding between the Office Rwandais de Tourisme et des Parcs Nationaux the Uganda Wildlife Authority and the Institut Congolais pour la Conservation de la Nature on the Collaborative Conservation of the Central Albertine Rift Transfrontier Protected Area Network 2004 7.
[250] Tripartite Declaration On the Transboundary Natural Resources Management of the Transfrontier Protected Area Network of the Central Albertine Rift 2005 2.
[251] Trilateral Memorandum of Understanding between the Uganda Wildlife Authority 'UWA', the Office Rwandais de Tourisme et des Parcs Nationaux 'ORTPN' and the Institut Congolais pour la Conservation de la Nature

2012 Transboundary Strategic Plan (TSP) introduced transboundary planning and governance to the GVL.[252] This first TSP created an international multi-institutional scheme to address political oversight (Inter-Ministerial Board), implementation (PAAs and Transboundary Core Secretariat), technical issues (Regional Technical Committees or RTCs on Research, Tourism, Community Conservation & Enterprise and Security & Law Enforcement) and stakeholder participation (Regional Transboundary Forum).[253]

In July 2008, following the shocking murder of ten mountain gorillas in Virunga NP, allegedly involving ICCN rangers in the illicit charcoal trade, a Ministerial Declaration was signed in Rubavu.[254] With funding from the Netherlands, the GVTC Executive Secretariat (GVTC-ES) established itself in Kigali, signing a Headquarters Agreement with the Government of Rwanda in 2013.[255] In 2014, the GVTC-ES signed a MoU with the International Conference on the Great Lakes Region (ICGLR) and Economic Community of the Great Lakes Countries (CEPGL) and has similarly formalized collaborative MoUs with other landscape partners.[256] Most recently, the *GVTC Treaty* was signed in October 2015, indicating high-level political support for the growing collaboration, but continues to await ratification in all three parliaments.[257]

Law and Peace in the Albertine Rift

Although the *GVTC Treaty* does not explicitly reference this complex matrix of violence, conflict and insecurity, it provides a potentially transformative platform for contemporary conflict resolution by formalizing a governance structure that has been materializing since the *2004*

'ICCN' on the Collaborative Monitoring of and Sharing Revenues from Transfrontier Tourism Gorilla Groups 2006 6.

[252] Refisch and Jenson (n 14) 9.

[253] Ibid.

[254] Ibid 10.

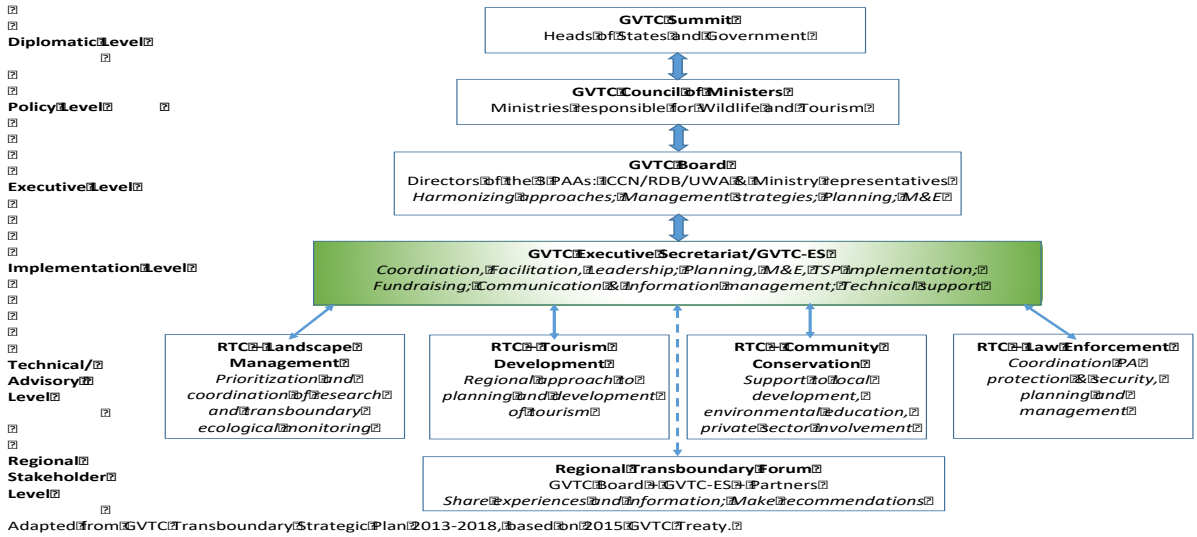
[255] GVTC, 'Transboundary Collaboration in the Greater Virunga Landscape Protected Area Network: Transboundary Strategic Plan 2013-2018' 73–80.

[256] Memorandum of Understanding between International Conference on the Great Lakes Region (ICGLR) and the Economic Community of Great Lake Countries (CEPGL) and Greater Virunga Transboundary Collaboration (GVTC) 2014.

[257] Greater Virunga Transboundary Collaboration Treaty on Wildlive Conservation and Tourism Development (GVTCT) 2015 18.

Trilateral MoU. It codifies diverse institutional collaboration operating at various levels: (1) Diplomatic – Heads of State/Government; (2) Policy – inter-Ministerial; (3) Executive – involving management-oriented PAAs and their Ministries; (4) Implementation – GVTC-ES is responsible for day-to-day coordination, facilitation and programming; (5) Technical/Advisory – convening thematic experts and partners; and (6) Regional Stakeholders – integrating GVTC's multi-level structure with other conservation, development and landscape actors (See Figure 4 below). *The Headquarters Agreement* gives the GVTC-ES legal personality to engage in bilateral MoUs to develop strategic partnerships; e.g., MoU with ICGLR/CEPGL to eradicate regional militias.[258] The flexibility of this governance structure to address conflicts at the appropriate level and to bring the right parties to the table is critical to the GVTC's conflict transformation and peace potential. In international, social and ecological peace, GVTC laws provide direct and indirect guidance. The legal mechanisms provided for in GVTC agreements are described in the three subsections below, identifying a fairly diverse set of mechanisms available to address all three categories of peace, if implemented.

Figure 4. GVTC Governance Structure



Adapted from GVTC Transboundary Strategic Plan 2013-2018, based on 2015 GVTC Treaty.

[258] Headquarters Agreement Between the Government of the Republic of Rwanda and the Greater Virunga Transboundary Collaboration 2013 10, Art. 3.

GVTC and International Peace

Regarding international peace, the 2004 MoU dedicates transboundary collaboration to "building trust, understanding and cooperation amongst [stakeholders] to achieve sustainable conservation and thereby contribute to peace."[259] This includes recognition that "the pursuit of peace, security, stability and socio-economic development go hand in hand with the need for environmental protection and conservation of biodiversity" and therefore promotes integrated peace, development and conservation.[260] In peacekeeping and peacemaking, it asks governments and development partners to support effective peacemaking processes and to "promote regional security, in particular disarmament and evacuation of armed groups in DRC from protected areas,"[261] while engaging ICGLR to eradicate armed groups and negative forces from all protected areas.[262] Parties to the *GVTC Treaty* commit "to promote and support safety and security of wildlife resources and tourists."[263] When the militia group, M23, occupied the trinational volcano Mt. Sabinyo and over 100 rebels attempted to cross from refugee camps in Uganda back to DRC late January 2017, GVTC-ES sat with PAAs and security personnel to share intelligence and minimize the armed threat. Following joint security operations, UWA reopened tourism to Mt. Sabinyo in April 2017.

When it comes to border disputes, the legal framework brings in regional institutions (ICGLR and CEPGL) to integrate border management and development of cross-border trade, while the governance structure provides for dialogue and dispute resolution between the Heads of State/Governments in the Summit, or between Ministries of Foreign Affairs and relevant border committees through the Council of Minister.[264] Whether it is a border dispute or other international conflict, issues can be brought forth for peaceful resolution through the institutional

[259] 2004 Trilateral MoU (n 17).
[260] MoU between ICGLR, CEPGL and GVTC (n 24).
[261] (Ministers and High Level Representatives of the Governments of the DRC, Rwanda and Uganda, 2008, opp. 6–7).
[262] MoU between ICGLR, CEPGL and GVTC (n 24).
[263] GVTC Treaty (n 25).
[264] Ibid Arts. 8-10, 17; GVTC, 'TSP 2013-2018' (n 38) 34; MoU between ICGLR, CEPGL and GVTC (n 39).

organs of the GVTC at regular meetings or extraordinary meetings,[265] as convened by the GVTC-ES.[266]

GVTC and Social Peace

Social peace is incorporated in the GVTC legal framework less directly and is mostly targeted at poverty reduction, community participation in park programs and socio-economic development through local tourism. The narrative has long been that park-adjacent communities suffer conservation costs while receiving insufficient benefits, so the GVTC approach to transforming park-community conflict is through reversing that imbalance.[267] Enhancement of conservation benefits, development of sustainable alternative livelihoods, ecotourism and equitable revenue sharing are repeatedly highlighted and to be addressed through the two RTCs Tourism Development and Community Conservation.[268]

The *2008 Rubavu Declaration* directly links security to regional socio-economic potential, inviting governments and development partners to simultaneously support peacemaking and poverty reduction.[269] Embedding the GVL in broader Great Lakes development, the 2014 MoU between ICGLR, CEPGL and GVTC creates permanent cooperation towards integrated planning, cross-border trade and socio-economic development.[270] At site level, each park implements revenue-sharing to fund integrated conservation and development projects (ICDPs) in park-adjacent districts. In May 2017, Rwanda doubled its gorilla permit fees to $1,500 USD and raised community revenue-sharing from 5% to 10%.[271] Park staff alleged that ICDPs around Volcanoes NP have noticeably eased historic conflicts between parks and people.

[265] GVTC Treaty, at Arts. 9(f), 10(f) & 11(g) (n 34).
[266] Ibid Art. 12(h)(iii).
[267] GVTC, *Greater Virunga Landscape: Annual Conservation Status Report 2015* (GVTC 2017) 11, 13; GVTC, 'TSP 2013-2018' (n 38) 28–29.
[268] 2004 Trilateral MoU (n 17); Ministerial Declaration of Rubavu (n 44); GVTC Treaty (n 25).
[269] Ministerial Declaration of Rubavu (n 39), pps. 5-7 & ops. 6-7.
[270] MoU between ICGLR, CEPGL and GVTC (n 24).
[271] Volcanoes National Park Administration, 'Rwanda Has Double Gorilla Permits Fees!' (*Volcanoes National Park Rwanda*, 8 May 2017) <http://www.volcanoesnationalparkrwanda.com/rwanda/rwanda-has-double-gorilla-permits-fees.html> accessed 21 June 2017.

Villagers who used to sound alarms warning local poachers as rangers approached are now arresting the poachers themselves and turning them in to PAAs.[272] This antagonism-turned-collaboration is perceived by the PAAs as evidence of human-PA conflict transformation brought about by increased economic benefit to PA-adjacent communities.

There are no specific mechanisms in the transboundary legal framework for social conflicts such as identity-based conflicts or land conflicts, so this defaults to general GVTC governance mechanisms. A recent example involves a border-related land conflict in Sarambwe between DRC and Uganda, which sparked accusations on both sides. The two accounts quoted below demonstrate how citizens on each side of the border frequently blame the other, making it difficult to frame either side as "wrongdoer" or "victim."

A local leader's accounts of ICCN abductions of Ugandan villagers near Buhoma, the headquarters of Bwindi NP:

> "They came to some few households near the border. They would come at night and force a person to open and [would] take things. The other time, we may find somebody is working along the boundary in the garden and they come, they abduct. […] At times it's mixed up, but quite often they dress up with the uniform of the parks of Congo. Conservationists, ICCN. They dress up like that, with guns, but most especially those ones who come to abduct here. They come in that uniform. […] For him, he suspects even they are the park staff, the Congolese staff, because they are the neighbor behind there. […] But now he's saying that after a lot of crisis…Uganda deployed there UPDF. […] When the security came here, they put a detach[ment] here and the border remains where these ones want, so they are using what? – the land."[273]

La Voix de la Nature coordinator and former ICCN warden in charge of Virunga NP's central sector, Claude Sikubwabo Kiyengo's, accounts of Uganda People's Defense Force (UPDF) encroachment inside Sarambwe Game Reserve:

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[272] Interview with Oreste Ndayisaba and Janvier Kwizera, 'Interview with Volcanoes NP Community Conservation Wardens on 13 Feb 2017' (13 February 2017).
[273] Interview with Anonymous, 'Interview with Local Leader near Bwindi Impenetrable NP on 16 Jan 2017' (16 January 2017).

> *"In May [2014], 4 Ugandan soldiers crossed the border into the reserve near the fields cultivated by the Ugandans in Congo. At the end of August 2015, 5 Ugandans entered the reserve in order to conduct pit-sawing. On being encountered by the rangers and trackers, they fled, abandoning three saws. They alerted their soldiers who crossed into the DRC to recover what they had left behind from their 'abductors', whom they 'identified' as Rwandan FDLR rebels. The Ugandans led the heavily armed [UPDF] soldiers all the way to the Sarambwe ranger post. A multitude of soldiers overpowered the rangers and took them by force to make them stand trial there. In spite of the intervention of several persons, these ICCN staff members were taken to the army barracks in Mbarara for interrogation, before being taken to Bwindi, where they were released at the border the day after their arrest."*[274]

As each side made claims that fed on historical distrust and violations of sovereignty, GVTC-ES stepped in to facilitate dialogues between local leaders, PAAs and security personnel, calling for a fact-finding investigation and ultimately proposed resolution of the underlying international border dispute by higher levels of government. It is believed that once the true borderline is known and markers placed, mistaken invasions will cease, and each will keep to their side. Even if incursions persist, violations will be more easily identifiable by GVTC partners like the ICGLR Extended Joint Verification Mechanism (EJVM), which can investigate and propose solutions to land conflicts that transgress the shared border.

GVTC and Ecological Peace

When it comes to ecological peace, the GVTC legal framework primarily addresses violence against nature in the forms of biodiversity or ecosystem services loss, environmental crimes, impacts of human conflicts on the environment and unsustainable development. The entire collaboration strives to ensure conservation of GVL biodiversity. This includes a commitment to conserve wild flora and fauna within each State's jurisdiction and to share information for collaborative management of biodiversity.[275] Environmental crimes, including wildlife trafficking, are combatted through a range of partnerships. The GVTC-ES holds Chief Wardens'

[274] Angela Meder and Claude Sikubwabo Kiyengo (eds), 'Sarambwe Reserve: Current Developments and Threats' [2015] Gorilla Journal 9, 10.
[275] MoU between ICGLR, CEPGL and GVTC (n 24).

Forums to coordinate border patrols, share law enforcement information and strategize regionally.[276] It collaborates with ICGLR and CEPGL to combat illegal trade in endangered species, while facilitating legal harmonization for wildlife crimes.[277] Partners like INTERPOL and WCS participate through RTCs (mainly Law Enforcement, but also Landscape Management and Community Conservation) and transboundary projects to build capacity for environmental crimes management.[278]

Human-wildlife conflict is typically addressed at the site/PA-level through a variety of species-specific interventions, which can be categorized as: (1) barriers to limit wildlife movements out of park boundaries – e.g., trenches, chili and beehives for elephants, stone walls for buffaloes, electric fences for all "problem animal" species; (2) education and awareness-raising regarding the value of wildlife and how to prevent damages to life or property; and (3) revenue sharing programs.[279] These are more often found in bilateral MoUs or general GVTC institutional arrangements, like the *Community Conservation RTC*.[280] The MoUs are typically negotiated with the assistance of each PA's community conservation unit.

To address ecological impacts of human activities, GVTC is to provide technical support to CEPGL projects and programs to ensure environmental standards and compliance, including through comprehensive environmental impact assessments, while CEPGL is supposed to consider "environmental issues in the implementation of its Regional Economic Programme," periodically review socio-economic development for comprehensive environmental impacts, and integrate the GVL into its Department for Energy, Infrastructure, Environment and Natural

[276] GVTC, 'TSP 2013-2018' (n 38) 32.
[277] GVTC, 'Concept Note on Harmonization of Wildlife Crime Related Policies and Laws in GVL Stakeholders Meeting'; MoU between ICGLR, CEPGL and GVTC (n 39).
[278] GVTC, 'Concept on GVTC Landscape/Law Enforcement Regional Committees Meeting: January 2017'.
[279] Dennis Babaasa, Emmanuel Akampulira and Robert Bitariho, 'Human-Wildlife Conflict Management: Experiences and Lessons Learned from the Greater Virunga Landscape' (Institute for Tropical Forest Conservation 2013).
[280] Memorandum of Understanding for the Promotion of Bee Keeping between the Greater Virunga Trans-Boundary Collaboration Executive Secretariat and Uganda Wildlife Authority (UWA) 2016 20; Memorandum of Understanding between the Greater Virunga Transboundary Collaboration Secretariat (GVTCS) and Uganda Wildlife Authority (UWA) 2012 9.

Resources.[281] This regional approach likely applies to larger-scale development programs for the Great Lakes Region and may not affect smaller more localized projects or activities. For those, it may fall to national legislation regarding environmental protection and impact assessment. For this reason, the PAAs strive to coordinate with local and district-level authorities to harmonize development activities that may impact upon the PAs. Regarding ecological impacts from violent conflict, GVTC has responsibility to restore parks degraded by armed conflicts and illegal exploitation.[282]

Contemporary Conflict Resolution in the Albertine Rift

The previous section provides an overview of the GVTC governance framework and how a variety of peacekeeping, peacemaking and peacebuilding mechanisms that can be drawn upon to intervene in different phases of the peace/conflict spectrum or conflict curve have been formalized over the decades through MoUs, declarations and the 2015 *GVTC Treaty*. This section highlights the conflict resolution mechanisms on-the-ground that are worthiest of mention: (1) Transboundary Institutions, (2) Transboundary Activities and (3) Traditional or Alternative Mechanisms.

As noted previously, the GVTC governance structure is potentially one of its most powerful tools for contemporary conflict resolution. If fully mobilized, it has the ability to coordinate multilateral, multi-level, multistakeholder dialogue and decision-making as-needed when conflict arises (e.g., Sarambwe) or regularly (e.g., Wardens' Forums/RTCs), creating an adaptive transboundary conflict resolution platform that can be specially tailored for each situation. This could allow the GVTC to address international, social and ecological conflicts of various sorts, as well as those that are interlinked and require comprehensive solutions. Transboundary institutions at various levels enable the appropriate actors to convene and address conflicts through effective mechanisms (e.g., diplomatic relations, policy change, technical implementation), without

[281] MoU between ICGLR, CEPGL and GVTC (n 24).
[282] Ibid Art. 8(6).

limiting conflict resolution to one-channel (e.g., diplomacy-only). Even if an organization is unable or unwilling to participate, other partners at other levels can be brought into the fold.

Furthermore, the establishment of the GVTC-ES, with legal personhood to coordinate activities and partner directly with key actors in the landscape, has been salient. The GVTC-ES' MoU with ICGLR and CEPGL commits two of the Great Lakes Region's multilateral institutions to peace, security, conservation and sustainable socio-economic development in the GVL. At a transboundary meeting of the Landscape Management and Law Enforcement RTCs organized by GVTC-ES in January 2017, personnel from ICGLR's EJVM sat with park wardens, customs officers, judiciary, conservation NGOs and academics to solidify "peace and security" as a priority objective for the Law Enforcement RTC and each partner identified their role in that pursuit. In a follow-up meeting in June 2017, a roundtable of military representatives, PAAs, ICGLR and government representatives from DRC and Uganda enumerated a series of conflict issues (e.g., deployment of FARDC soldiers in designated 'no man's land,' Sarambwe border violations, transboundary crimes, illegal fishing and the presence of armed groups in PAs).[283]

Related to the development of transformative transboundary institutions is on-going coordination of cross-border activities. This includes research and monitoring, law enforcement and patrols, stakeholder meetings, revenue-sharing, tourism and community development, plus ICDP implementation. Transboundary activities unite stakeholders to share perspectives, propose solutions, and even provide lessons learned from experiences on the ground. For PAAs who typically manage remote sites with limited connectivity to information and resources, co-learning is invaluable and enables effective mechanisms to be optimized. In 2016/2017, two transboundary projects launched to specifically address regional conflicts – Netherlands Initiative for Capacity Development in Higher Education (NICHE) and Water4Virunga. NICHE will develop natural resources conflict resolution curricula, provide scholarships for Masters/PhD-level studies and produce training programs on conflict-sensitive conservation. Water4Virunga, also a 4-year Netherlands-funded project, will construct water infrastructure for communities

[283] GVTC, 'Round Table on Dialogue between State Partners of DRC and Uganda on Wildlife Conservation and Development in the Greater Virunga Landscape (Security Group)' (GVTC 2017).

that are water insecure and vulnerable to water conflicts. In some cases, the most available water source for a community derives from a neighboring country; in these cases, Water4Virunga has the means to overcome international jurisdictions to reduce water conflicts and insecurity for thousands living around the GVL.

The GVTC-ES is also working on a GVL tourism development strategy and revised revenue-sharing policies and guidelines, both are relevant to address underlying socio-economic conditions for conflict.[284] However, it is not clear that neoliberal approaches to conservation are effective towards conflict transformation and positive peace.[285] On the DRC side, researchers in Virunga NP have been very critical, condemning heavily exaggerated park benefits for development, job creation, revenue-sharing, and livelihood alternatives, accompanied by heavy-handed "green militarization" of PA law enforcement (e.g., burning of homes and fields "encroaching" within PA boundaries), for aggravating (violent) PA-community conflicts.[286] In Rwanda and Uganda, the criticism is more nuanced. A 2010 assessment of ICDPs in Bwindi and Mgahinga NPs (Uganda) indicated that 15 years of ICDPs helped improve community perceptions of PAs and even enhanced PA-community cooperation in certain areas (e.g., fire-fighting), but it did not reduce illegal activities or increase reporting.[287] A 20-year review of IGCP's work in the GVL found ICDPs difficult to implement successfully; instead, they highlighted the development of mountain gorilla tourism, which provided a revenue stream to the

[284] Memorandum of Understanding Between the Greater Virunga Transboundary Executive Secretariat (GVTES) and Uganda Wildlife Authority 2011 6.
[285] Bram Büscher, *Transforming the Frontier: Peace Parks and the Politics of Neoliberal Conservation in Southern Africa* (Duke University Press 2013); Nik Heynen and others (eds), *Neoliberal Environments: False Promises and Unnatural Consequences* (Routledge 2007); Francis Massé and Elizabeth Lunstrum, 'Accumulation by Securitization: Commercial Poaching, Neoliberal Conservation, and the Creation of New Wildlife Frontiers' (2015) 69 Geoforum 227.
[286] Stephan Hochleithner, 'Beyond Contesting Limits: Land, Access, and Resistance at the Virunga National Park' (2017) 15 Conservation and Society 100; Esther Marijnen and Judith Verweijen, 'Selling Green Militarization: The Discursive (Re)Production of Militarized Conservation in the Virunga National Park, Democratic Republic of the Congo' (2016) 75 Geoforum 274; Britta Sjöstedt, 'Environmental Governance and Peacebuilding as a Joint Enterprise', *Protecting Nature in Conflicts & Building Peace: Success Stories in Conflicts & their Aftermath* (Unpublished 2017); Judith Verweijen and Esther Marijnen, 'The Counterinsurgency/Conservation Nexus: Guerrilla Livelihoods and the Dynamics of Conflict and Violence in the Virunga National Park, Democratic Republic of the Congo' [2016] The Journal of Peasant Studies 1.
[287] Tom Blomley and others, 'Development and Gorillas? Assessing Fifteen Years of Integrated Conservation and Development in South-Western Uganda' (IIED 2010).

governments that improved government perceptions of nature conservation and thereby, receptiveness to institutionalizing community conservation (including revenue-sharing) within their own programs and management.[288] In field interviews, PAAs in Rwanda and Uganda reflected that PA-community relations have improved in many ways.[289] It should be noted that in addition to revenue-sharing and ICDPs, UWA permits both resource use and co-management of natural resources, while the Rwanda Development Board (RDB) provides compensation for crop destruction by wildlife. Thus, it is difficult to determine whether better PA-community relations are purely economically-driven or also rights-based.

As the diversity of transboundary activities grows, so does the diversity of partners. GVTC evolved from a joint endeavor of PAAs supported by select environmental NGOs to include multilateral institutions (e.g., CEPGL, INTERPOL), all levels of government (from heads of villages to Heads of State/Government), security organs (ICGLR, militaries, police, customs, judiciary), private sector (e.g., tourism operators), academia and research institutions (e.g., Institute for Tropical Forest Conservation, University of Rwanda) and Community-Based Organizations in addition to NGOs. This has enriched collective efforts in the landscape and brought new conflict management and peace-oriented perspectives to previously disparate endeavors. It illustrates how traditional security can be enhanced through transboundary collaboration and how traditional security approaches can improve conservation (e.g., Sabinyo), as well as how alternatives to traditional securitization (NICHE, Water4Virunga) and non-traditional (security) partners can be engaged to address conflict drivers and build peace (e.g., local leaders).

As the GVTC expands its partnerships and approaches to contemporary conflict resolution, it might look to traditional and alternative peace mechanisms that already exist in the landscape. These include stretcher groups, traditional chiefs/elders and faith-driven peace processes. In mountainous areas, stretcher groups are effective community systems of norming and conflict resolution. People typically join the same stretcher their parents belong to or if they have moved away from their family village, will join the closest one. Stretcher groups meet regularly and

[288] Gray and Rutagarama (n 30) 7–8.
[289] Interview with Ndayisaba and Kwizera (n 55).

mobilize to carry members through the mountains to nearby services when they become ill, injured or die. They also convene to address local conflicts. Once resolutions are determined, everyone complies as no one wants to be kicked out and shunned. In many rural communities, local leaders, including elders and chiefs, continue to hold authority. In North Kivu, it is unwritten protocol that a person operating in a particular chief's territory must present themselves and seek permission. When suspicions or situations arise concerning the person or group of people, authorities will often inquire first with the local chief. Where militias control a territory and exploit natural resources, it is tacitly, explicitly or coercively with the chief's knowledge and sanction. This makes cooperation with traditional chiefs incredibly important in neutralizing negative forces. Local leaders are often the first resort when solving social conflicts within the community and a key liaison with PAAs when park-community conflicts arise. Spiritual leaders can also be influential at the community-level and even across borders. Locally speaking, one of the most positively perceived colonial legacies is religion, hence its continued social authority. Religious leaders, like the Catholic Diocese, have been directly involved in regional peace processes – ideally, their influence should be positively harnessed to prevent or manage conflicts, deflect peace spoilers and build peace.[290] Traditional systems or authorities are locally important for conflict resolution and can be effective where government institutions are weak or institutional counterparts are unavailable.

Conclusion

For decades no legal framework existed in the GVL, yet transboundary collaboration has survived through all forms of human strife, including violent conflict, genocide, extreme poverty, etc. The survival of transboundary cooperation is frequently attributed to the mountain gorillas. A common interest in protecting and preserving the last of these charismatic megafauna and the highly lucrative tourism income attached to their safety, well-being, and accessibility seems to have triumphed over the conflicts of humankind. As the mountain gorilla population grew, so did formalization of transboundary collaboration in the GVL. The progression of GVTC laws

[290] Ayo Whetho and Ufo Okeke Uzodike, 'Religious Networks in Conflict and Peace: The Case of the Democratic Republic of the Congo, 1996-2006' (2009) 31 Gandhi Marg 83.

indicates that transboundary cooperation can exist without formal legal agreements, including soft laws like MoUs, but there may be value in "legalizing" a TBCA. Transboundary agreements can help sustain actions on-the-ground and long-term political buy-in. Once the *GVTC Treaty* is ratified by the three parliaments, the collaboration will enjoy a high-level commitment that binds all successive governments. General rules and principles of international law pertaining to treaties (e.g., *pacta sunt servanda* which commits parties to uphold agreements in goodwill) oblige all three nations to the governing principles and commitments and restrains them from undermining them in any way.[291] This makes formal agreements (especially binding ones) for a TBCA incredibly important.

Following the same logic, it is important to include a clear peace mandate and mechanisms for conflict transformation and peace in TBCA laws. Making peace explicit can maximize the conflict transformation and peace potential by making the objective known, providing parties with necessary capacities and ensuring that conservation is not just a bystander to violence. Legally recognizing peace empowers actors in the landscape to optimize conservation for peace ("do good"), avoiding inadvertent violence or conflict collateral ("do no harm"). As is occurring in the GVL, sharing a common objective towards peace and conflict resolution allows parties to broaden their partnerships with peace and security sectors, including development organizations and non-conservation actors who can address different aspects of contemporary conflict resolution. Without clear jurisdiction, PAAs or environmental ministries may find it difficult to justify engagement with issues that are traditionally considered matters of security or national development and exhibiting less obvious relationships to wildlife and nature. Ultimately, if humans are to cease their vicious war against nature, it will require the participation of all sectors of society, not just the environmentalists.

Of course, it is insufficient to merely state a generic aspiration for peace in TBCA laws. Appropriate mechanisms must be included to provide the range of interventions and programs required to address peace and conflict resolution, from brokering peace amidst violence to transforming cultural, economic and political drivers or even climate change as they impact upon

[291] Vienna Convention on the Law of Treaties 1969 331, Arts. 18 & 26.

peace and conflict dynamics. The *GVTC Treaty* itself does not mention peace, but it does speak to some of the underlying factors for conflict in the region, namely socio-economic conditions and sustainable development. It also formalizes a governance structure that has developed over decades of cooperation, surviving great violence and hostile perceptions towards parks and wildlife, and will continue to address conflicts as they emerge. There are also some clear gaps in the legal framework – for example, the absence of legal measures that address all existing conflicts in the landscape (e.g., identity-based conflicts, land/resource conflicts, historical injustices, indigenous/community rights) – that may handicap efforts towards positive peace. As a framework, the legal agreements provide promise, but there is still a long way to go before full implementation is achieved and furthermore, for implementation to fully comply with principles of positive peace.

GVTC's ability to optimize its cross-border institutional peacebuilding or conflict transformation potential is currently severely limited, however, due to resource constraints (human resources, capacity, funding, etc.) related to political buy-in (treaty remains unratified and the institutional mechanism is not funded by member states) and impacted by priority interests (oftentimes donor-driven) and areas of expertise (e.g., conservation vs. conflict transformation). The GVTC-ES' capacity to convene a diverse range of actors often comes down to financial resources, as people need to be brought in from remote corners of the GVL landscape (and even outside). Transboundary activities are also impacted by political will to participate. Joint border patrols have not been occurring for some time because the DRC PAAs have been preoccupied with triage conservation and have not prioritized collaboration with neighboring PAAs. With more resources and the political support of treaty ratification, the GVTC could potentially support a broader range of targeted and comprehensive mechanisms to build durable and just peace.

This can include the incorporation and even strengthening of local and traditional peace practices that may be small-scale but wield social legitimacy. Traditional practices risk weakening as society, culture and landscapes change rapidly. Legal pluralism can help to preserve and protect these indigenous peace processes, which can supplement higher-level mechanisms when institutions or governments are unable or unwilling. A focus on customary peace practices provides an alternative to the more criticized approaches of liberal peace, neoliberal

conservation and green militarization. As experiences in the countries imply social conflicts and ecological conflicts between communities, PAAs and wildlife will need more than an economic fix. Making peace in places for nature and people requires collaboration to extend beyond PAAs and other conservation partners working across international boundaries to include cooperation with communities around park borders.

The IUCN definition of "parks for peace" requires formal dedication of a TBCA to "peace and cooperation," indicating that there is value in naming peace explicitly. It also emphasizes the distinction between parks for peace and any other TBCA. Although the GVTC does not yet consider the GVL a park for peace, it remains one of its nobler aspirations. Even if GVL realities are complex and insecure, an increasingly clear and enabling legal framework, formal transboundary institutions and on-going cross-border activities designed to transform conflicts and cultivate peace provide key and critical building blocks in the construction of that dream. This article outlines the potential for nomoscaping peace in the GVL through its framework of transboundary agreements, cross-border institutions and activities, and integration of traditional/local peace processes and mechanisms. Many obstacles in implementation and gaps in the legal framework will need to be overcome if transboundary conservation is to transform conflicts in the region or to address all of the academic critiques of PAs and TBCAs. On-going critical nomospheric investigations can help to address these on-going challenges and advance the mission of nomoscaping peace throughout the GVL, one of the world's most bioculturally precious and socio-politically unique regions of the world.

COUNTRY REPORT: AUSTRIA

Courts at the Frontline

Birgit Hollaus*

The year 2017 has reminded us of the importance of the courts in settling and advancing environmental law in Austria: in what was dubbed Austria's first climate change lawsuit, national courts had an opportunity to identify the role of climate change considerations as a 'public interest' in project permitting procedures. Meanwhile, the Court of Justice of the European Union (CJEU) gave its opinion on the longstanding discussion on the rights of environmental non-governmental organisations (NGOs) in relation to Austrian project permitting procedures. Both cases are expected to have extensive implications for Austrian national law and the environment.

1. Austria's First Climate Change Lawsuit: Knockout in Round Two?[292]

Austria's first climate change lawsuit was a prominent development in 2017. While an administrative court refused an EIA permit for a third airport runway project based on climate change considerations,[293] the Constitutional Court found that those considerations were unlawful.[294]

Legal Background

In Austria, the permitting of specified large-scale projects including the extension of airports is subject to the EIA Act.[295] The EIA permitting procedure is conceptualised as a one-stop-shop. This means that the EIA authority applies all national laws that are relevant to the implementation of the project in this one procedure.[296] The authority thus not only applies environmental laws but also others such as the Austrian Aviation

292 This part of the present country report is a condensed and updated version of the author's journal contribution Birgit Hollaus, 'Austrian Constitutional Court: Considering Climate Change as a Public Interest is Arbitrary – Refusal of Third Runway Permit Annulled' (2017) International Constitutional Law Journal 3, 467-477.

293 BVwG, Judgment of 2 February 2017, W109 2000179-1/291E.

294 VfGH, Judgment of 29 June 2017, E 875/2017, E 886/2017.

295 *Environmental Impact Assessment Act 2000 – EIA Act* (UVP-G), Austrian Federal Law Gazette 697/1993, as amended by Austrian Federal Law Gazette I 111/2017.

296 § 3(3) *EIA Act* 'consolidated development consent procedure'.

Act[297]. As a consequence of this concentrated procedure, the EIA authority issues one single permit (EIA permit) and no further (sectoral) permitting is required.

EIA permits are subject to legal review ('complaint') by the Federal Administrative Court (BVwG). The BVwG is competent to review both the substantive and procedural legality of an EIA permit, and decides – as a rule – on the merits of the case after establishing the missing facts, if necessary.[298] Where the law applicable to the case under review granted discretion to the public authority and the BVwG finds that the authority had exercised this discretion unlawfully, the BVwG is competent to exercise that discretion in place of the authority.[299]

The judgment of the BVwG is subsequently subject to legal review by Austria's highest administrative courts, the Administrative Court (VwGH) and the Constitutional Court (VfGH). Essentially, the VfGH examines breaches of constitutional law, while the VwGH examines breaches of simple law like the EIA Act or the Austrian Aviation Act.[300] An exception is the claim that an administrative (court) decision is in conflict with the constitutional principle of equality before the law (Art 7 *B-VG*). For this particular claim, it is the severity of the breach that ultimately determines which of the two courts is competent to decide the case;[301] only when the breach is so severe it extends into the constitutional realm, is the competence of the Constitutional Court established.

[297] *Austrian Aviation Act* (LFG), Austrian Federal Law Gazette 253/1957, as amended by Austrian Federal Law Gazette I 80/2016.
[298] Art 130 of the *Austrian Federal Constitution (B-VG),* Austrian Federal Law Gazette 1/1930, as amended by Austrian Federal Law Gazette I 138/2017.
[299] David Leeb, 'Das Verfahrensrecht der (allgemeinen) Verwaltungsgerichte unter besonderer Berücksichtigung ihrer Kognitionsbefugnis' in Andreas Janko and Leeb, David (eds), *Verwaltungsgerichtsbarkeit erster Instanz* (MANZ, Vienna 2013) 85, at 105.
[300] On the competing competences of Austria's highest administrative courts, see Martin Stelzer, *An Introduction to Austrian Constitutional Law* (3rd edn LexisNexis, Vienna 2014) 77.
[301] Ronald Faber, 'Austrian Constitutional Court – An Overview' [2008] Vienna Online Journal on International Constitutional Law 49, at 52.

Two Courts, Two Judgments: Climate Protection as an 'Other Public Interest'?

In 2012, several citizens' initiatives and individuals appealed the EIA permit for a third runway project at Vienna International Airport. In its judgment of 2 February 2017,[302] the competent BVwG[303] found this EIA permit to be unlawful as the EIA authority had performed a flawed balancing exercise based on §71(1) of the *Austrian Aviation Act*. This provision requires a permit for civil airfields to be granted if 'other public interests do not oppose' [i.e do not oppose the permitting of the civil airfield]. The EIA authority, however, had not considered all public interests involved, and most importantly 'not all public interests opposing the project such as the public interest in climate protection'.[304] Subsequently deciding on the merits of the case, the BVwG in its own balancing exercise concluded that the public interest in reducing CO2 emissions in Austria and complying with EU and international climate law obligations would outweigh the other public benefits of the project. Consequently, the BVwG rejected the application for the third runway project and denied an EIA permit.

Unsurprisingly, the project developers filed for judicial review of the BVwG's judgment with both the VfGH and the VwGH. The VfGH was first to give its view, and found that the BVwG's judgment would repeatedly violate the constitutional guarantee of equality before the law which, together, impacted the decision to such a degree that it extended into the constitutional realm ('arbitrariness'); the Court thus established its competence to decide the case.

In its judgment,[305] the VfGH found unlawfulness in several parts of the BVwG's judgment; the main argument, however, was the following: in performing the balancing exercise based on § 71(1) of the *Austrian Aviation Act*, the deciding authority or court must identify how and to what degree the proposed project interferes with public interests relevant to the Act. Only after this initial step can it be established which interest

[302] BVwG, Judgment of 2 February 2017, W109 2000179-1/291E.
[303] The BVwG took over appeal proceedings (now termed 'complaint proceedings') once the administrative justice reform took effect on 1 January 2014. It replaced the before competent Independent Environmental Senate (US), an independent tribunal competent exclusively to decide appeals in relation to EIA permit procedures.
[304] BVwG, Judgment of 2 February 2017, W109 2000179-1/291E, at s 4.5.2.
[305] VfGH, Judgment of 29 June2017, E 875/2017, E 886/2017.

outweighs the other(s). However, it was clear that 'other public interests' to consider in the balancing exercise are only those interests already reflected in the Act itself such as the explicitly mentioned interest in 'the protection of the general public'[306] and 'the prevention of negative effects on life, health and property'.[307] These public interests must indeed be interpreted in light of § 3 of the *Austrian Federal Constitutional Act on Sustainability,*[308] which requires 'the prevention of harmful effects on the natural environment as the basic resource of the human being'. Yet, such an interpretation of 'other public interests' could not result in reading the term as including such public interests not already reflected in the Act, including 'climate protection'. The BVwG, however, had done exactly that and thus – in the terminology of the VfGH – comprehensively misjudged the applicable law. This amounted to a constitutionally relevant error and the VfGH consequently annulled the BVwG's refusal of the EIA permit.

Assessment

Reactions to the VfGH's judgment were manifold. In short, some saw in it the indispensable correction of judicial law-making,[309] while others judged it as a one-off condemnation of well-established judicial methodology.[310]

With the annulment of its judgment, the BVwG is now required to decide anew on the EIA application for the third runway project. In its new decision, the BVwG is bound by the VfGH's views, as set out in its judgment. Hence, it cannot – as it did before – interpret the term 'other public interests' in view of § 3 of the *Austrian Federal Constitutional Act on Sustainability* to the effect that 'climate protection' is one of those 'other public interests'. However, commentators have argued that the rather broad public

[306] § 92(2) and § 96(1) of the *Austrian Aviation Act*.
[307] § 133(2) of the *Austrian Aviation Act.*
[308] Austrian Federal Constitutional Act on sustainability, animal protection, comprehensive environmental protection, on water and food security as well as research (BVG Nachhaltigkeit), Federal Law Gazette I 11/2013.
[309] Christian Schmelz, 'Der VfGH zur dritten Piste – Klimaschutz im Widerspruch zu Rechtsstaat und Demokratie?' [2017] ZVG 288.
[310] Ferdinand Kerschner, 'VfGH 3. Piste und juristische Methode: Verfassungskonforme Auslegung verfassungswidrig?' (2017) RdU 5, 190. Arguing a self-interest of the VfGH in order to establish its competence to judge the case Gottfried Kirchengast et al, 'VfGH behebt Untersagung der dritten Piste' (2017) RdU 6, 252; Verena Madner and Eva Schulev-Steindl, 'Dritte Piste – Klimaschutz als Willkür?' [2017] ZÖR 72, 635.

interests already acknowledged in the *Austrian Aviation Act* – 'the protection of the general public' and 'the prevention of negative effects on life, health and property' – could be interpreted to the effect that they encompass 'climate protection'; § 3 of the *Austrian Federal Constitutional Act on Sustainability* would provide the necessary interpretative link. In doing so, the BVwG would be in a position to consider 'climate protection' in its balancing exercise based on § 71(1) of the *Austrian Aviation Act*. Whether, however, this public interest indeed outweighs the public benefits of the third runway project is a question to be closely examined by the court.

The Case's Ripple Effect

Both the BVwG's and the VfGH's judgment in Austria's first climate change lawsuit had extensive impacts on the legal realm.

Rethinking the Competences of Courts

Legal scholars and practitioners argued fundamentally about – while undoubtedly they *can*[311] – whether Austria's administrative courts *should* be performing a balancing exercise themselves; public authorities, which are democratically legitimated, traditionally perform that role. The argument presented is threefold: For one, the courts are not equipped with the necessary knowledge to perform such balancing exercises, as these are regularly rather complex and the exercise is politically charged. Thus, such a decision can legitimately only be taken by a public authority or by democratically elected politicians.[312] Lastly, it is not for the courts to take this sort of decision, as a court's role is merely to review an authority's decision in view of its legality.[313]

To this end, much debate in legal journals and at legal conferences in Austria focused on the need to 'protect' the discretion granted to public authorities from (review by) the

[311] Franz Merli reportedly acknowledged the courts' competence de lege lata, yet argued the legislator had erred in granting this competence in the context of the 2012 reform, see Eric Frey, 'Flughafen-Urteil beruht auf "Fehler des Gesetzgebers"' *derStandard* (Vienna, 3 April 2017) <http://derstandard.at/2000055264864/Flughafen-Urteil-beruht-auf-Fehler-des-Gesetzgebers> accessed 5 January 2018.

[312] Disagreeing, Martin Donat and others, 'Stellungnahme zum Urteil des BVwG zur dritten Piste' [2017] Recht der Umwelt 104, at 106.

[313] Martin Niederhuber, 'Dritte Piste: Interessenabwägung doppelt verfehlt' (*umweltrechtsblog.at*, 12 February 2017) <https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID={CA5A32D6-60B1-11E7-9671-08606E681761}> accessed 5 January 2018.

administrative courts. Interestingly, this debate had its focus on administrative court proceedings in environmental (and climate change) matters and has lost momentum ever since the Constitutional Court has annulled the BVwG's judgment. Whether this will change again depends, in my view, on how the BVwG will decide in its new, to be awaited, judgment.

Committing to Business Interests in Law

The Austrian national parliament saw a legislative initiative proposing the introduction of a state objective 'acknowledging the importance of economic growth, employment and representing a competitive business hub'[314] which should form part of Austrian constitutional law. The explanatory statement by the initiating MPs holds that this state objective should require public authorities to reconcile the public interest in competitive business policies with other public interests. The parliamentary initiative is still in its preparatory stage and no decision on its fate has yet been made. However, with the new majority government coalition representing a general pro-business attitude, it thought to be likely that this initiative will become law.[315]

An example in that regard was already set in one of Austria's provinces, which was – not coincidentally – the province in which the third runway project was planned to be implemented. The provincial legislator of Lower Austria amended its constitution in order to include the 'support of business development' as an objective and principle of public action. The provision now highlights that economic growth, (full) employment, and the competitiveness of the province as a business hub are of high importance.[316] Just below that, in paragraph 3 of the same provision, the constitution states that 'climate protection, protecting and preserving the environment, nature, and land- and townscape are of special relevance'. However now that both, to at least some extent,

[314] Legislative initiative 2172/A of 17 May 2017, available at <https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_02172/index.shtml> accessed 5 January 2018.
[315] Ökobüro, 'Staatsziel Wachstum ist falscher Ansatz für Verfahrensbeschleunigung', <http://www.oekobuero.at/oekobuero-staatssiel-wachstum-falscher-ansatz-fuer-verfahrensbeschleunigung> accessed 5 January 2018.
[316] Art 4(2) of the *Constitution of the Austrian Province of Lower Austria* (NÖ LV 1979), Provincial Law Gazette 0001-0, as amended by Provincial Law Gazette 71/2017.

regularly competing objectives benefit from constitutional law protection, it is ensured that 'one doesn't overrule the other'.[317]

Protecting Business Interests in Permitting Procedures

Austria also witnessed a debate on the adequacy of the (EIA) permitting procedure, and ways to improve it in view of business interests. In addition to the complexity and lengthiness of the procedure, so the argument of businesses, environmental interests would be overrepresented through the (possible) participation of environmental non-governmental organisations (NGO), citizens' initiatives and the Environmental Ombudsman; business interests, only represented by the project developer, were thus simply deemed to lose out.[318]

The Austrian Economic Chambers, an organisation representing businesses in Austria through mandatory membership, thus put forward a proposal to establish a 'Federal Business Hub Ombudsman' to be party in project permitting procedures.[319] In permitting proceedings, this Ombudsman would be accorded party rights in view of ensuring business and economic interests in the 'business hub of Austria'. This proposal has not been picked up in a law-making process yet. However, it forms part of the new majority government's programme and is thus believed to become law rather soon.

2. Austria's First Sectoral Law Granting Rights to Environmental NGOs?

A recent lawsuit, involving EU law and a binding interpretation of Austria's legal commitments by the CJEU is expected to be the long-awaited trigger to finally change the legal position of environmental NGOs in relation to permitting procedures for other than large-scale projects.

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[317] Nina Pöchhacker, 'Schneeberger: „Werden weiter die treibende Kraft sein"', *NÖN* (St. Pölten 13 December 2017) <http://www.noen.at/niederoesterreich/politik/landtag-schneeberger-werden-weiter-die-treibende-kraft-sein/70.891.592> accessed 5 January 2018.

[318] Walter Ruck, 'Wien braucht rasch einen Standortanwalt' <https://news.wko.at/news/wien/Wien-braucht-rasch-einen-Standortanwalt.html> accessed 5 January 2018.

[319] Walter Ruck, 'Standortanwalt jetzt' <https://news.wko.at/news/wien/Standortanwalt-jetzt.html> accessed 5 January 2018.

Legal Background

In Austria, environmental NGOs have standing and the subsequent right to legal review only in national permitting procedures falling within the scope of the EU *EIA Directive*[320] and the *IE Directive*[321].[322] If no such permit is required, projects usually still require several individual environmental and other permits ('sectoral permitting procedures'), such as a species protection permit, a water permit and an industrial installation permit. In those sectoral permitting procedures, however, environmental NGOs have neither standing nor the subsequent right to legal review. At international level, the competent compliance body has already found this situation to be contrary to Austria's international law obligations stemming from the *Aarhus Convention*,[323] forming also part of EU law. The Austrian legislator, however, has not taken any action yet.[324]

The CJEU's Judgment: Give them Access to Justice! And Standing!?

In a national case relating to the permitting of a water abstraction, the CJEU was asked to give a binding answer on several questions[325] regarding the interpretation of commitments stemming from the *Aarhus Convention* and the *EU Water Framework Directive*[326], both relevant for deciding the case. In essence, the CJEU had to examine the question whether these laws require Austria to grant a right to a legal remedy to environmental NGOs, and if so, whether this also means environmental NGOs must have standing in the initial permitting procedure.

To begin with, the CJEU established that the *Aarhus Convention* required Austria to grant environmental NGOs a right to challenge a permit allegedly being in breach of

[320] Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.
[321] Directive 2010/75/EU of 24 November 2010 on industrial emissions [2010] OJ L 334/17.
[322] These are in essence permitting procedures covered by the *EIA Act* and permitting procedures for large-scale industrial installations falling within the scope of the *Industrial Code* (*GewO*) or the *Waste Management Act* (*AWG*) respectively.
[323] See ACCC/C/2010/48.
[324] See Country Report for Austria 2016, IUCN AEL E-Journal, Issue 8.
[325] Question 3 and its answer by the CJEU is owed to the particularities of the underlying case (see Case C-664/15, para 99) and it thus not reported for the purpose of this contribution.
[326] Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

the *EU Water Framework Directive*'s obligations. The *EU Water Framework Directive's* obligation to prevent a deterioration of ground and surface water quality ('prohibition of deterioration') is one of the main pillars of the Directive. Establishing a clear obligation for member states, it would be incompatible with the general binding character of Directives and the effectiveness of the Directive at stake, if individuals or organisations were not in a position to invoke these obligations in national legal review procedures. The Directive does not require member states to establish such procedures; the *EU Charter of Fundamental Rights (CFR)*[327], does however, where it establishes that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy'.[328] Reading this obligation together with Art 9(3) of the *Aarhus Convention*, the CJEU concluded that the Austrian situation, which prevents an environmental organisation in general from challenging a permit allegedly being in breach of the *EU Water Framework Directive*'s obligations, did not comply with those requirements.

The CJEU then examined the question whether the *Aarhus Convention* required Austria to grant environmental NGOs standing and party rights already in the initial permitting procedure. The CJEU answered in the affirmative, however it based its findings on the particularities of the Austrian legal system. Indeed, the CJEU highlighted that the *Aarhus Convention* only requires standing for environmental NGOs where a procedure falls within the scope of Art 6(1) of the Convention; these are procedures relating to projects listed in the Convention's Annex I (litera a) or projects identified by the respective Convention's party as may having significant effects on the environment (litera b). As neither was applicable in the present case,[329] the Convention as such does not require standing and party rights in the permitting procedure.[330] However, the Austrian administrative legal system links standing in permitting procedures and the subsequent right to a legal remedy: only parties to permitting procedures are in a position to later challenge the permit issued in that procedure. Due to this link, the

[327] Charta of Fundamental Rights of the European Union [2000] OLJ 364/1.
[328] Art 47 *EU CFR*.
[329] The CJEU, however, appears to having had doubts that the project at stake was indeed one to be considered as 'may having significant effects on the environment' in the sense of Art 6(1)(b), see Case C-664/15, para 66 et seq. In that case, the right to standing for environmental NGOs in the permitting procedure would already be based on this provision of the *Aarhus Convention*.
[330] Case C-664/15, at para 68.

CJEU found that the *Aarhus Convention* indeed requires standing and party rights for environmental NGOs in permitting procedures; otherwise, those environmental NGOs would not be in a position to exercise their right to a legal remedy as foreseen by Art 9(3) of the *Aarhus Convention* and that right would ultimately remain ineffective.

Assessment

The CJEU's binding interpretation of Austria's international and EU law commitments was positively received in the environmental (law) community. The lack of a right to legal review for environmental NGOs in relation to sectoral permitting procedures has been centre of legal discussion for years[331] and is now hoped to grab the legislator's attention. Pro-business legal practitioners, however, have raised concerns that a change in law might lead to longer proceedings and uncertainty for project developers.[332]

Environmental NGOs are in particular concerned with the implementation of their argued standing in project permitting procedures falling within the scope of the EU *Water Framework Directive* and beyond.[333] In that regard, however, it is advisable to remind ourselves that the CJEU deduced the right to standing in permitting procedures in the present case from the right to legal review guaranteed by Art 9(3) of the *Aarhus Convention*; this because Austrian administrative law establishes a link between those two aspects. This suggests that in cases where this link to the right to legal review does not exist, the right to standing in the initial permitting procedure would no longer be required. The Austrian legislator could thus rectify the situation by providing for a mere right to legal review for environmental NGOs without prior party rights in the permitting procedure. Decoupling party rights and the (subsequent) right to a legal remedy in that

[331] See Eva Schulev-Steindl and Barbara Goby, Rechtliche Optionen zur Verbesserung des Zugangs zu Gerichten im österreichischen Umweltrecht gemäß der Aarhus-Konvention (Artikel 9 Abs 3) (Wien 2009).
[332] Felix Karl Vogl, 'EuGH ermöglicht Projektgegnern viele Möglichkeiten zu taktieren' DiePresse (Vienna 2 January 2018) < http://diepresse.com/home/recht/rechtallgemein/5346811/EuGH-eroeffnet-Projektgegnern-viele-Moeglichkeiten-zu-taktieren> accessed 5 January 2018.
[333] Ökobüro, 'Gerichtszugang für Umweltorganisationen und Öffentlichkeit endlich auch in Österreich?' <http://www.oekobuero.at/gerichts-zugang-fuer-umweltorganisationen-und-oeffentlichkeit-endlich-auch-in-oesterreich> accessed 5 January 2018.

way is indeed a 'special arrangement' for Austrian administrative law. However, it has been done before in the context of EIA permitting and would be the often relied on 'minimum solution'.[334]

In my view, it would be more successful to rely on another avenue already sketched by the CJEU: Art 6(1)(b) of the *Aarhus Convention* requires its parties to grant environmental NGOs standing in procedures relating to 'activities which may have a significant effect on the environment'. Indeed, this requires such activities being identified by the respective party, e.g. by an act of law. However, when EU law already suggests that an activity may have significant effects on the environment, EU law is capable of reducing this room for manoeuvre for its member states, which are all parties to the Convention. An example in that respect is the requirement for member states to assess a plan or project appropriately, which may significantly affect a nature protection site.[335] In the present case, the CJEU suggests that the possibility of the deterioration of water quality, prohibited by the *EU Water Framework Directive*, implied the project might have significant effects on the environment.[336] In such a case, the EU member state must read its national law in light of Art 6(1)(b) of the *Aarhus Convention* and grant standing to environmental NGOs, provided national law can be interpreted in that way. For Austrian national law, the CJEU appears to believe this possible, as have Austrian legal scholars before.

Conclusion

Austria's 2017 was marked by firsts: the country saw its first climate change lawsuit and a binding opinion of the CJEU to the effect that Austria's *Water Act*[337] might be the first sectoral law granting the right to a legal remedy to environmental NGOs in the context of other than large-scale project permitting. In both cases, courts have been at the frontline of legal developments. Whether the Austrian legislator catches up with

[334] See Country Report for Austria 2016, IUCN AEL E-Journal, Issue 8.
[335] C-664/15, at paras 38 et seq.
[336] The CJEU explains that only when the deciding courts concludes that significant negative impacts on the environment are excluded, Art 9(3) of the Aarhus Convention is the relevant norm on which to base the right to a legal remedy for environmental NGOs, see case C-664/15, at para 43.
[337] *Austrian Water Act* (*WRG*), Austrian Federal Law Gazette 215/1959, as amended by Austrian Federal Law Gazette I 58/2017.

those developments or may even counteract them by passing statutory law, remains to be seen.

Country Report: The Bahamas

Save The Bays and the Freedom of Information Act 2017

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with assistance from

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Introduction

This report provides an overview and update on a significant piece of litigation originally brought by Save the Bays, an environmental advocacy group, in 2016. This report will also look at the important developments of the Freedom of Information Act of The Bahamas which was passed and partially enacted in 2017, and its significance in aiding environmental advocacy in the country.

Save The Bays

Save the Bays (STB), formerly known as the Coalition to Protect Clifton Bay, is an environmental advocacy group in The Bahamas that campaigns for the protection of Bahamian natural resources through education, proactive policy, and legal avenues.[338] It is mainly known in The Bahamas for its involvement in a series of high profile environmental cases brought in the past few years.[339]

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[338] Coalition to Protect Clifton, 'Our Story' (*Save the Bays*) http://www.savethebays.bs/about-us/our-story/ accessed December 27th, 2017.

[339] See 'Country Report: The Bahamas, Environmental Litigation and The Bahamas' Signing of the Port State Measures Agreement by Megan Curry, Berchel Wilson and Andrew Smith with assistance from Lisa Benjamin IUCN eJournal 2017(8) < http://www.iucnael.org/en/e-journal/current-issue#> accessed January 3rd, 2018; See also 'Country Report: The Bahamas Legislative Developments' by Theominique Nottage, Renee Farquharson and Megan Curry with assistance from Lisa Benjamin IUCN e Journal 2016 (7); *The Queen v Minister of Agriculture and Marine Resources, Director of Fisheries and Marine Resources, Town Planning Committee, Minister responsible for Crown Lands, and Blue Illusions Ltd ex parte reEarth* 2013/PUB/jrv/00034, 17July 2014.

Background and Relevance of Environmental Litigation brought by Save The Bays

Cogent examples of such environmental advocacy encouraged as a consequence of Save The Bay's stewardship include the Bimini Bay case, whereby the Bimini Blue coalition took action against the Government of The Bahamas and a number of other respondents, including Resorts World Bimini, to stop the dredging of nearly 1,000,000 cubic feet of seabed which would lead to the destruction of an area of rich marine diversity. The dredging was intended to enable passengers to come directly from the cruise ship onto the dock, as opposed to ferrying in small boats to the island.[340] The developer had all of the necessary permits and approvals except for those required for dredging.[341] The matter went to the Privy Council where certain suspicions were held by the Council in relation to the overnight production of the permits by the Government indicating an arbitrary use of governmental power and thereby stated that the Government could not rely on these permits. The action was then referred to the first instance courts once again which determined that the permits were valid.

In 2017 Save the Bays launched a constitutional case concerning Parliamentary privilege.[342] This controversial case has highlighted the link between citizens' right to information and the empowerment of the citizenry to make informed social, environmental and economic decisions, and, ultimately, to combat secrecy and resistance by the Government to transparency with respect to decisions that affect the Bahamian

[340] Allison Lowe 'Questionable demand for Bimini ferry' The Nassau Guardian (October 25th 2013) available at: https://thenassauguardian.com/2013/10/25/questionable-demand-for-bimini-ferry/ accessed January 4th, 2018; Harriet Alexander 'Islands in the Steam: the battle for the soul of Bimini' The Telegraph (July 6th, 2014) available at: http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/bahamas/10947445/Islands-In-The-Stream-The-battle-for-the-soul-of-Bimini.html accessed January 4th, 2018; Bimini Blue Coalition v Minister Responsible for Crown Lands et al, PUB/JRV/FP-3 2013, rough transcript dated 24th January 2014.; See also 'Country Report: The Bahamas, The Problem of Unpermitted Development and Fragmented Environmental Laws ' by Lisa Benjamin with assistance from
Theominique Nottage and Renee Farquharson, IUCN eJournal 2015(6) http://www.iucnael.org/en/e-journal/previous-issues?layout=edit&id=615 accessed January 3rd, 2018.

[341] Bimini Blue Coalition v Minister Responsible for Crown Lands et al, PUB/JRV/FP-3 2013, rough transcript dated 24th January 2014.

[342] *Coalition to Protect Clifton Bay and Zachary Hampton Bacon III v The Hon. Frederick Mitchell MP (Minister of Foreign Affairs and Immigration) and The Hon. Jerome Fitzgerald MP (Minister of Education, Science and Technology) and The Attorney General of the Commonwealth of The Bahamas* 2016/PUB/con/00016.

environment.

Importance of the 2016 Judgment

On March 15 and 17 2016, the then Minister of Education Science and Technology, read from and referred to private and confidential emails in Parliament, as well as other documents belonging to STB and Mr. Zachary Bacon. The Minister of Education Science and Technology alleged that payments were made to various individuals — whom the Minister did not disclose and were never discovered — by STB for various purposes and to there being emails, wire transfers and bank statements relevant to those transactions.[343] STB launched a suit alleging that the Minister's actions constituted a breach of their Constitutional rights under Articles 21 (Right to Protection of home and other property), and Article 23 (Freedom of Expression) under the Constitution of The Commonwealth of The Bahamas. The Government alleged in response that the Minister's actions were protected by Parliamentary privilege. The following legal action proved to be complex, and ultimately it fell to the courts to consider whether the original jurisdiction of the Supreme Court granted in the Constitution was overruled by the Powers and Privileges Act of The Bahamas 1969, with particular reference to Constitutional breaches and Parliamentary Privilege.[344] In other words, could the Court adjudicate on matters affecting or controlling the conduct or speech of Members of Parliament, or could a Minister, by reliance on the Powers and Privileges Act 1969, breach the fundamental rights granted to citizens under the Constitution? It was held in the judgment by the Hon. Madame Justice Indra Charles, that the Court had been granted exclusive jurisdiction to adjudicate on and to supervise breaches of the Constitution by the Executive and the Legislature; and this jurisdiction could not be ousted by any legislation. To rely on the shield of Parliamentary privilege would amount to a breach of Article 20(8) and 15(a) of the Constitution.[345] An appeal was

[343] *Khrisna Virgil,* 'Distress' As private emails revealed by Fitzerald, *Tribune 242 (Thursday, April 7th, 2016)* http://www.tribune242.com/news/2016/apr/07/distress-private-emails-revealed-fitzgerald/ accessed January 3rd, 2018.
[344] *Coalition to Protect Clifton Bay and Zachary Hampton Bacon III v The Hon. Frederick Mitchell MP (Minister of Foreign Affairs and Immigration) and The Hon. Jerome Fitzgerald MP (Minister of Education, Science and Technology) and The Attorney General of the Commonwealth of The Bahamas* 2016/PUB/con/00016. See paragraph 33 of the judgment for crystallization of the issues.
[345] Ibid, para 3 & 71 where the judge determined that a constitutional right cannot be ousted by a statutory instrument.

filed to the 2016 judgment; however, the appeal was withdrawn in 2017 by the Government of The Bahamas.[346] The effect of this withdrawal is that the judgement of Hon. Madame Justice Indra Charles remains the law on the limits of Parliamentary Privilege. The case has also highlighted the importance and the effectiveness of environmental advocacy within The Bahamas.

Around the world it is not uncommon for the protection of the environment to play second fiddle to the economic and political agenda of a country. Such a status quo is effectively being resisted within The Bahamas by environmental advocacy groups such as Save The Bays. Such activism is 'essential to holding powerful economic actors, including States, accountable, pressuring Governments and private industries to commit to higher environmental standards, and exposing projects that could lead to environmental degradation'.[347] Save the Bays has also emboldened other environmental organizations, such as Bimini Blue Coalition, formed with the assistance of members of Save the Bays, to stand against environmental degradation.[348] In the spirit of accountability and transparency, the constitutional case in particular, brought by Save The Bays, is illuminating in that it demonstrates that the Government must be held accountable for its actions, even in the precincts of Parliament, when any constitutional right of a citizen has been infringed, and adds to the development of a rich vein of environmental litigation in the country.

Freedom of Information Act 2017 (FoIA)

Freedom of information is pivotal in a democratic society. The free flow of information lies at the heart of the very notion of democracy and is crucial to effective respect for

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[346] Lamech Johnson 'Parliamentary Privilege Appeal Formally Withdrawn', *Tribune 242 (July 26th, 2017)* < http://www.tribune242.com/news/2017/jul/26/parliamentary-privilege-appeal-formally-withdrawn/> accessed December 28th, 2017.; The Hon Jerome Fitzgerald, MP (Minister of Education, Science and Technology) and The Attorney-General of The Commonwealth of The Bahamas v Coalition to Protect Clifton Bay and Zachary Hampton Bacon III SCCivApp & CAIS No. 216 of 2016.

[347] International Center for Not-for-Profit Law, 'Environmental Advocacy: Challenges to Environmental Groups' Rights to Assemble Associate and Express their Opinion' (2016) Vol.7 Issue 1 International Journal of Not-for-Profit Law 1.

[348] *Bimini Blue Coalition Limited v. The Rt. Hon. Perry G. Christie, Prime Minister of the Commonwealth of The Bahamas (in his capacity as the Minister Responsible for Crown Lands) and others* [2014] 1 BHS J. No. 132.

human rights.[349] It is a channel which gives the public access to important documentation which lies in the hands of public officials. A Freedom of Information Act is in the public's interest as the Act will benefit and protect citizens, residents, private businesses, civil society organisations, and ultimately, the country.[350] In 2012, The Bahamas introduced a Freedom of Information Act (FoIA). Its overarching purpose was to give the Bahamian people a general right of access to records held by public authorities. However, the 2012 Act was met with many criticisms both from the general public and politicians.[351]

Similarly, freedom of information is fundamental to environmental protection. The general public has the right to be well informed of any issues that will affect the environment. Moreover, it is essential for the public to have access to environmental information that is in the possession of public authorities. It is equally important for public authorities to make information readily available to the public. Public awareness of environmental issues gives the public the opportunity to express their concerns and enable public authorities to formulate a plan to take due account for such concerns.[352]

Some of these criticisms were that the 2012 Act provided that when a record is exempt from disclosure, the public can gain access to this record only after a period of thirty years has passed (otherwise known as the sunset clause). Many Civil Society Organisations (CSOs) in The Bahamas felt this period was too long and called for it to be reduced to a period of fifteen years. Additionally, section 26 (2) of the 2012 Act provided that the definition of public interest was to be 'defined under the Regulations'. Failing to define public interest in the Act can open the door to a very limited definition being adopted by the Government, which would allow the withholding of vital

[349] Toby Mendel, *Freedom of Information: a comparative legal survey,* (2nd rev. edn, UNESCO publications, 2008).
[350] Ava Turnquest 'Freedom of Information Bill Missed opportunity' *The Tribune(December 22nd, 2016),* http://www.tribune242.com/news/2016/dec/23/freedom-information-Bill-missed-opportunity/ accessed December 20th, 2017.
[351] Royston Jones Jr. 'Protesters demand Freedom of Information Act' *The Nassau Guardian(June 12th, 2014) available at:* https://thenassauguardian.com/2014/06/12/protestors-demand-freedom-of-information-act/ accessed December 26th, 2017.
[352] Toby Mendel, *Freedom of Information: a comparative legal survey,* (2nd rev. edn, UNESCO publications, 2008).

information from the public even if it is within the public's interest.[353] Casaurina McKinney-Lambert, Executive Director of BREEF (Bahamas Reef Environment Educational Foundation), in a letter to the Government called for a definition to be added under the Act so that the public may be aware of exactly "what would fall into this category".[354]

The 2012 Act also sought to establish the role of the Information Commissioner. Ultimately the Information Commissioner is the regulatory entity which is to be responsible for the information the public has access to. The process of appointment of the Information Commissioner was never outlined in the 2012 Act. An NGO, Organization for Responsible Governance (or ORG), suggested that the Information Commissioner be selected through a Selection Committee (Judicial Services Committee or Parliamentary Select Committee) involving Government, opposition, and members of civil society to maintain independence and avoid bias.[355] The role of the Information Commissioner is important as they have powers to conduct investigations, require evidence to be produced, and compel witnesses to testify if an applicant has been denied information from a public authority.[356] Further comments and recommendations made by ORG included amongst others that the funding of the Freedom of Information Unit should come from a separate and dedicated line budget and not from the choice of Parliament, the response time within which to respond to a request should be reduced from 30 days to 10 days, and that the payment for records requested by the public be limited to the cost of reproduction of the requested documents.[357]

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[353] Ibid.

[354] The Bahamas Reef Environment Educational Foundation (BREEF), Freedom of Information Act https://www.bahamaslocal.com/files/BREEFCommentsFreedomofInformationApril2016.pdf accessed December 26th, 2017.

[355] Organization for Responsible Governance (ORG), 'Freedom of Information', http://www.orgbahamas.com/freedom-of-information accessed December 20th, 2017.

[356] For a more extensive review of the process of the previous Bills and public consultation, see Theominique Nottage, Renee Farquharson and Megan Curry, with assistance from Lisa Benjamin, "Country Report" (The Bahamas): "Legislative Developments" (2015) 7 IUCNAEL EJournal http://www.iucnael.org/en/documents/1306-bahamas-2> accessed (December 31st, 2017).

[357] See full commentary and recommendations made for the Freedom of Information Act available at: Citizens For A Better Bahamas 'Recommendations for Freedom of Information Bill' (August 5th, 2015) <http://www.citizensforabetterbahamas.org/recommendations-freedom-information-bill/> accessed January 12th, 2018

A Committee was formed by the Government to review the 2012 Act, and public consultations were also undertaken. This process resulted in a revised Bill of 2016, which included some, but not all, of the recommendations set out by CSOs to the Government. The amendments included the introduction of public interest considerations under section 2 of the Bill. For example one recommendation the Bill did take into consideration was maintaining the privacy of a person who requested documents, versus disclosing their identity to the public in situations when a public servant makes a request in respect to a Government owned business.[358] Another recommendation added in the 2016 Bill was included in section 35(g), where it says the Information Commissioner "shall provide training to public authorities for implementation and compliance under the Act in accordance with best practices."[359] Despite the 2016 Bill including these significant recommendations, the Bill was still lacking in other areas, most significantly in the way in which the Information Commissioner was to be appointed, the sunset clause remaining at 30 years, and the definition of public authority. Further amendments were made, and the Freedom of Information Act 2017 was passed into law on 31 March, 2017.

The FoIA 2017 still retains the sunset clause limit of thirty years, however under the interpretation section of the Act it sets out a non-exhaustive list of examples of what public interest ought to include, and includes a detailed process on the requirement of impartiality and appointment of the Information Commissioner. Despite some criticisms being addressed, the 2017 Act failed to include other vital recommendations set out by CSOs and the general public. For example, there was a wide call for the definition of public authorities to be expanded to include bodies that were "substantially financed" by the Government.[360] The 2017 Act also failed to include documents which form part of the deliberative process of the Government such as opinions, advice and recommendations of Cabinet as documents that can be included under the Act for

[358] Lemarque A. Campbell, 'Freedom of Information Bill, 2016 Assessment' Citizens for a Better Bahamas (New Providence, January 30th, 2017) < https://d3n8a8pro7vhmx.cloudfront.net/itsnojoke/pages/163/attachments/original/1485900481/FOI_Bill_2017_Assessment_-_CBB_(final).pdf?1485900481> accessed January 4th, 2018.
[359] Freedom of Information Bill, 2016 section 35 (g)
[360] 'Make Freedom of Information A Priority' *The Tribune,* (New Providence, September 12th, 2017) www.tribune242.com/news/2017/sep/12/make-freedom-of-information-a-priority/ accessed December 27th,2017.

disclosure.[361] The Act states that a record revealing the Government's deliberative process is exempt if it contains opinions, advice, a record of consultation or deliberation, or recommendations prepared for proceedings of the Cabinet or a Cabinet committee.[362] This provision does not apply however to records which contain material of a purely factual nature, technical data, statistical information, or analysis of factual information which are now disclosable under the amended Act.[363] This leads to the conclusion that Environmental Impact Assessments may fall within the exception of this section of the Act as they contain technical data. However, like previously mentioned the provision of section 21 (3) includes other areas that fall within the exception. Such an exception under the Act potentially opens the door for public access to Environmental Impact Assessments. The Privy Council in the Save Guana Cay case indicated that the disclosure of Environmental Impact Assessments and documents connected therewith for developmental projects are not subject to public disclosure. With the enactment of the 2017 Freedom of Information Act this will no longer be the case as a result of the enabling exception.

From the first Freedom of Information Act passed in 2012 to the subsequent bills which looked to improve the 2012 Act, the 2017 Act does reflect major changes and advancements, however there are still more improvements that need to be incorporated for the Government to be truly accountable and transparent. The development of a mega hotel resort, Baha Mar, which has involved significant investment from the Export-Import Bank of China has sparked much discussion about the enactment of FoIA. The plans for the creation of this resort were announced in late 2005 by the original developer, Sarkis Izmirlian. The development of Baha Mar seemed to be heading in the right direction until its December 14th 2014 opening was stalled. After repeated missed deadlines and with the project more than 90 percent complete, Mr. Izmirlian filed for Chapter 11 bankruptcy protection in the United States in June 2015.[364] The Government vigorously opposed this process, claiming that it threatened The

[361] Freedom of Information Act, 2017 section 21 (1)
[362] Ibid
[363] Freedom of Information Act, 2017 section 21 (3)
[364] Ava Turnquest, 'PM Confirms Baha Mar Sale To Chow Tai Fook Enterprises', *The Tribune, (New Providence 12 December, 2016)* www.tribune242.com/news/2016/dec/12/pm-confirms-sale-baha-mar-chow-tai-fook-enterprise/ accessed January 12th, 2018.

Bahamas' sovereignty, and instead petitioned the Supreme Court to place Baha Mar into liquidation.[365] The ownership of Baha Mar was transferred to Chow Tai Fook Enterprises, resulting in the establishment opening in April 2017. The resorts' phased opening will be completed this year, with its final phase, 'Rosewood', to open sometime this year, 2018.

On October 27th, 2016 the then leader of the opposition, Dr. Hubert Minnis in his contribution to the Baha Mar discussion, made remarks on the stalled FoIA process, highlighting the Baha Mar project. He asserted that the lack of transparency from the then Prime Minister Perry Christie, on the secret Baha Mar deal he struck with his Chinese 'allies', demonstrated the need for immediate enactment of Freedom of Information legislation in The Bahamas.[366] Further, after the election in May 2017, Dr Hubert Minnis is now the Prime Minister of The Bahamas, yet the majority of the FoIA Act 2017 remains to be enacted under the present administration.

There are numerous examples of developments in the country where the public would have benefited from having a FoIA regime in place. In 2008, Abaco residents were left in the dark when the Government entered into a deal where the Wilson City power plant would burn a highly toxic fuel known as Bunker C and no access to an EIA was provided to the public until after ground had been broken on the development.[367] The residents of Abaco sought to put an end to this deal as soon as it became public knowledge, however, it was discovered that the deal was made back in 2005, and the Courts in the first instance decided that the time for challenging the decision had passed.[368] The decision was overturned, but the costs to bring such proceedings were astronomical and the development continued. Other examples of developments being kept secret from the Bahamian public can be found in the likes of the 2010 Kamalame

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[365] Ibid

[366] 'Minnis Calls For Information Act To Be Enacted Immediately', *The Tribune, (New Providence 27 October, 2016* www.tribune242.com/news/2016/oct/27/minnis-calls-information-act-be-enacted-immediatel/ accessed December 29th, 2017.

[367] Save The Bays, 'Students Urged to Stand Up For Their Rights', (New Providence, 27 October, 2014) www.savethebays.bs/2014/10/27/students-urged-stand-rights/ accessed December 28th, 2017.

[368] Lisa Benjamin, "Country Report" (The Bahamas): "Access to Environmental Information, EIAs and Public Participation in Development Decision" (2013) 5 IUCNAEL EJournal <http://www.iucnael.org/en/documents/1306-bahamas-2> accessed December 31st, 2017.

Cay decision where an excavation project started which included the dredging of the seabed to create a man-made canal which would completely change the face of the original landscape of the Cay off of Andros.[369] Local fisherman reported that the area that was once teeming with aquatic life is now barren land due to the dredging.[370]

In the controversial dredging operation initiated by the Bimini World Resorts, and referred to above, to create a cruise ship terminal, many citizens were concerned and called for the project to be stopped as many environmentalists said that the cloud of silt created from the dredging would have devastating effects on Bimini's unique and pristine coral reefs by essentially suffocating the ecosystem that houses many underwater marine resources.[371] In the case of Bimini Bay, the environmental impact assessment that was done was not released to the public as required by the Planning and Subdivision Act of The Bahamas.[372]

Despite a change of Government in 2017, full implementation of the Freedom of Information Act is still out of reach as the Government is actively seeking experts to help policymakers strike the right balance between restrictions and access.[373] The only provisions which have been enacted involve the appointment of the Information Commissioner and training provisions, but at the date of the writing of this article no Information Commissioner has been appointed. The appointment of an independent and active Information Commissioner is critical to the successful implementation of a fully

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[369] Ella Jones, 'Andros residents fear environmental damage in kamalame cay' *(New Providence, November 2nd, 2010)* http://www.bahamasb2b.com/news/2010/11/andros-residents-fear-environmental-damage-in-kamalame-cay-dredging-3759.html accessed December 26th, 2017.

[370]'Androsians claim dredging near resort is damaging environment' *Bahamas Local,(New Providence , November 2nd, 2010)* https://www.bahamaslocal.com/newsitem/8543/Androsians_claim_dredging_near_resort_is_damaging_environment.html accessed December 23rd, 2017

[371]'Bimini dredging halted by the Privy Council', *Dredgingtoday,(New Providence May 26th, 2014)* https://www.dredgingtoday.com/2014/05/26/the-bahamas-bimini-dredging-halted-by-privy-council/ accessed December 28th, 2017.

[372]Theominique Nottage, Renee Farquharson and Megan Curry, with assistance from Lisa Benjamin, "Country Report" (The Bahamas): "Legislative Developments" (2015) 7 IUCNAEL EJournal <http://www.iucnael.org/en/documents/1306-bahamas-2> accessed December 31st, 2017.

[373] Ava Turnquest, 'Full enactment-fioa still some way bethel' *The Tribune, (New Providence, November 28th, 2017)* www.tribune242.com/news/2017/nov/28/full-enactment-foia-still-some-way-bethel/ accessed December 29th, 2017.

functioning FoIA.[374] The Attorney General of The Bahamas, Carl Bethel asserted that he has reached out to his international colleagues, requesting their assistance to ensure that the Act is implemented with a minimum amount of errors, is not too restrictive or too open, but rather achieves a balance between the two.[375] A phased implementation of the Act may also serve to minimize the errors in the Act and allow for training and improvement of public record management before the Act comes into full effect.[376] In the developing world the passing of a FoIA is often due to pressure from domestic and international civil society groups as well as international institutions.[377] The assurance that Government and businesses are being responsible in the development of the country is aided within The Bahamas by the implementation of FoIA.

Conclusion

The recent withdrawal of the appeal by The Government of The Bahamas in the constitutional case concerning whether the court of original jurisdiction has the power to adjudicate on matters relating to the speech and conduct of Members of Parliament while in Parliament, leaves the ruling delivered by Hon. Madame Justice Indra Charles in effect. The jurisdiction of the court as given by the Constitution of The Bahamas is not ousted by legislation, and this decision affirms the primacy of the jurisdiction of the courts. Further, the Freedom of Information Act 2017 has rectified some of the problems that plagued prior versions of the Act, but at present there is no discernible timeline as to when the Act will be fully enacted and implemented, leaving a major gap for environmental advocacy and litigation in The Bahamas.

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[374] Lisa Benjamin, 'Freedom of Information Acts in the Developing World: Lessons from the Caribbean for the Bahamian Experience' (2017) vol. 23 IJBS < http://journals.sfu.ca/cob/index.php/files/article/view/292> accessed January 18th, 2018.
[375] Ava Turnquest, 'Full enactment-fioa still some way bethel' *The Tribune, (New Providence, November 28th, 2017)* www.tribune242.com/news/2017/nov/28/full-enactment-foia-still-some-way-bethel/ accessed December 29th, 2017.
[376] Lisa Benjamin, 'Freedom of Information Acts in the Developing World: Lessons from the Caribbean for the Bahamian Experience' (2017) vol. 23 IJBS < http://journals.sfu.ca/cob/index.php/files/article/view/292> accessed January 18th, 2018.
[377] Ibid

COUNTRY REPORT: BANGLADESH

Bangladesh Biological Diversity Act 2017: An Appraisal

Imtiaz Ahmed Sajal*

Introduction:

In response to international legal developments on biological diversity Bangladesh has recently developed legislation on biological diversity including a framework for governance. As the conservation of biodiversity and biosafety issues were broadly covered by existing laws, the significance of this new development lies in introducing an access and benefit sharing mechanism. This report aims to assess the new legislation and institutional framework dealing with biodiversity in a comprehensive manner. Based on this assessment it will provide policy guidance for necessary amendments/enactments to the regulatory regime by taking into account the international legal instruments on biodiversity.

Salient Features of the Bangladesh Biological Diversity Act 2017

Bangladesh has ratified the Convention on Biological Diversity[378] (CBD) and the Cartagena Protocol[379] and is a signatory of the Nagoya Protocol[380]. As a duelist country, Bangladesh requires implementing domestic law to give legal effect to this at the national level. Now, after 25 years from the adoption of CBD, the *Bangladesh Biological Diversity Act 2017*[381] (hereafter Biodiversity Act) has been enacted. The salient features of the Biodiversity Act are described below.

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[378] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) (1992) 31 ILM 822. Bangladesh ratified the Convention on 03 May 1994. See <https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en> accessed 22 Dec 2017.

[379] Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 29 January 2000, (Cartagena Protocol); 39 (2000) ILM 1027. Bangladesh ratified it on 5 February 2004.

[380] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization of 29 October 2010, (Nagoya Protocol). Bangladesh has not yet ratified it.

[381] Act No. II of 2017. Bangla text of the Act was published in the Bangladesh Gazette, extra-ordinary issue of 29-02-2017. The Act has been given the overriding effect over other laws and it came into force on 30th November 2017 as per the gazette notification of MoEF (SRO No. 334-Law/2017). The report is based on unofficial English translation by author.

Objectives of the Biological Diversity Act:

The preamble to the Biodiversity Act contains the objectives and considerations to guide the legislature in enacting the law and so has great relevance for the interpretation and implementation of the legislation. Firstly, the Preamble refers to the constitutional obligation of the state to the conservation of biodiversity[382] which is enshrined in the Constitution as one of the fundamental principles of state policy.[383]

Secondly, the Preamble states that, as a party to the CBD, Bangladesh is internationally committed to the enactment of this Act. In realising the objectives of the CBD, the Act provides for the same objective as of the CBD — "to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters incidental thereto".

The third objective of the Act as set out in the preamble is that, as a country enriched in biological resources and associated traditional knowledge (TK), it is expedient and necessary to enact a law on biological diversity. To many, this initiative of protecting TK on biological resources is a progressive one, although the protection of TK is one of the unsettled issues of international intellectual property law.[384]

Definitions:

[382] Article 18A was inserted by *the Constitution (Fifteenth Amendment) Act 2011* (Act XIV of 2011), s 12. Which reads as follows: "18A. Protection and improvement of environment and biodiversity:—The State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens."

[383] The Constitution of Bangladesh incorporates in its part II certain directions to the State termed as 'Fundamental Principles of State Policy' which are not judicially enforceable. See Muhammad Ekramul Haque, Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh, The Dhaka University Studies, Part-F Vol. XVI (1): 45-80, June 2005.

[384] For more see Tshimanga Kongolo, *Unsettled international intellectual property issues* (Kluwer Law International 2008) 29-62. See WIPO's work <http://www.wipo.int/tk/en/igc/> accessed 22 Dec 2017.

In line with the CBD, the Biodiversity Act has differentiated between the terms "Biological diversity" (or "biodiversity") and "biological resources". While the CBD declared "Biological diversity" as a 'common concern of mankind'[385] and "biological resources" as a matter of 'national sovereignty', for the same, respectively the Biodiversity Act provides for 'conservation' and 'sustainable use' of these. The term "biological resources" is defined to mean genetic resources derived from plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) or any other biotic component of ecosystems with actual or potential use or value for humanity, but does not include human genetic material. This definition is slightly different from that of the CBD as it expressly excludes 'human genetic material', basically on ethical grounds[386], from the purview of biological resources.[387]

Regulation of Access to Biological Resources

A non-resident citizen, non-citizen, or any organization not incorporated in Bangladesh is required to request and be granted the prior approval of the National Committee on Biodiversity[388] (hereafter National Committee) in order to collect or obtain any biodiversity, biological resource or associated TK for research or for commercial utilisation or for bio-survey and bio-utilisation.[389] Moreover, no other person or organization can, without prior approval of the National Committee, transfer to them the results of any research relating to biodiversity or biological resources.[390] It is further clarified that the publication of any research paper and dissemination of that knowledge in any seminar

[385] Sumudu Atapattu, 'The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North–South Divide' in Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez and Jona Razzaque (eds), *International environmental law and the Global South (*CUP 2015) 74, 86.
[386] TRIPS Agreement of the WTO, art 27(2). Reads as follows "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment…"
[387] No jurisdiction has yet recognized the patenting of human genes *per se*. See Argentina's declaration to the CBD <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&clang=_en#EndDec>. For more see Samantak Ghosh, 'Patenting human genes in the United States' in Duncan Matthews and Herbert Zech (eds) *Research Handbook on Intellectual Property and the Life Sciences* (Edward Elgar Publishing 2017) 41.
[388] A 21-member Committee consisting of officials from all concerned government ministries and departments responsible for overall control and management of biodiversity related activities (ss 8, 9 and 10).
[389] *The Bangladesh Biological Diversity Act 2017*, s 4.
[390] ibid.

or workshop is allowed and will not be considered as 'transfer' of research result as prohibited in the preceding section, if such paper is published as per the guidelines of the Government. The National Committee can take into account the findings or recommendations of any such paper in their activities.[391] The Biodiversity Act provides for harsh punishment for the contravention of these provisions.[392]

One of the key expectations from the legislation was that it would prevent biopiracy[393] by checking the grant of illegal and unauthorised patents or other IPRs based on Bangladesh's biological resources or associated TK in other countries by foreign corporations. It is in this context, for the application of biodiversity related intellectual property rights (IPRs), the Biodiversity Act provides that for any person, whether a citizen or non-citizen, prior approval of the National Committee is required to apply for a patent or any other form of IPR for any invention based biological resource, within or outside Bangladesh.[394] The National Committee can determine, while granting the application of IPRs, the benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights. Contravention of these provisions is also punishable.[395]

The National Committee, following the prescribed procedure, can accept or reject the applications for undertaking research on biodiversity or related activities or for IPRs.[396] The National Committee is mandated to address the applications made to it within ninety days from the date of receipt thereof. Thereafter, the applicants must be informed in writing regarding the status of approval or rejection. The National Committee will consult with other local committees when necessary and may take advice of any technical committee or any other government department of organization while

[391] ibid, s 5.
[392] ibid, s 39. Imprisonment up-to five years or fine up-to ten lac Taka or both; but when the amount of loss or damage to biodiversity exceeds ten lac Taka, the fine will also increase.
[393] It ordinarily refers either to the unauthorized extraction of biological resources and/or associated traditional knowledge from developing countries, or to the patenting of spurious 'inventions' based on such knowledge or resources without compensation to the peoples or nations in whose territory the materials were originally discovered. See Graham Dutfield, *Intellectual Property, biogenetic resources and traditional knowledge* (Earthscan 2004) 52-57.
[394] *The Bangladesh Biological Diversity Act 2017*, s 6.
[395] ibid, s 40.
[396] ibid, s 7.

examining the applications. After granting any application on research activities or on IPRs, the National Committee will issue a public notice on the matter.[397]

Any person or institution aggrieved by any decision of the National Committee can file a review application to the National Committee itself. The decisions given by the National Committee on review applications will be regarded as final.[398]

Biodiversity Management and Surveillance Committees, Groups, Societies etc.

To engage local bodies in the conservation, management and documentation of biodiversity, the Biodiversity Act provides for different committee systems in all local government bodies[399] and local administrative units.[400] The Biodiversity Act provides for constituting a 'Biodiversity Management and Surveillance Committee' in country's all City Corporations[401], Districts[402], Upazilas,[403] Municipalities[404] and Unions.[405]

These Biodiversity Management Committees are formed by the concerned government officials at different levels, people's representatives of local government bodies and local Parliament members.[406] The Biodiversity Act provides for ensuring representation of civil society and environmental NGOs in all committees and also representation of farmers and fishing communities and religious leaders from dominant religious groups in some committees.[407] Moreover, these Committees may co-opt any

[397] ibid, s 7(7).
[398] ibid, s 48.
[399] Bangladesh is a unitary country. But for the purpose of decentralized governance, the whole country is divide into different local government units. Local Government set-up comprises of 4554 Union council, 491 Upazila council, 64 Zila (District) council, 311 Municipalities and 10 City Corporations.
[400] For the purpose of local or decentralized administration, the whole country is divided in 8 Divisions, 64 Districts.
[401] City corporations are the local government units in mega cities, which provide civic facilities.

[402] Administrative unit designated by the Government. There are 64 Districts in Bangladesh.
[403] Sub-district level tier of local administration. There are 491 Upazilas in Bangladesh.
[404] Municipalities are the local government units in sub-urban areas for providing civic facilities.
[405] Lowest tier of local government set-up in Bangladesh consisting of a number of villages. There are around 80,000 villages in Bangladesh.
[406] Committees in local government bodies are constituted mainly by the elected representatives of those bodies and Committees of administrative units are mainly formed by the concerned ex-officio government officials. See *the Bangladesh Biological Diversity Act 2017,* ss 13, 16, 19, 22, 25.
[407] The Bangladesh Biological Diversity Act 2017, ss 13, 16, 19, 22, 25.

person or organization interested in biodiversity conservation activities as members.[408] The City Corporation Committee will meet at least twice and all other Committees will meet at least thrice in a year. Decisions will be taken on the majority of votes of the members present and voting in the meeting.[409]

In general, all these committees are mandated to assist the Government in implementing the National Biodiversity Strategy and Action Plan (NBSAP) and to visit the biodiversity enriched areas in their respective territories, and monitor the progress of implementation of the NBSAP. They are also mandated to raise awareness among the local people on conservation of biodiversity and to recommend the National Committee for required measure.[410] While the primary responsibility for documentation of biodiversity is vested in the local government bodies, the local administrative units i.e. District and Upazila Committees will combine and compile the biodiversity registers prepared by the local bodies.[411]

As there is a hierarchy among different committees, upper level committees will oversee and assess the activities of its subordinate Committees and Biodiversity Conservation Groups or Societies (if any) in their respective territories.[412] All the Committees are responsible for taking the necessary administrative and legal measures against any activities harmful for biodiversity in their respective territories.[413]

As the lowest tiers of local government in sub-urban and rural areas and closely engaged in conservation activities, the Committees of Municipality and Union levels are additionally mandated for the preservation of ecosystems, conservation of landraces and cultivars, domesticated stocks and breeds of animals, fish and microorganisms and documentation of (traditional) knowledge relating to biodiversity.[414] They will also

[408] ibid.
[409] idid, ss 14, 17, 20, 23, 26.
[410] ibid, ss 15, 18, 21, 24, 27.
[411] ibid.
[412] ibid.
[413] ibid.
[414] ibid, ss 24, 27.

create mass awareness on activities which cannot be initiated or continued in that area for the conservation of biodiversity. Moreover, these Committees are responsible for generating alternative means of livelihoods, if for any biodiversity protective measures the livelihood options of locals is being hindered.[415]

To spread the Biodiversity conservation activities up to the grass-root level of the country, the above-mentioned Committees can form the Biodiversity Management Groups, Societies and sub-committees in grass-root levels based on village, locality, occupation or community, with the persons enthusiastic in environment conservation.[416] Necessary money from the Fund can be allocated to these Groups or Societies as grants to improve their lives and livelihoods.

Equitable sharing of benefits arising out of genetic or biological resources

The National Committee will determine the fair and equitable benefit sharing by applying all or any of the following parameters, namely:[417]

(a) equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with prior-informed consent (PIC) and mutually agreed terms (MAT) and conditions between the person applying for such approval, local bodies concerned and the benefit claimers; (b) granting the ownership of IPRs to benefit claimers where benefit claimers are identified; or granting the joint ownership of IPRs where not identified; (c) transfer of technology relating to the development of biological diversity in favour of benefit claimers of local communities or people; (d) the location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;(e) engaging Bangladeshi scientists or their organizations, benefit claimers and the local communities with research and development in biological resources, bio-survey or bio-utilization; and/or (f) payment of monetary compensation and non-monetary benefits to the

[415] ibid.
[416] ibid, ss 28, 29.
[417] ibid, s 30.

conservator of biodiversity, holder and inventor of biological knowledge, as the National Committee may deem fit.

Other Remarkable Developments in the Act

The Biodiversity Act provides for developing and adapting the National Biodiversity Strategy and Action Plan (NBSAP) to coordinate all the plans, programmes and policies for the conservation, development and sustainable use of biodiversity.[418]

Under the Biodiversity Act, the Government is empowered to declare, in consultation with local communities and bodies and in coordination with concerned ministries or departments, any place or area significant for its biological heritage as Biodiversity Heritage Sites.[419] The Government may initiate projects or schemes for compensating or rehabilitating any person or institution economically affected by such declaration. The Government may frame directives for the management and conservation of all the Biodiversity Heritage Sites.

Interestingly, while the CBD calls for financial assistance to developing countries, the Biodiversity Act provides for a domestic fund[420] called the 'Biodiversity Conservation Fund'. Any grants given by the Government and money obtained from any other sources, subject to the approval of the government, will be credited to the Fund. The Fund will be utilized for the conservation and management of Biodiversity Heritage Sites, compensating or rehabilitating any person or section of the people economically affected by the declaration of Biodiversity Heritage Sites and for any other incidental expenses.

Concluding Remarks:

[418] In 2004, Bangladesh framed its first NBSAP which provides an overall policy framework on Biodiversity. The Government of Bangladesh updated its existing NBSAP as 'NBSAP 2016-2021'.

[419] ibid, s 32.

[420] This is not an isolated example, Bangladesh is pioneer in creating its domestic funding mechanism to combat climate change, being an LDC and one of the worst victims.

As the conservation of biodiversity and biosafety issues were broadly covered by the existing laws[421], the significance of the Biodiversity Act lies in introducing an ABS mechanism, preparation of a nation-wide biodiversity registers and documentation of TK relating to biodiversity. Moreover, provisions for a community-based approach to biological resource management, a specialised funding mechanism, and alternative livelihood generation for affected people are also commendable.

Despite all these positive aspects, there are some legal and practical challenges to face in implementing the Biodiversity Act. Firstly, without establishing a full-fledged institutional mechanism — a legal entity, it has proposed to establish a National Committee with all bureaucrats as a highest decision-making body. Although a Technical Committee is there to support the National Committee it has no say in decision-making. Previously, this type of committee system was part of policy frameworks[422] but now it is being provided frequently under domestic environmental legal frameworks instead of providing institutional arrangements, which ultimately weakens the regime. There are many committees and authorities at local government levels already constituted or designated by other laws. Thus, harmonization in their functions and their capacity building in preparing biodiversity registers and TK documentation is of special importance.

Secondly, articulation of the ABS mechanism is of serious concern. Under the CBD and the Nagoya Protocol, any domestic ABS system must be based on PIC and MAT. The Biodiversity Act indicated six methods of determining fair and equitable sharing and suggested to follow all or any of those. Among the six methods only the first provides for PIC and MAT, clearly falling short of CBD or Nagoya standards. It is submitted that further rules are needed provide more clarity on PIC and MAT requirements, particularly with respect to indigenous[423] and local communities.

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[421] In general, *the Environment Conservation Act 1995* and in particular *the Wildlife (Conservation and Security) Act 2012* and *the Bangladesh Biosafety Rules 2012*.
[422] *See National Environment Policy 1992, National Water Policy 1999* etc.
[423] The Act contains no mention of the term 'indigenous', rather it used 'local community or people'. Officially Bangladesh uses the term 'tribes' or 'ethnic minorities' instead of 'indigenous people'.

Thirdly, application for IPRs outside the country on any biological resources or TK obtained from Bangladesh is not allowed without prior approval but the law does not require the National Committee to take any proactive action/measures to oppose the grant of such IPRs. And for domestic patent applicants, introduction of a requirement to disclose the origin or source of the genetic resource and TK used in an invention is needed.[424] There is no specific law on 'Plant Varieties Protection' in Bangladesh. The Biodiversity Act has not addressed this issue except with a simple reference for encouraging people in the conservation of 'cultivars' and 'landraces'. A harmonized law for protecting farmers' rights on their traditional practices in conservation of biodiversity and access and benefit sharing is needed, in light of these issues.

Fourthly, the legal validity of the National Committee's decisions is not subject to any judicial or other independent review as the law provides that an appeal against the decisions of National Committee goes to the National Committee itself. Moreover, despite having the separate Environment Courts in Bangladesh, these Courts have not been given the jurisdiction to try offences relating to wildlife and biodiversity.

Furthermore, the idea of establishing a separate funding mechanism is novel. But, so far, no budgetary allocation has been granted for the Biodiversity Fund. Without the necessary budgetary allocation it is not feasible to incur the implementation costs of the Act. In addition to this, Biodiversity— as a cross-cutting issue, fund can be mobilized from other existing funds, including the Climate Change Trust Fund.

[424] TRIPS art 29 does not prevent the introduction of the requirement to disclose the source within the national legislation. For more see Monirul Azam, *Intellectual Property and Public Health in the Developing World* (Open Book Publishers 2016) 158-63.

BELGIUM'S PATH TO CLIMATE ADAPTATION

Anemoon Soete

Globally, 2017 was a year in which adaptation to climate change stood front and center. The *Paris Agreement* had entered into force at the end of 2016 in which adaptation to climate change was duly recognized as being equally important as mitigation of climate change.[425] Whereas mitigation entails a reduction of climate changing emissions and seeks to lessen the rising of global temperatures, adaptation seeks to adjust our ways of life to be able to live with inevitable changes to our climate.

2017 was also the year in which the European Union took stock of how its *EU Adaptation Strategy*, adopted by the European Commission in 2013, has played out so far with regards to stimulating member states to prepare adaptation strategies.[426] With regards to Belgium, the Commission was able to take note of a *National Adaptation Plan* which was agreed upon in 2017.[427] For Belgium, this task was complicated due to its constitutional make-up. In Belgium, competences at the highest level are divided between the federal government, the governments of the three regions (Flanders, Brussels-Capital and Walloon), and the three language-based communities (Dutch, French and German). With consideration for their competences, the Federal government and the three regional governments have each made up an adaptation plan,[428]

[425] Paris Agreement, adopted 12 December 2015, entered into force on 4 November 2016, COP Report No. 21, Addenum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Jan. 29, 2016).
[426] European Climate change adaptation platform (Clima-ADAPT), 'Country information on Belgium', <http://climate-adapt.eea.europa.eu/countries-regions/countries/belgium> accessed 17 January 2018.
[427] National Climate Commission, 'National Adaptation Plan 2017-2020' (Federal Public Service Health, Food Chain Safety and Environment 2016), http://www.climat.be/files/4214/9880/5755/NAP_EN.pdf.
[428] For Flanders, the Flemish Climate Plan which includes a section on adaptation known as the Flemish Adaptation Plan is in place. For the Brussels-Capital Region, the Integrated Air-Climate-Energy Plan deals with adaptation for the region. Furthermore the region has several thematic plans in place which feature adaptation measures, such as a new regional water management plan (2016-2021). Also the Walloon government has an Air-Climate-Energy plan which addresses adaptation. Finally, the Federal government presented its adaptation policies directly to be included in the National Adaptation Plan. Flemish Government, 'Flemish Climate Plan' (Secretary-general Environment, Nature and Energy

which were then joined in the 2017 overarching national adaptation plan for the whole of Belgium. The *National Adaptation Plan* focuses on the development of high resolution climate scenarios for Belgium, establishing a Belgian Centre of Excellence on Climate, developing a national online platform for climate adaptation, strengthening sectoral coordination at a national level, taking into account the risks climate change present in bringing in invasive species, evaluating the impact of climate change on energy supply, transport and infrastructure, evaluating socio-economic impacts of climate change, taking into account health-related climate change risks, raising awareness, promoting transnational cooperation, and finally coordinating responses to emergency climate change situations.[429]

These goals at the international and regional level of states are boosted by initiatives at a municipal level and vice versa. In 2016, a study was published by the European Environment Agency which comprises best practices of cities on their way to adapting to climate change. This has boosted the exchange of knowledge between European cities to learn from in the following years.[430] This knowledge-sharing effort is further supported by the online European Climate Adaptation Platform (Climate-ADAPT) which informs cities further and more in real time on all actions undertaken by European cities.[431] In 2017, the *Global Covenant of Mayors for Climate & Energy* was born by merging and streamlining the existent *EU Covenant of Mayors* and the *UN-initiated Compact of Mayors*. The non-binding Global Covenant of Mayors aims to aid cities in their voluntary adherence to the goals set out in the Paris Agreement and even exceeding them. It can be observed that cities are being given an ever-growing role in

Department 2013) https://www.vlaanderen.be/en/publications/detail/the-flemish-climate-policy-plan-2013-2020-1; Bruxelles Environnement, 'Plan regional air-climat-energie' (Bruxelles Environnement - Département Planification Air, Climat et Energie 2016) http://document.environnement.brussels/opac_css/elecfile/PLAN_AIR_CLIMAT_ENERGIE_FR_DEF.pdf; Leefmilieu Brussels, 'Waterbeheerplan van het Brussels hoofdstedelijk gewest 2016-2021' (Leefmilieu Brussel 2017) http://document.environnement.brussels/opac_css/elecfile/RAP_Eau_PGE2016-2021_NL.pdf; Agence Wallonne de l'air & du climat, 'Plan Air, Climat et Énergie 2016-2022' (Agence Wallonne de l'air & du climat 2016) http://www.awac.be/images/Pierre/PACE/Plan%20Air%20climat%20%C3%A9nergie%202016_2022.pdf; National Adaptation Plan (n 3).

[429] National Adaptation Plan (n 3).

[430] European Environment Agency, 'Urban adaptation to climate change in Europe 2016: Transforming cities in a changing climate' (European Environment Agency 2016) *https://www.eea.europa.eu/publications/urban-adaptation-2016*.

[431] See: European Climate Adaptation Platform, 'Cities and towns' <http://climate-adapt.eea.europa.eu/countries-regions/cities> accessed 15 March 2018.

the challenge of adapting their cities to climate change. High time then to consider how Belgian local governments were taking adaptive action in 2017 and which legislative hurdles they had to overcome to do so.[432]

Challenging The Status Quo

Most Belgian cities have joined the *Global Covenant of Mayors* and duly take note of the regional, federal and national adaptation plans which implement international and European adaptation strategies.[433] After all, cities are very vulnerable and will have to cope with various impacts of climate change as they usually consist of densely populated areas, and are often located in coastal areas or near a river. When adding the effects of climate change to already existing challenges of urban planning, firstly, there will likely be a direct increase of flooding events due to extreme weather and threats such as sea-level rise – not to mention the salinization of freshwater the latter can provoke and the detrimental effects this can have on biodiversity. Secondly, the urban heat island effect will be intensified. The urban heat island effect describes the phenomenon in which cities have higher temperatures than rural areas. Heat builds up in cities for numerous reasons but especially the significant presence of heat-absorbing materials such as concrete and the spewing of hot air from air-conditioners in order to cool down the inside of buildings.[434] Since climate change impacts can vary according to the precise location and make-up of a city, area-specific solutions will need to be generated for them. As a result, this task will have to be dealt with in large part by local spatial planners.

One of the projects which has emerged from a city's commitment to the *Global Covenant of Mayors* is Antwerp's approach to projects in the city which were already

[432] Members of the various governments and the EU level got together to highlight Belgium's steps in adaptation to climate change on 23rd November 2017. This country report has grown from that gathering and was further assisted by discussions with those involved with the spatial planning of the cities of Antwerp and Leuven. National Climate Commission, 'Conference: Adaptation to climate change: what is the situation in Belgium?' <https://www.cnc-nkc.be/en/ConfAdapt> accessed 15 March 2018.
[433] Currently 285 Belgian cities are members of the Covenant. Global Covenant of Mayors for Climate & Energy, 'Cities' <https://www.globalcovenantofmayors.org/cities/> accessed 18 March 2018.
[434] Andreas Gravert and Thorsten Wiechmann, 'Climate Change Adaptation Governance in the Ho Chi Minh City Region' in Antje Katzschner, Michael Waibel, Dirk Sshwede, Lutz Katzschner, Michael Schmidt and Harry Storch (eds), *Sustainable Ho Chi Minh City: Climate Policies for Emerging Mega Cities* (Springer, Switzerland 2016), 19-21.

planned to undergo a metamorphosis. The Zuiderdokken' project is one in which it is foreseen that a concrete parking lot is transformed into a park which increases the city's capacity to adapt to climate change.[435] On the ground, this meant a study was conducted to see how much the 'Zuiderdokken' area contributed to building up heat stress which makes the city less liveable during hot summers. Additionally, the area was considered as to how it could contribute to alleviating flood risk caused by excessive rain.[436] As a result the concrete square will be transformed into a sunken park lower than street level making it capable of acting as a buffer zone for draining excess water from streets if sewers are unable to cope. Additionally, not only draining of water is envisioned, but currently Antwerp is considering how the project can also include capture and reuse of rainwater. The latter represents a legal maze in which it needs to be considered how rainwater which plummets on to privately-owned roofs might be used for public purposes such as cleaning of streets or filtering the water into drinking water. Particularly for this project the approach of the city planners has to take into account the fact that climate change, and adaptation in particular, is not a separate agenda point or forms the basis for a focused local governmental department, nor is there always specific funding available for the matter. A lesson to learn from this case is that, even when little focused monetary or administrative means are at hand and when legal knots are unraveled such as working out novel types of easements to use privately harvested rain for public sanitation needs, proactively jumping onto an already moving train and using that window of opportunity, can lead to climate adaptation being introduced into projects much more quickly.

Strategic Environmental Assessment Meets Climate Change

Of course, when the train is not running yet and you need to start from scratch, to adapt a city to climate change, new spatial plans which authorize a change of the function of an area are often needed. Spatial plans form the source of planning rules which local administrations need to take into account when granting planning permits. Today, many areas in Belgium are still covered by '*Gewestplanbestemmingen'* which

[435] Information on the project is derived from Griet Lambrechts' presentation at the Conference on 'Adaptation to climate change: what is the situation in Belgium?, 23 November 2017, Brussels (n 8).
[436] The 'Zuiderdokken' project in its capacity to deal with flooding of high-density areas is a pilot project for the European Sponge2020 project which is supported by the European Regional Development Fund, 'EU Interreg 2 Seas Programme' <https://www.interreg2seas.eu/en/SPONGE2020> accessed 15 March 2018.

are plans made on a regional level usually dating back to the seventies. Even when more recent '*Ruimtelijke Uitvoeringsplannen*' or '*RUPs'* are at hand, which are plans made on a regional or local level, they are often ill-fitted for climate change adaptation as previous priorities often focused on simply increasing infrastructural capacity without concerns for heat stress or flooding due to extreme weather.[437] Altering this current reality is a crucial step in adapting to climate change.[438] A critical instrument in assisting the cities to take into account climate change related impacts of spatial planning when making new spatial plans is a strategic environmental assessment (SEA) which is legally required in one form or the other, by the *Strategic Environmental Assessment (SEA) Directive.*[439] The *SEA Directive,* which entered into force in 2001, tries to boost sustainable development by aiding EU Member States to integrate environmental assessment into their 'plans' and 'programmes' at the early stages of developing large areas. The *SEA Directive* should not be mistaken for the *Environmental Impact Assessment (EIA) Directive* which guides the development of singular public and private 'projects' – such as the 'Zuiderdokken' project. The original *EIA Directive* of 1985 was amended three times and ultimately replaced in 2011. The 2011 *EIA Directive* was amended in 2014 in order to streamline and simplify assessment procedures and make them more transparent.[440] Seeing how the *SEA Directive* is the tool regulating town and country planning as well as land use, it can prove to be a helpful tool in making sure plans and programmes are adaptive to climate change. However, though

[437] Plans such as *RUPs* are regulated by the Vlaamse Codex Ruimtelijk Ontwikkeling 2009 (VCRO), Chapter II as amended by Vlaams Decreet tot wijziging van de regelgeving voor ruimtelijke uitvoeringsplannen teneinde de planmilieueffectrapportage en andere effectbeoordelingen in het planningsproces voor ruimtelijke uitvoeringsplannen te integreren door wijziging van diverse decreten 2016.

[438] Anna C Hurlimann and Alan P March, 'The role of spatial planning in adapting to climate change' (2012) 3 WIREs clim change477, 477. Of course this article in no way wishes to underestimate many other steps the cities have taken or will need to take such as for example a thorough review of a city's building code to obligate the use of green roofs to avoid when a roof has no slope or only a slight slope, a measure already implemented in the building code of many large cities such as for example Ghent and Antwerp. As of today, Antwerp is once more delving into its building code to review where even more progress can be made. Stedenbouwkundige Verordening stad Antwerpen: bouwcode 2014 art 38.

[439] Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197. . This directive exists alongside the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context(adopted on 21 May 2003, entered into force 11 July 2010) 2685 UNTS 140.

[440] Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26; Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124.

the *SEA Directive* mentions taking into account planning,[441] the directive itself is not literally dedicated to taking measures to respond and adapt to climate *change* factors. Today nevertheless, measures which ensure adaptation to climate change have started clawing their way into SEA procedures through non-binding guidelines offered by the EU.[442] Seeing how the EU Commission is currently reviewing the *SEA Directive*, we may see more binding climate change-oriented ground rules in a new or amended Directive which is foreseen for the end of 2019.[443] Luckily, driven by their voluntary commitment to the Global Covenant of Mayors more and more local governments have already started to review existing spatial plans and performing climate change aware SEAs in order to include such measures and adapt their cities to climate change, though as discussed below, the journey involves going down a rocky road.

Victories and Hardship in the Realm of Spatial Planning

In Antwerp, the new *RUP* 'Hoekakker' was made by the city administration. This local *RUP* concerns land in a flood zone which had become a zone for residential housing since 2015 on account of the regional *RUP* of 2009 which covers the area known as Hoekakker amongst other areas. Though the regional *RUP* had already highlighted the high water sensitivity of the area, it had not worked out how this needed to be managed upon development of the area.[444] This is precisely what the local *RUP* has now managed to do by changing the residential zone partly to a greener area with a floodable park in order to have the capacity to capture an additional 40.000 m³ rain-water as needed for adapting the area to climate change weather extremities.[445] As a result of a change in functionality of part of the zone, the loss of monetary value for land owners whose plots of residential building land have turned into a green area

[441] Directive 2001/42/EC, (n 16) Annex I..
[442] More guidance on the topic is offered by the European Commission, 'Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment' (European Union 2013) <http://ec.europa.eu/environment/eia/pdf/SEA%20Guidance.pdf>.
[443] The Roadmap for the reviewing process explicitly mentions the need to look into the coherence between climate change policies and the SEA Directive. Directorate-General for Environment, 'REFIT evaluation of the SEA Directive on Strategic Environmental Assessment' <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3481432_en> accessed 16 March 2018.
[444]Flemish Government, 'Gewestelijk Ruimtelijk Uitvoeringsplan - Afbakening grootstedelijk gebied Antwerpen: Bijlage III a toelichtingsnota' (Flemish Government) <http://doc.ruimtevlaanderen.be/GRUP/00150/00195_00001/data/212_00195_00001_d_3tnt.pdf> 142-149.
[445] BUUR, 'RUP Hoekakker: Plan-MERscreening' (Bedrijfseenheid Stadsontwikkeling Antwerpen 2017) <https://mer.lne.be/merdatabank/uploads/nthnvg5237.pdf> 39.

unfit for housing will have to be (partially) compensated. [446] Though this was in any event a much needed and appropriate detailing of the area, it must be noted that the regional *RUP* was in fact a fairly recent one, dating from 2009. Seeing how the assessment of adaptation to climate change needs has only recently gained traction[447] — which nevertheless in this case came on top of already known flooding risks — this means that land owners may find themselves in a period of legal insecurity wherein still fairly recent zoning plans can be altered to the detriment of the value of plots of land as land function changes from residential to park. It would be wise for regional planning to rise up to the challenge and take climate change adaptation into account for any new plans in order to avoid necessary local changes later.

For Leuven, 2017 meant a new vision for the future. A new '*Ruimtelijk Structuurplan*' or '*RSP'* was finalized which is a plan setting out the vision for the city which is to be materialized in every future *RUP*.[448] In its *RSP*, Leuven explicitly mentions the need for climate adaptation and the need to take into account heat stress and potential flooding according to high risk climate scenarios.[449] A *RUP* that was recently finished in Leuven was the *RUP* 'Hertogensite' which takes into account flood risk according to various climate change scenarios as well as tries to tackle heat island effects.

These elements were assessed in a SEA review of the *RUP*.[450] An obstacle which was to be overcome for the *RUP* is the fact that the plan, including its SEA, as with many *RUPs* is often appealed by locals who live or have a business in the area for

[446] This is regulated in: VCRO (n 13) Chapter VI.
[447] See European Commission (n 18). .
[448] Such as the RUP which is currently being developed: These concerns are indeed already reflected in the current process of making the new RUP 'GGR-W2 'Aarschotsesteenweg 2, 3 en 4''. As a side note, concerning climate mitigation, it is laudable the RUP already foresees the possibility of having heat districts working on excess energy of surrounding industries, as well as highlights the role heat pumps and solar panels can play. Stad Leuven, 'Ontwerp Gemeentelijk gebiedsgericht ruimtelijk uitvoeringsplan GGR-W2 'Aarschotsesteenweg 2, 3 en 4': Deel 1: Toelichtingsnota' (Seen and taken note of by the City Council in a session of 26 June 2017) < https://www.leuven.be/file/10677/download?token=7l2qKpdw> accessed 15 March 2018, 49.
[449] City of Leuven, 'Deel 3 - Hoofdstuk 1: blauwgroene structuur' (City of Leuven 2017) < https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjYgqDA0e7ZAhUM-aQKHf-ICQAQFggoMAA&url=https%3A%2F%2Fwww.leuven.be%2Ffile%2F8985%2Fdownload%3Ftoken%3DnxmV_twj&usg=AOvVaw0rjbpq1IO7Sn7AM-KANp8kZ > 19-20.
[450] City of Leuven, 'Hertogensite te Leuven Plan-MER screening masterplan' (City of Leuven 2015) <https://mer.lne.be/merdatabank/uploads/nthnvg4208.pdf> accessed 15 March 2015.

which the plan is being created. One of the favorite arguments wielded during the making of a *RUP* consists of doubts about the correct execution of the EIA. This flows from the fact that Belgium has had a troubled history in the implementation of the *SEA Directive* and still legal insecurities exist despite numerous alterations to the implementing law. In short, an SEA obligation can be fulfilled either by making a full-blown SEA ('plan-MER') or making an SEA *light* ('plan-MER-screening'). The latter assesses the need for a full-blown SEA – which may prompt lengthy research - for those projects for which doubt arises whether they will necessarily provoke considerable implications for the environment. Doubts and litigation have continuously arisen which path of the bifurcated SEA-procedure a *RUP* needs to go down, especially as many try to avoid having to make a lengthy full-blown SEA. As a result, debates emerge on this issue in every stage of the planning process, lengthening the process tremendously.[451]

Another tool in the spatial planners toolbox is the 'masterplan', which they can order to be created if so decided by the administration at their own discretion. A masterplan is a non-obligatory, non-binding textual and graphic vision of how a site would preferably look like in the future. However, because masterplans are not legally binding instruments they rely on trust between parties in order to become real – unless they are used to form the basis of a binding *RUP*. As can be imagined, the willingness of project developers to commit funds to greening and climate proofing their planned constructions when asked to voluntarily do so by the permitting government is a difficult matter. For example, fifteen years ago, a masterplan was made for a science park in Leuven. Though willingness and cooperation were great on all sides to ensure the business area would be a balance between business buildings and green surroundings, once constructions began and budgets were calculated, priorities swayed more in favor of infrastructure and focused less than envisioned on green surroundings. To alleviate such an unfortunate turn of events, the City immediately links today's permits for future buildings on the same site to the obligation to include green areas as foreseen for the site. Indeed, permitting governments can attach tangible *quid pro quo* conditions to a permit derived from the provisions for the area as set out in the RUP or ordonnances

[451] The length of this overview does not allow for extensive explanation of this contentious debate. For a very lucid overview of the EIA procedure for RUPs and the problems which they bring with them, as well as an extensive overview of relevant case law, see: Hendrik Schoukens, 'MER-Screening bij RUPs: puberale groeipijnen of lastige wetten?' [2015] TROS 215, 215-236.

of higher authorities. For example, in order for the developer to be granted the public development project of a park for the 'Vaartkom' area in Leuven, the developer had to comply to the condition to include a buffer water basin in his design in order for the local government to be in compliance with an ordonnance on freshwater applicable to the entire area - wherein the park is located[452].[453] A different remedy which is available for permitting governments are the so-called 'stedenbouwkundige lasten' which represents financial compensation owed to the permitting government when a large site is developed and public utilities will be needed.[454]

Gaining Ground

There are several obstacles which can be recognized when spatial planning is used to adapt cities to climate change. Of course there are also hurdles which have for the most part already been overcome in Belgium, such as the idea that planning should seek to meet consistent growth of building infrastructure and a lack of knowledge which can turn policy into practice. Nevertheless, it seems that misjudged expediency of decisions, unclear red tape and miscommunications between different hierarchical levels of planning institutions continue to represent spatial planning growing pains towards a more climate adaptive future for Belgium.[455] It would seem a top priority lies in providing legal certainty on the rules which need to be followed when trying to roll out cutting edge adaptive measures in order to cut back on the time needed to adapt spatial plans to allow for a climate change compatible approach. Despite certain sore points, it must be concluded that willingness to adapt to climate change is living up to

[452] Besluit van de Vlaamse Regering houdende vaststelling van een gewestelijke stedenbouwkundige verordening inzake hemelwaterputten, infiltratievoorzieningen, buffervoorzieningen en gescheiden lozing van afvalwater en hemelwater 2013, as amended in 2016, by the Besluit van de Vlaamse Regering houdende wijziging van diverse bepalingen van het besluit van de Vlaamse Regering van 16 juli 2010 tot bepaling van handelingen waarvoor geen stedenbouwkundige vergunning nodig is, van diverse bepalingen van het besluit van de Vlaamse Regering van 16 juli 2010 betreffende de meldingsplichtige handelingen ter uitvoering van de Vlaamse Codex Ruimtelijke Ordening en van artikel 10 van het besluit van de Vlaamse Regering van 5 juli 2013 houdende vaststelling van een gewestelijke stedenbouwkundige verordening inzake hemelwaterputten, infiltratievoorzieningen, buffervoorzieningen en gescheiden lozing van afvalwater en hemelwater 2016.

[453] The factual context was derived from an interview with a spatial planner working for the City of Leuven, transcript with author.

[454] VCRO (n 13) Art 4.2.20.

[455] The concerns mentioned here were also identified as potential stumbling blocks in a study on spatial planning and climate change. Anna C. Hurlimann and Alan P. March (n 11) 483.

international and regional expectations and is already determining Flemish cities' future layout, functions and livability in the Anthropocene era.

COUNTRY REPORT: CZECH REPUBLIC

Restriction of Public Participation

Milan Damohorsky[456]* & Petra Humlickova**

Introduction

In 2017 many amendments to laws in the environmental field were adopted in the Czech Republic.The most important of these amendments limits significantly the opportunities for public participation. In this article, therefore, we highlight the restrictions on public participation and note several minor amendments to various laws, including the Act on the Protection of Animals against Cruelty (Act No. 255/2017 Coll.) and the Packaging Act (Act No. 149/2017 Coll.)

Amendment to the Building Act (2006) – Restriction of Public Participation

.1. General Framework for Public Participation in the Czech Republic

In the general context of the legal regime in the Czech Republic, we can distinguish two basic forms of participation: consultative participation and full participation. Consultative participation is significantly limited as opposed to full participation, in the extent of the rights granted to the participants and consequently also in the possibility of influencing proceedings in any significant way.

Consultative participation is mainly regulated within environmental impact assessment (Act No. 100/2001 Coll.) or in the preparation of land-use plans (Act No. 183/2006 Coll.), where anyone is entitled to make comments. As a result, anyone can make a comment e.g. documentation as part of the environmental impact assessment process or the draft of land-use plan. In this type of participation, however, the public is not authorised to seek an administrative or judicial review.

The persons directly concerned by the proceedings are entitled to participate in the procedure (**full participation**). Typically, these are either natural persons (for example,

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neighbors of a permitted project) or legal entities in the form of environmental NGOs, who are entitled to participate in e.g. land-use procedure for new highway. The rights within the full participation procedure include:

- the right to participate in the proceedings,
- the right to information on the proceedings in a timely manner and in an appropriate form,
- the right to a sufficient period to prepare for the individual stages of the proceedings,
- the right to participate in the process at the earliest stage when all options and alternatives are open and where public participation can be effective,
- the right to submit comments,
- the right to submitted comments being dealt in any adopted decision,
- the right to information on the final decision with justification,
- the right to request an administrative and judicial review of the given decision.

1.2 Public Participation in Proceedings Subject to Full EIA[457]

Environmental Impact Assessment (EIA) is an independent proceeding in the Czech Republic which is not part of any other process and is subject to separate rules on participation. Similarly to the general arrangements described above, anyone has the right to consultative participation, i.e. to make comments within the EIA process. However, differently from the general arrangements, part of the public concerned pursuant to EIA Act (Art. 3 g EIA Act: non-profit legal person protection the environment or public health which exists at least 3 years before the permitting of the project or is supported by at least the signatures of 200 people) has the right not only to participate actively in the environmental impact assessment process but also fully participate in the subsequent permission proceedings (especially land-use and building proceedings) and effectively influence them (Art. 9c para. 3 EIA Act).

However, a "full" EIA procedure[458] is mandatory for only a very limited number of projects (about 100 projects per year throughout the Czech Republic) presenting a

[457] i.e. not ending by screening.
[458] i.e. not ending by screening.

possible significant impact on the environment, given the number of projects that will not be subject to a binding EIA opinion. An overwhelming majority of projects with a potentially negative impact on the environment do not require an EIA and therefore there is no requirement for the public participation procedures described above.

.2. Public Participation in Proceedings on Projects Not Subject to EIA

For public participation in proceedings on projects not subject to EIA, there is a significant reduction in the possibility of the NGOs to participate in the proceedings and so to effectively influence the results of environmental decision-making. The fragmentation of the legal regulations governing the different types of proceedings plays a significant role in this. In a number of cases, NGOs can fully participate (e.g. IPPC[459]) or the whole public is excluded from permitting process (the Atomic Act or the Public Health Protection Act - in connection with the authorization of so-called noise exemptions allowing the exceeding of statutory noise limits[460]).

Until the end of 2017, the most important Act governing NGO participation was **the Act on Nature and Landscape Protection**.[461] Environmental NGOs were entitled to participate in all proceedings where nature and landscape conservation interests could be affected. Since 2018 however, NGOs are no longer allowed to participate in these proceedings (with a small exception concerning mainly activities which are not connected at all to any construction). As a result, the amendment effectively cancels out the possibility for NGOs to become involved in proceedings in which nature conservation authorities do not issue the final decision and which are not subject to EIA (even smaller incinerators or industrial plants). NGOs are not, for example, allowed to take part in the process of deciding to cut trees or to intervene in a specially protected area if these projects are related to construction. This change leads to the exclusion of the 'organized public' from participation in environmental decision-making with potentially significant environmental impacts, reducing the possibility of public control and is contrary to the principle of democratic public administration.

[459] See art. 7 Act No. 76/2002 Coll., on Integrated Prevention.
[460] See Art. 31 Act No. 258/2000 Coll, on Public Health Protection.
[461] The amendment of the Act on Nature and Landscape Protection was made by the amendment to Building Act No. 225/2017 Coll.

Amendments to the Environmental Impact Assessment Act

Public participation in EIA has undergone fundamental changes also in connection with the adoption of the amendment to EIA Act itself (Act. No. 326/2017 Coll.). The obligation to hold an oral public hearing was changed to only the possibility to have an oral public hearing. The public will not have the right to be personally informed about the project and immediately express itself. The right of a public authority to require the investor to assess alternatives to the project was also removed. These changes deprive the public of the opportunity to comment on the different variants and then influence the choice of the most appropriate. Furthermore, the deadlines for submitted public comments were also shortened.

The amendment to the Building Act (Act No. 225/2017) changes not only the availability of public participation under the Nature and Landscape Protection Act, but also the following. The deadline for the possibility of judicial review of land-use plan was shortened from the current 3 years to one year. The main objective of the amendment was to simplify permitting processes of land-use planning and building and thus contribute to the acceleration of construction in the Czech Republic. The Act allows merging of the individual permitting processes into one proceeding. Newly, there will be 3 new integrated procedures:

- land-use proceeding connected with EIA;
- common land-use and building proceedings;
- common land-use and building proceedings connected to EIA.

The existence of these integrated practices, however, does not change the obligations to obtain binding EIA opinions. The process of environmental impact assessment must be carried out in accordance with the rules laid down by law.

Adaptation to Climate Change

The Paris Agreement[462] also obliges the Czech Republic, as a party, to prepare a **National Action Plan for Adaptation to Climate Change**, which further elaborates on the Strategy for Adaptation to Climate Change in the Czech Republic. This strategic document is intended to help the Czech Republic tackle the effects of climate change including, for example, drought, floods and protect forests and water resources by hundreds of specific tasks and measures. The action plan is structured on the effects of climate change (long-term drought, floods and floods, temperature rises, extreme meteorological phenomena - heavy rainfall, heat waves, extreme winds - and natural fires), identifies key sectors affected by climate change, as well as impacts, vulnerabilities and risks. The Action Plan elaborates the actions outlined in the Adaptation Strategy into specific tasks, assigning responsibilities, deadlines for implementation, relevance of measures to individual climate change outcomes and sources of funding. The Action Plan contains 33 specific objectives and 1 cross-cutting objective on education, training and education. The individual objectives are fulfilled by 52 priority measures, which are then elaborated into specific tasks. An integrated approach to adaptations can be implemented, for example, through ecosystems, landscape management, shared responsibility for the functioning and sustainable management of aquatic ecosystems, understanding and ensuring sustainable management of the landscape water regime, application of sound management on agricultural and forest land.

Taking into account the ongoing processes of climate change and the need for adaptation to it as part of environmental safety, the government also approved the update of the **State Environmental Policy[463]** as a basic strategic document. The update does not change the basic priorities and direction of Czech environmental policy but regulates the structure of its priorities. The 4th priority is a newly defined "Safe Environment", which includes preventing and reducing the consequences of natural hazards such as floods, long-term drought, extreme weather fluctuations, slope instability, erosion, etc.

[462] Paris Agreement under the United Nations Framework Convention on Climate Change.
[463] "The updating of state environmental policy", approved by the Government of the Czech Republic on 26 November 2016.

The **strategy of protection against drought**[464] for the first time systematically and in detail analyzes the current state of drinking water supplies in the Czech Republic. Although it states that the existing drinking water sources in the Czech Republic are sufficient, it also warns that nearly one fifth of the Czech Republic's territory is at risk of drought. The concept of protection against drought is based on 5 basic pillars. Measures lead to the strengthening or creation of new water resources, the creation of a unified drought communication platform or the increase in the volume of water in the soil and throughout the country. This will contribute both to reducing the soil moisture deficit and to reducing the occurrence of insufficient flow streams. Another set of measures leads to responsible water management, i.e. to its reuse and reduction of water pollution, which returns to the natural environment. Due to the lack of legal regulation of drought, the concept anticipates a draft amendment to the so-called dry head of the Water Act. The concept also includes plans for drought management. In cooperation with research institutes and state administration institutions, a drought information platform will be set up, including the development and linking of drought monitoring, the emergence of a drought warning system, a limited water resource management program, or a prognosis of water resource development.

Recent Developments – Other Changes

In the past year they were approved two small and simple changes in laws with crucial effect to protecting the environment.

The amendment to the Act on the Protection of Animals against Cruelty (Act No. 255/2017 Coll.) was approved in 2017. This amendment **prohibits the breeding of so-called fur animals in the Czech Republic** since January 2019. At present, the ban concerns 9 farms, which together account for about 20,000 miners and foxes. These animals are kept in unsuitable conditions and are cruelly killed.

[464] "The concept of protection against effects of drought for the territory of the Czech Republic", approved by the Government of the Czech Republic on 24 July 2017 by Resolution No. 528.

The Amendment to the Packaging Act (Act No. 149/2017 Coll.) seeks to reduce the consumption of plastic shopping bags, and as of 2018 these **bags are no longer available for free in stores**. Charges do not apply to thin sachets that do not reach their 15 micron thickness and fulfill the hygienic function, so they are commonly used, for example, for vegetables or rolls. The price for a plastic bag can be determined by the vendor themselves, but the consumer must at least pay the price to cover the cost of the bag. The amendment also narrows the scope of the provision in which persons placing beverages into circulation in non-returnable packages are required to offer the same beverages also in returnable packages if such variants exist on the market. This provision will now only apply to the three most common types of beer, as consumers still have a strong demand for returnable glass bottles.

Conclusions

Based on the above description of developments in Czech environmental regulation in the past year we can say that there are more negative than positive features and points of legal development, especially in the typical Czech law without the direct influence of European Union law (Building Act, EIA Act etc.).

The cancellation or limitation of the rights to public participation in environmental and nature and landscape protection procedures and decision making is a very undemocratic step in the Czech post Velvet Revolution development. After 25 years of quite progressive development we are again facing steps and efforts to take of environmental NGOs totally out of the picture.

As the results of the October 2017 elections are not very in favour of environmental protection and democracy, as a prime minister is *a billionaire industrialist turned politician in multiple conflicts of interest*[465] and most of the parties in the Parliament are

[465] See *A scandal in Bohemia: The tangled affairs of the probable next Czech prime minister*, The Economist, Print edition | Europe, Sep 21st 2017.

"anti-systematic"[466]. As the president for the period 2018-2023 remains Milos Zeman, who is generally considered to be very anti-environmentalist and anti-activist.[467]

The role of the other remaining institutions, such as Senate (the upper chamber of the Czech Parliament), the courts (especially of the Supreme Administrative Court and of the Constitutional Court of the Czech Republic), as well as the mass media and the academic sphere (universities and the Czech Academy of Science), will need to increase to control the environmental protection.

[466] See *Czechs and balances: In the Czech Republic, almost everyone ran against the system,* The Economist, Print edition | Europe, Oct 26th 2017.
[467] As one of the last examples see *Zeman: Poland has right to felling in Bialowieza Forest,,* http://www.praguemonitor.com/2018/05/11/zeman-poland-has-right-felling-bialowieza-forest , Prague Daily Monitor, 11 May 2018

AIR POLLUTION, POLLUTER-PAYS PRINCIPLE AND ENVIRONMENTAL LIABILITY DIRECTIVE

Túrkevei Tejtermelő Kft.
Samvel Varvaštian

Interpretation of the Polluter-Pays Principle

On 13 July 2017 the European Court of Justice (ECJ) delivered a preliminary ruling in the case *Túrkevei Tejtermelő Kft.*[468] The case concerned the interpretation of the polluter-pays principle under Directive 2004/35/EC (Environmental Liability Directive)[469] and Articles 191 and 193 of the Treaty on the Functioning of the European Union (TFEU).[470] The circumstances of the case are as follows:

On 2 July 2014, the Hungarian Lower Environmental Protection Agency was informed that municipal waste was being incinerated at the Túrkevei Tejtermelő Kft. (TTK) facility in the town of Túrkeve, Hungary. Upon the inspection of the site, the Agency staff found three storage units containing 30 to 40 m^3 of incinerated municipal waste, including tin cans and other metallic waste, while more metallic waste resulting from the incineration was found in a 5 x 5 metre area outside the storage units. The inspectors also found three lorries ready to transport the incinerated metallic waste.

The Agency established that TTK, according to a statement given on 12 July 2014, had leased the land since 15 March 2014 to a natural person who had died on 1 April 2014. Therefore, the Agency decided to impose on TTK, in its capacity as the owner of the land, a fine of approximately EUR 1 630 for failing to comply with the provisions of Government Decree 306/2010 on air quality protection.[471]

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[468] Judgment of 13 July 2017, *Túrkevei Tejtermelő Kft.*, C-129/16, EU:C:2017:547.
[469] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L143/56 30.4.2004).
[470] Consolidated version of the Treaty on the Functioning of the European Union (OJ C202/47 7.6.2016).
[471] *Túrkevei Tejtermelő Kft.*, paras 21-22. The Decree, as a general rule, prohibits to incinerate waste either outdoors or in facilities that do not comply with the law on waste incineration and grants the

TTK disputed that fine before the Agency but its complaint was rejected. The authorities explained that the incineration of waste in an open space releases substances which are harmful for human health and the environment and which, therefore, constitute an environmental hazard.[472] Liability for this environmental hazard rests with the owner of the facility. This is so because the facility where the incineration took place belongs to TTK and in accordance with the legislation on environmental protection persons who own or are in possession of the land at any time are to be held jointly and severally liable, except where the owners can prove unequivocally that they are not responsible for the environmental hazard.[473] Taking account of the fact that the lessee of the land died, the Agency considered that there had been a reversal of the burden of proof to the effect that the burden was on TTK to prove that it was not liable.[474]

TTK then brought proceedings challenging the decision before the Szolnok Administrative and Employment Law Court. The latter noted that according to the ECJ case-law, in order for the environmental liability mechanism under the Environmental Liability Directive to be effective, the competent authority must establish a causal link between the activity of an identifiable operator and concrete and quantifiable damage, irrespective of the type of pollution caused.[475] Only in these circumstances can the remedial measures be required of that operator.[476] The national court held that there was no established causal link between TTK and the environmental damage and, accordingly, no legal basis for imposing an administrative fine on the owner of the land,[477] thus it decided to stay the proceedings and refer the matter to the ECJ.

Agency a right to impose fines on any entities that have breached the provisions relating to air quality and, at the same time, order cessation of the illegal activity or rectification of the failure to act.

[472] Opinion of Advocate General Kokott delivered on 16 February 2017, ECLI:EU:C:2017:136, para. 21.

[473] *Túrkevei Tejtermelő Kft.*, para. 18. Under Article 102(1) of the law on environmental protection, "liability for environmental damage or an environmental hazard is - except where evidence to the contrary is provided - to be borne jointly and severally by those who, once the environmental damage or hazard has materialised, own or are in possession (the user) of the land on which the environmental damage or hazard has occurred." The owner is relieved of joint and several liability if he identifies the actual user of the land and unequivocally proves that he cannot be held responsible (Article 102(2)).

[474] Opinion of Advocate General, para. 21.

[475] *Túrkevei Tejtermelő Kft.*, para. 33 (citing judgment of 4 March 2015, *Fipa Group and Others*, C-534/13, EU:C:2015:140).

[476] Ibid.

[477] Ibid.

Principally, the ECJ had to answer two questions: 1) whether the provisions of the Environmental Liability Directive and Articles 191(2)[478] and 193[479] TFEU preclude national legislation, which identifies, in addition to operators using the land on which unlawful pollution has been produced, another category of persons jointly liable for such environmental damage, namely the owners of the land, without it being necessary to establish a causal link between the conduct of the owners and the pollution found to have occurred;[480] 2) in the case of a positive answer to the first question, whether a fine aimed at protecting air quality may be imposed on the basis of national legislation, which is more stringent within the meaning of Article 16 of Environmental Liability Directive[481] and Article 193 TFEU, or can that more stringent legislation not, at any rate, result in the imposition of a fine which is solely punitive in nature on the owner of the property, who is not responsible for the pollution caused.[482]

The Judgment and Commentary

At the outset, the ECJ observed that Article 191(2) TFEU defines the general environmental objectives of the EU; consequently, it is directed at action at the EU level and cannot be relied on by individuals in order to exclude the application of national legislation.[483] Therefore, invoking the polluter-pays principle under the above-mentioned Article is possible only in those situations, which are covered by the relevant EU legislation.[484]

With regard to the latter, the ECJ addressed the alleged relevance of the Environmental Liability Directive. The scope of the Directive is to "establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy

[478] Article 191(2) TFEU sets out the principles of the EU environmental policy, namely the precautionary principle, the principle of preventive action, the principle that environmental damage should as a priority be rectified at source and the polluter-pays principle. The current case concerned only the interpretation of the polluter-pays principle.
[479] Article 193 TFEU allows Member State to maintain or introduce more stringent protective measures than those adopted at the EU level, provided that such measures are compatible with primary law.
[480] *Túrkevei Tejtermelő Kft.*, para. 35.
[481] Article 16(1) of the Environmental Liability Directive establishes that the Directive "shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage".
[482] *Túrkevei Tejtermelő Kft.*, para. 34.
[483] Ibid., paras 36 and 37.
[484] Ibid., para. 38.

environmental damage".[485] The Directive, however, does not specifically list air pollution as environmental damage within the meaning of Article 2(1).[486] Nevertheless, recital 4 of the Directive stipulates that environmental damage also includes damage caused to natural resources outlined in Article 2(1) by airborne elements.

The ECJ held that it was for the referring court to determine, whether, in the present case, the air pollution from waste incineration was capable of causing such damage or the imminent threat of such damage so as to give rise to the need to take preventive or remedial measures within the meaning of Environmental Liability Directive.[487] The ECJ therefore, has reiterated the importance of recital 4, leaving open the possibility for air pollution to be considered environmental damage under the Directive, in case it damages or threatens to damage the natural resources covered by Article 2(1).[488]

At the same time, it may be observed that TTK was held liable not as polluter, but rather as owner of the land on which the pollution took place.[489] Meanwhile, as rightly noted by the national court, the environmental liability mechanism under the Environmental Liability Directive requires the competent authority to establish a causal link between the activity of one or more identifiable operators and the environmental damage or the imminent threat of such damage.[490] Notably, the ECJ emphasized in its earlier case-law that a causal link should be established both in case of strict

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[485] Article 1.
[486] Article 2(1) defines "environmental damage" as damage to protected species and natural habitats or damage affecting water or land.
[487] *Túrkevei Tejtermelő Kft.*, para. 44.
[488] Ibid., para. 46: "[I]f the referring court should find that the air pollution at issue in the main proceedings has also caused damage or given rise to an imminent threat of such damage to water, land or protected natural species or habitats, such air pollution would come within the scope of [Environmental Liability Directive]."
[489] Ibid., para. 54.
[490] Ibid. See Article 4(5): "This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators"; Article 11(2): "The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken […] shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary"; recital 13: "Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors."

environmental liability and the fault-based liability (when liability arises from fault or negligence on the part of operator), as provided in Articles 3(1)(a) and (b) of the Environmental Liability Directive.[491] Otherwise, the situation is dealt with solely by national legislation.[492]

In that context, the causation element is all the more relevant given the fact that in situations like this the polluter-pays principle and, accordingly, the Environmental Liability Directive are invoked when the operator did not contribute to the pollution, nor to the risk of such pollution. The ECJ stressed that according to Article 8(3)(a) and recital 20 of the Environmental Liability Directive, an operator should not be liable if he can prove that the environmental damage was caused by *force majeure*, including, for instance, damage caused by a third party, which occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority.[493] This protects the owners from being liable for any environmental damage to their property arising from the acts of third parties, including the potentially deliberate acts of sabotage, which goes beyond the scope of the Environmental Liability Directive.[494]

Nevertheless, it should be kept in mind that Article 16 of the Environmental Liability Directive does allow more stringent national provisions with regard to prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements and the identification of additional responsible parties.[495] In the present case, such national legislation, namely Article 102(1) of the law on environmental protection, provides that, unless proven otherwise, the "persons who own or are in possession of the land 'on which the environmental damage or hazard occurred' are to be held jointly and severally liable; the owner can discharge himself of his liability only if he can identify the actual user of the land and can prove beyond reasonable doubt that he did not cause the damage himself."[496]

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[491] Varvaštian, Samvel. "Environmental liability under scrutiny: The margins of applying the EU 'polluter pays' principle against the owners of the polluted land who did not contribute to the pollution" *Environmental Law Review* 17.4 (2015): 274. See also *Fipa Group and Others*, paras 55 and 56.
[492] Ibid.
[493] Ibid., at 275.
[494] Ibid.
[495] *Túrkevei Tejtermelő Kft.*, para. 56.
[496] Ibid., para. 57.

In other words, the above-mentioned national law seeks to prevent the lack of care and attention on the part of the owner, as well as to encourage the owner to adopt measures and develop practices likely to minimise the risk of damage to the environment.[497] Therefore, the owners of land are deemed to monitor the conduct of those persons using their property and to report them to the competent authority in the event of environmental damage or the threat of environmental damage, failing which the owners will themselves be held jointly and severally liable.[498]

The ECJ agreed that since such legislation strengthens the liability mechanism established by the Environmental Liability Directive by identifying a category of persons who can be held jointly liable in addition to operators, it does fall under Article 16.[499] The Court therefore concluded that, if applicable in the present circumstances (which is for the national court to determine), the Environmental Liability Directive and Articles 191 and 193 TFEU do not preclude national legislation identifying another category of persons who, "in addition to those using the land on which unlawful pollution was produced, share joint and several liability for the environmental damage, namely the owners of that land, without it being necessary to establish a causal link between the conduct of the owners and the damage established."[500]

Similarly, the ECJ held that the above-mentioned provisions do not preclude national legislation to impose fines upon such persons by the competent national administrative authority. This is because when a Member State identifies those owners of land as being jointly liable, "it may prescribe sanctions designed to increase the effectiveness of this more stringent protection mechanism" in accordance with the discussed provisions of the Environmental Liability Directive and TFEU.[501] Hence, an administrative fine imposed on the owner of land as a result of unlawful pollution which he has not prevented and in respect of which he is not able to identify the party responsible can come under the liability mechanism because it can be appropriate for the purposes of contributing to the attainment of the objective of more stringent environmental

[497] Ibid., para. 58.
[498] Ibid., para. 59.
[499] Ibid., para. 60.
[500] Ibid., para. 63.
[501] Ibid., para. 65.

protection.[502] This, however, is left for the national court to determine.[503] Likewise, it is the national court that should determine whether the methods for calculating the amount of the fine go beyond what is necessary to attain the above-mentioned objective.[504]

Concluding remarks

The ruling in the present case underscores that the Environmental Liability Directive may be invoked in situations where environmental damage occurs via air pollution, although its application is contingent on whether such damage affects protected species, natural habitats, water or land.[505] What is more, Article 16(1) of the Environmental Liability Directive may be used to support the imposition of fines for such environmental damage, even despite the fact that the Directive does not contain any provisions on penalties.[506] The ECJ's reasoning in the present case once again endorses the leeway enjoyed by the Member States in setting national environmental liability standards.[507]

[502] Ibid., para. 66.
[503] Ibid., para. 67.
[504] Ibid., Para. 68.
[505] Opinion of Advocate General, para. 74.
[506] Ibid., para. 2: "[the Environmental Liability] Directive is not applicable because it does not contain any provisions on penalties. Penalties for the illegal incineration of waste instead should rather be assigned to the Waste Directive."
[507] In its previous significant ruling on the Environmental Liability Directive in 2015, the ECJ held that the Directive does not preclude national legislation, "which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out" (*Fipa Group and Others*, para. 63).

COUNTRY REPORT: FRANCE

Adrien Bodart*

The year that is drawing to a close appears to be, in France, transitional, mostly harvesting the fruits that were sown during previous ones or preparing future strategic plans, with a special effort to tackle long term issues including energy strategy and climate change, biodiversity loss, sustainable land-use and natural resource planning, and public participation in environmental matter). For instance, the first elements of the second national climate change adaptation plan were published in July 2017[508] and a set of actions against (recurring) drought were announced in August.[509] A draft law, adopted on the 19th December, ending conventional and non-conventional hydrocarbons prospecting and exploitation,[510] has also to be mentioned for its symbolic value, (acknowledging that French domestic extractions of hydrocarbons are economically and practically insignificant).

Although this year has not seen major environmental law reforms, 2017 has nonetheless been an eventful year, in which the key objectives were further *rationalisation* and, in relation to wider participation, *mobilization* in favour of better protection of the environment. The encouragement of citizens and economic actors to involve themselves in environmental matters has, for instance, benefited from an implementing *decree* enabling environmental class action lawsuits.[511] This decree defines the procedure to be followed to take the class actions that were created by the statute law for

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[508] *Cf*. https://www.ecologique-solidaire.gouv.fr/sites/default/files/2017.07.06%20-%20Plan%20Climat.pdf and https: //www.ecologique-solidaire.gouv.fr/adaptation-france-au-changement-climatique (accessed December 20, 2017).
[509] *Cf*. https://www.ecologique-solidaire.gouv.fr/sites/default/files/2017.08.09_cp_communication_eau_cm.pdf (accessed December 20, 2017).
[510] *Cf*. http://www.assemblee-nationale.fr/15/projets/pl0155.asp (accessed December 20, 2017).
[511] Décret n° 2017-888 du 06/05/2017 relatif à l'action de groupe et à l'action en reconnaissance de droits prévues aux titres V et VI de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, Journal Officiel de la République Française n°0109 du 10/05/2017, texte n° 110 (art. 6).

modernization of justice (2016)[512] and doing so, modifies the Code of Civil Procedure and the Code of Administrative Justice. Among these new class actions,[513] is included an environmental class action, which is opened to groups (various persons that have suffered similar prejudice, from the same person, as a result of an unlawfulness of the same nature) who seek to stop a violation of the law or of a contract, and/or seek redress for damages. Only associations fulfilling certain conditions are entitled to bring this class action. The scope of this action is broad: it includes protection of nature, improvement of the living environment, protection of water, air, soil, landscapes, urbanism, fishing, fight against pollution and nuisances, nuclear safety, and 'greenwashing'.[514] Such a dynamic has also been nourished by strengthening public participation and information (by extending the range of projects, plans or programs subject to public participation obligations, and by modernizing the procedure – *via* its dematerialization for instance[515]) or simplifying some complex procedures (for instance through a decree replacing several environmental authorisations with a single one[516]), to make environmental law more readable and accessible.

However, sometimes, attempts to simplify or rationalise solve existing problems but generate new ones. For instance, local competence for "GEMAPI" (management of water and aquatic environments and flood prevention[517]), was granted in 2014 to the sole municipalities or some inter-municipalities (from January 2018 onwards). This aimed to clarify the division of roles between all local public authorities but has created other uncertainties. The cost of GEMAPI missions[518] and the lack of means and

[512] Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n°0269 du 19 novembre 2016, texte n° 1.
[513] Before the above-mentioned statute law of 2016, existed only a class action for consumers.
[514] Art. L.142-3-1 of the Environmental Code.
[515] Décret n° 2017-626 du 25/04/2017 relatif aux procédures destinées à assurer l'information et la participation du public à l'élaboration de certaines décisions susceptibles d'avoir une incidence sur l'environnement et modifiant diverses dispositions relatives à l'évaluation environnementale de certains projets, plans et programmes, Journal Officiel de la République Française n°0099 du 27/04/2017, texte n° 6.
[516] Décret n° 2017-81 du 26/01/2017 relatif à l'autorisation environnementale, Journal Officiel de la République Française n°0023 du 27/01/2017, texte n° 19.
[517] Loi n° 2014-58 du 27/01/2014 de modernisation de l'action publique territoriale et d'affirmation des métropoles Journal Officiel de la République Française n°0023 du 28/01/2014, p. 1562, texte n° 3 (art. 56), modifying the General Code of Territorial Collectivities, and referring to art. L.211-7, 1°, 2°, 5° and 8°, of the Environmental Code.
[518] Four obligatory missions that are assigned to (inter-)municipalities by the article L.211-7 of the Environmental Code:

experience in (inter-)municipalities raise adverse reactions and concerns about the management of the "large" water cycle[519] (whose relevant area is the basin, not the inter-municipality territory). In response, a statute was introduced which aims to soften this legal obligation.[520] The (inter-)municipalities' management monopoly is tempered, in order to ease the financial burden induced by these costly missions. The previous version of the article L.211-7 of the Environmental Code forbade any intervention of the upper territorial echelons (Departments and Regions) in pursuing GEMAPI missions after 2020; they can now contribute to their achievement even after this date, subject to concluding a convention with the concerned (inter-)municipality. Welcomed by local authorities, this reform nevertheless remains unsatisfactory. The new law allows (inter-)municipalities to transfer or delegate some or all of their missions to one or various mixed syndicates: in some cases, it may look like a step backwards to an unreadable allocation of roles between territorial authorities and a risk of over-fragmentation of actions and strategies within a same river basin.

The example of water management is indicative of the great difficulty in rationalising action at the same time as mobilizing all concerned actors (especially the ones enduring successive structural reforms). Yet, subject to a sustainable timetable, these goals seem possible, as could attest the promising voluntary dynamic of regional agencies for biodiversity, discussed in detail below.

Experimentation, Prefiguration or Launch of the First Regional Agencies for Biodiversity

2017: Year of Construction

- Management of a river basin or a fraction of it (1°);
- Maintenance and management of rivers, canals, lakes and other water bodies (2°)
- Flood and marine submersion defence (5°)
- Protection and restoration of aquatic sites and ecosystems, watersheds, and riparian woodlands (8°)

[519] The "large" water cycle (river basin) is distinguished from the "small" water cycle (drinking water and sanitation).

[520] Loi n° 2017-1838 du 30/12/2017 relative à l'exercice des compétences des collectivités territoriales dans le domaine de la gestion des milieux aquatiques et de la prévention des inondations, Journal Officiel de la République Française n°0305 du 31 décembre 2017, texte n° 3.

Materializing the possibility allowed by the 21rst article of the statute no 2016-1087 for biodiversity, nature and landscapes recovery,[521] 2017 saw regional agencies for biodiversity begin to take shape, with diverse degrees of progress, depending on the challenge(s) peculiar to each of the current eight French regions[522] involved in such an initiative.

Regional Councils are referred to in the Environmental Code as "leading partners" in the field of the biodiversity policy; as such, they are entrusted with the coordination of relevant actions led by the different local authorities. That is why the statute enables them, if they wish to do so,[523] to create "territorial delegations", in order to deal with common interests shared with the French Agency for Biodiversity[524] (acting alongside with the French Agency for Biodiversity and its territorial divisions,[525] at regional or interregional scale).

The added value of regional agencies for biodiversity with regard to the interventions of BFA territorial divisions is one of the main matters discussed in the negotiations between the potential partners. The former Secretary of State for Ecology has provided answers on the subject: the general course of action is certainly established at the **national** level, but without **local** appropriation of the (biodiversity) issues or mobilization of stakeholders on the ground, no effective solutions will emerge. For this purpose, regional agencies are meant to offer a more appropriate framework than the French Agency for Biodiversity territorial divisions, being closer to a large number of local

[521] Loi n° 2016-1087 du 08/08/2016 pour la reconquête de la biodiversité, de la nature et des paysages, Journal Officiel de la République Française n°0184 du 09/08/2016, texte n° 2.
[522] Out of the 13 new metropolitan French regions: Brittany, Normandy, Ile-de-France, Centre-Val de Loire, Bourgogne-Franche-Comté, Auvergne-Rhône-Alpes, Sud-Provence-Alpes-Côte-d'Azur, Occitanie, Nouvelle-Aquitaine. Latest review of December 2017.
[523] Coordination between local authorities and the French Agency for Biodiversity does not necessarily require to create regional agencies for biodiversity: the latter represent a tool proposed, not imposed, to cooperate.
[524] Operational since January 2017.
[525] Deconcentrated bodies of a national public establishment, unlike decentralized entities such as regional agencies.

actors, and giving them a new voice in this decentralized governance. An implementing decree[526] refers indeed, about their creation, to all "interested partners".

In order to build such a partnership, the statute grants an (unusually) great freedom to the potential founding members of regional agencies for biodiversity: their legal status, their governance, and their missions are left to the choice of the partners.[527] The statute simply excludes police missions (under the State prerogative)[528] from their field of competence, and suggests the adoption of the new legal status of public establishment of environmental cooperation,[529] along with the inclusion of departments (in charge of "sensible natural areas"[530] management) in the governance.

Both freedom to choose the defining elements of the future agency and the political complexity of trustful negotiations building or – if it already exists – formalizing the partnership, takes time. This explains why a possibility available from August 2016 only started, to get its first achievements more than a year later.

Exploration by Regional Councils of the Opportunity Given by the Statute

Regional Councils hold the monopoly to initiate a process of creation of regional agencies for biodiversity. Territorial divisions of the French Agency for Biodiversity have to be associated to this process – thus providing their support – but it is not for them to impulse such an approach. Some Regional Councils and/or some of their local

[526] Décret n° 2016-1842 du 26/12/2016 relatif à l'Agence française pour la biodiversité, Journal Officiel de la République Française n°0300 du 27/12/2016, texte n° 3 (notably creating art. R.131-32-1 of the Environmental Code).
[527] Among the numerous missions assigned to the national Agency, detailed in art. L.131-9 of the Environmental Code.
[528] Articles L.131-8 and L.131-9 of the Environmental Code forbid regional agencies to carry out missions of administrative and judicial police related to water and environment. Police is a regalian privilege, since it is linked, by its very nature, to national sovereignty.
[529] New "custom-made" legal status introduced by the Biodiversity statute – codified in articles L.1431-1 et seq. of the General Code of Territorial Collectivities. One of its advantages is the possibility to include in its governance Deconcentrated State administrations, which is not allowed in other French legal forms.
[530] Natural areas that are protected by the departments, in accordance with art. L.113-8 et seq. and R.R.113-15 et seq. of the Urban Planning Code. The departments purchase land (by exercising their pre-emptive right) of ecological or landscape interest, or conclude a contract with private owners in order to protect these sites, but also in order to make them accessible to the public (unless the natural habitat is too fragile).

partners are not immediately convinced of the added value of regional agencies. For the most cautious Councils, a preliminary approach of experimentation has been requested before potential engagement in an approach of prefiguration. The idea is to highlight, collectively, possible gains and losses for the partners, especially by developing some pilot actions, allowing them to test the interest of common regional-scale actions. That is currently the case of the Brittany Region, since June 2017.

Other Regional Councils wish to engage faster, and enter into an agreement with the relevant territorial division of the French Agency for Biodiversity, in order to organise the prefiguration of the future agency. This is the case of most of the interested regions. Prefiguration[531] is a more advanced methodological step than experimentation, since in addition to pilot actions, further reflections are launched to concretely drawing up the future entity. To this end, partners are discussing the eligibility of possible members, the elements of a shared diagnosis of the stakes in the regional territory, the exact delineation of the agencies' scope of intervention, the search for mutualisation, synergies, integration, the most appropriate legal status, the available and potential funding sources, the staff's composition and status, the becoming of some existing entities, etc.

One of the most interesting and important questions arising with such an approach is the role and place of civil society and economic representatives. It raises related questions, about innovative ways to preserve water and biodiversity, to fund it, or about production, use and diffusion of data, including the data generated by participatory science. More generally, this idea of regional agencies, in essence partnership-based, offers a new opportunity to gather and mobilize, locally a maximum number of concerned actors, to better take hold of this underrated stake that is biological diversity. It poses a significant challenge in France, considering the high number and fragmentation of relevant entities acting in favour of biodiversity, and the slowly fading habit to sectorize public policies – for instance, water and biodiversity.

[531] Preparation of the budgetary and legal conditions of the future structure's creation, in order to ensure, once established, its immediate and complete operationality.

At the moment, only the Regional Council of Ile-de-France has launched its regional agency for biodiversity, on the basis of a multi-party[532] convention signed on the 23rd November 2017. This first agency pursues the objectives of development of knowledge, regional policies support, training and awareness raising of biodiversity issues. In doing so, the agency seeks a better coordination of regional-scale projects and wishes to work together with the future network of regional agencies. Its governance brings together all the relevant actors of biodiversity protection: in addition to representatives of the Regional Council and of the French Agency for Biodiversity, its governing body also gathers representatives of departments, inter-municipalities, protected areas managers, associations, research organisms, companies, etc. Most of the other currently intended regional agencies are expected to be born in the course of 2018.

Prospects

Regional agencies for biodiversity may breathe new life into the local management of biodiversity-related issues. Such institutionalised partnerships would not only make local public action more efficient, thanks to leverage effect and rationalisation of material and human resources. They above all would make the biodiversity policy more visible and understandable, closer to the citizens, by bringing together relevant local stakeholders and performing/supporting collectively defined actions. Two essential legal principles will find material expression through these new agencies: the principle of integration (their potential missions, for instance, allow a significant space to water-related actions, and not only from the standpoint of aquatic and wetlands habitats and species) and the new principle of "ecological solidarity", enshrined in the statute no 2016-1087 for biodiversity[533] (which "calls to take into account, in every public decision-making with significant impact on the environment of the concerned territories, the interactions between ecosystems, living beings and natural or modified environments"). Let us see, in the coming months and years, how these regional agencies will

[532] Convention between the Regional Council, the French Agency for Biodiversity, the Water Agency and the Land Use and Urban Planning Institute of Ile-de-France.
[533] Art. 2 of the statute, modifying the art. L.110-1 of the Environmental Code.

contribute to reconnect biodiversity stakeholders (including between themselves), the society as a whole and everything that lives.

COUNTRY REPORT: ITALY

The 'Italian Plastic Bag War'

Carmine Petteruti*

The amendment of Legislative Decree No. 152/2006.

Decree No. 91 of 20th June 2017 (converted into Law No. 123 of 3rd August 2017) introduced, in art. 9, an important amendment to the Legislative Decree No. 152/2006 (*Italian Code of the Environment*) — the obligation to pay for lightweight plastic carrier bags. This amendment is an important provision in relation to the extensive use of plastic bags which has a great impact on the environment. It is estimated that in 2010 every European citizen used just under 200 plastic bags with an expected increase of about 10% in 2020. Plastic carrier bags represent a serious threat to the environment due to their cheap value, which favors their use as a one time, single use good. As confirmed by the Directive 2015/720/EU,[534] littering of plastic carrier bags results in environmental pollution and aggravates the widespread problem of litter in water bodies, threatening aquatic eco-systems worldwide. This is especially the case with plastic carrier bags with a wall thickness below 50 microns (*lightweight plastic carrier bags*), which represent the vast majority of the total number of plastic carrier bags consumed in the European Union; these are less frequently reused than thicker plastic carrier bags. Consequently, lightweight plastic carrier bags become waste more quickly and are more prone to littering due to their light weight.[535]

Notwithstanding this, the prohibition involved the allocation of costs of biodegradable plastic bags (especially used for foods) to consumers. This choice of the Italian Legislator raises doubts about the correct application of the polluter pays principle.

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[534] Directive 2015/720/EU of the European Parliament and of the Council of 29 April 2015, amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags.

[535] The 4th recital of Directive 2015/720/EU.

Background: Plastic bags as waste under Directive 2015/720/EU.

In 2014, the European Parliament adopted a Resolution for a European Strategy on plastic waste in which it provided for an amendment of Directive 94/62/EC[536] on packaging[537] to introduce provisions on plastic recovery, recycling and disposal.[538] Thus, the European Parliament adopted Directive 2015/720/EU in order to prevent or reduce the impact of packaging waste on the environment.

Directive 2015/720/EU falls under the general framework of the fight against plastic waste pollution. Specifically, it regulates a particular plastic waste sector: the plastic carrier bags which are considered as packaging by the Directive 94/62/EC.[539] In this regard, Directive 2015/720/EU introduces measures to minimise the use of plastic carrier bags which requests intervention measures inspired by the principle of prevention (like recovery and recycling policies).[540]

The aims of these measures can be summarised as follows:

- to reduce the production of packaging waste;
- to promote plastic waste recycling and reuse.

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[536] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, *Official Journal of the European Communities*, No. L 365/10, 31.12.94.

[537] The Resolution was adopted after publication of the Green Book of the European Commission on *A European Strategy on Plastic Waste in the Environment*, COM (2013) 123, March 2013, www.eur-lex.europa.eu.

[538] The Directive 94/62/EC, at the art. 6, provided just a minimum objectives for plastic recycling. The Framework Directive on wastes No. 2008/98/EC provides just minimum objectives for separate waste collection systems too.
See the European Commission *Final Report* on *Options to improve the biodegrability requirements in the Packaging Directive*, February 2012, www.ec.europa.eu.

[539] Directive 94/62/EC, art. 3: *«'packaging' shall mean all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer. 'Non-returnable' items used for the same purposes shall also be considered to constitute packaging».* See *Plato Plastik Robert Frank GmbH c. Caropack Handelsgellschaft mbH*, European Court of Justice, 29 April 2004, C-341/01. A. GRATANI*, L'istituzione di sistemi nazionali di recupero di imballaggi monouso o c.d. a perdere e la tutela ambientale*, in Rivista giuridica dell'ambiente, 2005, 2, 278.

[540] The European Parliament Resolution of 2013 points out the importance of plastic and the need to enhance the ability of reuse of plastic waste, banishing the landfilling. Moreover, the European Commission, according to the waste management hierarchy, affirmed that landfilling is the least preferable option and should be limited to the necessary minimum. Where waste needs to be landfilled, it must be sent to landfills which comply with the requirements of Directive 1999/31/EC on the landfill of waste. The objective of the Directive is to prevent or reduce as far as possible negative effects on the environment, in particular on surface water, groundwater, soil, air, and on human health from the landfilling of waste by introducing stringent technical requirements for waste and landfills. A. Di Feo, *La gestione e lo smaltimento dei rifiuti plastici in Europa*, Canterano, Aracne editrice, 2017, 41.

At the same time, the Directive introduced a new definition in addition to those provided by the Directive 94/62/EC:

- *plastic carrier bags* shall mean carrier bags, with or without handle, made of plastic, which are supplied to consumers at the point of sale of goods or products;
- *lightweight plastic carrier bags* shall mean plastic carrier bags with a wall thickness below 50 microns;
- *very lightweight plastic carrier bags* shall mean plastic carrier bags with a wall thickness below 15 microns which are required for hygiene purposes or provided as primary packaging for loose food when this helps to prevent food wastage;
- *oxo-degradable plastic carrier bags* shall mean plastic carrier bags made of plastic materials that include additives which catalyses the fragmentation of the plastic material into micro-fragments;

However, the Directive refers also to the polluter pays principle providing that to promote sustained reductions of the average consumption level of plastic carrier bags, Member States may involve the use of economic instruments such as pricing, taxes and levies which have proved particularly effective in reducing the consumption of plastic carrier bags, and marketing restrictions provided that these restrictions are proportionate and non-discriminatory, as explicitly declared in the Explanatory Memorandum to the Directive (point 11).

In this regard, the *Directive* provides that Member States must adopt:

- measures ensuring that the annual consumption level does not exceed 90 lightweight plastic carrier bags per person by 31 December 2019;
- measures ensuring that the annual consumption level does not exceed 40 lightweight plastic carrier bags per person by 31st December 2025, or equivalent targets set in weight;
- instruments ensuring that, by 31st December 2018, lightweight plastic carrier bags are not provided free of charge at the point of sale of goods or

products, unless equally effective instruments are implemented. Very light-weight plastic carrier bags may be excluded from those measures.

Finally, the Directive provides on the one hand the promotion of bioplastic bags and on the other hand, the introduction of actions by Member States to promote reductions of the consumption of plastic carrier bags. However, the prospective wider use of bio-plastics again poses the problem of using land for purposes other than food production.[541] Furthermore, there is the real danger of an increase in the use of bioplastic bags due to a possible perception on the part of the consumer of a lower environmental impact. In reality, to achieve a lower environmental impact bioplastic bags must be disposed of in industrial composting plants.

In this regard Directive 2015/720/EU has missed an opportunity to clarify the difference between biodegradability and compostability in regards to plastic waste. The *Directive* refers to technical standards (the European Standard EN 13432 on *Requirements for packaging recoverable through composting and biodegradation*) that consider a material compostable only if it can be recycled through a process of organic recovery comprised of composting and anaerobic digestion.[542] However, a clear definition of biodegradability referring to all organic materials capable of self-decomposing within a certain time does not exist. In reality, the Directive makes the same mistake as other laws which use the two concepts interchangeably and overlaps them as in Directive 94/62/EC on packaging. This defect has had repercussions on transposition of the Directive in Member States, including Italy.

Implementation in Italy: Law Decree No. 91 of 20th June 2017, art. 9a on plastic carrier bags.

Directive 2015/720/EU has been transposed in Italy with Law No. 123 of 3rd August 2017. The Italian legislature adopted with this law the solution for reducing the use of

[541] C. Petteruti, *The role of the agro-energy in the European 20 20 20 by 2020 package: problems and prospects*, in R. Giles Carnero (edited by), *Cambio climático, energía y derecho internacional: perspectivas de future*, Huelva, 2012, 325.
[542] The 16th recital of Directive 2015/720/EU.

plastic bags: to charge the cost of bags to the consumer. This choice aims to act as a deterrent to the use of biodegradable plastic carrier bags. In reality, it is not an efficient solution in terms of behavior change, because of their small price which leads consumers to not perceive their purchase. At the same time, although the Directive provides that Member States can introduce economic instruments such as pricing, taxes and levies, the choice of Italian legislator to charge the plastic bags cost to the consumer cannot be considered as a correct application of the polluter pays principle, in view of the seller's liability.[543] As is well known, the polluter pays principle refers to the internalisation of environmental protection costs by charging them to polluters.[544] The application of the polluter pays principle implies that pollution costs must be charged to the actor responsible for originating the pollution. It is clear that the use of plastic bags is part of a sales process: the seller uses plastic bags as packaging. Thus, the costs of plastic bags should be charged to the seller and not the consumer who is merely the final user.[545]

Presently, Directive 2015/720/EU provides that in the waste hierarchy, prevention comes first of reuse, recycling, recovery, disposal. In this regard, the consumers'

[543] Italian legislator would have to charge the plastic bags cost to the sellers for a correct application of the polluter pays principle. Indeed, plastic bags come into product sales circuit by sellers that use them as packaging to sell their products. The consumers are just the final users who sometimes are obliged to use plastic bags as in the case of plastic carrier bags for food.

[544] D. Amirante, *Diritto ambientale Italiano e Comparato*, Jovene Editore, Napoli, 2003, 33. R. Rota, *Profili di diritto comunitario dell'ambiente*, in P. Dell'Anno, E. Picozza (edited by), *Trattato di diritto dell'ambiente. Principi generali*, Cedam, Padova, 2012, I, 175.

[545] Italian legislator considers such taxation a certain remedy for reducing consumption, and intended to take the experiences of other countries as an example, in order to make consumers fully aware through the cost of plastic bags (Parliamentary Question of 9th January 2018). Law does not deal with the option to bring used plastic bags for customers, because of a serious hygienic risk if they contain food residues and, therefore, bacteria, considering the sellers' difficulty of checking the incontamination of the customers' plastic bags. So, an Italian Health Ministry note of 4th January 2018 announced costumers will be able to bring their own plastic bags, provided that they are food and disposable bags, namely new ones. However, it is more useful to pay them at a certainly cheaper price of supermarkets, rather than buy them somewhere else.
Italian Council of State recently expressed an opinion about this faculty (Opinion No. 859/18 of 29 March 2018, requested by the Health Ministry), thus declining the obligation to buy them at the supermarkets, provided that they are 'suitable for preserving the integrity of the goods and in conformity with the characteristics of the law': not reusable, anyway.
Therefore, in April 2018 the Health Ministry adopted a circular declaring that every seller will be kept to verify the conformity to the law of the plastic bags used by the consumers. It is clear that it is an hard (or impossible) check.

information related to proper waste treatment is an important measure to ensure that the needed plastic carrier bags will not end up as waste in the environment.[546]

In the past, Italy adopted different laws about plastic bags. The Budget Law 2007 provided the start of an experimental program to reduce the use of non-biodegradable plastic bags (art. 1, paragraph 1129), providing a marketing ban on non-biodegradable plastic bags from 1st January 2010 onwards (art. 1, paragraph 1130). This date was extended by Decree No. 2 of 25th January 2012[547] which introduced administrative penalties for the marketing of non-compliant plastic bags (art. 2, paragraph 4). Despite the date set by the Decree it was only with Decree No. 91 of 24th June 2014,[548] containing urgent provisions on agriculture, environment and energy efficiency, that administrative sanctions come into force for:

- plastic bags which do not comply with technical standards (UNI EN 13432:2002);
- reusable plastic bags which do not comply with provisions of Ministerial Decree 18th March 2013 on identification of the technical properties of the bags for carrying goods.

Subsequently, when Directive 2015/720/EU come into force in Italy, Decree No. 9 of 20th June 2017 was adopted,[549] which, under article 9a, modified some provisions of Legislative Decree No. 152/06 about packaging management. Specifically, the Decree introduced some articles among which:

- article 226a about the ban on the marketing of non-biodegradable and non-compostable plastic bags;
- article 226b about reduction of lightweight plastic carrier bags marketing;

[546] The 6th recital of Directive 2015/720/EU.
[547] Converted into Law No. 28 of 24th March 2012, came into force from the 31st December 2013.
[548] Converted into Law No. 116 of 11th August 2014.
[549] Coverted into Law No. 123 of 3rd August 2017. A. Muratori, *La guerra "all'italiana" contro gli shoppers "sottili": macchinosità e zone d'ombra, a rendere inviso un sacrosanto obiettivo*, *Ambiente&Sviluppo*, 1, 2018, 16.

- article 261 has been integrated with the provisions of administrative panlties just provided by the previous laws.

Analysis of these provisions of Article 9a of the Law Decree No. 91/2017 reveals a law more rigorous than the European Directive: for instance, the Decree provides for payment for lightweight plastic carrier bags by 1st January 2018 instead of 31st December 2018 as the Directive provides. Moreover, Decree No. 91/2017 introduces payment on the part of consumers for very lightweight plastic carrier bags even though the Directive provide that very lightweight plastic carrier bags may be excluded from payment.[550]

Conclusions

Directive 2015/720/EU shows an approach on plastic waste which is based in the preventive and polluter pays principles. Indeed, the Directive refers to reuse and recycling of plastic bags (including lightweight and very lightweight plastic carrier bags) because the consumption of plastic carrier bags will continue in the future. Thus, to ensure that the needed plastic carrier bags will not end up as waste in the environment, adequate measures should be in place to inform consumers about proper waste treatment. In this regard, the Directive stresses that awareness programmes developed for consumers in general and educational programmes for children can play an important role in reducing the consumption of plastic carrier bags.[551]

Compared to the choice of European Legislator, the Italian Law preferred to introduce solely economic instruments considered more efficient to change consumer behavior and consequently to reduce the use of plastic bags. But this choice does not seem to be congruent with the Directive's aims. First of all, it must be noted that the introduction of the payment obligation to the consumer is not a measure which will effectively change behaviors. The low price of bags and the need to use them (for instance to carry foods) considerably reduce the efficiency of economic measures if they are not

[550] The Directive 2015/720/EU provides that Member States may choose to exempt plastic carrier bags with a wall thickness below 15 microns (*very lightweight plastic carrier bags*) provided as primary packaging for loose food when required for hygiene purposes or when their use helps prevent food wastage.
[551] The 15th recital of Directive 2015/720/EU.

coupled with prevention measures for example information and sensitive action to induce consumers to correctly use and reuse plastic bags. At the same time, it has to be noted that the Italian Legislator did not provide a fixed price for the different kinds of bags. Thus, the lack of setting a fixed price, in theory, could determine the application of prices without control, leaving to the open market and to the competition, the ability to determine sustainable prices.

Moreover, the choice of the Italian Legislator to charge the cost of plastic (biodegradable) bags, lightweight plastic carrier bags and very lightweight plastic carrier bags to the consumer is not congruent with a correct application of the polluter pays principle. It seems to be in contrast with the European Court of Justice's jurisprudence according to which it is not possible to charge pollution costs to who did not produce it.[552] In that regard, it should be noted that the polluter-pays principle, referred to in Article15 and the 29th recital of Directive 94/62 requires, according to that recital, that «all those involved in the production, use, import and distribution of packaging and packaged products become more aware of the place of packaging waste generation' and 'agree to assume liability». That principle does not cover only those directly responsible for the production of waste, but has a broader scope. It also covers those who contribute to that production of waste, which includes importers and distributors of packaged products.[553] Thus, the purpose of the principle is to discourage every action or behavior which has negative impact on the environment. However, in this case of the principle is not correctly applied: examining the problem of environmental impact of plastic bags (including biodegradable or compostable ones) must be considered by large retailers which rely on the plastic packaging to sell their products. Thus, we have a definite environmental impact from large retailers that use plastic bags to sell their products without actions that can ensure the reuse or recycling of the plastic bags. For this reason the costs of plastic bags, as potential polluting goods, should be charged to the large retailers. This is the only way to ensure to avoid that, once again, measures to environmental protection becoming only business for enterprises.

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[552] See European Court of Justice, Commune de Mesquer Vs. Total France SA, case C-188/07, 24 June 2008.

[553] See European Court of Justice, SC Cali Esprou srl Vs. Administraţia Fondului pentru Mediu, case C-104/17, 15 March 2018.

The Legal Framework for Plastic Ban in Kenya

Dr Collins Odote

Introduction

On 28th February, 2018, the Government of Kenya banned the use of single-use plastic bags.[554] It banned the use, manufacture and importation of all plastic carrier and flat bags used for commercial and household packaging.[555] The ban, which took effect six months later in August 2017, heralded Kenya into the list of more than forty countries that have used a ban as a way of dealing with the plastic ban menace.[556] In a press statement communicating the implications of the ban, the National Environment Management Authority summarized the purpose of the ban as being "to avoid health and environmental effects resulting from the use of plastic bags."[557] The statement itemized these effects as including: the inability of plastic bags to decompose and thus affect soil quality; the littering of such bags in various parts of the country; the blockage of sewerage and water drainage infrastructure causing floods during the raining season; damage of ecosystems and biodiversity due to plastics bags, death of animals after consuming plastic material; endangering human health when used for packaging food in particular hot food; poisonous gases when used as fuel to light charcoal; and air pollution when disposed by burning in open air.[558]

The six months between the announcement of the ban and its implementation saw debate about the advantages and disadvantages of the ban and whether the

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[554] Kenya Gazette Notice, Number 2334 and 2356, Vol CXIX-No 31, 14th March, 2017
[555] Ibid
[556] See Guardian, "Kenya Brings in Worlds Toughest Plastic Bag Ban: Four Years Fine or $40,000 Fine" Mon, 28 August, 2017, available at https://www.theguardian.com/environment/2017/aug/28/kenya-brings-in-worlds-toughest-plastic-bag-ban-four-years-jail-or-40000-fine(accessed on 21/6/2018).
[557] NEMA, Press Statement on Total ban of All Plastic Bags, available at https://nema.go.ke/images/Docs/Awarness%20Materials/PRESS__STATEMENT_ON_TOTAL_BAN_ON_ALL_PLASTIC_BAGS.pdf (accessed on 15/5/2018).
[558] Ibid.

implementation should be suspended or not. In the end the ban became effective after the stipulated six-months lead time and led to the country receiving international accolade for its decision due to the bold and far reaching decision and punishment prescribed for its violation.[559]

Plastic Ban and Right to A Clean and Healthy Environment

The legal regulation has to address the linkage between banning use of plastics or polyethene and the right to a clean and healthy environment. The action by Kenya has to be seen in the context of the global efforts. Single-use bags are a pragmatic environmental regulatory target: because their use remains largely uncontrolled, a unique opportunity exists for regulation that will shift consumer habits away from items that are excessive and disposable.[560] They are a big source of litter, impacting on the environment and health. In Kenya, for example, every year during the rainy season, media reports capture plastics including single-use bags being carried as debris. These eventually clog drains in urban areas, resulting in negative impacts to the environment. As one writer concluded, "the problem with plastic bags isn't just where they end up, it is that they never end.[561] This is because, they do not biodegrade.[562]

Plastics are part of solid waste. When Kenya made its decision to impose a total ban on plastics, it did so under two provisions of its framework environmental law, the Environmental Management and Coordination Act (EMCA).[563] The first provision was Section 86 of the Act.[564] The Section empowers the Cabinet Secretary responsible for environmental matters to identify materials and processes that are dangerous to human health and the environment; issue guidelines and prescribe measures for the management of the identified materials and processes; prescribe standards for waste,

[559] See for example https://www.theguardian.com/environment/2017/aug/28/kenya-brings-in-worlds-toughest-plastic-bag-ban-four-years-jail-or-40000-fine
[560] Rebecca, Fromer, "Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana" 23(2) *Tulane Environmental Law Journal, (*Summer, 2010), 493-515 at 494-5.
[561] Katharine Mieszkowski, Plastic Bags Are Killing Us, Salon, Aug. 10, 2007, available at https://www.salon.com/2007/08/10/plastic_bags/
[562] Ibid.
[563] Act Number 8 of 1999.
[564] Ibid, Section 86.

their classification and analysis, and formulate and advise on standards of disposal methods and means for such wastes; or issue regulations for the handling, storage, transportation, segregation and destruction of any waste.[565] The decision recognized single-use plastics as a danger to the environment human health and one for which action under the Act was necessary. Despite objections by the private sector, the decision to ban plastic can arguably fall within the permissive action on "regulating the handling storage, transportation and destruction of any waste."[566] However, the form of action was a gazette notice. Section 86(4) of the Act, however speaks about regulations. Consequently, there is debate on the legal propriety of the action of the Cabinet Secretary undertaken through a gazette notice and not regulations, the latter of which would require approval from Parliament within the Kenyan legal system.[567]

The second part of the of the EMCA on which the decision to ban plastic bans hinged was the constitutional right to a clean and healthy environment.[568] Before 2010, Kenya did not have constitutional provisions protecting the right to a clean and healthy environment. Instead reliance was placed on the right to life as the basis of constitutional protection of the environment.[569] In addition, the EMCA captured the need for sound management of the environment by including the right despite contestations over whether, by capturing the right in the Act, it would be equivalent to a human right as envisaged under international law. This debate though was settled in 2010, by the inclusion of the right in similar wording within the Bill of Rights Chapter of the Constitution.[570]

From the foregoing, the action to ban plastic bags is predicated on the need to promote the right to a clean environment. Plastics as already argued earlier negatively affect both the environment and the health of human beings. By littering the environment, they cause pollution and as such interfere with the rights of citizens to enjoy a clean

[565] Ibid.
[566] Ibid, Section 86(4)
[567] Statutory Instruments Act, Act Number 23 of 2013.
[568] Act Number 8, 1999, Section 3.
[569] See *Republic vs Peter K Waweru, Misc Civil Application Number 118 of 2004. Available at* http://kenyalaw.org/caselaw/cases/view/14988/
[570] Article 42, Constitution of Kenya 2010. For a discussion of this right, see also Odote, C., *Country Report: Kenya Constitutional Provisions on the Environment,* Issue 1(2012), IUCN Academy of Environmental Law, e-journal, 136-145.

and healthy environment. The action taken by Kenya sought to eliminate plastics from the environment due to their biodegradable nature and pollutant effect on the environment and health hazards that they pose. Citizens could, before the ban, arguably bring an action to court under the provisions of the Constitution arguing that the continued use of such plastic bags were threatening their enjoyment of the right to a clean and healthy environment. Such an action would result in the Government being compelled to stop the continued use and even to pay compensation for the violation of the right.[571] Article 69 of the Constitution places an obligation on the part of the state in relation to the conservation of the environment.[572] Part of that obligation requires the state to "take measures to eliminate processes and activities that are likely to endanger the environment. "[573] Citizens could, therefore argue that by allowing plastics to be used and to litter the environment while they are non-biodegradable and with the risks they pose would be a violation of the rights of citizens to a clean and healthy environment and the Constitutional responsibility of the state to promote the realization of this right and protect the environment.

By taking the action they did, the Kenyan Government took a proactive decision, that while unpopular at first, helps meet an important constitutional guarantee to every citizen in the country. It also aligns to the responsibility of Government to protect and promote human rights. The Constitution places an obligation on the state to "to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."[574] This obligation is in accord with international obligations that Kenya, just like every other state, as a party to international human rights instruments is under a responsibility to observe.

The Objections by the Private Sector

The decision by Government, however, was contested by the private sector. The contestation derives from the overall place of the private sector in environmental management; a position that places pursuit of economic progress, profit and development

[571] See Article 70, Constitution of Kenya, 2010.
[572] Article 69, Constitution o Kenya, 2010.
[573] Ibid, Article 69(1).
[574] Article 21(1), Constitution of Kenya, 2010.

against the need to conserve the environment. With a focus on profit and bottom line, business operations are normally viewed as being inimical to environmental management. This approach views the private sector as relying on the environment and natural resources for their business operations oblivious to, or even negligent of, the consequences of those operations on the environment.[575] An early demonstration of this position was captured in the discussion of the dangers of common property, using the example of pollution control. [576] In the article, Hardin demonstrates the problems with common property by demonstrating that the lack of secure ownership of property increases pollution as nobody cares about any pollution to the environment as the negative consequences will be shared by all who have access to that property.[577] However, modern developments recognize that businesses can and should play a positive role in environmental management.[578] The concept of sustainable development recognizes the need to balance between economic development and environmental conservation.

The place of the private sector in the realization of sustainable development became the subject of discussions during the Rio+20 Conference in 2012. The Outcome Document captured the role of private sector in sustainable development, calling for public-private partnership, private sector financing and contribution to the transition to a green economy.[579] As the Sustainable Development Goals were adopted three years later, partnerships was captured as SDG 17.

Kenya's private sector were against the ban, just as they had argued against efforts at the regional level for polythene materials control legislation,[580] . Led by the Kenya

[575] Suzanne Benn and Dexter Dunphy, "Towards New Forms of Governance for Issues of Sustainability: Renewing Relationships between Corporates, Government and Community" 9 Electronic Journal of Radical Organization Theory 1, pp.1-29
[576] G. Hardin, "The Tragedy of the Commons" [1968] 162(3859) Science (New Series) 1243-1248.
[577] Ibid.
[578] For a discussion of the role of the Private sector in environmental management in Kenya, See F, Okomo-Okello, "The Role of Bankers in Promoting Compliance with Environmental Law", paper presented at the Kenya High Court Judges Colloquium on Environmental Law and Access to Justice, 9th-13th January, 2006. Available at http://www.kenyalaw.org/Downloads_Other/Francis%20Okomo-Okello.%20Bankers%20and%20environment.pdf.
[579] https://sustainabledevelopment.un.org/futurewewant.html.
[580] East African, "Kenya Pitted Against Rwanda, Tanzania Over Ban on Plastics" Monday, January 16 2017. Available at http://www.theeastafrican.co.ke/news/ea/Kenya-pitted-against-Rwanda-and-Tanzania-over-ban-on-plastic/4552908-3518890-remtbu/index.html (accessed on 20/6/210

Association of Manufacturers, they asked for postponement of the implementation of the ban, arguing that the six-month period was insufficient for companies to adjust, or even clear the stock they already had.[581] In addition, the private sector made the case that they employ many people, who would lose their jobs as a consequence of the ban.[582] They made a proposal for dealing with plastics through establishment of a fund to address plastic waste.[583] In their view plastic problem was more of a waste management and not a production issue.[584] However, their pleas were rebuffed, based on the argument that the efforts to ban plastics had been going on in Kenya for over fifteen years without coming to fruition.[585] In a study published in 2005 and supported by UNEP, proposals for addressing the plastic bag menace were initially made.[586] One of the policy options suggested in the report was the total ban on flimsy plastic bags less than 30 microns thick and the application of a levy or tax on the thicker ones.[587] Despite this suggestion the intention of banning and/or regulating plastic bags never came to fruition, until the notice in 2017. The main reason was the strong lobby against these initiatives by the private sector.

Due to the failure to convince Government to either postpone the implementation of the ban or to shelve it completely, the private sector proceeded to court. First, the Kenya Association of Manufacturers filed a Judicial Review application seeking to quash the gazette notices banning plastic bags in Kenya.[588] The main grounds of objection to the ban by the manufacturers, included, that plastics were cost-effective, versatile as a packaging material, that those for domestic use were recyclable, and that there were ongoing proposals and efforts to implement more effective alternatives

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[581] Kenya Association of Manufacturers, "Statement on Plastic Bag Ban" available at http://kam.co.ke/statement-plastic-bag-ban/ (accessed on 21/6/2018).
[582] Ibid.
[583] Ibid
[584] Ibid.
[585] See, NEMA, "Plastic Bags Ban is a Blessing for Kenya," available at https://nema.go.ke/images/Docs/Notices/Chairman_statement_on_ban_of_plastic_bags.pdf. (Accessed on 21/6/2018). See also Wambui, W. "KAM Petitions President to Lift Ban on Plastic Bags," Standard Digital, Thursday, 3rd August, 2017. Available at https://www.standardmedia.co.ke/business/article/2001250144/kam-petitions-president-to-lift-ban-on-plastic-bags. (accessed on 21/6/2018).
[586] UNEP, *Selection, Design and Implementation of Economic Instruments in the Solid Waste Management Sector of Kenya; The Case of Plastic Bags,2005.* Available at https://unep.ch/etb/publications/EconInst/Kenya.pdf.
[587] Ibid.
[588] Kenya Association of Manufacturers Vs Cabinet Secretary, Ministry of Environment and Natural Resources, HC (Constitutional and Human Rights), NO 375 of 2017.

to the ban including imposition of taxes.[589] The Kenya Association of Manufacturers also contended that the ban would lead to massive job losses[590] and affect investor confidence.[591] The case was, however, not heard on its merits as the Judge held that the proper court to hear the matter was the Environment and Land Court, and not the High Court where it had been filed, based on the Constitutional provision which establishes the environmental and land court as the court to listen to environmental disputes.[592]

The Second case, *Kenya Association of Manufactures and Another Versus Cabinet Secretary, Ministry of Environment and Natural Resources and Others,* involved similar parties.[593] The manufacturers challenged the ban and urged the court to grant interim orders staying the implementation of the Gazette notice on the grounds that it was beyond the scope of the powers of the minister, it was undertaken without public participation and consultation of relevant stakeholders and in disregard of previous agreements on how to address the challenge of plastic bag menace in Kenya.[594]

The case is still pending final determination before the courts. In the application for interim orders, though, the court declined to stay the implementation of the ban, arguing that such a decision would not promote the spirit of the Constitution and of section 3 on the right to a clean environment. In addition, the court argued that:

> *"a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests."*[595]

[589] Ibid.
[590] Ibid.
[591] Ibid.
[592] Article 162(2) (b).
[593] ELC Number 32 of 2017 (Nairobi).
[594] Ibid.
[595] Ibid.

Based on the above stipulations, the court undertook a preliminary analysis of the sections under which the ban was issued and held, in relation to section 3, that:

> *"Section 3 of the Act echoes the constitutional framework on the right to a clean environment. It also provides a broad framework on environmental governance principles and access to justice in environmental disputes. One of the environmental governance principles emphasized by this legal framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources. The other key principle set out in this section is the precautionary principle. This principle requires that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment."*[596]

The court also held that, from a preliminary view, the Cabinet Secretary seemed to have powers under Section 86 to issue the Directive and that there had been public consultation. One of the main arguments against the ban was by private sector. The Kenya Association of Manufacturers hinged their objection on the complaint that the ban would be detrimental to their membership and consequently the economy. The Court, was however, not persuaded, holding that:

> *"I have also reflected on the 1st Petitioner's contention that its members will suffer loss. In my view, this apprehended loss is to be carefully weighed against the public interest of the over 40 Million Kenyans whose right to a clean environment the legal notice seeks to secure. Grant of a conservative order in the circumstances of this dispute would mean that, the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags dealers.*

[596] Ibid.

> *In my view, that would offend Kenya's constitutional and legal framework on protection and management of the environment. That would also subordinate the public interest of the Kenyan people to the commercial interests of plastic bag dealers."*[597]

Implementation Challenges Beyond the Ban[598]

While the ban has helped the country to move beyond rhetoric to action in its quest to manage the plastic bag menace, its implementation is wrought with several challenges. First, it has resulted in negative impacts on small-scale traders who relied on plastic bags to earn a living, either by hawking these single-use carry bags to consumers purchasing various products across the country or to those who used them to wrap retain products like sugar-cane and vegetables. These vendors find it increasingly difficult to earn a living in light of the ban. This is based on anecdotal evidence from several small-scale traders who have traditionally relied on single use plastics to wrap goods before selling to customers.

The second challenge relates to alternatives to plastic bans. While there is a business opportunity in development and selling of alternatives to plastic bags, the process was both slow in coming and not easily embraced by the private sector initially. The failure to embrace the ban meant that private sector did not develop and provide alternatives to plastic bags for consumers until a few months after the ban. This demonstrates the importance of collaboration of various actors for the success of an initiative such as the ban of plastic bags.

Thirdly is the cost of the alternatives. A visit to supermarkets and shops saw the misapplication of the concept of the polluter-pays principle. Captured in Principles 16 of the Rio Declaration, the principle requires those responsible for pollution bear the cost of it. Unfortunately, consumers were required to either go with their shopping bags or

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[597] Ibid, Per Judge Eboso.

[598] Based on article by C. Odote, "Market Alternatives to Plastic Bags" *Business Daily,* September, 17, 2017. Available at https://www.businessdailyafrica.com/analysis/columnists/Market-alternatives-to-plastic-bags--/4259356-4100174-oydiitz/index.html.

purchase the alternatives to plastic bags. Viewed against the context where these plastic bags used to be supplied free to shoppers, this action seemed a backhanded attempt to tax the consumers for the implications of the ban.

Conclusion

Banning single-use plastic ban by Kenya in 2017 was a progressive first step in the fight against solid waste from plastic bag. However, the decision can only be a first step. The coverage of the ban excludes several categories of plastics, including plastics bottles whose negative effect on the environment equals that of single-use plastics bags. This explains why there were subsequent efforts to ban these.[599] Although these efforts saw differences between the National Environment Management Authority and the Ministry of Environment, with the former arguing for banning plastic bottles before the latter overruled it,[600] it shows that this challenge is one which will require legislative and policy response. In addition, there is a need for a more robust legal framework to govern the medium to long-term application of the ban and ensure that the teething problems experienced with the implementation of the gazette notice are responded to.

In addition to the implementation of the ban, it is important that the use of other economic instruments, including both taxes and incentives be explored and operationalized so as to enhance the success of the current efforts to eliminate plastics from the Kenyan environment. This is because the challenges of plastics will continue if the country only retains the total ban of single-use plastics since some other categories of plastics continue to be available in the country for being outside the purview of or exempted from the current gazette notice. It is also important that agencies responsible for environmental management enhance and sustains efforts at awareness creation.

[599] Ndanunga, L, "Government Plans to Ban Plastic Bottles," The Star, June 15, 2018. Available at https://www.the-star.co.ke/news/2017/09/07/government-plans-to-ban-plastic-bottles_c1629909. (accessed on 21/6/2018).

[600] Mwiti, L, "Environment PS Differs with NEMA on Plastic Bottles Ban" Standard Digital, Thursday, 1 February, 2018. Available at https://www.standardmedia.co.ke/article/2001268040/environment-ps-differs-with-nema-on-plastic-bottles-ban. (accessed on 21/6/2018).

COUNTRY REPORT: SPAIN

The energy transition before the highest State Courts

Laura Presicce*

1. Introduction.

In 2017 the jurisprudences of the Constitutional Court and the Supreme Court in the area of electrical energy have been of particular interest, especially concerning the regulation of self-consumption.

The energy transition is understood as the transformation of the energy model to change from one based on conventional primary energy, fossil fuels in a highly centralized system, to another model that is more decentralized and de-carbonized to achieve an authentically sustainable society. From this perspective, the decisions of the highest courts on the regimes of renewable energy and self-consumption are very significant in the definition of the juridical structure that supports the energy model of a country.

Specifically, we analyse here the ruling of the Constitutional Court 68/2017, dated 25 March and the ruling of the Supreme Court 1542/2017 of 13 October, relating to Royal Decree 900/2015 of 9 October, which regulate the administrative, technical and economic conditions of the energy supply modalities with self-consumption as well as production with self-consumption. We also analyse the Constitutional Court ruling 36/2017 of 1 March, on some articles of Royal Decree 413/2014 of 6 June, which regulates the activities of producing electricity from renewable resources, cogeneration and waste are regulated.

2. Analysis of the most outstanding jurisprudence.

Self-consumption in the jurisprudence of the Constitutional Court

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The Plenary Session of the Constitutional Court, in ruling 68/2017 of 25 May 2017, resolved the positive conflict of jurisdiction raised by the Government of Catalonia in relation to various precepts of Royal Decree 900/2015 of 9 October, which regulates the administrative, technical and economic conditions of the electricity supply modalities with self-consumption and production with self-consumption[601] (hereinafter RD Self-consumption).

The Constitutional Court analysed the issue of implementing a Self-Consumption Register and the prohibition of "shared self-consumption", considered as the true novelty introduced by the ruling under analysis. [602]

In relation to the administrative register of self-consumption of electricity, Law 24/2013 of 26 December, of the Electricity Sector (hereinafter LSE) established in Article 9.4 the obligation for consumers under the electrical self-consumption modalities to register in the administrative record of self-consumption, created for this purpose by the Ministry of Industry, Energy and Tourism. The article left to the Government the regulatory development of the creation, organization, and the procedure for registering and communicating data to the self-consumption register.

The Constitutional Court, in its ruling 32/2016[603], confirmed the constitutionality of the creation of the registry and the obligation of consumers to register. However, the same court added "the Government's use of referral to the regulation may, where appropriate, be subject to the corresponding control, by appropriate procedural means, before this Court or before the ordinary jurisdiction". [604]
The Government of Catalonia has challenged the articles 19 to 22 of Royal Decree 900/2015 of October 9, which regulates the registration of self-consumption of

[601]RD 900/2015 constitutes the regulatory development of art. 9 of Law 24/2013 of 26 December, of the Electricity Sector in which electricity self-consumption installations are regulated.
[602]Preliminarily, the Constitutional Court places the controversial precepts in the constitutional system of distribution of competences, considering that it is a conflict in energy matter and, in particular, in the electric sub-sector. The CC establishes that prevailing competency titles to resolve the controversy are those derived from article 149.1.13 ("bases and coordination of the general planning of economic activity") and 149.1.25 ("bases of the energy regime"), given the relevance of the electricity sector as a strategic sector for the Spanish economy.
[603]Resolving the appeal filed by the Government of Catalonia in relation to various precepts of Law 24/2013, of 26 December, of the electricity sector.
[604]See CCD 32/2016, of 18 February, 2016. Appeal for unconstitutionality 1908-2014.

electricity in accordance with the provisions of Article 9 LSE, arguing that they incur the same violations of powers that were highlighted in the aforementioned resource.[605] The issue was that these provisions constitute an invasion of powers because the State not only created the registration of self-consumption facilities, but also the regulation on the procedure for registering and managing the registration process; therefore, in this group of precepts it was detailed and confirmed that everything was in the hands of the State.

Thus, in CCD 68/2015 of 25 May, the Constitutional Court considered unconstitutional the regulatory development of the creation of a single registry, declaring null and void articles 19, 20, 21 and 22[606] of RD 900/2015, which regulated the said registry. In particular, it was established that the aforementioned articles violate the constitutional order of powers by attributing to the registry executive powers that injure the competences of the Autonomous Communities.

The Constitutional Court (hereinafter referred to as CC) recognizes that consumers under the modalities of self-consumption have the obligation to register in the registry, although the competence to regulate the procedure of registration in the said registry of the facilities located in the respective territories will be of the Autonomous Communities.

In relation to the issue of "shared self-consumption", the CC declared art. 4.3 of the RD Self-consumption unconstitutional and null.

The third section of the aforementioned art. 4, which specified the classification of self-consumption modalities, prohibited connecting a generator to the internal network of several consumers. The prohibition, contained in the phrase "[i]n no case can a generator be connected to the internal network of several consumers" was considered a very controversial issue of the Royal Decree under debate, since it created a problem

[605] Recourse number 1908/2014

[606] The arts. 20, 21 and 22 regulate the obligation of consumers under the electric power modalities to request registration in the state register of self-consumption of electric power, the registration procedure in this register and the modification and cancellation of the inscriptions.

in the implementation of self-consumption facilities in communities of owners or shared properties, prohibiting the creation of an «internal network» of several consumers.

In relation to article 4.3 of the RD Self-consumption, on one hand, the Government of Catalonia argued that the prohibition established in the said article entailed an absolute prohibition that did not leave it any possibility of developing in the exercise of its shared competence in promoting the implementation of self-consumption facilities in communities of owners or shared properties. The State Attorney argued that the provision contained in RD Self-consumption was a simple technical specification of Article 39.3 LSE, which states

"All facilities intended for more than one consumer shall be considered as a distribution network and shall be assigned to the distribution company in the area, which will be responsible for the security and quality of the supply. This infrastructure will be open to the use of third parties."

The CC does not share the argument of the State Attorney and considers that these internal networks of several consumers correspond to what are technically called "liaison facilities ", that is, facilities that through the connection link the distribution network with the interior facilities or receivers of each of the users that are in the same urbanization or building, and that always run through places of common use but remain the property of the users, who are responsible for their conservation and maintenance.

Consequently, the CC establishes that the prohibition contained in article 4.3 of Royal Decree 900/2015 "affects the scope of the powers assumed by the Government of Catalonia [..] in terms of the 'promotion and management of renewable energies and energy efficiency' in its territorial scope, and makes it difficult to achieve energy efficiency and environmental objectives in line with those established by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, concerning promoting the use of energy from renewable sources; Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings; and Directive 2012/27/EU of the European Parliament and of the Council, of 25 October 2012, relating to energy efficiency."

Another relevant aspect of the ruling is the statement made by the CC in relation to discharges to the electricity grid for consumers that implement savings and efficiency systems.[607] The CC considers that the provision is constitutional if it is interpreted in the sense that the granting of these authorizations corresponds only to the State "when its use affects another Autonomous Community or the transport of energy out of its territorial scope".[608]

Therefore, it will be the competent body in energy matters of the Autonomous Community which can authorize consumers of electrical energy connected in a high voltage to carry out an activity whose secondary product is the generation of electricity and which, due to the implementation of a system of energy savings and efficiency that is not a means of generating electricity, or battery, or energy storage system, has at certain times electricity that cannot be consumed in their own installation to provide the said energy to the network.

Self-consumption in the jurisprudence of the Supreme Court: the Sun tax or a contribution to system costs?

The RD Self-consumption, during the reference period, has also been challenged in front of the Supreme Court (hereinafter SC) which, in a ruling worth highlighting, has addressed a very controversial issue in the sector of the regulation of electricity.

Articles 17 and 18 of the RD Self-consumption, among others,[609] were in the spotlight in relation to the charges imposed on consumers under the self-consumption modalities, which have been called the "Sun tax". These articles, according to the appellant company, violated article 9.3 LSE, which establishes that self-consumers have to pay

[607]First section of the Second Additional Provision of the Self-Consumption RD.
[608]That is, in the cases in which Article 149.1.22 EC attributes to the State powers to authorize electrical installations.
[609]In addition to the articles cited, the appellant requested the nullity of article 25 of RD 900/2015 in sections 1 and 2.b), 2.c) and 3.b), relating to the sanctioning system; the third transitory provision on the adaptation of the self-consumption facilities in operation to the requirements of RD 900/2015 and the nullity of the entire RD 900/2015 due to its inadequacy to the European Directives on energy matters 2009/72/EC, 2009/28/EC and 2012/27/EU.

> *"the same access tolls to the networks, charges associated with the costs of the system and costs for the provision of backup services of the system that correspond to a consumer not subject to any of the self-consumption modalities."*

With the ruling no. 1542/2017 of October 13, the Supreme Court, dismissing the appeal, has denied the existence of the so-called "Sun tax".

In detail, the Supreme Court has considered that it is a

> "*contribution to the costs of the system when a self-consumer, in addition to consuming the energy generated by themselves, has the support of the electrical system to consume electricity from the system at any time they need it, and, in their case - as is usual - they effectively consume it*."

According to these considerations, the Supreme Court emphasizes that the self-consumer who depends exclusively on the energy that they generate and who is not connected to the electrical system does not pay anything.

Second, the Court evidences that the aforementioned articles 17 and 18 do not impose additional charges on those subject to the various forms of self-consumption with respect to ordinary users, as opposed to the arguments of the appellant. The SC once again maintains a very formalistic stance without going into the heart of the matter, declaring the conformity to the right to the formula used for setting the criteria, although the court itself observes that "it can certainly be the subject of a legitimate criticism."

The ruling of the Constitutional Court on the distribution of powers in the field of renewable energies.

In the field of electrical power, lastly, it should be noted the Constitutional Court ruling 36/2017, of 1 March 2017, on the appeal raised by the Government of Catalonia in relation to various precepts of Royal Decree 413/2014[610] of 6 June, which regulates

[610] A positive conflict of competence proposed by the Government of Catalonia, against arts. 8, sections 1 and 2, 30 and 35.1 a) i) and the first final provision of Royal Decree 413/2014 of 6 June, which regulates the activity of production of electrical energy from renewable energy sources, cogeneration and waste.

the activity of producing electricity from renewable energy sources, cogeneration and waste.

The challenged provisions oblige the owners of the facilities to send certain information directly to the Ministry of Industry, Energy and Tourism and attribute executive powers to the General State Administration, specifically the inspection and authorization of the electricity production facilities. First, the Government of Catalonia does not question that the State wants to obtain the information indicated in article 8 of Royal Decree 413/2014, but that it does not do so through the Government of Catalonia and that it is not the one that provides it to the General Administration of the State, given that it is an executive function that corresponds to the companies that produce electricity in Catalonia, over which the Government of Catalonia has authority for authorization and inspection.

The CC states that, without prejudice to the collaboration and coordination mechanisms between the State and the Government of Catalonia in relation to the reciprocal exchange of information, the receipt of information by the State cannot be conditioned in an absolute way by this information being transferred through the Government of Catalonia.
Regarding the State's power to inspect the production facilities (Article 30 RD 413/2017), the CC considers that the control that the State must exercise over the specific remuneration regime and the competitive allocation of these facilities is sufficient cause to adduce its executive inspection function, circumscribed to the aforementioned purposes.

3. The absence of relevant developments in the environmental regulations approved by the State during 2017.

The environmental regulations adopted in the period under analysis have been of very low importance because no statutory regulations of particular relevance have been approved, but rather only regulatory standards in very specific sectorial areas, focused on the modification of existing standards and the transposition of Directives of the European Union.

Among these regulations, it is interesting to note those related to the improvement of air quality and limiting emissions to the atmosphere; those related to the development of the Nagoya Protocol, through access to genetic resources and the sustainable use of Plant Genetic Resources for agriculture and food[611]; and those related to the safety of storing chemical products.[612]

In detail, the national legislator has given particular attention to the issue of improving air quality and the emissions of certain pollutants. We can highlight, in this area, the following rulings:

- **Royal Decree 39/2017 of 27 January, which modifies Royal Decree 102/2011 of 28 January, related to the improvement of air quality,** which develops aspects of Law 34/2007 of 15 November of air quality and protection of the atmosphere. The main modifications included in the aforementioned RD refer to the data quality objectives in relation to benzo (a) pyrene, arsenic, cadmium and nickel, polycyclic aromatic hydrocarbons (PAH), other than benzo (a) pyrene, total gaseous mercury and total deposits.
- **Royal Decree 1042/2017 of 22 December, on the limitation of emissions to the atmosphere of certain pollutants from medium-sized combustion facilities and by which Annex IV of Law 34/2007 of 15 November of air quality and protection of the atmosphere has been updated.** This RD contains specific provisions for the control of atmospheric emissions of sulphur dioxide (SO2), nitrogen oxides (NOx), carbon monoxide (CO) and particles from medium-sized combustion facilities in order to reduce atmospheric emissions and the risks of these emissions for the environment and health. In addition, it updates the catalogue of potentially polluting activities in the atmosphere, which affects medium-sized combustion facilities.
- **Royal Decree 115/2017 of 17 February, which regulates the marketing and handling of fluorinated gases and equipment based on them, as well as**

[611]Highlighting Royal Decree 124/2017, dated 24 February, regarding access to genetic resources from wild taxa and control of use, and Royal Decree 199/2017 of 3 March, approving the Regulation of the National Programme for the Conservation and Sustainable Use of Plant Genetic Resources for Agriculture and Food.

[612]Royal Decree 656/2017 of 23 June, by which the Regulation of the Storage of Chemical Products and its Complementary Technical Instructions MIE APQ 0 to 10 are approved.

the certification of the professionals who use them and by which the technical requirements are established for the facilities that carry out activities that emit fluorinated gases.

- **Royal Decree 617/2017 of 16 June, which regulates the direct granting of aid for the purchase of alternative energy vehicles and for the implementation of electric vehicle charging points in 2017** (MOVEA 2017 Plan).
- **Royal Decree 773/2017 of 28 July, by which various royal decrees were modified in terms of products and industrial emissions.**

Finally, it is important to highlight Royal Decree 363/2017 of 8 April, which establishes a framework for the management of maritime space. This Royal Decree transposes the Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014, with the purpose of establishing a framework for the management of maritime space to promote the sustainable growth of maritime economies, the sustainable development of marine spaces and the sustainable use of marine resources.

COUNTRY REPORT: NEW ZEALAND
Overall Conservation Values and Statutory Planning Policies

Trevor Daya-Winterbottom*

Introduction

This report focuses on the Supreme Court decision in *Hawke's Bay Regional Development Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*.[613]

The background to the Supreme Court decision was that the Hawke's Bay Regional Development Company (a council controlled organisation established under the Companies Act 1993 and the Local Government Act 2002 to manage the infrastructure investments of the Hawke's Bay Regional Council) proposed to construct the Ruataniwha water storage scheme, including a dam across the Makaroro River to create a 7km-long storage lake to provide capacity for irrigating 25,000ha of agricultural land in the surrounding area. In order to create the lake it was necessary to innundate 22ha of land in the 93,260ha Ruahine Forest Park, located in the Whanganui and Manawatu regions of the central North Island. The park is described by the Department of Conservation as unique in terms of its geology, ecology, vegetation, lakes, and habitat for native fauna (birds, skinks, geckos, bats, and giant snails). As a result, Ruahine was gazetted as forest park in 1976, and subsequently deemed to be a conservation park by virtue of s 61(2) of the Conservation Act 1987 as from 1 April 1987 when that statute came into force.[614] To implement the scheme the Company requested the Minister of Conservation to revoke the conservation park status of the subject land and enter into an agreement for exchange of the land. The Royal Forest and Bird Protection Society applied for judicial review of the decisions made by the Director-General of Conservation on behalf of the Minister.

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613 [2017] NZSC 106.

614 The Crown conservation estate administered by the Department of Conservation under the Conservation Act 1987 (and related statutes listed in sch 1) covers 8.6 million hectares or 32 per cent of the total land area of New Zealand, including 51 conservation parks. In the hierarchy of New Zealand's protected areas, conservation parks rank second after national parks in terms of their importance. They are reserved to protect water and soil conservation values and to provide opportunities for outdoor recreation.

The decisions were upheld by the High Court but subsequently quashed by the Court of Appeal. The matter was brought before the Supreme Court by way of further appeal. The Court was required to consider four questions regarding the proposed land exchange.

Overall Conservation Values

Firstly, the Supreme Court considered whether the Court of Appeal was correct in holding that when revoking the conservation park status of the subject land the Minister was confined by law to considering only the conservation values of that land, as opposed to enhancement of the Crown conservation estate generally.

At first instance the High Court had held that the conservation park status of the 22ha subject land area could be revoked provided that there was some "rational" connection between that decision and the "broad" understanding of the statutory purpose of the Conservation Act 1987, namely, the preservation and protection of the natural and historic resources of the land, and maintaining their intrinsic values for enjoyment by present and future generations.[615] The Supreme Court majority (Elias CJ, and Glazebrook and Arnold JJ) did not agree with this approach. It found that when read in context, the revocation power in s 18 of the Conservation Act 1987 posed a different and more refined question – namely, whether the conservation park status of the subject land area remained appropriate.[616]

The Supreme Court, by a majority, therefore found that the Minister had erred in law by relying on the High Court decision, and by taking into account the conservation values of the 147ha Smedley block that was to be acquired in exchange for the subject land and the potential for the Smedley block to enhance the conservation values Crown conservation estate generally. The majority found that while this comparison would have been appropriate regarding stewardship areas, it was not appropriate regarding

615 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [70].
616 [2017] NZSC 106 at [111].

land that was specifically protected as a conservation park or as an ecological area under s 18 of the Conservation Act 1987. Accordingly, the majority stated:[617]

> *It was not enough that on a "relativity analysis" there was considered to be a margin, on balance, in favour of the Smedley land in the swap. Gain in exchange was not the right question in considering revocation of protected status. If it were, there would be inevitable collapsing of the two decisions as to revocation and exchange, despite the recognition that they are distinct, and despite the legislative history which made it clear that gain in exchange of land did not justify exchange of additionally protected land but was available only in respect of stewardship areas.*

The majority therefore concluded that the revocation decision should have been focused exclusively on the intrinsic values of the subject land, and that comparison with the potential conservation values of the Smedley block was not appropriate,[618] upholding the previous decision of the Court of Appeal.[619] Essentially, the courts considered that a finding that special protection is no longer justified on the basis of the actual values of the subject land, was a prerequisite for any revocation decision regarding conservation areas.

However, the minority in the Supreme Court (William Young and O'Regan JJ) concluded that s 18 of the Conservation Act 1987 was not clear cut and that revocation decisions did not preclude "reference to the appropriateness of the proposed exchange".[620] They were therefore unwilling to find that the Minister's decision was based on irrelevant considerations.

Motivation for the Exchange

Secondly, the Supreme Court considered whether the decision was wrongly motivated by the proposed exchange. The Court noted that the revocation decision made by the Minister was based on departmental advice that revocation could be based on either

617 [2017] NZSC 106 at [114].
618 [2017] NZSC 106 at [115] and [117].
619 [2017] NZSC 106 at [116].
620 [2017] NZSC 106 at [203].

degradation of the conservation values of the subject land or the benefit added to the Crown conservation estate by the Smedley block.[621] This advice was in error (as noted above) because the "enhancement test" was only relevant in the case of stewardship areas.[622] Likewise the expert ecological and landscape evidence relied on by the Minister was based on a comparative assessment and did not address the question of whether the conservation values of the subject land continued to warrant special protection under s 18 of the Conservation Act 1987 as a conservation park.[623] As a result, the Minister failed to consider the question of whether "nationally significant values" would be lost following inundation of the subject land.[624] While the High Court found that the exchange was consistent with the broad statutory purpose of the Conservation Act 1987 (noted above),[625] the comparative approach was rejected by both the Court of Appeal[626] and the Supreme Court.[627] In particular, the Supreme Court considered that the comparative approach was not consistent with the statutory planning policies adopted under the Conservation Act 1987 – indeed, the Court held that it was reasonably clear from the policies that the broad approach adopted by the Minister was not consistent with managing the subject land for conservation purposes.

Relevant statutory planning policies

Thirdly, the Supreme Court considered whether the Minister was required to have regard to relevant statutory planning policies as a mandatory consideration.

Sections 17B and 17D of the Conservation Act 1987 provide for statutory planning documents to be adopted at national and regional level. Pursuant to these provisions, the Conservation General Policy and the Hawke's Bay Conservation Management Strategy had been adopted by the Minister. However, the Minister and the Company argued that these documents were not relevant to the revocation decision in this case, and the the Minister was not "constrained" by the documents when making decisions

621 [2017] NZSC 106 at [118].
622 [2017] NZSC 106 at [118].
623 [2017] NZSC 106 at [125]-[126].
624 [2017] NZSC 106 at [120].
625 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [79]-[80].
626 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828 at [98].
627 [2017] NZSC 106 at [124] and [127].

under the Conservation Act 1987.[628] The Supreme Court majority rejected these arguments. The Court found that the documents played a "significant" role in the statutory hierarchy by informing the choices that could "reasonably" be made by decision-makers.[629] It stated:[630]

> *The policies in the planning instruments ensure consistency of decision-making while allowing adaptation to meet changing circumstances through plans developed with public participation. It would be unaccountably wasteful of the effort in adopting such planning instruments and there would be a gap in the legislation if the planning instruments it enables and recognises are irrelevant to the exercise of the significant powers conferred on the Minister to alter the classification of protected conservation land and dispose of it, including by exchange. They enable the public participation provided for in the Act in actual decisions to be focused and consistent with the general policies adopted through a public process in a manner comparable to … the familiar hierarchy set up for resource management under the Resource Management Act 1991.*

In particular, the majority found that wording of the statutory provisions (e.g. s 17A of the Conservation Act 1987) was consistent with the decision-makers being bound by the statutory planning policies and the assumption that the policies would affect decision making in specific cases. While at a more detailed level, the Court found that ch 6 of Conservation General Policy regarding the disposition of land "would be pointless" if decision-makers were not required to give effect to it.[631] Likewise, the Court was not persuaded by an argument that the requirements for consessions granted under s 17T and s 17W of the Conservation Act 1987 to conform with statutory planning documents were otiose if policies were intended to bind decision-makers.[632]

Turning to the specific policies in the statutory planning documents, the Supreme Court majority noted that the Minister had proceeded on the basis that the policies were not

628 [2017] NZSC 106 at [129].
629 [2017] NZSC 106 at [130].
630 [2017] NZSC 106 at [131].
631 [2017] NZSC 106 at [132]-[133].
632 [2017] NZSC 106 at [135].

relevant to the revocation decision.[633] However, the majority found that policy 6(a) in section 3.7 of the Hawke's Bay Conservation Management Strategy related to land acquisition and exchange, that policy 6(b) was focused on review to ensure that conservation area status remains appropriate over time, that policy 6(c) related to land disposal, and that policy 6(d) precluded disposal of the land that was significant for the survival of threatened indigenous species or under-represented ecosystems. The Court found that policies 6(c) and 6(d) were particularly relevant to the revocation decision and noted:[634]

> *They are additional pointers to a statutory framework by which revocation of protected status turns on whether the intrinsic qualities of the protected land warrant prohibition against disposal …*

Overall, the majority found that the statutory planning documents adopted under the Conservation Act 1987 could not be "ignored by decision-makers", and that it was only appropriate to exchange land that had "low conservation values" and that revocation of protected status was not permissible where the land had "significant ecological, landscape and habitat values".[635]

However, the Supreme Court minority agreed with the High Court decision and concluded that the relevant statutory planning policies did not apply to specific matters, such as the land exchange. Instead, the minority observed that the policies were:

… expressed in general terms and provide a framework for review processes which are intended to take place in the ordinary course of the Department's administration of the Act. [636]

Arguably, the third question was the most important question in terms of its potential for broader application to policies prepared under other statutes. For example, in *King Salmon* the Supreme Court found that statutory planning documents prepared under

633 [2017] NZSC 106 at [144].
634 [2017] NZSC 106 at [145].
635 [2017] NZSC 106 at [149].
636 [2017] NZSC 106 at [214].

the Resource Management Act 1991 (RMA) are designed to give specific effect to sustainable management in particular locations,[637] and as a result reference back to the purpose and principles of the RMA in pt 2 or higher order documents in the statutory planning hierarchy is not generally required unless the provisions in the document being applied are found to be invalid, incomplete, or uncertain.[638] Put simply, this approach gives primacy to the most relevant lower order statutory planning document in the hierarchy. The *King Salmon* doctrine constrains decision-makers to a particular approach to decision-making, and the *Hawke's Bay Regional Development Company* decision further constrains decision-makers by reinforcing that relevant provisions in statutory planning documents are mandatory considerations that decision-makers must have regard to.

Reservation of Marginal Strip

Fourthly, the Supreme Court considered whether the High Court (at first instance) was correct in finding that a marginal strip should have been reserved on exchange. Marginal strips are reserved on the disposition of Crown land under s 24 of the Conservation Act 1987 for the purpose of conserving water bodies (including their ecology, natural values, and water quality), and enabling public access and recreational use of water bodies.[639] Generally, a 20m wide strip of land is reserved along the landward margin of the river bed, but the width of the marginal strip can be reduced to 3m wide or an exemption can be granted by the Minister.[640] However, the Company argued that the exchange did not constitute a disposition of land under s 24 of the Conservation Act 1987. This argument was robustly rejected by the High Court (at first instance),[641] and subsequently by the Supreme Court.[642] It was not persuaded that a purposive approach to interpretation would exclude land exchanges from the ambit of dispositions under s 16 of the Conservation Act 1987, or that the wording of s 24 (that *inter alia* allows the exchange of marginal strips) was circular and that the requirement to reserve marginal strips should not apply on exchange.

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637 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.
638 *RJ Davidson Familty Trust v Marlborough District Council* [2017] NZHC 52.
639 Conservation Act 1987, s 24C.
640 Conservation Act 1987, s 24A and s 24B.
641 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220, (2016) 19 ELRNZ 370 at [89].
642 [2017] NZSC 106 at [156]-[158].

Outcome

Accordingly, the Company's appeal was dismissed for the reasons given by the Supreme Court majority.

Commentary

While the Supreme Court decision in *Hawke's Bay Regional Development Company* is important in terms of the approach to statutory planning policies, arguably the decision is narrowly confined to the facts of the particular case. In this sense, a valuable opportunity was (potentially) missed to provide a broader statement about biodiversity offsets. This area of law has been fraught with uncertainty in New Zealand, particularly in relation to the protection of biodiversity on private land. The Environment Court has applied a principled approach when deciding appeals under s 120 of the RMA arising from land use consent applications. For example, in *JF Investments Ltd v Queenstown Lakes District Council* concerning location of a house in an outstanding natural landscape in return for a covenant to remove wilding pines, the Environment Court considered that biodiversity offsets could be appropriate in certain cases:[643]

We conclude that off-site works or services or a covenant, if offered as environmental compensation or a biodiversity offset, will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:

- It should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;
- It should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;
- It must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;
- There should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;

643 *JF Investments Ltd v Queenstown Lakes District Council* (C48/2006), paragraph [42].

- It should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.

However, when putting forward these criteria the Environment Court noted the complexity inherent in determining whether biodiversity offsets could be appropriate in specific cases. This uncertainty was reflected by the comments of Dr Susan Walker of Landcare Research (a Crown research institute) that:[644]

> *Viable biodiversity barter and meaningful biodiversity protection seem mutually exclusive. We can achieve one or the other, but not both. Although compensation and no net loss are laudable ideals, ecological and political problems appear intractable, and mean that bartering is likely to accomplish more harm than good for biodiversity.*

More significantly, the issue is compounded by the failure to provide national policy direction under the RMA. While a draft National Policy Statement on Indigenous Biodiversity (NPS) was prepared for consultation in 2011, the process for making the proposed NPS operative stalled after submissions had been referred to the Minister for the Environment, and it is now anticipated that the NPS could be subject to further public consultation later in 2018 following a collaborative stakeholder process that has been designed to break the impass between community, land owner, infrastructure operator and extractive industry expectations.

Given this policy vacuum, a principled national statement from the Supreme Court about the place of biodiversity offsets under the Conservation Act 1987 and New Zealand environmental law generally would have been appropriate.

644 Susan Walker et al, "Why bartering biodiversity fails" Conservation Letters (2009) Volume 2, Issue 4, 155.

COUNTRY REPORT: UNITED STATES

Trump Administration Launches an Aggressive Rollback of Environmental Regulation and Pursues "Energy Dominance" for U.S.

Robert V. Percival*

Introduction

In 2017, his first year in office, President Donald Trump moved aggressively to slash environmental regulations and to encourage greater production and use of fossil fuels. Ten days after taking office President Trump issued Executive Order 13771 on "Reducing Regulation and Controlling Regulatory Costs." The order mandates that agencies repeal two rules for every new rule they promulgate and it specifies that the repealed rules have to reduce costs to industry by at least as much as the new rule costs. Although he backed off from his campaign promise to abolish the US Environmental Protection Agency (EPA), President Trump appointed former Oklahoma Attorney General Scott Pruitt, a fierce opponent of the agency, to be its new administrator. Pruitt acted swiftly to suspend significant air and water pollution control regulations, launched the processes to rescind them, and proposed policies to make it harder for EPA to issue new regulations. Many of the Trump administration's actions are being challenged in court where environmentalists have had some early victories.

President Trump announced that he intends to withdraw the US from the Paris Agreement on climate change. In pursuit of the President's stated goal of "energy dominance," his administration has opened up vast new areas of public lands to oil and gas drilling, reduced the size of protected areas and legalized incidental takes of protected migratory birds. A Congress controlled by Trump's Republican Party used the Congressional Review Act (CRA) to veto environmental regulations adopted during the last months of the Obama administration and it used tax legislation to open up the Arctic

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National Wildlife Refuge to oil drilling. But Congress refused to accept the administration's plan to slash the EPA budget by 31 percent.

Air Pollution and Climate Change

EPA Regulation of GHG Emissions from Power Plants

In 2015, the EPA adopted final rules for controlling GHG emissions from existing power plants through the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (October 23, 2015). Known as the Clean Power Plan (CPP), the regulations were designed to reduce GHG emissions from power plants by 32 percent over 2005 levels by 2030. In an unprecedented move, the US Supreme Court in February 2016 stayed the CPP regulations pending resolution of legal challenges to them. These challenges were argued before the US Court of Appeals for the DC Circuit on September 26, 2016, but no decision has yet been issued by the court.

On March 28, 2017, President Trump issued Executive Order 13783 on Promoting Energy Independence and Economic Growth. Executive Order 13,783 directs EPA Administrator Scott Pruitt to review and, "if appropriate" to "suspend, revise or rescind" EPA regulations on greenhouse gas emissions, including the CPP. The executive order also disbands the Interagency Working Group on the Social Costs of Greenhouse Gases and withdraws its guidance on how the social cost of GHG emissions should be calculated.

On April 28, 2017, the DC Circuit agreed to the request of EPA to hold in abeyance any ruling on the legal challenges to the CPP because the Trump administration is seeking to repeal the regulations. On October 10, 2017 EPA issued a proposal to repeal the CPP regulations based on the Trump administration's conclusion that the rules exceeded EPA's authority. Because the Clean Air Act requires EPA to regulate emissions of any pollutant that endangers public health or welfare, EPA on December 28, 2017 published an advance notice of proposed rulemaking, soliciting public comment on GHG control measures for power plants that could replace the CPP.

Reconsideration of Fuel Economy Standards

One of the signature environmental initiatives of the Obama administration was a substantial strengthening of corporate average fuel economy (CAFÉ) standards. In August 2012 EPA and the National Highway Transportation Safety Administration (NHTSA) adopted regulations requiring new cars and light-duty trucks to meet an average of 54.5 miles per gallon (mpg) by model year 2025. This was designed to achieve a substantial reduction in GHG emissions to help meet the US pledge in the Paris Agreement. After performing a midterm evaluation of the feasibility of meeting the new standard, outgoing EPA Administrator Gina McCarthy reaffirmed the 54.5 mpg goal for 2025 on 12 January 2017, eight days before the Trump administration took office.

On March 15, 2017, President Trump ordered the EPA to reconsider this regulation. In April 2018, EPA administrator Scott Pruitt announced that EPA plans to weaken the CAFÉ standards. In a particularly controversial move, the Trump EPA is proposing to require the District of Columbia and thirteen states, including California, which for decades have been allowed to have stricter air pollution standards than the federal standard, to relax their standards. This action is being challenged in court by the states that follow the California standard.

Climate Change Litigation

In 2011 the US Supreme. Court held that federal common law nuisance actions for climate change were displaced by the Clean Air Act. But the Court expressly reserved the question whether such lawsuits could be brought under state common law. American Electric Power v. Connecticut, 564 US 410 (2011). Nine cities and counties, including New York and San Francisco have brought state common law nuisance actions against fossil fuel companies seeking compensation for the costs of adapting to climate change.

In November 2016 a federal district court in Oregon rejected a motion to dismiss a "future generations" climate change lawsuit against the President and top U.S.

officials. Juliana v. U.S., 217 F.Supp.3d 1224 (D. Ore. 2016). The plaintiffs, who include 21 people between the ages of eight and nineteen, allege that the federal government knew about the dangers of climate change for more than 50 years, but failed to take action to protect them. The children argue that this violated their substantive due process rights to life, liberty and property as well as the government's public trust obligations to hold natural resources in trust for future generations. The plaintiffs seek a declaration that their rights have been violated and an order requiring federal officials to develop a plan to control emissions of greenhouse gases. The court rejected the government's arguments that the case raises a non-justiciable political question and held that plaintiffs had adequately pleaded substantive due process and public trust violations by the federal government.

The Justice Department then petitioned the Ninth Circuit for a writ of mandamus to halt discovery and any trial, arguing that the federal government should not be subject to burdensome discovery when the plaintiffs have failed to state a justiciable claim. On March 7, 2018, a panel of Ninth Circuit judges denied without prejudice the federal government's motion for a writ of mandamus. In re United States, 2018 WL 1178073 (2018). The court held that the federal government had not met the "high bar for mandamus relief" at this stage of the litigation. It observed that it was "mindful that some of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies plaintiffs seek may not be available as redress." But the court left it for the district court to develop the record and to consider the claims raised by the plaintiffs. Plaintiffs are hoping for a trial to commence before the end of 2018.

Protection of Water Quality

EPA's "Waters of the United States" Rule

In May 2015, the EPA issued a final rule clarifying its interpretation of the meaning of 'waters of the United States,' the jurisdictional trigger for federal regulation under the CWA. The rule is a response to the Supreme Court's sharply divided ruling (four to one to four) in *Rapanos v United States* (547 US 715 (2006)). In this decision, Chief Justice Roberts expressly invited the EPA to issue new rules clarifying the reach of its jurisdiction and indicated that they would be entitled to deference under the court's Chevron doctrine. On October 9, 2015, the US Court of Appeals for the Sixth Circuit issued, by

a two-to-one vote, a nationwide stay of the EPA's "Waters of the United States" (WOTUS) rule.

A week before President Trump took office, the Supreme Court agreed to review the decision by the US Court of Appeals for the Sixth Circuit that challenges to the WOTUS rule should be heard first in the US Courts of Appeals instead of in federal district courts. After President Trump issued Executive Order 13778, the federal government asked the Court to put the case on hold pending its reconsideration of the WOTUS rule. On April 3, 2017 the Supreme Court denied this motion.

On January 22, 2018 the Supreme Court reversed the Sixth Circuit and decided that proper venue for challenges to the "waters of the U.S." rule lies in the federal district courts and not the U.S. Courts of Appeal. National Association of Manufacturers v. Department of Defense, 138 S.Ct. 617 (2018). Justice Sotomayor wrote the opinion for a unanimous Court. The Court held that the plain language of the judicial review and venue provisions in § 509(b) of the Clean Water Act, 33 U.S.C. §1369(b), does not provide for the filing of initial petitions for review in the Courts of Appeal because the rule was not among the categories of actions for which the statute specified such venue. Now that the Supreme Court has ruled that legal challenges to the WOTUS rule initially must be brought in federal district courts, litigation is likely to be brought there. Faced with the dissolution of the Sixth Circuit's nationwide injunction staying the WOTUS rule, EPA on 6 February 2018 extended the effective date of the rule to February 6, 2020. EPA states that this will give it time to revise or rescind the rule before it takes effect. Meanwhile litigation over the legality of the WOTUS rule is proceeding in several federal district courts.

On February 28, 2017, President Trump signed Executive Order 13778 on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule. The executive order directs EPA Administrator Scott Pruitt to reconsider the EPA's 'WOTUS rule. It directs the EPA to consider adopting Justice Scalia's 'continuous surface connection' test that obtained only four votes in the Supreme Court's 2006 *Rapanos v United States* decision. Because this test, which would

sharply restrict the reach of federal jurisdiction, was rejected by a majority of the court, the EPA would be on shaky legal ground if it was adopted. On March 6, 2017 EPA and the US Army Corps of Engineers announced their intent to "review and rescind or revise" the WOTUS rule. In July 2017 EPA and the Corps proposed to rescind the WOTUS rule.

Environmental Impact Assessment

In August 2016 the Council on Environmental Quality (CEQ) completed a six-year effort to provide guidance to federal agencies concerning how to consider GHG emissions and the effects of climate change in environmental impact assessments required by the National Environmental Policy Act (NEPA). CEQ, Council on Environmental Quality's Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed Reg 51866 (5 August 2016). On 28 March 2017, President Trump issued Executive Order 13783 on Promoting Energy Independence and Economic Growth. The order revokes the CEQ guidance, leaving it agencies to determine how to meet their NEPA obligations to assess the environmental effects of actions likely to have a significant effect on the environment. The executive order also rescinds President Obama's *Climate Action Plan*, revokes Executive Order 13653 that required agencies to prepare for the impacts of climate change, and revokes a September 2016 presidential memorandum on climate change and national security.

The Department of Interior is moving to shorten the length of environmental impact statements (EISs) and to speed the process of environmental impact assessment. In a memorandum dated 31 August 2017 Deputy Secretary David Bernhardt decreed that EISs normally should not be more than 150 pages and should not take more than a year to prepare.

Energy Production on Public Lands

In pursuit of his stated goal of U.S. "energy dominance," President Trump on March 28, 2017, issued Executive Order 13783 on Promoting Energy Independence and

Economic Growth. This order directed all federal agencies to reconsider any existing regulations that "unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources." On March 28, 2017 Secretary of Interior Ryan Zinke lifted a moratorium on new coal leasing on federal lands that had been issued on January 15, 2016.

In December 2017 the US Bureau of Land Management (BLM) suspended regulations limiting leaks of methane from oil and gas production on federal lands. On February 22, 2018 a federal district court ruled the suspension to be illegal and ordered BLM to enforce the rule. In February 2018 BLM proposed rescinding the regulations. An effort to use the Congressional Review Act to strike down the regulations limiting methane leaks from oil and gas production on federal land failed. On February 3, 2017 the US House of Representatives passed a resolution disapproving the regulations. However, on May 10, 2017 the U.S. Senate voted down the disapproval resolution by a vote of 51-49 with three Republican senators joining all opposition Democrats in voting against it.

On April 28, 2017 President Trump signed Executive Order 13795 on Implementing an America-First Offshore Energy Strategy. The order opens up to offshore oil drilling millions of acres of waters in the Atlantic and Arctic Oceans that previously had been off limits. The order also requires a review of existing marine sanctuaries to determine whether oil exploration should be allowed within their boundaries. On January 4, 2018 the US Department of Interior announced a new five-year plan to offer offshore oil leases in most U.S. coastal waters. However, on January 9, 2018 Interior Secretary Zinke announced that Florida waters would be off limits to oil drilling, following objections from the Republican Governor of Florida.

On December 29, 2017 the Bureau of Safety and Environmental Enforcement proposed revising or rescinding offshore drilling safety regulations that had been adopted by the Obama administration in the wake of the catastrophic Deepwater Horizon oil spill in the Gulf of Mexico.

On December 4, 2017 President Trump issued a proclamation reducing the size of two national monuments in Utah. The proclamation reduced the size of public land protected by the Bears Ears National Monument by 85 percent, while shrinking the Grand Staircase Escalante National Monument by nearly half. The public land removed from the monuments was opened to new mining claims on February 2, 2018. Coalitions of environmental groups, tribes, and the outdoor equipment retailer Patagonia have filed suit to challenge the President's authority under the Antiquities Act to reduce the size of national monuments.

Decades of efforts by environmentalists to keep the Alaska National Wildlife Refuge ANWR closed to oil drilling were dealt a blow by tax cut legislation. On December 22, 2017, President Trump signed into law the Tax Cut and Jobs Act of 2017, which contains a provision opening ANWR to oil drilling. The provision was added at the behest of Republican Senator Lisa Murkowski of Alaska, a long-time supporter of drilling ANWR in order to increase royalties to be received by the state of Alaska. The bill passed the Senate by a vote of 51-48 under a "reconciliation" procedure that avoided the need to obtain 60 votes to overcome a filibuster. It was argued that because the measure would raise revenue from oil royalties it was germane to the tax bill. At a White House celebration following passage of the tax cut legislation, President Trump boasted that he had been able to overcome more than 40 years of opposition to opening ANWR. It will take considerable time before any drilling is done in ANWR and with oil prices lower than in decades past, it is unclear how keen oil companies will be to drill there.

Environmental Enforcement

Decline in Environmental Enforcement Actions

There are early indications of a dramatic decline in EPA enforcement action during the Trump administration. In fiscal year 2017 EPA and the US Department of Justice (DOJ) resolved 44 percent fewer civil enforcement actions, recovering 49 percent less

in civil penalties than in the first year on average of the last three presidential administrations. Violators also agreed to spend less than one-third of what they agreed to spend to correct violations than in the initial year of the Obama administration. EPA is now referring far fewer criminal and civil enforcement actions to the DOJ for prosecution. EPA headquarters must now approve any efforts by the agency's regional offices to investigate discharges from suspected violators of the environmental laws.

Criminal Prosecution of Volkswagen

The EPA continued its enforcement actions against Volkswagen for installing 'defeat device' software on its diesel vehicles that disabled their pollution control devices except when they were being tested. The emissions control cheating occurred on 590,000 vehicles sold in the United States in model years 2009–16 and more than 11 million vehicles worldwide. On March 10, 2017 Volkswagen AG (VW) pled guilty in federal district court in Detroit to criminal charges for intentionally violating the Clean Air Act and obstruction of justice in connection with its cheating on vehicle emissions testing. The company agreed to pay a $2.8 billion criminal fine and an additional $1.5 billion civil penalty. On January 11, 2017 seven VW executives were indicted for their role in this deliberate fraud. One, Oliver Schmidt, who was arrested while vacationing in the US, pled guilty in August 2017 to a criminal conspiracy to defraud the US and a criminal violation of the Clean Air Act. The other indicted executives remain in Germany and it is unclear whether that country will permit their extradition to the U.S. to face the criminal charges. In December 2017 Schmidt was sentenced to seven years in prison and fined $400,000. In May 2018 former VW CEO Martin Winterkorn and five other former top VW executives were indicted for criminal violations connected to the emissions cheating scandal. It is doubtful Germany will permit their extradition to the US.

Elimination of Criminal Penalties for Incidental Takes of Migratory Birds

On January 10, 2017 the Obama administration's outgoing Solicitor of Interior issued an opinion reaffirming long-standing policy that the "take" prohibition in the Migratory Bird Treaty Act (MBTA) criminalizes "incidental takes" of birds protected by the Act. Incidental takes occur when birds are killed by oil spills and other activities that do not

intentionally and directly apply physical force to the birds. On December 22, 2017 the Trump administration's Solicitor of Interior revoked the January 2017 opinion and issued a new opinion declaring that only affirmative actions intended to kill birds are prohibited by the MBTA. A bipartisan group of former Interior Department officials from every administration since President Nixon denounced the new policy as ""a new, contrived legal standard that creates a huge loophole in the MBTA . . .".

EPA Budget and the Congressional Review Act

EPA Budget

In his first budget request to Congress, President Trump proposed to slash funding for the EPA by 31% to $5.7 billion, the deepest cut he proposed for any federal agency. The Trump budget also sought to cut one-quarter of the agency's employees. Congress, however, must enact the budget and it rejected President Trump's request to slash the EPA budget. Congress funded the EPA at a level of US $8.3 billion for fiscal year 2017 and $8.0 billion for fiscal year 2018. EPA now has 15,400 employees, down from 17,000 at the start of the Obama administration in 2009, but approximately the same number the agency had in 2015. President Trump's proposed fiscal year 2019 budget seeks to slash the EPA's budget to US $6.1 billion and to reduce the number of EPA employees to 12,250.

Congress Uses Congressional Review Act to Overturn Stream Protection Regulations

The Congressional Review Act (CRA) creates a special fast-track procedure permitting an up or down vote in each house of Congress to disapprove a regulation within sixty legislative days of its passage. Shortly after the inauguration of President Trump, Congress used the CRA to veto several regulations. On February 16, 2017, President Trump signed a joint resolution of disapproval vetoing an Interior Department regulation that would have limited the dumping of debris from mountaintop mining into streams. The rule, which had been under development for two and one-half years, was promulgated by the US Department of Interior in December 2016. Under the provisions of the CRA, because the regulations were disapproved by Congress, the department is forever barred from issuing substantially similar regulations without prior authorization by Congress.

President Trump's "Two for One" Executive Order

On January 30, 2017, President Trump signed Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs. President Trump described it as mandating 'the largest cut by far, ever in terms of regulation' and the key to 'cutting regulations massively' for businesses. The order requires federal agencies to repeal two existing regulations for each new regulation they issue, and it gives each agency a regulatory budget of zero for the imposition of aggregate costs on industry during the current fiscal year. President Trump's executive order has legal qualifiers. It purports not to 'impair or otherwise affect' agencies' existing legal authority, and it requires federal agencies to comply with the APA when repealing rules. The APA's judicial review provisions direct courts to strike down agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' If an agency's only justification for repealing a rule is to comply with President Trump's new directive, it should be possible to convince a reviewing court that the action is arbitrary enough to be struck down.

International Environmental Law

Paris Climate Agreement

On June 1, 2017, President Trump announced that he intended to withdraw the US from the Paris Agreement on climate change. In his withdrawal announcement, Trump preposterously claimed that the agreement would impose "draconian financial and economic burdens" on the US "to the exclusive benefit of other countries," costing the economy by 2040 "close to $3 trillion in lost GDP and 6.5 million industrial jobs." Under the terms of the Paris Agreement, parties must wait three years from its entry into force before depositing instruments of withdrawal and then wait one year before the withdrawal can become effective. Because the agreement entered into force on 4 November 2016, the earliest a US withdrawal could become effective would be 4 November 2020, the day after the next US presidential election. In 2017 Nicaragua and Syria joined the Paris Agreement, making the US the only nation in the world that now rejects it.

In an effort to mollify some of his critics, Trump bizarrely announced that the U.S. would "begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers." World leaders promptly rejected any suggestion of renegotiating the Paris Agreement. In response to Trump's announcement, the governors of 15 states and Puerto Rico, representing 36 percent of the US population, formed the United States Climate Alliance, which pledges to continue to honor the Paris Agreement. More than 2,700 leaders of US cities, corporations, and universities also have joined the "We Are Still In" movement pledging to continue to reduce GHG emissions to achieve the US nationally determined contribution in the Paris Agreement despite the president's intended withdrawal.

Kigali Amendment to the Montreal Protocol

One important international environmental initiative that President Trump has yet to oppose is the Kigali Amendment to the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol). The Kigali Amendment was adopted in October 2016 by nearly 200 countries at the twenty-eighth Meeting of Parties to the Montreal Protocol. This landmark agreement expanded the list of ozone-depleting substances subject to phase down to include hydrofluorocarbons (HFCs), which are potent GHGs. Because HFCs are widely used in refrigerators and air conditioners, this is the single most significant measure the world has undertaken to combat climate change. Under the Kigali Amendment, developed countries, including the United States, are required to achieve an 85 percent reduction in the use of HFCs by 2036 over the levels used in 2011–13.

Title VI of the Clean Air Act, added in the 1990, directs EPA to require the phaseout of ozone-depleting substances. Section 612 of the Act provides that ozone-depleting substances "[t]o the maximum extent practicable . . .shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." Although companies initially were permitted to replace CFCs and other ozone-depleting substances with HFCs, in 2015 EPA moved

HFCs to the prohibited list. In August 2017 a divided panel of the DC Circuit held that, although EPA can move HFCs to the prohibited list because they are GHGs, EPA cannot require companies who previously replaced ozone-depleting chemicals with HFCs to discontinue their use under §612 of the Clean Air Act. Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017). As a result of the decision, US implementation of the Kigali Agreement may require additional action by Congress even though § 614 of the Clean Air Act provides that "[i]n the case of conflict between any provision of [Title VI] and any provision of the Montreal Protocol, to which Kigali in an amendment, the more stringent provision shall govern." After the DC Circuit refused to rehear the case *en banc*, environmental NGOs and companies that produce HFC-free refrigerants announced that they will seek review of the decision by the US Supreme Court. In the meantime, the Kigali Agreement has strong support from major US companies that produce HFC-free refrigerant products, such as Honeywell, Trane, and Carrier. These companies are lobbying the Trump administration to support implementation of the Kigali Agreement. On March 23, 2018 the California Air Resources Board announced that it had prohibited the use of HFCs in California.

President Trump Reverses Obama Disapproval of Canada's Keystone XL Pipeline Project

On March 24, 2017 President Trump announced that he had approved a permit for construction of the controversial Keystone XL pipeline to transport oil from Canada's tar sands in Alberta to oil refineries in Texas. This action reverses President Obama's November 2015 decision to reject TransCanada's application to build the pipeline. President Obama had argued that because the pipeline would facilitate the extraction and marketing of higher carbon oil it would contribute to increased GHG emissions, making approval inconsistent with US leadership in combating climate change. In his announcement approving the pipeline, President Trump did not mention climate change. Instead he emphasized the jobs that would be provided by constructing the pipeline and its potential contribution to North American energy independence.

Conclusion

During its first year in office, the Trump administration has moved aggressively to roll back environmental regulation. It has begun the process of repealing significant regulations to control air and water pollution and to reduce emissions of greenhouse gases. It also has opened up vast areas of public land to oil and gas production. Nearly all of these actions are being challenged in court by environmental NGOs and some subnational levels of government. Ultimately the Trump administration may accomplish significant regulatory changes by executive action and it seems to have relaxed enforcement of existing environmental laws., However, it is unlikely to be able to make fundamental changes in the underlying environmental laws, particularly if President Trump's opponents gain control of Congress in the November 2018 midterm elections. This will increase the importance of the judiciary as a vehicle for ensuring that the administration complies with the remarkably durable federal environmental laws.

SINS OF THE FATHER

A Rise in Children's Lawsuits Against Climate Change

Mrinalini Shinde*

In November 2017, Dr. James Hansen, renowned expert on climate change, and Professor at Columbia University said, '[w]e are seeing injustice against the young. The present generation has a responsibility to future generations'.[645] This statement was made while discussing a lawsuit[646] that he is supporting wherein twenty-one children are suing the government of the United States of America, among others,[647] for its inadequate action against climate change.

With national governments undertaking inadequate action to combat climate change, civil society must turn to their domestic judiciary to attempt to safeguard their environmental rights and hold the fossil fuel industry and complicit governments accountable. A study conducted by the UN Environment Programme and Columbia Law School found that as of March 2017, a total of 654 climate suits were filed in the United States, followed by 80 in Australia and 49 in the United Kingdom[648], indicating that citizens are

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[645] Jonathan Watts, 'We should be on the offensive' – James Hansen calls for wave of climate lawsuits' *The Guardian* (London, 17 November 2017) <https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits> accessed 7 December 2017.

[646] *Juliana et al v United States et al*, 6:15-cv-01517-TC.

[647] The original defendants in the complaint were: The United States of America; Barack Obama, in his official capacity as President of the United States; The Office of the President of the United States; Christy Goldfuss, in her official capacity as Director of Council on Environmental Quality; Shaun Donovan, in his official capacity as Director of the Office of Management and Budget; Dr. John Holdren, in his official capacity as Director of the Office of Science and Technology Policy; The United States Department of Energy; Dr. Ernest Moniz, in his official capacity as Secretary of Energy; The United States Department of the Interior; Sally Jewell, in her official capacity as Secretary of Interior; The United States Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation; The United States Department of Agriculture; Thomas J. Vilsack, in his official capacity as Secretary of Agriculture; The United States Department of Commerce; Penny Pritzker, in her official capacity as Secretary of Commerce; The United States Department Of Defense; Ashton Carter, in his official capacity as Secretary of Defense; The United States Department of State; John Kerry, in his official capacity as Secretary of State; The United States Environmental Protection Agency; Gina McCarthy, in her official capacity as Administrator of the EPA.

[648] Oliver Milman, 'Climate change lawsuits are on the rise' *Grist* (Seattle, 24 May 2017) <http://grist.org/article/climate-change-lawsuits-are-on-the-rise/> accessed 7 June 2018, citing United Nations Environment Programme, 'The Status of Climate Change Litigation-A Global Review' (May 2017) <http://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> accessed 7 June 2018.

increasingly viewing litigation as a method to resolve climate related grievances, chipping away at the idea that climate change is a political question to be limited to the realm of the Legislature or Executive.[649] The issue of climate action has transcended from this realm to the courtroom where it requires the assessment of evidence, culpability and responsibility. We are especially witnessing a surge of lawsuits specifically filed by children, who face higher consequences of climate change than previous generations while having had no intentional role in its causation.

The institution of climate lawsuits on behalf of children is a practical utilisation of the principle of intergenerational equity, popularized in 1972 in the Declaration of the United Nations Conference on the Human Environment[650] and subsequently included in the Rio Declaration on Environment and Development[651], and the United Nations Framework Convention on Climate Change[652] in 1992.The concept of children suing governments for the protection of environmental rights, as an expression of this principle is, similarly, not new but it has gained increasing momentum of late. In 1993, for instance, the Philippines Supreme Court in *Oposa v Factoran* [653] was faced with a complaint by children seeking the Secretary of the Department of Environment and Natural Resources to be directed to cancel existing licenses and prevent new licenses for timber felling for themselves and future generations; the Court decided in favour of the plaintiffs."[654] The Court relied on intergenerational equity, stating that nature had a 'rhythm and harmony' and that 'every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology'.[655] The Court listed several statutory provisions apart from the Constitution

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[649] Sabrina McCormick, 'The Judicial Branch Is Our Best Hope for Climate Action. Is It Up to the Task?' *Slate Magazine*, (New York, 11 September 2017) <http://www.slate.com/articles/health_and_science/science/2017/09/the_judicial_branch_is_our_best_hope_for_climate_action_under_trump.html.> accessed 7 June 2018.

[650] Declaration of the United Nations Conference on the Human Environment (16 June 1972) U.N. Doc. A/Conf.48/14/Rev. 1 (1973) Principle 1 and 2.

[651] Rio Declaration on Environment and Development (13 June 1992) UN Doc. A/CONF.151/26 (vol. I) Principle 3 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

[652] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 3 (1) '[T]he Parties should protect the climate system for the benefit of present and future generations of humankind…'

[653] *Oposa v Factoran* 224 SCRA 792 (1993).

[654] D B Gatmaytan, 'The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory.' (2003) 15(3) Geo Int'l Envtl L Rev 457.

[655] *Oposa v Factoran* 224 SCRA 792 (1993).

which paid 'special attention to the "environmental right" of present and future generations.'[656] The case with which Dr. Hansen is associated with, *Juliana v. United States,*[657] was filed in October 2015 on behalf of a group of twenty-one youths and children in the United States District Court, District of Oregon, Eugene Division, against several defendants, primarily the government of the United States and [then] President Barack Obama. The Court rejected the defendants' motion to dismiss the suit, and the trial began in December 2017.

Additionally, three private bodies representing the fossil fuel industry who had intervened as Defendants in the case, filed motions to withdraw from the case, possibly to avoid having to admit the extent of their knowledge regarding climate science and carbon emissions.[658] One of the key challenges for the Defendants was arguing that the plaintiffs did not have standing to bring the suit. The Court held in favour of the Plaintiffs, saying that they had satisfied the three main criteria to establish standing; that the injury complained of was 'concrete, particularized, and actual or imminent', that the injury was 'fairly traceable to the defendant's conduct' and that it could be 'redressed by a favourable court decision'. The court emphasized that an injury does not lose its particularized and concrete nature merely because the same injury and harm is faced by others. Moreover, the District Court decided that the injuries complained of were 'fairly traceable' to the government's actions or lack thereof.[659]

Irrespective of the final decision in the Juliana case, the decision by the District Court, rejecting the motion to dismiss is significant in achieving children's standing, or *locus standi*, in court and in the opportunity to sue climate polluters including the government machinery for their active contribution to climate change. On 7 March 2018, the United States Court of Appeal for the Ninth Circuit denied a petition by the Defendants seeking

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[656] *Oposa v Factoran* 224 SCRA 792 (1993).
[657] *Juliana et al v United States et al*, 6:15-cv-01517-TC Opinion and Order (D. Or. 2016) (Denying the Defendants' motion to dismiss).
[658] Chelsea Harvey, 'These fossil-fuel groups joined a historic climate lawsuit. Now, they want to get out of it.' *The Washington Post*, (Washington D.C. 26 May 2017) <https://www.washingtonpost.com /news/energy-environment/wp/2017/05/26/three-fossil-fuel-groups-joined-a-historic-climate-lawsuit-now-they-want-to-get-out-of-it/?utm_term=.5d19d2629489> accessed 7 June 2018.
[659] Michael C. Blumm and Mary Christina Wood, '"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine' 67 American University Law Review 101, 134-135.

a writ of mandamus directing the district court to dismiss the case, and held that seeking a writ of mandamus was not the appropriate remedy in the given case.[660]

In addition to the Juliana case, similar actions have been pursued in other legal jurisdictions. Subsequent to the *Oposa* case in the Philippines, a case was filed in 2014 in the Supreme Court in Manila, by several members of civil society including those representing the children of the Philippines and future children, which was filed as a writ of *Kalikasan* (Nature), seeking a writ of mandamus directing the Government to take action against air pollution in Manila, arguing that that 'the respondents' failure to implement the foregoing laws and executive issuances resulted in the continued degradation of air quality, particularly in Metro Manila' and that the said failure was a violation of the plaintiffs' 'constitutional rights to health and to a balanced and healthful ecology'."[661] The Court however, dismissed the petition saying that the 'petitioners failed to show that public respondents are guilty of any unlawful act or omission that constitutes a violation of the petitioners' right…'[662] Despite the decision of the Court, the case is an illustration of the global trend in climate lawsuits on behalf of children; it must be noted that the case was not dismissed on grounds of standing, but of causation.

In the Netherlands' the landmark decision in 2015 in *Urgenda Foundation v. The State of the Netherlands*[663], held that the government of the Netherlands should reduce greenhouse emissions by 25 per cent below the levels in 1990, by 2020, in order to fulfil its mandate under the Paris Agreement.[664] Although the case was filed by 886 Dutch citizens, the court's verdict considered the harm that climate change would cause especially to children, while deciding the case. Moreover, the Court in *Urgenda* held that while the private citizens are usually required to prove that they have sufficient interest in a matter in order to establish standing before the Court, public interest

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[660] United States v. U.S. District Court for District of Oregon, No. 17-71692 D.C. No. 6:15-cv-01517-TC-AA (Order dated 7 March 2018).
[661] *Victoria Segovia and 9 Ors. v The Climate Change Commission and 11 Ors*. GR No. 211010; Date of Judgment: 7 March 2017 (Concurring Opinion on March 7, 2017); Supreme Court of the Philippines.
[662] Ibid.
[663] *Urgenda Foundation v The State of the Netherlands* C/09/456689 / HA ZA 13-1396, Judgment dated 24 June 2015.
[664] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) No. 54113, under the United Nations Framework Convention on Climate Change (adopted 5 September 1992, entered into force 21 March 1994) 1771 UNTS 107.

associations like the Urgenda Foundation could establish standing by proving that were representing collective interest.[665]

In Norway in 2016, a youth based NGO called Youth and Nature, along with Greenpeace, filed a suit against the Norwegian government for violating section 112 of their Constitution which guarantees the public a right to a healthy environment, including for future generations, owing to the government's decision to grant further licenses for Artic oil exploration, and consequently failing to meet its targets under the Paris Agreement.[666] While the petition was not brought by children themselves, the case emphasised the inclusion of intergenerational equity and constitutional rights of future generations to the environment. In January 2018, the Oslo District Court[667] ruled in favour of the government and even imposed legal costs on the petitioners. The petitioners have now appealed to the Supreme Court of Norway to overturn the decision of the District Court.[668]

In India, a nine-year-old girl Ridhima Pandey[669] filed a case before the National Green Tribunal (NGT) in 2017, wherein the Government of India was made a respondent on the grounds that its inability to take adequate action against rising carbon emissions, and fiscal support to the fossil fuel industry, violated core environmental law principles such as the doctrine of public trust and intergenerational equity. The case is currently being heard by the National Green Tribunal. The application in the matter stated:

> *Because the Applicant as well as the entire class of children and future generations have the right to a healthy environment under the principle of intergenerational equity. It is submitted that*

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[665] Giulio Corsi, 'A bottom-up approach to climate governance: the new wave of climate change litigation' (2017) 57 ICCG Reflection 1, 3.
[666] Tone Sutterud and Elisabeth Ulven, 'Norway sued over Arctic oil exploration plans' *The Guardian* (London, 14 November 2017) <https://www.theguardian.com/environment/2017/nov/14/norway-sued-over-arctic-oil-exploration-plans> accessed 7 June 2018.
[667] Judgment of the Oslo District Court dated 4 January 2018 (16-166674TVI-OTIR/06).
[668] Alister Doyle and Terje Solsvik, 'Greenpeace appeals after losing Norwegian Arctic drilling lawsuit' *Reuters* (5 February 2018) <https://www.reuters.com/article/us-climatechange-norway/greenpeace-appeals-after-losing-norwegian-arctic-drilling-lawsuit-idUSKBN1FP15B> accessed 20 March 2018.
[669] *Ridhima Pandey v Union of India and Ors*. O.A. 187 of 2017, NGT Principal Bench.

> *the Applicant is part of a class that amongst all Indians, is most vulnerable to changes in climate in India and yet are not part of the decision making process*.[670]

Similarly, in 2016 in Pakistan,[671] a seven-year-old girl called Rabab Ali represented by her father, the lawyer in the case, sued the government of Pakistan for violating her environmental rights, and those of future generations. The Supreme Court of Pakistan reversed the decision of the registrar, and held that minors had a right to file suits in the public interest, if represented by a lawyer.

The global trend of children's lawsuits and the invoking of the rights of future generations while safeguarding present environmental rights is a solid way of implementing the international environmental law principle of intergenerational equity within domestic law, but it also begs the question as to how we distinguish between the rights of different generations, and how tort law must evolve to keep up with this trend. The general trend thus seems to be in favour of recognising the rights of the youngest generations with respect to the environment. However, it still remains to be seen if the principle of intergenerational equity can be judicially extended to successfully establish the standing of legal persons not yet born, to protect the rights of future generations. As younger generation's standing as a special category of plaintiffs is further established, it remains to be seen whether this will lead to successful substantive claims based on intergenerational equity.

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[670] Original Application in *Ridhima Pandey v Union of India and Ors*. O.A. 187 of 2017, NGT Principal Bench. <https://static1.squarespace.com/static/571d109b04426270152febe0/t/58dd45319f74568a83fd7977/1490896178123/13.03.22.ClimateChangePetition.pdf> accessed 7 June 2018, reported by Chloe Farand, 'Nine-year-old girl files lawsuit against Indian Government over failure to take ambitious climate action' *The Independent* (London, 1 April 2017) < https://www.independent.co.uk/environment/nine-ridhima-pandey-court-case-indian-government-climate-change-uttarakhand-a7661971.html> accessed 7 June 2018.

[671] Zofeen T. Ebrahim, 'Seven-year-old girl sues Pakistan government over climate change' *Dawn* (Karachi, 5 July 2016) <https://www.dawn.com/news/1269246> accessed 7 June 2018.

HOUSE SPARROW POPULATIONS AND LOCAL PROTECTION OF BIODIVERSITY

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Introduction

In 2012, the then Chief Minister of Delhi, Sheila Dikshit, announced the House Sparrow as the state bird of Delhi.[672] The House Sparrow, with scientific name *Passer domesticus,* is nowhere to be seen in cities like Delhi and many other urban areas of India and yet it is listed in the "least concern" category of the International Union for Conservation of Nature (IUCN) Red List.[673] It is, we argue, a matter of great concern that a once common feature of National Capital Territory (NCT) of Delhi has totally vanished from the city.[674] DA similar problem of decline has been seen in some other cities.[675] The species was red-listed in the UK in 2002 and was listed as near threatened in Germany as a result of population decline (Summers-Smith *et al*. 2015).[676] This is a bio-indicator that there is some imbalance in the ecosystem and if a small bird is

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672 Special Correspondent, " House Sparrow declared State Bird of Delhi" The Hindu (India 15 August 2012) <https://www.thehindu.com/news/cities/Delhi/house-sparrow-declared-state-bird-of-delhi/article3775082.ece > accessed 28 July 2018

673 See Figure 1, below, 2001 Categories & Criteria (version 3.1)

http://www.iucnredlist.org/static/categories_criteria_3_1> accessed 12 march 2018

674 Jasjeev Gandhiok, " Where have all the sparrows gone? Blame it on urban nesting places, Times of India (India March 20 2018) <https://timesofindia.indiatimes.com/city/delhi/where-have-all-the-sparrows-gone-blame-it-on-vanishing-urban-nesting-spaces/articleshow/63372794.cms >accessed 28 July 2018

675 David Sandison, "Mystery of the vanishing sparrow" The Independent Online (U.K. 20 November 2008) <https://www.independent.co.uk/environment/nature/mystery-of-the-vanishing-sparrow-1026319.html >accessed 13 July 2018

676 IUCN Red List of Threatened Species, "Passer domesticus" http://www.iucnredlist.org/details/103818789/0 > assessed 19 December 2017

eradicated from the urban ecosystem,[677] then it becomes a matter of great concern as other life forms including human beings are living in a polluted environment.

The IUCN Red List of Threatened Species

The IUCN Red List of Threatened Species, founded in 1964, is the world's most comprehensive inventory of the global conservation status of biological species.[678] When discussing the IUCN Red List, the official term "threatened" is a grouping of three categories: Critically Endangered, Endangered, and Vulnerable (see Figures 1, and 2 below). The Red data book contains three coloured pages, red, pink, and green. Red is symbolic of the danger that some species of both plants and animals presently experience throughout the globe. The pink pages indicate critically endangered species. While, Green pages are used for those species that were formerly endangered but have now recovered to a point where they are no longer threatened.[679] As time passes, the number of pink pages continues to increase. There are pitifully few green pages. The IUCN Red List system for evaluating the endangered status of species is illustrated in Figures 1-3 below.[680]

Figure 1: IUCN RED LIST SYSTEM

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[677] H. S. Sudhira and K. V. Gururaja, 'Distribution of House Sparrows in Bangalore, India' (2013) Gubbi Labs <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.703.5129&rep=rep1&type=pdf >accessed 28 July 2018

[678] The IUCN Red List of Threatened Species < http://www.iucnredlist.org/about/introduction> assessed 28 July 2018

[679] Clinthblog, Red Data book https://chinthblog.wordpress.com/2012/12/24/red-data-book/ accessed 12 Aug.2018

[680] IUCN Red List of Threatened Species, < http://www.iucnredlist.org/static/categories_criteria_3_1> accessed 10 May 2018

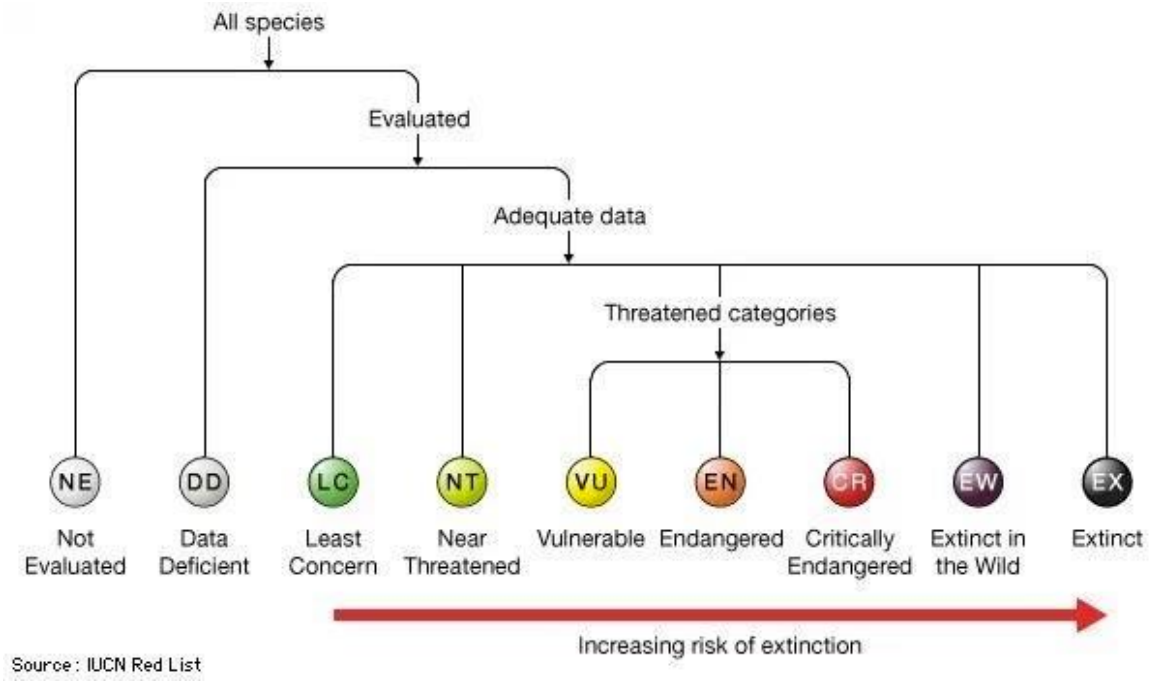

Figure 2: Categorization of Species as Per the Level of Extinction

S.no.	Category	Explanation
1	Extinct (EX)	No recognized species alive.
2	Extinct in the Wild (EW)	Known only to survive in captivity, or as a naturalized population outside its historic range.
3	Critically Endan-gered	Extremely high risk of extinction in the wild
4	Endangered (EN)	High risk of extinction in the wild.
5	Vulnerable (VU)	High risk of endangerment in the wild.
6	Near threatened (NT)	Likely to become endangered in the near future.
7	Data deficient (DD)	Not enough data to make an assessment of its risk of extinction.

8.	Not evaluated (NE)	Has not yet been evaluated against the criteria.

Figure 3: IUCN criteria of the extinction of species.

As per figure 1 and figure 2, House Sparrows fall into the category *threatened* and within that in the category of Least Concern (LC). The justification for House sparrows falling into this category is that this species has an extremely large range, and hence does not approach the thresholds for Vulnerable under the range-size criterion (extent of Occurrence <20,000 km2 combined with a declining or fluctuating range size, habitat extent/quality, or population size and a small number of locations or severe fragmentation). Despite the fact that the population trend appears to be decreasing, the decline is not believed to be sufficiently rapid to approach the threshold for being classified as Vulnerable under the population trend criterion (>30% decline over ten years or three generations). Meanwhile, the population size is extremely large, and hence does not meet the population size criterion either (<10,000 mature individuals with a continuing decline estimated to be >10% in ten years or three generations, or with a specified population structure). For these reasons the species is evaluated as Least Concern.[681]

Causes of Decline for House Sparrow Populations in India

In the United Kingdom, a decline in the numbers of House sparrows has been documented; this decline, it has been reported, began in the late 1970's or early 1980's, and further accelerated from the middle 1990's.[682] One of the chief causes for the decline in the UK is purported to be the disappearance of insects that are a food source for the birds.[683] The loss of insects has been attributed to the excessive use of

[681] Encyclopaedia of Life, Passer domesticus, House Sparrow <http://eol.org/pages/922241/hierarchy_entries/24952129/details#conservation_status> accessed 13 September 2018

[682] The BTO, Looking out For Birds, House Sparrow Research <https://www.bto.org/volunteer-surveys/gbw/about/background/projects/sparrows >accessed 14 August.2018

[683] The Virtual Nature Trail at Penn State New Kensington , Species pages < https://www.psu.edu/dept/nkbiology/naturetrail/speciespages/house_sparrow.html > accessed 12 August 2018

pesticides.[684] The cause of the decline in India is, however, still unclear. Suggested explanations include the disappearance of insects, again because of pesticide use; disappearance of nesting places as inner-city areas are tidied up; pollution; and a favourite of many non-scientists - attacks by magpies and other predators within booming urban populations such as sparrow hawks and carrion crows.

With respect to the availability of insects, the threat to species from pesticide use is not new one. Rachel Carson warned in her award winning 1962 book, *Silent Spring*, that insecticides had been indiscriminately used for removing insects since 1939, leading to the accumulation of biocides in ecosystem. These accumulated biocides killed not only the insects but adversely affected all life forms. Rachel Carson called them "elixirs of death."[685] Today the House Sparrow is another species that is slowly disappearing from urban ecosystems. Agrochemicals have again been implicated with respect to declining House sparrow populations.[686]

Separately, the introduction of exotic species of plants and the elimination of native plant varieties like *Justicia adhatoda* and *Lawsonia inermis* has affected the populations of insects like aphids, which are a food source for the sparrow. Furthermore, invasion by alien plants (i.e. plant species introduced by humans to regions outside their native distribution) has become very common in cities.[687]

In addition, Mohammed Dilawar, an environmentalist and founder of The Nature Forever Society[688] is of the opinion that the bird is losing an important habitat. These birds

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[684] *Michael McCarthy*, "UK sparrows becoming an endangered species" Independent(U.K. 9 April 2000) < http://www.independent.co.uk/environment/uk-sparrows-becoming-an-endangered-species-279459.html > accessed 13 November 2017

[685] Rachel Carson, *Silent Spring*, (Penguin books, 2000) 31

[686] Anjan Dandapat, Dipak Banerjee et.al., 'The case of the Disappearing House Sparrow (Passer domesticus indicus)' (2010) Vet World <http://veterinaryworld.org/Vol.3/February/The%20case%20of%20the%20Disappearing%20House%20Sparrow.pdf> accessed 6 September 2018

[687] Inderjit . Jan Pergl et. al. "Naturalized alien flora of the Indian states: biogeographic patterns, taxonomic structure and drivers of species richness" (2017) Biol Invasions < http://www.ibot.cas.cz/personal/pysek/pdf/Inderjit,%20Pergl,%20van%20Kleunen,%20Hejda%20...%20Pysek-Naturalized%20alien%20flora%20of%20the%20Indian%20states_BiolInvas2017(online%20early).pdf.> accessed 27 July 2018

[688] The Nature Forever Society, < http://www.natureforever.org/> assessed 28 January 2018

have historically lived close to human habitations, and these are lacking in contemporary society. The House sparrow is traditionally associated with human beings and is a natural hanger. Recent Norwegian research suggests that these little beggars have hung around humans for more than 11,000 years.[689] They prefer staying close to human dwellings due to the ease of acquiring food. House Sparrows are becoming homeless, however, because of the modern, matchbox-type architecture of the homes, in which the birds cannot build their nests. They need holes, roofs and crevices, which traditional houses used to have. [690] Contemporary houses have glass panes meaning birds cannot find any safe corners to build a nest. Therefore, it has been suggested that creating holes in these buildings and modern homes would be beneficial for the sparrow's population as it would allow the birds to make nests.

P A Azeez, former director of Sálim Ali Centre for Ornithology and Natural History (SACON), suggests that since the pulses and grains are now packed in plastics there is no spillage and this is leading to a scarcity of food for the House sparrow.[691] Global sales of packaged food were approximately $2.47 trillion USD in 2016, with food sales forecast to reach approximately $2.64 trillion USD by 2019.[692] With people in India increasingly buying packaged food, the traditional method of cleaning the wheat grains and pulses at home is becoming a thing of the past and so the House Sparrows are bereft of food, leaving them to either starve or consume packaged food. The consumption of packaged food however may still be detrimental to their health given that packaged foods can contain a range of additives and chemicals to prolong their shelf life.[693]

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[689] Nanvy Bazilchuk, "House sparrows and humans are old buddies" ScienceNordic (Norway 3 September 2018)

[690] Lorna M. Shaw, Dan Chamberlain & Mathhew R. Evans, 'The House Sparrow Passer domesticus in urban areas: Reviewing a possible link between post-decline distribution and human socioeconomic status' (2008) J ornihol < https://www.researchgate.net/publication/225799233_The_House_Sparrow_Passer_domesticus_in_urban_areas_Reviewing_a_possible_link_between_post-decline_distribution_and_human_socioeconomic_status > accessed 28 July 2018

[691] Subhojot Goswami, "How can we bring disappearing sparrows back to our cities?" Down to Earth (India 20 March 2017) < http://www.downtoearth.org.in/news/how-can-we-bring-disappearing-sparrows-back-to-our-cities--57396> assessed 10 May 2018

[692] Statistica, 'The Statistics Portal' 'Statistics and Studies from more than 22,500 Sources'

< https://www.statista.com/statistics/420252/global-packaged-food-retail-sales-value/> accessed 27 July 2018

[693] Lisa Guy, "body and soul" "Packaged foods can look healthy but contain plenty of hidden chemicals to prolong their shelf life." Daily Telegraph (Australia 25 March 2015) < https://www.dailytelegraph.com.au/lifestyle/food/packaged-foods-can-look-healthy-but-contain-plenty-of-hidden-chemicals-to-prolong-their-shelf-life/news-story/e0bb4c9d34a900249a7b7083aa380088 > accessed 12 Aug.2018

In 2011, an expert committee from the Ministry of Environment, Forests, and Climate Change (MoEF&CC) suggested that electromagnetic radiation (EMR) was largely responsible for the population decline.[694] The committee explained that there has been a decline in the populations of the House sparrow in the cities like Nagpur, Jabalpur, Bhopal, Ujjain and many other cities, where the use of the mobile phones is increasing.[695] A survey conducted by the Bombay Natural History Society (BNHS) collated data on sparrows before and after 2005. It found that sparrows were absent from about 50% of the areas during 2005-2012, compared to the situation before 2005. Although groups of between 1-30 sparrows were spotted frequently, observations of clusters bigger than 30 sparrows declined significantly by 60%. Before 2005 nests of the sparrows were spotted very often but in the last decade they dropped by 65%.[696] Conservation efforts are consequently being made at places like Shanker Vihar in Delhi where feeders and nest boxes have been provided in large numbers, which has led to an increase in the population of sparrows.[697] Recently the number of house sparrows has increased in the outer slums of Delhi, where triangular nesting boxes were installed for the birds.[698]

Revising the Red List Criteria with Reference to Declining House Sparrow Populations

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[694] Press Information Bureau , Government of India, "MOEF Issues Advisory on use of Mobile Towers in a Way to Minimize their Impacts on Wildlife Including Birds and Bees"

Ministry of Environment, Forest and Climate Change (India 14 Aug.2012) < http://pib.nic.in/newsite/PrintRelease.aspx?relid=86127 > accessed 12 Aug.2018

[695] Subhojot Goswami, "How can we bring disappearing sparrows back to our cities?" Down to Earth (India 20 March 2017) < http://www.downtoearth.org.in/news/how-can-we-bring-disappearing-sparrows-back-to-our-cities--57396> assessed 10 May 2018

[696] Chinmayi Sayal, "Sparrows fly out, number falls by 50%" The Times of India (28 March 2013) < https://timesofindia.indiatimes.com/home/environment/flora-fauna/Sparrows-fly-out-number-falls-by-50/articleshow/19249457.cms> assessed 17 Dec. 2017

[697] Jasjeev Gandhioki, "Blame it on vanishing urban nesting spaces." The Times of India (India20 March 2018) < https://timesofindia.indiatimes.com/city/delhi/where-have-all-the-sparrows-gone-blame-it-on-vanishing-urban-nesting-spaces/articleshow/63372794.cms> Assessed 10 May 2018

[698] Shagun Kapil, "Rise in House Sparrows noticed in Delhi slums" The Asian Age (India 20 March 2018) < http://www.asianage.com/metros/delhi/200318/rise-in-house-sparrows-noticed-in-delhi-slums.html> assessed 10 May 2018

When one observes a total loss of biodiversity in their native place, however the species remains in the LC category in the IUCN list, then a dilemma arises. The categorisation is based upon global numbers[699] but does not address the loss of a species in a particular area or zone, where this species was in abundance few years before.

The dynamics of species populations, i.e. the variation of species' geographic distributions and abundances in space and time, represent one of the most fundamental aspects of biodiversity and its change. Decreases in the sizes of populations and contractions in the distribution of species result in the loss of potentially significant functions from communities and ecosystems, and in extreme cases may cause their global extinction. The population of a species must, therefore, be counted at regular intervals and these audits must include the appropriate and different topographies. As far as the House Sparrow is concerned the justification given by the IUCN for keeping it in the LC category is that this species has an extremely large range, and hence does not approach the thresholds for v*ulnerable* under the range size criterion (extent of Occurrence <20,000 km^2 combined with a declining or fluctuating range size, habitat extent/quality, or population size and a small number of locations or severe fragmentation). Despite the fact that the population appears to be decreasing, the decline is not believed to be sufficiently rapid to approach the thresholds for *vulnerable* under the population *trend* criterion (>30% decline over ten years or three generations). The global population size is large, and hence does not approach the thresholds for *vulnerable* under the population *size* criterion (<10,000 mature individuals with a continuing decline estimated to be >10% in ten years or three generations, or with a specified population structure).

In India, the *Biodiversity Act 2002* (which implements commitments made under UN Convention on Biological Diversity 1992), establishes the National Biodiversity Authority as a national authority to regulate access to Indian biodiversity for commercial and exploitative purposes and to protect the intellectual property of the country relating to biological resources. So far 25 states have established similar state-level biodiversity boards in India under section 22 of the *Biodiversity Act 2002*.. As per section 23 (a) of the Act the functions of the State Biodiversity Boards shall be to advise the State Government, subject to any guidelines issued by the Central Government, on matters

[699] http://www.iucnredlist.org/about/introduction

relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of the benefits arising out of the utilization of biological resources. It is significant to note here that the no actions for conservation of existing biodiversity are written into the Act, such as promoting the conservation of native bird species. To address the problems associated with relying on global species assessments, the present authors suggest that national biodiversity laws should be used to fill this gap. In order to conserve biodiversity at the local [domestic] level, an inventory of native flora and fauna should be made zonally to generate a clear idea about the loss or gain of species in that particular region. This data should be updated every year by the local authorities and be published on the authority's website.

Additional laws would support protection of species. For instance, as noted above the impact of non-native species is one factor linked with declining house sparrow populations; in this regard laws should be adopted for growing native plants. Certain measures like promoting or requiring the growth of appropriate plant varieties should be adopted in the *Biodiversity Act 2002*. Any loss of biodiversity is alarming and must be taken as an environmental exigency for achieving the proper functioning of an ecosystem. Loss of House sparrows from many cities world over must be addressed at a global scale and even if the House sparrow falls within the" least concerned list" measures must still be taken by the authorities to bring them back to the ecosystems which are now bereft of them.

BOOK REVIEW

Judith Blau, The Paris Agreement: Climate Change, Solidarity, and Human Rights (Palgrave Macmillan 2017), xvii + 119

REVIEWED BY: Imtiaz Ahmed Sajal*

The Paris Agreement[700] is a multilateral environmental agreement adopted unanimously by the international community on 12 December 2015, with the ultimate goal of slowing down planetary warming to save human civilization in this mother earth.[701] It is a unique environmental law instrument which for the first time incorporates an explicit reference to human rights including rights of particularly vulnerable groups.[702] The adoption of the Paris Agreement coincided with the adoption of Sustainable Development Goals[703] (SDGs) and both are informed by each other.

The book under review, written by a Professor of Sociology, puts forward its own conceptualisation of global solidarity as a means to achieve the temperature goal of the Paris Agreement.[704] This conceptual model would rely on peoples' ability to make the change rather than on State action. Referring back to the history of the global climate negotiations and analysing the scientific and political drivers that propelled the Paris Agreement, the author seeks to explore the social foundations which will turn such global goal in reality. That is where the merit of this book lies.

The book is divided into ten chapters that address relevant issues of global solidarity in halting global warming, with particular emphasis on the American context. Chapter 1 explains why solidarity is required for global action. Chapter 2 narrates the current trends and predictions of

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[700] Adoption of the Paris Agreement, 12 December 2015, UNFCCC, Decision 1/CP.21 (FCCC/CP/2015/10/Add.1, 29 January 2016). See <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> accessed 22 Dec 2017.

[701] See Preamble.

[702] María Pía Carazo, Contextual Provisions (Preamble and Article 1), in Daniel Klein and others (eds), *the Paris Agreement on Climate Change: Analysis and Commentary*, 114-117. For more see Sébastien Duyck, The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate, Yearbook of International Environmental Law, Volume 26, 3–45.

[703] Transforming Our World: The 2030 Agenda for Sustainable Development (21 October 2015) UNGA Resolution A/RES/70/1. Available at <www.un.org/Docs/asp/ws.asp?m=A/RES/70/1> accessed 22 Dec 2017.

[704] Article 2 establishes the following goal:

> Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change

the global warming referring to scientific evidence. Chapter 3 explores the nitty-gritty of climate negotiation history from 1980s to the Paris. Chapters 4 and 5 deal with US citizens' perceptions of the United State's contribution and responsibility for historical and current global emissions by examining the theoretical basis of American exceptionalism. The author gives a brief sketch of America's positions in the fields of human rights and environmental rights in chapters 6 and 7 respectively. Chapter 8 contextualises the Paris Agreement in relation to the Millennium Development Goals and the Sustainable Development Goals. Chapter 9 highlights the global and local movements to slow global warming. Finally, chapter 10 presents the ground for global solidarity in climate action.

The central thesis of the book is that as the climate is shared globally so the only way to protect it from catastrophe is to act in global solidarity, formed through peoples' engagement and participation. That solidarity is based on the recognition of fundamental human rights. Human rights principles recognise all human beings as equal and respect their dignity and rights accordingly, regardless of outward differences. The author argues that our equalities and our differences unite us, in solidarity, in the pursuit of collective well-being and a habitable planet. As equals, our collective interest is to save the planet. As different, we can each contribute in various ways (p 108).

The author herself is a US citizen and very critical of some American values, especially American individualism and exceptionalism. She seeks to categorically demonstrate how these values further shaped Americans' perceptions and sensibilities regarding human rights, the environment and climate change. Americans emphasize individual rights rather than collective rights. The author examines some empirical studies which reveal that Americans are less concerned about climate change than people in the rest of the world (pp 38-41). Even within the US, understanding of climate change varies on the basis of people's political affiliation as Republicans and Democrats (p 53). She finds the root cause in capitalism – the economic model that America follows and which promotes the objectification of the environment in a way that leads to exploitation rather than sustainability and privileges competition over cooperation, selfish pursuits over promoting the common good, and greed over generosity (pp 33, 42).

The author, through reference to American economist Elinor Ostrom, suggests that the American peoples change their perceptions on environment and ecology so that they longer think of these as commodities. Ostrom contended that the environment and its components constitute a "collective commons," and that the people who benefit from a common collectively care

for it, by protecting it from overuse or replenishing it (pp 71, 81, 112). The author, assuming the planet as a collective common, suggests the taking of collective responsibility by all to save the commons from the catastrophe of global warming. She argues that while States have the responsibility to do this they also have inherent limitations so the peoples have to take the responsibility and act upon in transforming our world from fossil fuels to renewables (pp 5, 109). In fact, here the author goes beyond the structures of Westphalian modern nation states and gives due deference to the strengths of peoples' will, taking therefore a people-centred rather than state-centred approach.

The author finds the principle of common but differentiated responsibilities (CBDR) in the UNFCCC and Paris Agreement as a call for all developed and developing countries to act in solidarity (p 23). She argues that this principle is based on the spirit of human rights, recognising equality and differences and that the most vulnerable deserve special protection. But the author does not mention that the nature of differentiation in the Paris Agreement is distinct from that in the UNFCCC and its Kyoto Protocol, where it obliged only developed countries and was favourable for developing countries, and was based on ideological divide of historical responsibility but which has now become diluted in a discordant political context.

The author makes the point that the US is not a party to any human rights or environmental treaties (except some soft law instruments) but always actively participates in the law-making process and tries to dictate their terms in the negotiations (p 21). In particular, the US was never helpful in the process of incorporating human rights in environmental treaties or a right to environment in the human rights treaties (p 24). At the same time the author acknowledges the proactive initiatives taken by some American states and coastal cities to combat global warming (p 29).

The author rightly points out that while the US evades making commitments under international human rights treaties, as a member of the United Nations it is subject to the Universal Periodic Review mechanism which sought to establish international accountability towards human rights obligations of States (p 66). But the author could not make the same analogy of international accountability under UN system and obligations under treaty law while discussing the relationship between the Paris Agreement and SDGs. This is because SDG Goal 13 on climate change specifically provides that the UNFCCC is the primary forum for negotiating the global response to climate change. In that way, it has decoupled the UN's legal process to address climate change from the UN's voluntary process to address sustainable development. Meaning

thereby, a UN Member State who is not a party to the UNFCCC is beyond the purview of SDG 13.

The author discusses the qualitative difference between MDGs and SDGs and concluded that both are premised on the fundamental principles of human rights. The Paris Agreement recognizes a human rights-based approach to combat climate change. This provided the opportunity to include climate goals in the SDGs and to highlight sustainability in the Paris Agreement. Here, the author finds that the goal of achieving zero emissions is inseparable from advancing and achieving the SDGs (p 92).

The book was published in early 2017, when the United States was a party to the Paris Agreement. However the author expresses her deep concern about the probability of the US's withdrawal from the treaty as the domestic political regime of US has changed by this time. Her doubts of course became true. On 4 August 2017, the US formally communicated its intent to withdraw. Under the terms of the Agreement, the US's withdrawal will not take effect until November 2020. Until that time the US is under an obligation to perform its treaty commitments in good faith.

Throughout the book, the author does not discuss the loss and damage associated with the adverse impacts of climate change which is now a reality. The reason could be that the author has seen the Paris Agreement as only a mitigation effort. Though she has advocated for a human rights-based approach to combat climate change in no way the issue of liability and compensation for loss and damage be ignored in climate justice discourse.