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Foreword

The Judicial Protection of the Environment in International and European Law

This Special Issue originates from the 19th Conference of Young Scholars of International Legal Studies (*Incontro di studio tra giovani cultori delle materie internazionalistiche*), held at Luiss University in Rome on 2 December 2022. Marking the 50th anniversary of the Stockholm Declaration, the Conference aimed to shed new light on the role of judicial bodies – both international and domestic – in the application and development of international and European Union (EU) environmental law. The idea was to explore how courts contribute to the interpretation and enforcement of international, regional and national legal frameworks dedicated to environmental protection; whether and to what extent they create new principles and norms regulating environmental matters; how they balance environmental protection with other competing interests, such as human rights, international trade, investment protection, or national security concerns; and ultimately, whether the judicial mechanisms of environmental protection currently laid down in international and European law are fit for purpose.

This last question, in particular, is a daunting one. In international environmental law, with the monitoring of compliance with treaty obligations being usually based on non-binding "non-compliance" procedures, the search for effective judicial protection has turned to regional, sectoral and ad hoc tribunals (e.g., in the areas of human rights, the law of the sea, international trade or investment) as well as to national courts, which are increasingly being used for strategic climate change litigation. As far as EU law is concerned, the Court of Justice of the European Union (CJEU) has frequently dealt with environmental cases concerning both procedural issues (e.g., access to environmental information prior to the adoption of

secondary legislation) and substantive issues (e.g., the binding nature of general principles in environmental matters). Nevertheless, several points concerning access to judicial protection and the effectiveness of existing remedies remain problematic. These include, for example, the structural limitations on the jurisdiction of international and national courts (such as the consensual principle and jurisdictional immunities, respectively), legal standing, the role of third parties, the collection and assessment of evidence, the quantification of damages, or the law applicable in transboundary environmental damage cases. These unresolved issues are not only the source of theoretical difficulties but they also create practical problems in ensuring effective judicial protection and compliance with international and European environmental standards.

The following thirteen contributions explore (some of) these open issues. In his introductory piece, Professor Jorge E. Viñuales emphasises the importance of international adjudication of environmental disputes and urges readers to reconsider the scepticism about its suitability to address such disputes as well as, more generally, environmental issues. Subsequent articles discuss the role of courts and quasi-judicial bodies in different contexts and from various perspectives. Examining the *Daniel Billy et al. v. Australia* case, recently decided by the United Nations Human Rights Committee, Riccardo Luporini contributes to the reflection on climate change litigation before international human rights bodies. In the same vein, Antonio Mariconda delves into the climate change applications before the European Court of Human Rights (ECtHR), focusing on the misalignments between these pending cases and the consolidated features of the Strasbourg system, with particular regard to the "victim status" requirement under Article 34 of the Convention. Issues connected to access to justice in environmental matters are then at the core of Federica Passarini's contribution, which investigates the interpretation of Article 9(3) of the Aarhus Convention given by the Aarhus Convention Compliance Committee, the CJEU, and domestic courts. Pierre Clément Mingozzi and Julio Alberto Tilloy deal with the International Tribunal for the Law of the Sea (ITLOS). More specifically, the former focuses on its advisory jurisdiction, taking the recent request to render an advisory opinion as the starting point of the analysis, whilst the latter examines the ITLOS' contribution to the interpretation of the obligation to conduct an environmental impact assessment. Moreover, remaining on inter-State litigation, Francesca Sironi De Gregorio offers a systematization of the regime of proof of environmental harm by examining the practice of international courts and tribunals in relation to five key aspects, namely the definition of "environmental damage",

the burden of proof, the means and methods of proof, the standard of proof, and the evaluation of the damage.

Moving on to the EU law perspective, Camilla Burelli examines the use of the infringement procedure, and most notably of financial sanctions pursuant to Article 260(2) TFEU, in the context of the violation of environmental obligations by the EU Member States, considering the effectiveness of these sanctions *vis-à-vis* other sanctions of an economic and non-economic character. Nadia Perrone provides an analysis of the proposal for an EU directive on corporate sustainability due diligence – adopted by the European Commission in February 2022 – through the lens of extraterritorial jurisdiction. Marco Pasqua investigates the role of authorisations to emit greenhouse gases under Directive 2003/87/EC (Emissions Directive) in climate litigation from a conflict-of-laws perspective. And finally, Anna Facchinetti analyses State immunity from civil jurisdiction in cases related to environmental transboundary damage, including climate change litigation, paying attention to the restrictive doctrine, the forum tort exception, and recent domestic attempts to lift jurisdictional immunity for acts *jure imperii*.

The special issue is then completed and enriched from a comparative public law perspective by two additional articles. Francesco Gallarati confronts the basic features of constitutional emergencies, as arising from legal scholarship and contemporary Constitutions, with the characteristics of the climate issue, thereby bridging the gap between the preceding contributions and the constitutional category of "emergency". Roberto Louvin, Ezio Benedetti and Pasquale Viola's article examines public law policies and legislation in reference to water management, focusing on three specific issues, namely environmental costs, participation and water management, and Alternative Dispute Resolutions and water disputes.

Our sincere thanks go to all the authors and to the participants of the 2022 Conference who contributed to the development and quality of the articles presented on that occasion. We also owe a huge debt of gratitude to Pietro Pustorino and the Department of Law of Luiss University, for supporting the idea of organising the conference and their financial support; Beatrice I. Bonafè, Francesco Cherubini and Roberto Virzo, for their precious advice on the call for papers of the Conference; Jorge E. Viñuales, for his inspiring keynote speech; Federico Casolari, Maria Rosaria Mauro, Fulvio M. Palombino and Chiara E. Tuo, who kindly agreed to chair the four panels of the Conference; Ornella Feraci, Mario Gervasi, Ludovica Poli and Lorenzo Schiano di Pepe, who attentively served as discussants; and Laura Pineschi, who honoured us with her closing remarks. Finally, we express our gratitude to the Editors of the

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