ENVIRONMENT AND WASTE AS AN IRRECONCILABLE DICHOTOMY: Lessons Learned from Italian Environmental Cases before the two European Courts

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Abstract: *The present work aims at illustrating the main verdicts of the European Court of Justice which demonstrated Italian's inability to accurately implement the European legislation on waste issued in the environmental field. After an introduction that mainly lays on the significance of the notion, in an empiric sense, of "environment", outlining the main objectives of the present study, the first part of the work deals with the evolution of this concept in juridical terms. The second one instead focuses on the regulations issued in the environmental field, underlying the process of development of this branch of law with particular regard to the international level. Before deepening into the real core of the script, that analyzes the context in which the Italian Republic has been held responsible, on the European level, for several failures in the field of waste management, recovery and disposal, the work describes the process of developing a protecting system within the frame of the European Community. The script finally ends by mentioning a recent case that, after more than three decades of censures, still leaves some shadows on this thematic.*

Sintesi: Il presente lavoro mira ad illustrare le principali sentenze della Corte di Giustizia dell'Unione Europea che testimoniano l'incapacità della Repubblica Italiana di applicare accuratamente la legislazione Europea sui rifiuti emessa in ambito ambientale. Dopo un'introduzione che si concentra principalmente sul significato, in senso empirico, del termine "ambiente", evidenziando i principali obiettivi del presente studio, la prima parte del lavoro tratta dell'evoluzione di tale concetto in termini giuridici. La seconda invece ha ad oggetto la legislazione emanata in campo ambientale, sottolineando il processo di sviluppo di questa branca del diritto con particolare attenzione al profilo internazionale. Prima di approfondire la parte centrale dello scritto, che analizza il contesto in cui la Repubblica italiana è stata ritenuta responsabile, a livello comunitario, di diversi inadempimenti inerenti, rispettivamente, alla gestione, al recupero e alla eliminazione dei rifiuti, il lavoro descrive il processo che ha portato allo sviluppo di un sistema di protezione in tale ambito all'interno dell' Unione Europea. Lo scritto si conclude con la menzione di una recente sentenza che, dopo più di trent'anni di censure ricevute dall'Italia, lascia ancora diverse ombre sul tema.

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waste law at the international level: the international background. **5.** The consequences of the disasters that "opened the world's eyes". **6.** The development of environmental and waste law in the framework of the European Union: the causes that favored the blossoming of the EU environmental regulations. **7.** The current EU legal framework on environmental protection. **8.** The protection of the environment within the EU Charter of fundamental rights. **9.** Regulation of waste at the level of EU law. **10.** The Italian defaults in complying with European environmental legislation in the field of waste: the procedures before the CJEU with particular regard to art. 260 TFEU. **11.** A deeper glance to the cases. **12.** The waste catastrophe faced by the region of Campania. **13.** The Italian violations on waste reach the ECtHR. **14.** Differences between the two Courts' approaches to handling the same factual situation. **15.** A second – and heavier – condemn for Italy ex art. 260 TFEU. **16.** History repeats itself: two earlier verdicts that should have guided the Italian behaviors regarding waste management. **17.** Concluding notes.

1. Introductory remarks.

The Cambridge online dictionary, under the term "environment" bears two main meanings, both related to people.

On the one hand, it is addressed more generally as the totality of "air, water and land in or in which people, animals and plants live"; on the other hand, focusing more on human beings, it is defined as the whole conditions in which people live or work in and that influence the way individuals feel or effectively work[1].

These two significances clearly show how environmental issues are strictly connected with human well-being and they reflect the main reason why, especially starting from the second part of the XXth century, the concern dealing with this topic gained importance at the international level.

The quick industrial development that affected worldwide the society during the last century, together with an increasing apprehension regarding, on the one hand,

1 See also M. Cortelazzo, P. Zolli, *Dizionario etimologico della Lingua italiana*, Giappichelli, Bologna 1979, I, 45-46, in which it is stated that, within the purview of the Italian language, the first who employed the term "environment" ("ambiente") was Galileo Galilei in order to designate « the space in which a person or a thing are », recalling the latin origin of the word.

the new forms of pollution and, on the other hand, the diminishing amounts of natural resources, encouraged the international community to focus more on the protection of the environment.

The aim of this work is then to firstly show how there is not unambiguity, in the international scholars' community, neither on the concept itself of the environment nor on the correct methods to use in order to study this phenomena.

Afterwards, even if the aims of this work do not allow to dwell too long on these aspects, the thesis will proceed through the analysis of the evolution that interested the branch of law which involves the protection of the flora and fauna, especially in the area of waste recovery and disposal.

A particular regard will then be placed on the regulations that have been released on the European Union level, underlying the renovate necessity of ensuring also in this field a common and systematic discipline.

Having set the coordinates of the juridical context in which the present study moves, the last part of the script will focus on the episodes in which a Member State of the European Community (namely Italy) has failed, in the field of waste management, to comply with such discipline, trying at the same time to outline the reasons that have led both the European Court of Justice and the European Court of Human Rights (with regard to their own competences) to find the latter State responsible for several violations respectively of the Community environmental law and of the European Convention on Human Rights.

2. Linking law and the environment: from a descriptive to a functional approach.

Before starting the described analysis, it seems necessary to linger both on the exact meaning, on a legal acceptation, of the concept "environment" and on the process, on an international scale, that fostered the flowering of this discipline.

Namely, it is difficult to formulate a unique juridical definition of "environmental law" since the notion itself could appear to someone excessively broad and abstract to be conveyed in few words.

On this aspect different scholars have in the past offered their contributions, delivering to the academic society at least three different approaches in order to face such complicated task[2].

According to the first conception, environmental law is the combination of all the laws and regulations that pertain to the protection of the environment within the legal body of a specific territory.

Such view, not by chance known as "descriptive" approach[3], only consists of the listing of the laws related to the topic. Perhaps this definition ends not to be as

2 E. Fisher, B. Lange, E. Scotford, *Environmental Law. Text, Cases and Materials*, Oxford University Press, Oxford 2013, 6.

3 *Ibid.*

precise as it aims to be, considering the amount of existing regulations that deal with different features of the environment.

In this way, environmental law appears more as a bumbling box of norms rather than a systematic set of rules.

Counterposed to the descriptive approach is the "purposive" path, which aspiration is to describe environmental law according to its function[4].

Even if the main objective of the policies released in this field concerns the protection of the environment, various are the ways to do so, just like the areas in which such safety is needed.

Thus, differently from the previous one, the purposive approach offers an incomplete reconstruction, too microscopic if compared to the countless sub-functions that this discipline tries to fulfill.

The last theory left for discussion is the "jurisprudential" one. As the name itself reveals, according to this view environmental law has to be considered as a body of legal principles, placing emphasis on the need for exegetes' interpretation in order to give a legal integrity to the subject.

3. Juridical concept of the environment – unity or diversity of factors in the rulings of the Italian courts and in comparative law.

The issues emerged in finding a correct definition stem from the difficulties that arose in the past even for determining how the "environment" itself needed to be intended.

According to a broader interpretation that in Italy has probably found its major supporter[5], the juridical concept of environment could not be reduced to unity, at least because of both the variety of interests that it pursues and the numerous subjects that it intercepts.

However, nowadays this belief has been abandoned in favor of a unitary concept of environment, interpreted as a synthesis of different factors which grant and foster human and animal life, in the light of a sustainable development that takes into account also the preservation of the environment for the future generations.

This last stance has been followed also within European member States, especially by the national Courts that have been called upon to dispel any remaining doubts with regard to the extent of the mentioned notion.

Namely, already from the second part of the last century the Italian Constitutional Court had the chance to clarify the meaning and the capacity of the above-mentioned concept[6].

4 A. D. Tarlock, "The future of Environmental Rule of Law Litigation", *Pace Environmental Law Review*, 19/2002, 575-577.

5 M. S. Giannini, "Ambiente: saggio sui suoi aspetti giuridici", *Rivista trimestrale di diritto pubblico*, 1973, 15 e ss.

In particular it asserted that, notwithstanding the fact that it represents the composition of various factors (each of which can be enjoyed in different forms and is susceptible of a separate protection), the environment is an intangible and unitary legal asset[7], which stands as a "*public interest of primary*[8] *and absolute*[9] *constitutional value*".

Taking the cue from this tendency, also the Italian Supreme Court of Cassation had the possibility to reaffirm the necessary view for an overall unity of the elements that compose the environment[10] and which include both natural resources as well as the operations put in place by man that are worthy of protection.

As it is easy to grasp, the contribution of the jurisprudence in this field has played a decisive role, especially considering that the Italian Constitution does not provide for specific protection of the environment, which is a subject that is only indirectly affected by other prescriptions of the same Chart, related now to the conservation of the landscape (art. 9 of the Italian Constitution), now to the safeguard of human health (art. 32 Italian Constitution), now to the economical initiative (art. 41 Italian Constitution) and now, finally, to the competence of the State for dealing with the subject (art. 117 Italian Constitution).

Italy therefore, together with France and Czech Republic, pertain to the same group of European States that do not establish an explicit reference to the conservation of the environment in their formal constitutional texts, but ensure a protection via other laws[11] or through case law[12].

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6 For a brief examination of the process that led to the jurisprudential development in Italy of the "right to a safe environment", see: P. Caretti, G. T. Barbieri, *I diritti fondamentali. Libertà e Diritti sociali*, Giappichelli, Torino 2017, 549 e ss.

7 Corte Costituzionale, 17 December 1987, n. 641, in *https://www.cortecostituzionale.it/actionPronuncia.do*

8 C. Cost., 27 June 1986, n. 151, in *https://www.cortecostituzionale.it/actionPronuncia.do*, which addresses as "fundamental" the norms that deal with environmental protection.

9 C. Cost., 22nd may 1987, n. 210, in *https://www.cortecostituzionale.it/actionPronuncia.do*, which specifies the necessity of a unified conception of the environment, comprehensive of natural and cultural resources. In particular, it includes the "*conservation, the efficient management and the improvement of natural resources (air, water, soil, and territory in general), as well as the existence and the preservation of the genetic heritage, terrestrial and marine, of all the animal and vegetal species that live within it and, ultimately, of human beings in all their externalizations"*.

10 Cass. pen., Sez.III, 3rd July 2018, n.29901, in *CED Cass*., n. 273211. For older verdicts that raise environment to a fundamental interest of the society, see also: Cass pen., 25th September 1996, in *Foro it.*, 1996, I, 3062; Cass. Pen., 1st September 1995, n. 2911, in *Corr. Giur.*, 1995, 1146.

11 See French Code on the Environment (as amended in 2012); see also (even if the State does not belong to the European Union) Arts 7 and 35 of the Charter of Fundamental Rights and Freedoms of the Czech Republic (as amended in 1999).

12 One of the first ruling that dealt with the set up of the right to a healthy environment - even if intended as a specification of the wider right to health - was: Cass. civ., Sez I, 6 October 1979, n. 5172, in *Giust. civ., 1980, I, 1970*. This verdict represents a milestone in the emergence of such right, which is considered to be instrumental to an effective health protection.

However, there is as well no shortage of European States' Constitutions which expressly recognize environmental protection, "*not only as a duty of governmental authorities, but also as a right (and duty) of the individual*".[13]

To this set belong, for example, the Spanish Constitution[14] and the fundamental Charts of certain Central[15] and eastern European States[16]. In particular some of the latter ones are not limited to impose a right/duty to the individuals/State, but also acknowledge some principles of European matrix in the area of environmental protection, such as the "polluter pays" principle (Estonia, Hungary and, more indirectly, Slovenia) or the "sustainable development" principle (Poland).

Finally, a third group of European States, albeit short of a right-based formulation, recognizes the environmental safeguard as a constitutional value, that needs to be preserved by the State.

Examples on this aspect can be found in the German Constitution[17], as well as in the Dutch one[18].

13 S. Peers *et. al.*, *The EU Charter of Fundamental Rights*, Hart, Oxford and Portland 2014, 989.

14 Art. 45 of the mentioned document places both a *right* for any individual to enjoy an environment which is suitable for his development and a *duty* on each member of the community to preserve it. The second paragraph is instead addressed to the public authorities, which are in charge of monitoring the "*rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment*".

15 Such as the Belgian Constitution, which expressly states in art. 23 the "*right to enjoy the protection of a healthy environment*"; also the Finnish constitution, as well as the Portuguese one provide for a reference to the protection of the environment: the former, in art. 20, that affirms the necessity for public authorities to "*guarantee for everyone the right to a healthy environment*"; the latter, in art. 66, recommends the need for every individual to "*possess the right to a healthy and ecologically balanced human living environment and the duty to defend it*".

16 Art. 44 of the Slovakian Constitution proclaims that "*everyone has the right to an auspicious environment*" but, at the same time, an obligation to "*protect and enhance the environment and the cultural heritage*".
See also art. 115 of the Latvian Constitution ("*The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment*"); art. 24 of the Greek Constitution ("*The protection of the natural and cultural environment constitutes a duty of the State and a right of every person […]*"); art. 53 of the Estonian Constitution("*Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her*"); art. 21 of the Hungarian Constitution ("*Hungary shall recognize and enforce the right of every person to a healthy environment. A person who causes any damage to the environment shall be obliged to restore it or to bear all costs of restoration as defined by law"*); art. 72 of the Slovenian Constitution ("*Each person shall have the right in accordance with statute to a healthy environment in which to live. The State shall be responsible for such an environment. To this end, the conditions and the manner in which economic and other activities shall take place shall be regulated by statute. The conditions under which any person damaging the environment shall be obliged to make compensation shall be determined by statute*"); art. 5 of the Polish Constitution (" *The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development*").

17 Art. 20a of the Basic Law for the Federal Republic of Germany states that "*Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation* […]".

18 Art. 21 proclaims that "*It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment*".

4. The establishment of environmental and waste law at the international level: the international background.

The advancement and the introduction in the States legislation of norms that care about the environment, far from being a fast course, has represented the result of a long international process that has its roots at the beginning of the XIX century.

In 1864, for the first time, the detrimental consequences on nature of human incautious behaviors were witnessed by George Perkins Marsh in his book "Man and Nature", which showed how man's actions were endangering the original balance of the world's ecosystems, irreparably compromising future generations[19].

However, rather than protecting the environment as a value itself, at that time the policies that were made on this regard were seen in a utilitarian perspective of economic benefits for human beings. In other words, they lacked of a real environmental vocation, aiming at pursuing a shorter-term advantage related to material needs that could, from time to time, make their appearance.

Suffice it to mention the 1902 Convention for the Protection of Birds Useful to Agriculture (the first pact on a global scale that had the aspiration to protect a particular species of wildlife)[20] which, already from the name, contained the idea of protecting the environment not for the purpose of safeguard itself, but for the sake of commercial convenience.

In the same direction was established the Whaling Convention in 1931, that limited the exploitation of whales. The Convention indeed aimed at providing for "*the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry*"[21].

Furthermore, also the 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State pursued the same utilitarian objective, even if in a less obvious way. In fact, it provided, on the one hand, for the creation of national parks and, on the other hand, for a severe protection of some species of wild animals. Behind those apparently positive measures other interests were hiding, such as the will to preserve big game hunting or the intention to domesticate animals which were susceptible of economic utilization[22].

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19 G. P. Marsh, *Man and Nature, or, Physical Geography as Modified by Human Action*, C. Scribner and Co., New York 1867.

20 *International Convention for the Protection of Birds Useful to Agriculture*, Paris, 19th March 1902, *http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-000067.txt* .

21 This sentence belongs to the Preamble of the 1946 International Convention for the Regulation of Whaling, that replaced the Whaling Convention of 1931. For further readings, see: *International Convention for the Regulation of Whaling*, 2nd December 1946, Washington, available at *http://library.arcticportal.org/1863/1/1946%20IC%20for%20the%20Regulation%20of%20Whaling-pdf.pdf*.

22 *Convention Relative to the Preservation of Fauna and Flora in their Natural State*, 8 November 1933, London, available at: *http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-000069.txt*. In particular, see art. 4 and 7.

Notwithstanding the context described, it was in the frame of this period that one of the guiding principles of today's international environmental law was generated: the so-called *good neighbourliness* principle[23]. It was conceived as a result of an arbitral procedure between Canada and the United States that lasted for more than 12 years (from 1928 to 1941) and is known as the *Trail Smelter* case[24].

The dispute dealt with transboundary air pollution, coming from the Trail Smelter situated close to the US border on the Canadian side, that ended in damaging the State of Washington in the USA.

The award of the tribunal represented a milestone in the development of the relations among States in environmental matters, since it proclaimed that "*no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in the territory of another…when the case is of serious consequence and the injury is established by clear and convincing evidence*"[25].

Thus, the importance of the case lays in the consideration that, for the first time, a clear limitation on a State' sovereignty was set with respect to activities with transboundary environmental effects.[26]

However, the real turning point occurred in the 1960s, again fostered by the publication of a book in which the author complained about the great damages the use of pesticides caused to the environment[27].

Even if it is undeniable the role played by this publication in raising people's consciousness regarding those issues, it would have not been enough on its own for creating a wide consensus about the need for a concrete action.

5. The consequences of the disasters that "opened the world's eyes".

In this sense, two other events, both catastrophes, encouraged the scientific world and the civil society to take awareness of the dangers threatening the environment.

The first one, dated 18th March 1967, occurred over the spilling of 118,000 tons of crude oil by a supertanker (the *Torrey Canion*) which stranded off the coasts of England. The impact of the accident was terrifying: it is estimated that about 25,000 birds died as a consequence.[28]

23 K. Hossain, "The international environmental law - making process", in *Routledge Handbook of International Environmental Law* (ed. by S. Alam *et al.*), Routledge, Oxon 2013, 73.

24 Trail smelter case (United States, Canada),16 April 1938 and 11 March 1941, *Reports of International Arbitral Awards,* V. III, 1905-1982, available at *https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.*

25 L. F. Damrosch *et al.*, *International Law, Cases and Materials,* Thomson/West, St. Paul 2009, 1493.

26 Some years later, in 1949, the International Court of Justice embraced this principle and adopted it for the solution of another dispute. In that occasion the Court, remodulating the *dictum* of the Arbitral Tribunale, asserted that no State should utilize its territory in a way which is contrary to the rights of other States. See: Corfù Channel Case (UK vs Albania), 3 April 1949, Merits, 1949, I.C.J. Rep. 4.

27 R. L. Carson, *Silent Spring*, Houghton Mifflin, Boston 1962.

Two years later, outside the shores of Santa Barbara (California) a drilling platform exploded during a routine maintenance intervention, releasing in the water more than 80,000 barrels of petroleum[29]. The effect of this disaster, together with the still present memory of the Torrey Canyon accident, was sufficient to awaken the consciences on regard of the need for a global feeling on environmental protection. It was indeed diffusing among nations the shared thought that events causing environmental damages could have serious healthy and economic consequences all over the world, and thus a synergic action ought to be performed on this matter.

The efforts put in place in this direction by several States as a consequence of those disasters were not vain, and they conveyed in the summit, held in Stockholm in 1972, known as *UNCHE* (United Nations Conference on Human Environment).

This conference was the first massive media event that dealt with environmental issues on a global scale, with the participation of 113 heads of States and governments, more than 700 observers coming from non-governmental organizations and about 1500 journalists[30].

It witnessed the need not to conceive the environment only as a right to enjoy, but also as a responsibility for its preservation weighing down on mankind.

Yet, the result of the congress did not consist in the promulgation of binding treaties which imposed certain obligation or restrictions to States' activities, but it ended in the issuance of non-binding instruments, two in particular: a *Declaration of Principles for the Preservation and Enhancement of the Human Environment*[31] and an *Action Plan*[32].

Even if the positive echo related to the improvements reached at the Stockholm summit had important repercussions on the legal growth, in several fields, of the

28 A. M. Halvorssenn, *The origin and development of international environmental law*, in *Routledge Handbook of International Environmental Law* (ed. by S. Alam *et al.*), Routledge, Oxon 2013, 31.

29 *Ibid.*

30 See: *https://www.are.admin.ch/are/it/home/sviluppo-sostenibile/cooperazione-internazionale/agenda2030/onu-_-le-pietre-miliari-dello-sviluppo-sostenibile/1972--conferenza-delle-nazioni-unite-sullambiente-umano--stoccol.html*.

31 A. M. Halvorssenn, *The origin and development of international environmental law, cit*.
To the Declaration in particular it is recognized the merit of having introduced the "*most ambitious and forward-looking set of environmental principles by the international community at that time*". The document is composed of 26 Principles regarding both rights and duties of humans in relation to the environment, regarding for instance *pollution control* (Principles 2 through 7), *stability of prices* (Principle 10), *implementation of environmental policies in all States* (Principles 11 through 13) and *States' cooperation* (Principle 22).
See also: Federico Antich, "Origine ed evoluzione del diritto internazionale ambientale. Verso una governance globale dell'ambiente.", *https://www.google.com/search client=safari&rls=en&q=ambiente+diritto+.it&ie=UTF-8&oe=UTF-8*.

32 A. C. Kiss, D. Shelton, *International Environmental Law,* Transnational Publishers, New York 2004, 47.
The Action Plan consisted in a world Programme for the environmental evaluation (*Earthwatch*), to be implemented through a global system of monitoring (*Global Environmental Monitoring System*, GEMS) and an exchange of information system (*International Referral System*, INFOTERRA), in order both to define the guiding principles for the promotion of a balanced utilization of the natural resources and to develop measures regarding supportive measures, such as education and professional formation.

international environmental law[33], the lack of a binding nature of the measures adopted in that context left the States with a too broad discretion on the policies to pursue in that regard.

It ended then to be more an occasion for declarations of (positive) intents rather than for taking concrete steps towards the enhancement of common measures.

Already aware of these facts, far from considering *UNCHE* the culmination of the process for the affirmation of environmental guarantees, the United Nations General Assembly, in 1983, voted for the creation of the World Commission on Environment and Development.

Such agency, later go down in history as the Brundtland Commission[34], was a body independent from (but at the same time linked to) the United Nations system, which was in charge, on the one hand of examining critical environment and development issues and, on the other hand, of formulating feasible measures for dealing with them[35].

The conclusions reached in the Brundtland Report[36] recognized the importance of the combination between the economic development of nations and the protection of the environment, introducing for the first time the concept of *sustainable development*, to be intended as a "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*"[37].

In this sense, it appears also interesting to mention that, in those years, the focus reserved to a particular branch of the environmental thematic (namely the waste issue) was gaining importance, especially in light of certain bad practices that were worldwide diffusing.

In particular, States commenced to consider important to put brakes to transboundary movements of hazardous waste from developed countries to less developed ones.

For these reasons, in 1989 it was adopted the so called "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal", which actually came into force in 1992. Such agreement still represents, on the global

33 In the years that followed the Stockholm Conference many international agreements on the safeguard of sectorial aspects of the environmental discipline were reached. Just to mention some of them, the *United Nations Convention on the Law of the Sea* (signed in Montego Bay the 10th December 1982) was the result of the negotiations started first at the mentioned summit and later subject of another meeting, on the law of the sea, held in New York in 1973.
Noteworthy is also the creation of the *World Charter of Nature* (28 October 1982), which came to existence after the emergence, at the *UNCHE*, of a strict relation between human rights and protection of the environment. In particular the importance of this document is remarked also by the incorporation of its principles in other conventions, such as the *South-East Asian Agreement on the Conservation of Nature and its Resources* (signed in Kuala Lumpur the 9th July 1985).

34 The denomination is due to the name of the President of the commission, the Norwegian Gro Harlem Brundtland.

35 A. C. Kiss, D. Shelton, *International Environmental Law cit.,* 51.

36 World Commission on Environment and Development, *Our common future*, Oxford University Press, Oxford 1987.

37 *Ibid.*

level, the most comprehensive one. It aims at protecting human life and the environment against the adverse effects resulting from uncontrolled movements of waste among nations.

However, for its global scope, it is an agreement of general matrix that cannot address specific contexts. For this reasons, already in the provision of its article 11, it contemplates the possibility, for the States part of the Convention, to stipulate bilateral or multilateral agreements among them, with the only limit represented by the need not to infringe the obligations arising out of the Convention itself.

If, on the one hand, the introduction of art. 11 appears really actual and demonstrates the will of the contracting parties not to ignore specific and contingent situations, at the same time it appears to leave too much discretion upon the States willing to use the instruments provided in it, with the risk not to circumscribe enough the powers of single nations.

In any case, art. 11 favored the flowering of many smaller agreements among states. It is possible, for example, to recall the Lomé IV Convention, which constituted a general and international agreement between 71 countries of the world (mainly of Africa, Caribbean and Pacific areas) and the European Community. Its aim was not only to control hazardous waste movements in those regions, but also to completely forbid these shifts in relation to certain residues[38].

Also the Bamako Convention was an effect of art. 11. This piece of law, drafted after the impulse of the Organization of Africa Unity (OAU), was the consequence of African States 'discontent with the excessively broad provisions of the Basel Convention. This aspect is also evident in relation to art. 4 of the Bamako convention, which bans waste importations to Africa coming from States which are not member of the Convention. The value of this agreement is also to have enlarged the notion of "hazardous waste", encompassing in it also other substances, such as, for example, radioactive residues[39].

The same *ratio* led also to the stipulation of a third Convention (Waigani Convention), whose main parties were nations of the South Pacific area.

Those States, joint together in the South Pacific Forum, agreed on the one hand to regulate waste movement between members of the already mentioned forum and, on the other hand, to forbid any hazardous or radioactive waste imports coming from foreign nations[40].

These progresses, together with the already mentioned Brundtland Report, pushed the United Nation to opt for the summons of another conference, that would have been held in 1992 in Rio de Janeiro, in order to discuss the innovative elements that arose from this document.

38 For further insights on the Lomé IV Convention, see*: http://aei.pitt.edu/7561/1/317350552612 38-1.pdf*.

39 For a further analysis on the Bamako Convention, see: *https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/meeting-international-environmental*.

40 For further readings on the Waigani Convention, see: *https://www.sprep.org/convention-secretariat/waigani-convention.*

To show the stress on the thematic faced by the Report, the name that was given to the summit was "United Nations Conference on Environment and Development" (UNCED)[41].

If compared to the *UNCHE*, Rio conference was a more resounding event, whether because of the amount of actors involved[42] or for the number of instruments adopted[43] (the *ratio* of which was taken as example, in the years that followed, for the emission of several binding and non-binding instruments such as for the promotion of other international initiatives)[44].

However, UNCED experienced the same issues of the Stockholm Summit related to the lack of mandatory measures which could actually bind the participant States.

41 U*nited Nations Conference on Environment and Development* (UNCED), Rio de Janeiro (Brazil), 3-4 June 1992.

42 At the conference were present around 10,000 participants (including 116 head of state and government), representing more than 170 States. Furthermore, also the participation of about 1500 non- governmental organizations is remarkable, as well as the presence of nearly 9,000 journalists.

43 As a result of the summit, five documents were released: two conventions (*UN Framework Convention on Climate Change* and the *Convention on Biological Diversity*); one declaration (*Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of forests*); two texts (*Declaration on Environment and Development* and *Agenda 21*). These last two documents bear a general scope.

The former one contains 27 principles (recalling in certain ways the Stockholm Declaration on the Human Environment), the common thread being the concept of sustainable development. The latter one instead consists of an action plan composed by forty chapters dealing with 115 specific topics, that can be divided in four main parts: socio-economic; conservation of resources; role of the non-governmental organizations; measure of implementation.

44 C. Breidenich *et al.*, "The Kyoto Protocol to the United Nations Framework Convention on Climate Change", *American Journal of International Law*, 92/1998, 315-331; F. Yamin, "The Kyoto Protocol: origins, assessment and future challenges", *Review of European Community & International Environmental Law*, 7/1998, 113-127; K. Campbell, "From Rio to Kyoto: the use of voluntary agreements to implement the Climate Change Convention", *Review of European Community and International Environmental Law*, 7/1998, 159-170; S. Oberthur, H. Ott, *The Kyoto Protocol, International climate policy for the 21st century*, Springer, Berlin-London, 1999; M. C. Pontecorvo, "Interdependence between global environmental regimes: the Kyoto Protocol on climate change and forest protection", *Zeitscrift fur Auslandisches Offentliches Recht und Volkerrecht* (Zaorv), 59/1999, 709-748.

Furthermore, many other expectations were not met[45], legitimizing part of the scholars of different portion of the world to consider it a complete failure[46].

Also in relation to its concrete results for the health of the planet the Rio summit left something to be desired: it was noticed that, after 1992, the environmental condition worldwide had got worse, not taking into account the needs of the future generations.[47]

These concerns emerged ten years later, during another occasion for the development of an international dialogue regarding the issues related to the environment: the World Summit on Sustainable Development (*WSSD*), held in Johannesburg in August 2002[48].

This conference had the precise aim of verifying the progresses (if any) in the implementation by the States of the commitments made in Rio: unfortunately, the results appeared to be the minimum that could be expected, confirming the fear of the most[49].

WSSD was then apparently just a further opportunity for the states to reiterate their promises[50], as it is shown in the two documents approved in the conclusion of the Conference[51].

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45 For example, the negotiations regarding the Earth Charter (a universal declaration concerning the protection of the environment and the sustainable development, which would expose in a clear way the rights and the duties of human beings towards the environment) did not bear fruit and its adoption was postponed to June 2000, at the Peace Palace in the Hague (*https://www.cartadellaterra.it/index.php?c=storia,* 14 March 2020).
The same considerations can be carried out in respect of the *Convention on Biological Diversity*, which was basically nullified from the beginning because of USA's non - adherence (*http://www.isprambiente.gov.it/it/temi/biodiversita/convenzioni-e-accordi-multilaterali/convenzione-sulla-biodiversita-convention-on-biological-diversity*, 14 March 2020), as well as for the *Convention on the Climate Change*, again hindered by the US denial to reduce its polluting emissions in the lack of a precise calendar and amount specifying the extent of the reduction (*http://www.isprambiente.gov.it/it/temi/cambiamenti-climatici/convenzione-quadro-sui-cambiamenti-climatici-e-protocollo-di-kyoto*, 14 March 2020).

46 T. Treves, "Il diritto dell'ambiente a Rio e dopo Rio", *Rivista Giuridica dell'Ambiente*, 1993, 577; see also M. Pallemaerts, "La conférence de Rio: grandeur ou décadance du droit international de l'environnement?", *Revue Belge de Droit International,* 28/1995, 175.

47 F. Antich, "Origine ed evoluzione", cit. In particular the author recalls some consideration carried out by Kofi Annan, at that time Secretary-General of the United Nations, during his speech "Verso Un Futuro Sostenibile" at the Annual Conference on the Environment, held in New York the 14th May 2002. In that occasion, Annan pointed out how advances in the environmental policies had been slower than expected, also because of the way to perceive environmental issues, always a step backward in comparison with the topics of economic and financial matrix.

48 For further readings, G. Gardner, *La sfida di Johannesburg. Creare un mondo più sicuro*, in *State of the World 02*, (a cura di C. Flavin, H. French, G. Gardner), Edizioni Ambiente, Milano 2002, 31-58.

49 For example, the ecological balance concerning the concentration, in the atmosphere, of carbon dioxide raised vertiginously, witnessing a general indifference towards the necessity of modifying the production and consumption models. See Federico Antich, "Origine ed evoluzione", cit.

50 Johannesburg summit was the event that experienced the highest rate of participation: more than 190 states representatives from all over the world. The total amount of people who took part to the conference exceeded the 22,000 presences, including non-governmental organizations, scientific institutions, local authorities and journalists.

Even if those means were still not binding[52], the matters faced in this occasion collected anyway a wide consensus among the States, especially regarding the renovate awareness that, in order to solve the issues came into view, a global governance was needed, including in the decision-making process also different branches of the world community.

The last noteworthy step of this international path which will (hopefully) lead to an adequate protection of the environment is quite recent[53].

The *United Nations Climate Change Conference* held in Paris had as main purpose the reduction of climate change, a commitment that was formally proclaimed in the *Paris Agreement*[54].

This time, on the basis of the limits of the other conferences' results, the prescription contained in the agreement were binding[55], imposing their respect to all the member States that accepted it[56].

The adoption of a document with such a " power" then bodes well regarding the concrete realization of the necessity for a "*revirement"* in world's policies on the environmental issues.

If the frame abovementioned shows, although briefly (for the sake of the present work), the international evolution process of institutions' and, more generally, people's awareness regarding the environmental thematic, noteworthy is also to mention the developments that this *iter* had on the (at that time still) European Community.

6. The development of environmental and waste law in the framework of the European Union: the causes that favored the blossoming of the EU environmental regulations.

51 The final document was the Resolution A/CONF. 199/20, which is composed by two other texts: the "Johannesburg Declaration on Sustainable Development from our origins to the future" and a "Plan of Implementation of the World Summit on Sustainable Development". The former one is a political declaration in which signing States expressed their will to reach certain social objectives (such as promoting a correct and wise usage of natural resources) through their policies; the latter one, as the same denomination suggests, is an action plan released on the heels of the previous Agenda 21, but with the noble intent to overcome its gaps. Specifically, differently from Agenda 21, the Plan of Implementation of Johannesburg wished to equip the international community with instruments that could effectively elicit a change in the States policies.

52 Again because of the opposition of certain industrialized States, such as USA.

53 *United Nations Climate Change Conference*, Paris, 15 December 2015.

54 See *https://ec.europa.eu/clima/policies/international/negotiations/paris_it,* 15 March 2020 . The document outlines the main objectives that were negotiated at the summit. In particular, they were: to maintain under the 2° Celsius the raise in temperature of the world (as a long term objective); to limit the increase of temperature to 1,5° Celsius (as a short-term objective). It was specified in the negotiations that these measures would be appropriate in significantly reducing the risks and the impacts of climate changes.

55 However, no international authority has the formal power to override a State's sovereignty. Thus, the measures adopted can be "indirectly coercive", for example providing the nations that disrespect the promises with a sanction. However, the mandatory degree of the measures is not always the same for the entire text, but it changes according to the language adopted in the single rule.

56 So far, the Agreement has been signed by 195 States, 158 of which have also ratified it.

The Stockholm Conference, as well as the flowering of international conventions on this matter during the 1970s, positively influenced the progress of political agreements in the European context. However, such concerts were not sufficient in order to enable a Community competence on environmental topics, which could only be established through a legislative act (namely, a treaty).

Such objective was reached only fifteen years later, in 1986, by means of the Single European Act (SEA), a reform that introduced into the TEC a specific Title concerning the environment.

However, as it happened also for the international path[57], it was the jurisprudence that played a fundamental role in this sense, providing the European Institutions with a legal basis for the recognition of an implied competence in this regard even before the promulgation of the SEA[58].

57 The jurisprudence of the European Court of Human Rights (ECtHR) was copious on this topic, in particular in relation to industrial pollution and people's right to health.
For example, in the dispute *Lopez Ostra v. Spagna*, 9 December 1994, *http://hudoc.echr.coe.int/eng?i=001-57905*, 16 March 2020, the Court stated that, in relation to the situation in which pollutant emissions are released from an industrial plant, in order not to violate art. 8 of the European Convention on Human Rights, States have a duty towards the citizens to ensure that the start-up of the activity does not result in abnormal consequences for the private and family life of the inhabitants of the neighboring places.
In another case (*Guerra e altri c. Italia*, 14th February 1998, *http://hudoc.echr.coe.int/eng?i=001-58135,* 16 March 2020), the Court enlarged the capacity of the principle proclaimed in the previous verdict, affirming that a violation of art. 8 ECHR occurs also if the State, in the case of a serious threat for the environment, does not provide citizens with a clear and complete information regarding the potential risks to which they are exposed.
To conclude, a more recent case that involved again Italy and which is noteworthy, is *Giacomelli v. Italia*, 2 November 2006, *http://hudoc.echr.coe.int/eng?i=001-77785,* 16 March 2020, in which the Court found the Italian government responsible for not having performed, before releasing to an industrial plant the authorization, appropriate investigations and studies regarding certain activities that could negatively affect the environment with dangerous repercussions for human health.

58 Already since 1980 the European Court of Justice ruled, although in an implied way, in the sense of a recognition of the importance of environmental protection for the sake of the Community itself.
In particular, worthy of note is the dispute *Commission v. Italy*, Case 92/79, ECR 1115. In this ruling, the Court analyzed that national environmental law plays a fundamental role in competition affairs, since "differing levels of environmental protection in different states distort competition between economic operators, because an operator in a state with very stringent environmental standards faces higher costs than an operator in a Member State with lower standards" (quoted from Maria Lee, *EU Environmental Law - Challenges, Change and Decision-Making*, Oxford and Portland, 2005, 11.
Another important verdict on the matter is: European Court of Justice, *Procureur de la République v Association de Défense des Bruleurs d'huiles Usages*, 7th February 1985, Case 240/83, *https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A61983CJ0240*.
In this case, invested with the interpretation of a directive of the European Council concerning the elimination of used oils, the Court clarified that the principle of free trade has not an absolute value and it is subjected to certain limits, which are the expression of specific Community's purpose of general nature. Namely, in the case at hand, the interest protected by the directive was worth of legal protection, since it aimed at the preservation of the *environment*, described as an essential objective of the Community.
For a more recent decision, see: European Court of Justice, *Commission v Austria*, 11th December 2008, Case 524/07, *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62007CJ0524*, in which is again shown the tension between the environmental objectives of the Union and the purposes concerning economic growth.

In this sense, both the Commission and the Council based their rudimentary environmental legislation on the articles 100 and 235 (now 94 and 235 of the TFEU), linking it now to the functioning of the common market, now to the actions "necessary to attain, within the frame of the common market itself, one of the objectives of the Community"(in the case the Treaties did not explicitly confer powers in that specific area to the Union).

Therefore, another similarity regarding the establishment of the environmental legislation can be drafted between the European Community and the international one: environmental measures, also within the European frame, were perceived as conditioned and ancillary to the economic policies of the European market.

Even though the Single European Act introduced in the EEC Treaty a chapter concerning the environmental protection, it was through the Maastricht Treaty that this topic became a concrete policy the Community was committed to pursue.

This is witnessed on the one hand by the insertion, among the objectives of the Union, of the one promoting a sustainable growth, respectful of the environment; on the other hand by the modification of the previous article 130 R, in which was added also the purpose of endorsing, on the international level, measures reserved to deal with environmental issues on both regional and national level.

7. The current EU legal framework on environmental protection.

Nowadays, the protection of the environment has reached a high level, being expressly considered both in the Treaty of the European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU).

The former one, in art. 3, places attention not only on the necessity of the Union to have a common market, but also to the modalities of its development, which in particular have to be determined according with environmental sustainability measures; the latter one offers instead a more detailed legal basis for the environmental policy of the EU.

In particular, the norms that assume importance in this regard are, on the one hand, art. 11 and, on the other hand, articles 191-193, enclosed in the XXth Title of the TFEU (entitled "Environment).

Article 11 introduces in the first part of the TFEU the *Principle of Integration*[59], by prescribing that environmental needs *must* be included both in the definition and in the implementation of the policies of the European Union, in a perspective of sustainable development[60].

59 The Principle of Integration was already provided for in article 130 R, n. 2 by the SEA. After the Treaty of Amsterdam however, it had been detached from the specific environmental discipline and placed within the first part of the TFEU, raising as a general principle.

60 It seems interesting to notice that, unlike the other integration clauses contained in the EU Treaties (for example with regard of *gender equality* - Art. 8 TFEU; *non discrimination* - Art. 10 TFEU; *employment and social protection* - Art.9 TFEU; *consumer protection* - Art. 12 TFEU; *animal welfare* - Art. 13 TFEU), is the only one that adoperates the term *must*. Namely, in the field cited in brackets, the expressions used are less

This statutory provision then enshrines the extent of the topic, which is to be seen as a transversal subject capable of influencing the decision-making process of the European Bodies.

The discipline provided in the XXth Title is instead more substantial and it regulates in details the objectives and the procedures related to the topic.

Namely, this Title opens with article 191, a norm of general extent: in the first paragraph, the disposition sets out the objectives of the environmental policy of the Union[61], while in the second it enumerates the principles on the ground of which the EU environmental legislation is implemented[62], giving also in a way the possibility to

limitative (from "*s*hall aim to" to "pay full regard", passing through "shall take into account").

61 Such objectives aim at the preservation and improvement of the *condition of the environment*; the safety of *human health*; the intelligent usage of *natural resources*; the promotion of measures that are *globally suitable* to deal with environmental issues.

However, in order to implement these objectives, European Institutions adopt "General environmental action Programs" which establish the primary objectives to reach, as well as the political choices and the implementing measures related to them.

While in the first four Programs the approach chosen was technical and more sector-specific, in the latest (fifth, sixth and seventh) it was expressed a more integrated conception, aiming at a sustainable development.

Currently, the eight Program is about to be perfected. It has been discussed in the past October 2019, and it will deal with several aspects (biodiversity, climate changes, economy) for the period that goes from 2021 to 2030.

For a further analysis, see: A. Tizzano, *Trattati dell'Unione Europea*, Giuffrè, Milano 2014.

62 The principles that are listed in this paragraph are of different matrix, especially in respect of the time discipline they set.

In a perspective of preventive action for example, are envisaged the *precautionary principle* and the *preventive action principle*. The first one requires the adoption of appropriate preventive measures in presence of a threat or a risk for the legal interests contemplated in the first paragraph of art. 191 TFEU (protection of the environment; health protection. See: European Court of Justice, 2 December 2004, C-41/02, *Commission v The Netherlands*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0041*), which has not been neither ascertained with a scientific evidence (see: European Court of Justice,26th May 2005, C-123/03, *Codacons and Federconsumatori*, *https://www.ecolex.org/details/court-decision/ministero-della-salute-v-coordinamento-delle-associazioni-per-la-difesa-dellambiente-e-dei-diritti-degli-utenti-e-dei-consumatori-codacons-federconsumatori-intervening-parties-lega-delle-cooperative-associazione-italiana-industrie-prodotti-alimentari-aiipa-adusbef-05cd53e9-9f57-44e9-bac2-2d82e394a2e7/*), nor have been subject to an adequate preventive evaluation (European Court of Justice*, 26th May 2011, C-538/09, Commission v Belgium, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62009CJ0538*). The precautionary principle then consists of a strategy of risk management in the cases in which are outlined possible negative effects on the environment or on human health, but the scientific datas available do not allow a complete evaluation of the dangers. The measures adopted have to be proportionated with the level of protection demanded and should be taken after the implementation of analysis of the costs and the benefits of the actions. Finally, the extent of this principle is not limited to the environmental matters, but extends also to other topics, such as to alimentary discipline (European Parliament and European Council, Reg. EC n.178/2002, *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002R0178:20060428:IT:PDF)*. In the Italian legal system, other than being an immanent principle of the environmental legislation (art. 3*ter*, D. Lgs. 152/2006), it has also been transposed in certain fields, such as in waste legislation (art. 178 D.Lgs. 152/2006) and in water legislation (art. 144, paragraph 4*bis*).

The *Preventive Action principle* instead draws the attention of the EU legislator towards actions which can avoid in the first place a prejudice for the environment, *in the case there is a proven threat* (and this is the main difference between the latter principle and the precautionary one). In this sense, instruments such as environmental impact assessments play a fundamental role, making the adoption of certain plans or projects contingent upon a check of its burden on the environment. In particular, environmental impact assessments have

Member States to derogate (after a control of the Community)[63] other EU provisions for the sake of environmental measures of non-economic nature.

The last two paragraphs describe, respectively, the elements the Union has to take into account in the elaboration of this policy and the cooperation processes with third States and international organizations.

Article 192 TFEU instead represents a procedural norm, identifying three different legislative procedures in the field of the environment.[64]

Finally, art. 193 defines the relation between the protection of the environment offered by the European Union and the one of the Member States, conceding the

been subject to a directive of the European Parliament and Council (Dir. EU 2011/92, 13th December 2011, *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:IT:PDF*), which has been interpreted by the European Court of Justice as a set of norms which provide for an high level of protection (each project in this field should be the object of an assessment), even if it is in any case recognized to any Member State a wide discretional power with regard to the hypothesis and modalities of the evaluation (see: European Court of Justice, 10th June 2004, *Commission v Italy*, C-87/02, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CJ0087&from=DA*).

Finally, it seems worth to mention that the two principles described have also been recalled in conjunction by the Court which, in a dispute concerning waste storage, stated that "*by virtue of those principles, it is for the Community and the Member States to prevent, reduce and, in so far as is possible, eliminate from the outset, the sources of pollution or nuisance by adopting measures of a nature such as to eliminate recognised risks"* (European Court of Justice, 5th October 1999, *Lirussi* and *Bizzarro*, C- 175/98 and C-177/98, *https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:61998CJ0175*).

The third principle provided by art. 191 TFEU (*Rectification at source of environmental damages)* is "hybrid" under the point of view of the time in which it has to operate, since it could be both interpreted as preventive and subsequent.

It implies the individuation of the most appropriate competence level to which entrust the management of the protection. This principle represents then an expression of the wider principle of subsidiarity, strictly related to the environmental protection. Concerning the aspect of waste management, the ECJ took the chance to clarify that municipalities, as well as regions, are in the first place required to adopt the most adequate measures in order to ensure that waste is disposed off in the area of its production (European Court of Justice, 23rd May 2000, *Entreprenorforeningens Affalds/Miljosektion*, C-209/98, *https://op.europa.eu/en/publication-detail/-/publication/c7ffd538-ebfb-4b5e-a2bb-cdd9f119e1e5*). In the same sense, see: European Court of Justice, 4th March 2010, *Commission v Italy*, C-297/08, *http://curia.europa.eu/juris/documents.jsf?num=C-297/08*.

63 In this sense, derogations must be founded on different conditions: they must be legitimized by environmental reasons of non-economic nature; they have to be temporary and they need the express authorization from the European Commission. Namely the control has to accurately and impartially cover all the relevant elements of the case (see: European Court of Justice, 6th November 2008, *Netherlands v. Commission*, C- 405/07, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0405*). Furthermore, this faculty of the Member States has to be exercised in conformity with the goals set in the first part of paragraph 2, meaning an high level of protection for the environment (see: European Court of Justice, 22nd June 200, *Fornasar*, C-318/98, *http://curia.europa.eu/juris/liste.jsf?language=en&num=C-318/98*).

64 The first one is the *ordinary legislative procedure*, which constitutes the general rule for both the realization of the objectives set in article 191 and for the adoption and implementation of the environmental action programs.

The second one, provided in the second paragraph, represents an exception to the ordinary procedure and requires, in certain topics of national interest, the *unanimity* through a special legislative procedure, outlined by the same article.

Finally, the so-called "*instrument procedure*" allows the Council, through a unanimous decision, to decide for the application of the ordinary procedure also to the topics included in the second paragraph of art. 191 TFEU.

possibility to the latter ones to grant a higher safeguard or, at least, an equal security to the one of the Union[65].

8. The protection of the environment within the EU Charter of fundamental rights.

For the sake of the present work it appears also important to address the provisions of the Charter of Fundamental Rights of the European Union that deal with the environment, considering that, since the Lisbon Treaty[66], this document has become directly applicable and is part of the binding primary sources of law of the Union.

In particular, article 37 of the Charter is entitled "Environmental protection" and sets the duties of public authorities in relation to environmental integration, referring to the need both of guaranteeing a high level of environmental protection and improving the quality of the environment. However, understanding what has to be intended for "high level" of safeguard has not been an easy task. Nowadays this statement has been interpreted as a "*moving target*"[67], which bears the belief of the need for regular enhancement of environmental protection standards within the frame of the EU.

Therefore, "any measure leading to environmental degradation runs counter to the spirit of Article 37 of the Charter"[68]; at the same time the CJEU, excluding that "higher level" can fit in with the lowest one accorded by one Member State[69], does not pretend that the degree of protection has to be in any case the highest technically available.[70]

9. Regulation of waste at the level of EU law.

65 In this hypothesis, Member States can activate the derogation unilaterally, without the necessity of a preventive control from the Commission.
For example, the European Court of Justice considered as an enforcement measure of the EU legislation ,the prohibition to build wind turbines in the area of Puglia region, in Italy (see: European Court of Justice, 21st July 2011, *Azienda Agro-Zootecnica Franchini e Eolica di Altamura*, C-2/10, *http://curia.europa.eu/juris/liste.jsf?language=en&num=C-2/10*). In the same sense, but regarding the protection of Italian national sites of European importance, see also: European Court of Justice, 13th January 2005, *Società Italiana Dragaggi*, C-117/03, *http://curia.europa.eu/juris/liste.jsf?language=en&num=C-117/03*).

66 The Charter was firstly conceived during the European Council held in 1999 in Koln; it was then solemnly proclaimed by the European Bodies in 2000 in Nice. However, it was with the adoption of the Lisbon Treaty the 1st December 2009 that it actually entered into force, becoming binding for the Member States.

67 L. Kramer, *EU environmental law*, Sweet & Maxwell, London 2011, 12.

68 "Article 37", *The EU Charter of Fundamental Rights. A Commentary* (ed. by S. Peers *et al.*), Hart, Oxford and Portland 2014, 993.

69 L. Kramer, *EU environmental law*, above, 11-12.

70 European Court of Justice, 14th July 1998, *Safety High-Tech v S & T Srl*, C-284/95, *https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:61995CJ0284*.

A sector of environmental law in which the production of norms on the European level has been conspicuous, significantly increasing through the years, regards the field of waste.

Waste management represents one of the main aspects concerning the protection of the environment, as it is expressly stated in art.1 of the directive 2008/98/EC[71]. It is based on the principles of precaution, prevention, sustainability, proportionality and cooperation among all the parties involved[72]. Furthermore, it is performed according to a *priority scale*, which highlights the best system that has to be followed in order not to cause neither a prejudice to the environment nor a danger to people's health. In this sense, art. 4 of the abovementioned disposition properly sets a waste hierarchy for legislation concerning its prevention and management[73].

However, the need for specific regulations on this field emerged long before the adoption of the Dir. 2008/98/EC, which, under certain aspects, represents only a copy of previous acts.

The first piece of European legislation that dealt with the topic has indeed been released right after the Stockholm Conference, in the years in which the attention reserved to the environmental issues was raising.

The 15th of July 1975 the European Council adopted the Dir. 75/442/EEC related to *waste*, that is for the first time defined as "*any substance or object [..] which the holder discards or intends or is required to discard*"[74].

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71 The disposition states that "*This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use",* available at *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A32008L0098*.

72 The cited principles resemble the ones provided in art. 191 TFEU. See footnote 62, *supra*.

73 In particular, the process should aim at first at *preventing* from generating waste; after, if this was not possible, waste produced should be *prepared for re-use*; if a further utilization is not possible, then the best option would be *recycling* what is left over, or provide for *other recovery* (such as energy recovery); finally, if none of the precedent possibilities are feasible, the phase of *disposal* should apply.

74 On this regard, an early verdict of the ECJ observed how this definition had not been respected by Italian legislation (art. 14, L. 178/2002), which excluded automatically from the sphere of art. 1 of the directive industrial residues that were to be re-used, even by third parties. The Commission believed that the effect of this provision was to "*narrow unlawfully the meaning of waste and thus to restrict the scope of the Italian legislation on waste management*". The Court, taking the steps from the Annex 1 related to the Directive (which contains a non-exhaustive list of certain *substances and objects which may be classified as waste'*), asserted that the notion of "waste" cannot be interpreted in a restrictive way (par. 33) and it does not exclude, *ex se*, substances that are capable of economic re-use (par. 36). The pronounce is also noteworthy for the Court's reference to *by-products*, which are to be differentiated from waste in light of the possibility for the former ones to be exploited or marketed. Namely, according to the the ECJ, the latter operation would speak in favor of the non-inclusion of those materials within the scope of art. 1 of the directive 75/442/CEE. However, the Court proceeded stating that "*if such re-use requires long-term storage operations which constitute a burden to the holder*" and a potential damage to the environment, then "*the substance in question must, as a general rule, be regarded as waste"* (par. 39). Thus, the value of this decision lies on the implied principle that a "concrete assessment" has to be conducted, case by case, in order to establish whether the substances are waste or by-products. See: European Court of Justice, C-263/05, 18th December 2007, available at: *http://curia.europa.eu/juris/showPdf.jsf?text=&docid=71922&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6382848*.

This directive has then been modified several times[75], until its complete abrogation, operated by Dir. 2006/12/EC (which was later replaced by Dir. 2008/98/EC)[76].

Recently, the European Parliament and the Council returned to regulate the waste framework through the adoption of a new Directive which lastly modified Dir. 2008/98/EC[77].

The objective of this last piece of legislation is to improve even more the management of waste in the European Union, in order to direct it towards a sustainable administration of the materials, "with a view to protecting, preserving and improving the quality of the environment, protecting human health, ensuring

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Besides, this proceeding was part of a triple condemn for Italy, occurred on the same day through two other verdicts bounded by the same *ratio*: C-194/05 and C-195/05. Rather than industrial residues, to be automatically prevented from being classified as waste were, for the first verdict, the "*excavated earth and rocks intended for actual re-use for filling, backfilling, embanking or as aggregates*"; for the second, on the one hand the "f*ood scraps from the agro-food industry intended for the production of animal feed*" and, on the other hand, "*leftovers from the kitchen preparation of all types of solid food, cooked and uncooked, which have not entered the distribution system and are intended for shelters for pet animals*". As it has been highlighted by scholars, the major point of friction between the European definition of waste and the Italian one belonged to the impossibility for a Member State to introduce, through national legislation, any kind of legal modalities of prove that automatically restricts the scope of application of the waste's notion as it was intended on the European level. Namely, in this way there could not only be a prejudice to the environment, but also to the wider and ontological principal of supremacy of European Law.

For the full text of the cited judgments, see: European Court of Justice, C-194/05, 18th December 2007, available at *http://curia.europa.eu/juris/showPdf.jsf?text=&docid=71918&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6395525*;

European Court of Justice, C-195/05, 18th December 2007, available at *http://curia.europa.eu/juris/showPdf.jsf?text=&docid=71919&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6395877*.

For a comment of the three judgments, see: A. Natalini, "Nozione di rifiuto, riutilizzazione e sostanze escluse: dai giudici comunitari tripla condanna per l'Italia", in *Diritto e giustizia*, 14/2007, 1.

Not least, it appears also worth of mentioning that those criticisms should have not been unexpected for the Italian Republic, especially in light of another Court's decision that involved the Country three years earlier (the so called "Niselli" case). In that occasion, invested with a preliminary ruling regarding the notion of waste, the Court already took the chance to stigmatize the Italian bad practice of unreasonably excluding, in an automatic way, certain materials from the scope of the abovementioned term. For the full text of the verdict, see: European Court of Justice, C-457/02, 11th November 2004, available at *http://curia.europa.eu/juris/liste.jsf?language=it&num=C-457/02*.

See also: Leonardo Baroni, "Le principali sentenze di condanna dell'Italia per la mala gesto dell'emergenza rifiuti in Campania e la perdurante violazione della normativa europea", *Riv. it. dir. pubbl. com.*, 2/2015, 633.

75 The most significant modifications have been introduced by Dir. 91/156/EEC and by Dir. 91/689/EEC. The goal of the former one is to take into account, after almost twenty years, of the experience gained by Member States in the implementation of Dir. 75/442/EC; the latter one instead introduces into the same directive additional and more stringent provisions concerning hazardous waste.

76 Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives, 19th November 2008, *Official Journal of the European Union*, L 312/3, 2008, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0098&from=EN.

77 Directive of the European Parliament and of the Council on Waste, 30th May 2018, *Official Journal of the European Union*, L 150/109, 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L0851&from=EN.

prudent, efficient and rational utilization of natural resources, promoting the principles of circular economy, enhancing the use of renewable energy, increasing energy efficiency, reducing the dependence of the Union on imported resources, providing new economic opportunities and contributing to long-term competitiveness". In particular, in order to render really circular the economy, European bodies believe that "it is necessary to take additional measures on sustainable production and consumption, by focusing on the whole life cycle of products in a way that preserves resources and closes the loop. The more efficient use of resources would also bring substantial net savings fo Union businesses, public authorities and consumers, while reducing total annual greenhouse gas emissions".

The directive, published on the 14th June 2018 in the Official Journal of the European Union, has to be transposed by Member States before the 5th July 2020.

As it appears easy to grasp from this brief analysis, waste regulations, through a metaphor, could be thought as a combination of concentric circles which spread from the smaller one, containing the core of the framework, towards the larger ones, that specify and further develop the principles of the previous spheres.

In this system then, it is undeniable the value of Dir. 75/442/CE, which has established an organic set of Community rules on waste disposal that, in spite of the cited modifications, has been handed down until today, inspiring all the subsequent modifications and progresses.

The frame outlined so far is going to be useful for well understanding the second part of this work, which deals with a particular Member State of the European Union, Italy, with the specific aim to investigate the episodes in which (and the reasons why) the latter State has been found responsible for violating the European legislation in the field of environmental protection and waste.

10. The Italian defaults in complying with European environmental legislation in the field of waste: the procedures before the CJEU with particular regard to art. 260 TFEU.

As it has already been brought forward in the previous chapter, the purpose of this second section of the research is to analyze some particular cases in which the Italian Republic has been found responsible, mainly before the Court of Justice of the European Union(CJEU[78]) but also in front of the European Court of Human Rights (ECtHR), for the violation of certain dispositions concerning EU environmental legislation.

However, this branch of law intercepts different areas, which are really diverse from each other in relation to the aspects they aim at protecting. Since this is not the venue for dealing with all the matters that could be relevant in this sense, for the sake of a thorough examination the present study will be circumscribed to one specific

78 However, in the text is present also another abbreviation (ECJ), which refers to older verdicts, released before the Lisbon Treaty (which changed the name of the Court).

field, which have been particularly significant not only on a juridical perspective, but also on a social acceptation.

Namely, what this work seeks to explore is the European discipline of waste recovery and disposal, figuring out which are the main obligations upon Member States in this field.

However, before starting the analysis just mentioned, it appears necessary to quickly linger on the types of proceedings before the European Court of Justice, in order to facilitate even more the comprehension of the verdicts that will be addressed.

The possibility to recourse to the European Court of Justice is recognized with regard to the direct competences expressly granted by the Treaty of the European Union to the parties involved (art. 19, par. 3, lett. a, TEU)[79].

The single procedures are then regulated in the Treaty on the Functioning of the European Union (TFEU) and they can be distinguished in four different types[80].

Among them, the one that gains importance in relation to the verdicts that will be later examined is the so called "*infringement procedure*", governed by artt. 258 and 259 TFEU. The former one regulates the hypothesis, which is also the most common, of the opening of the procedures by the Commission[81]; the latter instead contemplates the case in which it is a Member State that acts, soliciting the Commission to take actions towards another Member State. The verdicts released by the CJEU at the end of the disputes established through this procedure are not binding, but are only of mere determination and consist of a declaration in which it is certificated either the occurred violation or the inconsistency of the Commission's allegations.

In the past, if the Member State kept on violating the dispositions even after the condemn, the Commission could only start another trial of the same nature, which, as the first one, would not have a serious deterrent effect. In order to overcome this deadlock and increase the implementations of the Court's decisions, it was introduced a specific discipline in the second paragraph of art. 260 TFEU. The peculiar aspect of this "second" proceeding is that the final verdict can impose a lump sum or a penalty payment to the State that has not taken the necessary measures in order to comply with the first decision.

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79 "*The Court of Justice of the European Union shall, in accordance with the Treaties: a) rule on actions brought by a Member State, an institution or a natural or legal person; b) give preliminary rulings, at the request of courts or tribunals of the Member State, on the interpretation of Union law or the validity of acts adopted by the institution; c) rule in other cases provided for in the Treaties*".

80 Artt. 258 and 259 TFEU contemplate the "*infringement procedure*", which objective is the violation, by a Member State, of an obligation arising out from the treaties; artt. 263 TFEUsets the discipline of the *"application for annulment"*, which aim is to challenge the legitimacy of binding acts that have been adopted by European Institutions; art. 265 TFEUregulates the "*action for failure to act"*, through which stakeholders attempt to show the unlawfulness of the institutions' omissions; finally, art. 268 TFEU deals with "*application for compensation*", which have as objective the extra-contractual responsibility of the European Institutions.

81 In particular, the Commission acts in this sense whether it believes that a Member State has failed to comply with obligations emerging from the Treaties or from the acts adopted in light of the Treaties.

The application of these two correlated judgments is evident in a set of pronouncements (further addressed) that condemned the Italian Republic in the field of waste recovery and disposal.

Namely, as it has been already addressed, Dir. 75/445/EC introduced principles in this area of a new matrix for certain States, which struggled both in implementing them correctly and in respecting the deadlines in order to do so.

Among those States, the one that faced the biggest difficulties in this sense has certainly been Italy, which, after thirty years from the issuance of the cited directive, had the sad primacy in this field for the number of infringement procedures started against it by the Commission[82].

11. A deeper glance to the cases.

One of the oldest violations of Dir. 75/442/CEE perpetrated by Italy has indeed been ascertained in 2002[83]: the ECJ found out the non-fulfillment of art. 7 of the directive, as well as the transgression of art. 6 of Dir. 91/689/CEE. These dispositions introduced an obligation on Member States to develop a management plan for the disposal of respectively "ordinary" waste and "hazardous" waste related to certain areas of the peninsula. Nevertheless, "*at the date of expiry of the period laid down in the reasoned opinion, the Italian Government had sent to the Commission neither the information relating to plans for the management and disposal of waste and hazardous waste in respect of the regions of Sicily and Basilicata, nor the information relating to plans for the management of packaging and packaging waste in respect of all the Italian regions*"[84].

However, the violations of Dir. 75/442/CEE did not concern exclusively art. 7, but they regarded several other principles laid down in this piece of legislation.

As proof of this, among the numerous judgments of the ECJ[85] related to Italian Republic, of noticeable importance is a verdict of 2004 in the field of authorizations for disposing waste[86].

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82 M. Onida, "Procedure d'infrazione concernenti il diritto comunitario ambientale: recenti sviluppi e considerazioni sulla situazione italiana", in *Riv. giur. ambiente*, 6/2005, 1137. The author underlines how, at the date of 2005, Italy was subject respectively to: 40 infringement procedures for not having communicated in time to the Commission the measures adopted in order to transpose EU directives; 18 infringement procedures for having endorsed transposition measures which did not correctly comply with the content of the EU directives; 44 infringement procedures for wrong application of the directives in the national legislation. See also "Sixth Annual Survey on the Implementation and Enforcement of Community Environmental Law", available at *https://ec.europa.eu/environment/legal/law/pdf/6th_en.pdf*.

83 European Court of Justice, C-466/99, 24January 2002, available at: *https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX:61999CJ0466*.

84 Ibid., par. 19.

85 *Supra*, footnote 74.

86 European Court of Justice, C-103/02, 7th October 2004, *http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=c-103%252F02&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse*

Namely, art. 9 commanded that establishments which carried out the activities set out in the Annex II A of the directive must had attained before an authorization from competent authorities[87].

Art. 11 instead introduced a derogation to what has been said according to the previous disposition: there was no necessity of authorizations for those installations that either took care themselves of the waste disposal or operated in the sense of recovering it. Furthermore, the second paragraph specified that the dispensation could be released only if , on the one hand, the competent authorities had already set the rules and the conditions useful in this sense and, on the other hand, the procedures and the disposal measures were compliant with art. 4 of the Directive[88].

In the case at hand the European Court of Justice was invested with three different censures, raised by the Commission in relation to the decree 5th February 1998 of the Italian Ministry of Environment[89].

First of all, according to the interpretation of the EU Body, the Italian legislation did not respect art. 11 of Dir. 75/442, since it did not provide, for the purpose of the derogation covered by the Directive, a fixed maximum quantity of waste that could be recovered. It instead encompassed *a relative quantity which depends on the annual treatment capacity of each installation concerned*[90].

The Court, recognizing on one side the lack of an explicit expression in the Directive regarding a maximum quantity, nonetheless agreed with the concerns of the Commission, considering that the simplified procedure introduced by art. 11 must be "as easy as possible to apply and monitor". A variable regime, that floats depending on the size of each installation, would surely prevent from reaching such objective. It follows that the Italian Republic was not allowed to switch the maximum quantities connected to a specific type of waste with a variable regime that changes according to the capacity of each station.

Such interpretation, in the view of the writer, is of great importance not only for this branch of EU legislation, but for the entire relation that involves the European Union and Member States. Through this reconstruction indeed the ECJ reminds that, even if directives bind States in relation to the achievements that have to be accomplished, leaving a more or less wide discretion to them regarding the tools to

%252Cfalse&language=it&avg=&cid=3624895.

87 In particular, the authorization must indicate: the type and quantity of waste that has to be treated; the general technical requirements, as well as the precaution that must be taken; the information that have to be always available for the authority.

88 Art. 4 represents one of the most important provisions of the directive, since it clarifies its real aim: protecting human health and avoiding environmental prejudices. The content of these two aspects is then specified in the second paragraph by asserting that risks related to water, soil, fauna and flora, as well as noise or smell inconveniences must be dodged. Finally, the disposition ends - and this feature will gain importance in the next verdicts - by imposing to Member States to take the necessary measures in order to forbid uncontrolled disposal of waste.

89 Decreto Ministeriale 5 Febbraio 1998, *Official Gazette of the Italian Republic*, (GU Serie Generale n.88 del 16-04-1998 - Suppl. Ordinario n. 72), available at *https://www.gazzettaufficiale.it/eli/id/1998/04/16/098A3052/sg*

90 European Court of Justice, C-103/02, cit., par. 20.

use, this cannot mean nor a complete overturn of its principles neither an excessively broad assimilation of its content that could cause, eventually, a concrete ineffectiveness of its scope.

The second violation alleged by the Commission dealt with the lack of accuracy in listing the types of waste that could be covered by the already mentioned derogation.

In particular, on the one hand certain waste were described in a too vague way; on the other hand, some hazardous residues risked to be included in the category of ordinary waste because of an incorrect (or completely missing) incorporation of the codes provided in the European Waste Catalogue ('EWC codes'). Even if the Commission complained in a general way against this disposition, it actually mentioned only three cases in which this unlawful conduct was evident[91]. In light of this circumstance, the Court considered appropriate to exclusively analyze those hypothesis, and actually recognized an occurred violation in two out of the three criticisms of the Commission, on the grounds that art. 11 of dir. 75/442/CEE had been breached by a failure of the State in defining precisely the types of waste questioned[92].

The last plea concerned the incorrect inclusion of certain waste's disposal activities within recovery activities, violating through this behavior both art. 9 and 11 of the directive.

However this criticism was not upheld by the Court, which asserted that the mere fact that certain waste contains "very high levels of hydrocarbons or diesel oil or oil which is slightly toxic" does not imply the necessity of a disposal of those substances; on the contrary, those materials can still be recovered if they can "*serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources*"[93].

12. The waste catastrophe faced by the region of Campania.

So far, the main violations that have been highlighted concerned, on the one hand, an omissive behavior of the Italian authorities[94] and, on the other hand, an incorrect application and transposition, on the national level, of the dictates stemming from the directive[95].

91 In particular, the Commission firstly stated that, in relation to art. 5, par. 9 of the Annex 1 of the censored act, the EWC codes were not mentioned at all for "pieces of dielectric, semi-dielectric and metallic covered optical fibre cable"; secondly, art. 7, par. 8 of the same Annex listed several EWC codes which would not allow a clear identification of the materials therein mentioned among either ordinary waste or hazardous ones; finally, art. 3, par. 10, related to "spent silver oxide batteries" provided for a wrong code "given the mercury content of such batteries".

92 The censure related to art. 3, par. 10 was rejected in light of the lack evidence regarding the dangerous content of the batteries (see *supra*, footnote 84).

93 European Court of Justice, C-103/02, cit., par. 62.

94 European Court of Justice, C-466/99, cit.

95 European Court of Justice, C-103/02, cit.

However, the Italian Republic' default did not simply integrate nor an inactivity - by this meaning a total or partial absence of European Directives' transposition[96] - nor an active conduct consisting in introducing national legislation which contravenes European dispositions[97].

More broadly indeed, certain behaviors of the Italian Republic in the field of environmental law could be implicitly considered as violations of fundamental rights and principles that found the entire European system, such as human dignity and human rights[98].

An unfortunate example of what has been just said can be drawn by the waste catastrophe that the region of Campania, in the South part of Italy, faced in the last thirty years and which, under certain aspects, is not completely over yet.

It was the 11th of February 1994 when the Italian President of the Council of Ministers, through a decree, declared a state of emergency in the sector of waste disposal of Campania[99]. This situation grew out of different conditions, which can mainly be summarized in two broad factors: the lack of efficient infrastructures[100] and the presence, in the territory, of the so called "Ecomafie"[101].

A preliminary specification has to be made: it appears incorrect to state that the situation that is about to be narrated had the exact features of an emergency. The

96 A Member State default can also be integrated by the time passing without transposing the Directive or by an incorrect or incomplete transposition (for example, whether the State has not notified to the Commission the national measures adopted in this sense).
Ex multis, see: European Court of Justice, C-279/94, 16th September 1997, Commission v. Italy, *http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-279%252F94&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=it&avg=&cid=6775749* (related to the failure of notify a law to the Commission - notification that was mandatory according to Dir. 83/189/CEE); European Court of Justice, C-195/97, 25th February 1999, Commission v. Italy, *http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-195%252F97&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=it&avg=&cid=6775749* (concerning the failure to adopt and communicate, within the timing set by dir. 91/676/CEE, the legislative and administrative dispositions).

97 In this sense, the violation can consist even in the correct transposition of a directive, but with further conditions or limits which are not allowed or covered by the European disposition that has been incorporated.
On this regard, see A. Gratani, "L'ambiente: il settore prescelto dall'ordinamento italiano per violare la normativa comunitaria", in *Riv. giur. Ambiente,* 2/2007, 289.

98 Treaty on European Union, art. 2, *Official Journal of the European Communities,* No. C 224/2, 1992.

99 D.P.C.M. 11th February 1994, *Gazzetta Ufficiale*, 12th February 1994, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1994-02-12&atto.codiceRedazionale=094A0988&elenco30giorni=false.

100 It has been highlighted by national jurisprudence how, in this sense, main difficulties arose from both delays in planning and preparing suitable dumps (objective achieved only ten years later, in 2003) and inappropriate choices in processing waste.
See: Paola Brambilla, "La CEDU e l'emergenza rifiuti: la condanna del diritto interno in tema di danno ambientale", *Riv. giur. ambiente*, 3/2012, 408B.

101 This term indicates criminal organizations which, thought their illegal activities, cause a prejudice to the environment.

latter one indeed, for its ontological definition, is a transitional situation, which justifies the adoption of special legislation precisely in the light of its desirable brief length. On the contrary, it is not possible to consider of emergency a context that protracted itself for several decades[102].

Namely, the emergency state had been extended, year by year, until the 31st December 2009, day in which the Legislative Decree n. 195/2009 entered into force, announcing the end of the dangerous impasse. However, although this apparently positive news, the situation was still highly critical.

Already in September 2010, the government had to issue another decree in order to set measures which would grant a "seamlessly" waste disposal, accelerate the process of creation of incinerators as well as increase recycling methods[103].

Unfortunately, the inorganic and incoherent succession of dispositions adopted by the Government did not bring the expected results. In addition, such default was even made more serious in light of a condemn Italian Republic had already received by the European Court of Justice, with regard to this terrible situation affecting the region Campania. The content of this ruling, as it is easy to grasp, had not been implemented at that time: the axe of a new proceedings started by the Commission was pending on the Italian Republic.

Fears became reality in December 2013, when the "guardian of the Treaties"[104] promoted an infringement action against Italy in accordance with the second paragraph of art. 260 TFEU, for not having complied with the precedent judgment.

In order to fully understand the reasons placed as foundations of this ruling, it seems useful to deal with the older verdict that declared Italy's default on these aspects and which represents its necessary prerequisite.

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102 Namely, the institute of receivership has been used several time after the beginning of the crisis. Already in 1996 the Government in office had to dispose a second receivership, which was, through the subsequent years, strengthened by the conferral to it of powerful tools, derogatory towards ordinary legislation, in order to face in a more effective way the crisis.
In 2006, Legislative Decree n. 263 tried to bring back waste management to an ordinary level, providing for the termination of the chief's office by the end of the next year. However, this goal was not reached, since already during the year 2007 the difficulties regarding, on the one hand, the individuation of the sites for disposing waste and, on the other hand, the lack of any plan by the Region in this sense, led to the nomination of another Commissioner, invested of even wider functions. Also in this occasion however, this remedy was not sufficient. In 2008 then, the ex-Chief of State Police was appointed as new Commissioner, and he was flanked by the Chief of Civil Protection, who was entitled of derogating, for the entire emergency period, to environmental, landscaped and urban norms in order to resolve, as fast as possible, the dangerous situation.

103 D.L 26th November 2010, n.196, *Disposizioni relative al subentro delle amministrazioni territoriali della regione Campania nelle attività di gestione del ciclo integrato dei rifiuti*, available at *https://www.gazzettaufficiale.it/eli/id/2010/11/26/010G0222/sg*.
This piece of legislation was the followed by several others, such as D.L. 225/2010 (concerning the prorogation of the terms agreed before); D.L. 94/2011 (in which it was admitted the critical state arising from the non-self-sufficiency of waste system in Campania and it was arranged waste disposal out of the region); D.L. 2/2012 (which strengthened Commissioners' functions and set further measures in order to realize new installations).

104 An expression used to define the European Commission. In this sense, see: Armin von Bogdandy *et al.*, "Solange ribaltata - proteggere l'essenza dei diritti fondamentali nei confronti degli Stati membri dell'UE", *Riv. trim. dir. pubbl.*, 4/2012, 934.

The case at hand was issued the 4th of March 2010[105] and its object was an action for failure of Italy to fulfill its obligations related to art. 4 and 5 of the European Council and Parliament Dir. 2006/12/EC[106]. This directive, through a "system of supervision and control of waste within the EC" and by determining principles and rules regarding both residues and the processes for their treatment, aimed at protecting "human health and environment against the harmful effects caused by the collection, transport, treatment, storage and tipping of waste"[107].

In this perspective art. 7 of the Directive, in order to respect the obligations that are set out in the previous dispositions, commanded to the competent authorities to elaborate waste management plans, which shall indicate the general features of the activities[108].

The commission, in the case at hand, argued that the violation ascribed to Italy respectively consisted, on the one hand, in the failure to create an *integrated and adequate network of disposal* installations, thus violating as well the principles of *self-sufficiency* and *proximity* set out in art. 5; on the other hand, in the generation of a dangerous situation within the region of Campania that could jeopardize both human health and environmental protection.

In relation to the first allegation, the Commission noticed how, in order to fulfill the obligation set out in art. 5, it was needed that the State equipped itself with several technical structures, placed in the interested region, which allowed to dispose waste that could not be recovered both without harm for human health and in respect of the environment. In the absence of a similar system in Campania, not only recycling procedures were not doable, but also dumps were not properly

105 European Court of Justice, 4th March 2010, C-297/08, *http://curia.europa.eu/juris/liste.jsf?language=it&num=C-297/08*.

106 Art. 4, as well as art. 5, fully recall artt. 4 and 5 of Dir. 75/442/EC, since their texts are the same. In particular, art. 4 of the latter directive has been addressed *supra*. The content of art. 5 instead provides for two important principles in the field of waste: "cooperation" and "self-sufficiency". It states that "*Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually […]*". Furthermore, the second paragraph of the disposition requires that the mentioned network of disposal installations has to "*ensure a high level of protection for the environment and public health*".
For the full text of the directive, see: Directive of the European Parliament and of the Council on Waste, 5th April 2006, *Official Journal of the European Union*, L 114/9, 2006. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0012&from=it.

107 E. Scotford, " The New Waste Directive - Trying to Do it All…An Early Assessment", *Env. Law. Rev.*, 11/2009, 75. The author, in his contribution, highlights how certain articles of the directive are not as clear as they were intended to be by European Bodies.

108 In particular, the type, quantity and origins of waste, as well as special dispositions for specific residues. Authorities are also required to mention in the plan the areas in which waste-disposal will occur.

functioning[109]. As a consequence, residues were illegally left over around the region, especially in the streets of the cities[110].

With regard to art. 4 instead, the Commission assumed as a *significant degradation of the environment and the landscape* the ongoing presence in urban agglomerations of waste, which could probably "*cause contamination of the soil and aquifers, the release of pollutants into the atmosphere through the spontaneous combustion of waste and fires deliberately ignited by the local inhabitants, and the consequent pollution of agricultural produce and drinking water, not to mention foul-smelling emanations*"[111].

The defensive tactic Italian Republic adopted has been defined as a "cluster of excuses for its defaults"[112] which, it could be added in this context, had not serious grounds on its back that could justify its behaviors.

Namely, Italy tried to blame external factors for its conduct, such as breaches of contract by the enterprises in charge of waste management, or criminal behaviors of particular organizations or, even, a lack of cooperation by inhabitants: in one word, it appealed to *force majeure*.

Therefore, Italian Republic (contrary to what the Commission implied) tried to show it had never tolerated the illegal dumping of waste in its territory: it just could not do anything about its verification, even if it placed in action all the possible precautions and remedies to firstly avoid and, after, contain the crisis.

The Court, regardless of this reconstruction, agreed with the Commission and upheld its version.

In particular, it firstly did not consider the conditions described by the Italian government as traceable in the frame of the hypothesis of force majeure. Namely, it specified that the procedure provided by art. 258 TFEU is based just on an objective observation of the violations, perpetrated by a Member State, of the obligations imposed by the Treaties. Such norm indeed does not take into account the causes of the defaults, neither if they are due to the State's will nor if they arise from difficulties of any sort that the State had to face in the implementation of the European Law. On these grounds, the Court evoked the so called principle of "indifference" towards national situations (such as the inhabitants opposition) to exclude any justification for the Italian Republic for not complying with European dispositions[113].

Not even assigning all the blame to the companies in charge of disposing waste was favored by the ECJ, which believed that "*a diligent authority should have taken the*

109 In par. 37 of the decision, the Commission evidences how at that time, for the whole region, only one legal dump -sited in the area of Serre - was active. Its absorption capacities were obviously not sufficient for the need of Campania.

110 According to the Commission indeed, the amount of waste left in the streets, in March 2008, was of about 55 000 tons, to which it had to be added about 110 000 tons of other waste waiting to be treated in the municipalities's storages.

111 European Court of Justice, C- 297/08, cit., par. 90.

112 Marcello Mazzola, "L'Italia seppellita dai rifiuti della Campania, dinanzi alla Corte di Giustizia UE", *Riv. giur. Amb.*, 5/2010, 574.

113 See also: European Court of Justice, C-121/07, 9th December 2008, *Commission v. France,* par. 72, http://curia.europa.eu/juris/liste.jsf?language=it&num=C-121/07.

necessary precautions either to guard against the contractual non-performance in question in the region of Campania or to ensure that, despite those shortcomings, actual construction of the infrastructures necessary for waste disposal in the region would be completed on time"[114].

Furthermore, the Court recalled the discretion, upon Member States, with regard to the means through which it is possible to achieve the Directives purposes[115]. Discretion that, in Italy, can be seen in the choice to rely on Regions for the concrete operations regarding waste[116]. This choice, as long as it reveals itself appropriate to grant State' self-sufficiency, cannot be questioned by the Court.

When instead a particular region is not able to manage its waste by creating an "adequate network of disposal installations" in the nearest context to their production[117], "*such serious deficiencies are likely to compromise the national network of waste disposal installations, which will then no longer be integrated and adequate, as required under Directive 2006/12, or capable of meeting the obligation to enable the Member State concerned to move individually towards the aim of self-sufficiency as defined in Article 5(1) of that directive*"[118].

Therefore, art. 5 had been violated not only because Campania was lacking of an installation system that would allow waste disposal according with advanced technical instruments, but also because this situation could not permit the region to respect the "proximity" requirement, endangering the entire Italian system[119].

However, other than the structure of the Italian waste management system, also the irreducible right to health of the citizens living in those areas, set in art. 4 of the Directive, was in danger.

Namely, the discretion recognized to Member States cannot legitimize a conduct that causes a "*significant deterioration in the environment over a protracted period without any action being taken*". Art. 4 indeed cannot be interpreted in this sense, which,

114 European Court of Justice, C-297/08, cit., par. 86.

115 Italian Republic, against the European trend, opted for a system which gives priority to "disposal" rather than "recovery" of waste. However this choice, as it has been highlighted by the doctrine, generates "uneconomical processes", since it does not allow to take advantage from recycled waste as a source of raw material for further use.
See: Leonardo Baroni, "Le principali sentenze", cit., 651.

116 In particular, in order to cover the expenditures connected with such operations, municipalities were released from duties connected with the disposal of waste, in favor of the Region. Thus, the former ones were required to handle their waste to Region's authorities.
See: Legge Regionale 10th February 1993, n.10, *Bollettino Ufficiale della Regione Campania,* 3rd March 1993, n.11.

117 ECJ in particular specifies the criteria that needs to be used in order to determine the area where to place the installations, such as "distance of such sites from inhabited areas where the waste is produced; prohibition on establishing installations in the vicinity of sensitive areas; and existence of adequate infrastructure for the shipment of waste, such as connections to transport networks".
See: European Court of Justice, C-297/08, cit., par. 65.

118 European Court of Justice, C-297/08, cit., par. 68.

119 Such prescription represents, ultimately, a corollary of the principle, set out in art. 191TFEU, of *Rectification at source of environmental damages* (See *supra*, footnote 62).
The importance of this principle in the field of waste management had been already mentioned by the ECJ in an earlier verdict. See: European Court of Justice, 9th June 2009, C-480/06, *Commission v. Germany*, p.37.

otherwise, would run counter to the goals pursued by the Directive itself. Such degradation can represent a "*genuine threat*" also to human health, since it could generate "*pollution of agricultural produce and drinking water, not to mention foul-smelling emanations*"[120].

In light of these considerations, the piles of waste dumped in the streets, sometimes subjected to arson kindled by exasperated citizens , exposed inhabitants' health to an assured risk[121].

In addition to this, the Court specified how waste is a "*matter of a special kind, with the result that accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment, regard being had in particular to the limited capacity of each region or locality for waste reception*"[122].

Taking into account what has been set out above, with the award of the 4th March 2010, the Court declared the occurred violations of articles 4 and 5 of Dir. 2006/12/EC by the Italian Republic, and it condemned it to the payment of the costs of the proceeding[123].

Unfortunately the news reports that followed the verdict continued to witness the Italian inability to comply with European obligations[124].

120 European Court of Justice, C-297/08, cit., par. 90.

121 On this regard, another principle set in Art. 191 TFEU comes to gain relevance: the *preventive principle*. Namely, through such conduct, the Italian Republic was not trying to effectively avoid the exposition to a proven threat both people's health and environment.

122 European Court of Justice, C-297/08, cit., par. 105.

123 Rather than for the payment of the costs of the decision, this judgment was damaging Italian financial balance in relation to the loss of profit arising out from the infringement procedure itself.
Namely, the Commission believed this procedure to challenge the entire Italian waste management system, for which significant amounts of money had previously been allocated by the European Union through its structural found ERDF.
The Italian Republic protested against this decision, and proposed two actions regarding the Commission's denial to release the funds, in particular alleging the lack of a sufficiently direct link between this decision and the infringement procedure started in relation to the Campania's situation. The CJEU, confirming the findings of the EU Tribunal in the joined cases T-99/09 and T-308/99, rejected all the claims brought forward by the State and endorsed the Commission refuse to pay those financial contributes for the waste management and disposal related to Campania region.
For the full text of the judgment, see: Court of Justice of the European Union, C-385/13 P, 6th November 2014, *Italian Republic v. Commission*, http://curia.europa.eu/juris/liste.jsf?language=it&jur=C&num=C-385%2F13+P&td=ALL;
For further readings, see: L. Baroni, "La gestione dei rifiuti in Campania alla luce della recente condanna, dello Stato Italiano al pagamento di «sanzioni», pronunciata dalla Corte di giustizia UE nel giudizio di «doppia condanna» (ex art. 260 TFEU) relativamente alla causa C-653/13", *Riv. It. Dir. Pubbl. Com.*, 5/2016, 1207.

124 17th June 2010, "Slalom tra i rifiuti nelle strade di Napoli", *La Repubblica* - napoli.it, https://napoli.repubblica.it/cronaca/2010/06/17/news/slalom_tra_i_rifiuti_nelle_strade_di_napoli-4921044/.
See also: 23rd October 2010, " Rifiuti. Napoli soffoca. Berlusconi: "10 giorni per risolvere ogni cosa", *il giornale.it*, https://www.ilgiornale.it/news/rifiuti-napoli-soffoca-berlusconi-10-giorni-risolvere-ogni.html;
14th October 2012, "Roghi tossici, Campania come Taranto", *Il sole 24 ore*, https://st.ilsole24ore.com/art/notizie/2012-10-14/terra-fuochi-campania-come-165011.shtml?uuid=AbTrDvsG.

13. The Italian violations on waste reach the ECtHR.

In those years, the context was also exacerbated by another judgment related to the waste crisis of Campania, this time issued by the European Court of Human Rights[125]. It had a significant role because it demonstrated, two years after the case C-297/08, how the situation in that area did not improve, legitimizing even more the Commission to later start a second proceeding against Italy for non-compliance with the just mentioned award.

Thus it appears useful to linger for a while on this verdict, since it also offers several insights regarding both the different approaches ECJ and ECtHR had in relation to the same issue and, more broadly, their attitude toward the recognition of a general right to an healthy environment.

The European Court of Human Rights is an international body which monitors the correct application and the respect of the European Convention on Human Rights and Fundamental Freedoms[126].

In order to undertake this task, it is invested with both advisory[127] and jurisdictional functions.

In the frame of the latter one it indeed can get to know claims coming from individuals as well as from States (among those that ratified the European Convention). However it is a subsidiary authority, since it may be used only once all the national remedies have been borne; furthermore, differently from the European Court of Justice, its awards are not immediately applicable on the national level, but they need the intervention of States' constitutional Courts in order to remove national dispositions that may have been censored by the Court or that appear counterposed to the principles of the Convention..

With particular reference to individuals, among the other requirements, they can recourse to the ECtHR when they believe to be victims of a violation (by a State) of one or more rights enucleated in the Convention.

Incidentally, in the case *Di Sarno*, the lack of the victim's quality has been one of the main allegations the Italian government tried to assert in order to confute the applicants' appeal[128].

In addition Italy affirmed that the claimants did not exhaust all the domestic remedies at their disposal, since they "*could have brought an action for compensation*

125 European Court of Human Rights, 10th January 2012, *Di Sarno and Others v. Italy*, App. no. 30765/08, https://hudoc.echr.coe.int/eng#{"fulltext":["\"CASE%20OF%20DI%20SARNO%20AND%20OTHERS%20v.%20ITALY\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}.

126 The Convention was drafted and opened for signature in Rome on 4 November 1950 by the then newly formed Council of Europe, and came into force on 3 September 1953.
All Council of Europe Member States are party to it, but its ratification is open also to new members.

127 Mainly regarding the correct interpretation of norms contained in the Convention or in its additional Protocols.

128 European Court of Human Rights, 10th January 2012, *Di Sarno and Others v. Italy*, cit., par. 101. In particular the Government showed how the scientific studies it conducted demonstrate the lack of any prejudice both for the environment and human health.

against the agencies ranging the collection, treatment and disposal of waste in order to seek redress for the damages sustained as a result of the malfunctioning of the service"[129].

Other than these procedural arguments, the Government also in this occasion submitted that "the difficulties encountered in Campania were attributable to *force majeure* factors"[130], for which it could not be held responsible.

Finally, it stated that, contrary to what the "victims" were asserting, all the information that could enable the population of that zone to assess their degree of exposure to the risk associated with waste management had been given and, by this, witnessing Italian diligence and care regarding the situation itself and the well-being of the inhabitants.

Namely, on this regard the applicants[131] alleged that the public authorities "had neglected to inform the people concerned of the risks of living in a polluted area"[132]. In addition, they complained about the violations of articles 2 and 8 of the Convention, since, according to them, the Italian conduct in the administration of waste not only caused a significant contamination for the environment, but also created a threat to both health and, even more, to life of humans living in those surroundings[133].

To conclude, they also denounced the infringement of art. 13, since the Italian Authorities did not provide the parties with an effective remedy useful to stand up for their reasons.

In its verdict, the Court held that there had been a violation of both article 8 and 13, excluding at the same time any criticism for the Italian conduct regarding the providing of information[134].

Specifically, in relation to the latter article, the remedies provided by the Italian system could only grant a compensation to the inhabitants and not the concrete removal of the rubbish from the areas.

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129 The Registrar of the Court - Press Release, "Italy's prolonged inability to deal with «waste crisis» in Campania breached human rights of 18 people living and working in the region", 10th January 2012, *https://www.leggioggi.it/wp-content/uploads/2012/01/Chamber-judgment-Di-Sarno-v.-Italy-10.01.2012.pdf*.

130 European Court of Human Rights, 10th January 2012, *Di Sarno and Others v. Italy*, cit., par. 99. In particular, organized crime, contractors failures and inhabitants opposition were mentioned as *force majeure*.

131 The applicants were 18 Italians citizens: 13 of them lived in the environmentally polluted municipality of Somma Vesuviana, while the other 5 worked there.

132 European Court of Human Rights, 10th January 2012, *Di Sarno and Others v. Italy*, cit., par. 94.

133 On this aspect, they recalled a study held by the Italian Health Institute, dating back to 2009, in which it was revealed a link between tumor levels and the existence of landfills in the interested areas.

134 The Court noticed how the civil emergency planning department published its studies both in 2005 and in 2008, fulfilling the procedural requirements of art. 8, as well as art. 5, par. 1 of the Aarhus Convention. The latter indeed requires Parties of the Convention to ensure that "i*n the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected*".
For further readings, see: Paola Brambilla, "La CEDU e l'emergenza rifiuti", cit., 414B.

In addition, it did not seem that the residents of the affected zones could have joined as civil parties the criminal proceedings that the Italian authorities earlier started.

The only real possibility they had was then to encourage Environment Ministry to apply to the judicial authorities, since they could not do so directly. According to the Court, the latter hypothesis "*could not be said to constitute an effective remedy*" according to art. 35, par. 1 of the Convention, and, therefore, art. 13 ECHR had been violated.

With regard to art. 8, by the fact that it required to States both negative and positive obligations in respecting private or family life, it could find application in the case at hand since the almost twenty-years emergency situation in Campania could likely have led to "*a deterioration of the applicants' quality of life and, in particular, adversely affected their right to respect for their homes and they family life*"[135].

However, it is surprising to notice that, with relation to the link between this article and article 2 of the Convention, the ECtHR tread more cautiously on the matter than the ECJ did in its previous verdict[136].

The latter award, as it has been already pointed out, recognized that the accumulation of large quantities of refuse, both in public roads and in temporary storage areas, exposed the health of certain local inhabitants to an unquestioned danger. The ECtHR decision instead concluded that the applicant's lives and health had not been at stake. This solution was reached by the Court for two main reasons: first of all the applicants did not allege any medical disorders linked to their exposure to the waste; secondly, because the scientific studies that had been produced by both parties did not reach an unambiguous result, but led to contradictory findings regarding the existing link between health diseases and waste exposure.

14. Differences between the two Courts' approaches to handling the same factual situation.

According to what has been stated in the previous paragraph then, the ECJ, debunking the myth of its exclusive care about the economic issues of the European Union, granted a higher protection in the direction of the safeguard of the environment than the one offered by the ECtHR.

135 European Court of Human Rights, 10th January 2012, *Di Sarno and Others v. Italy*, cit., par. 108. Likewise, the Court excluded the relevance of force majeure, recalling its definition as it is provided by art. 23 of the Articles of the United Nations International Law Commission on State responsibility for internationally wrongful acts. Namely this document states that force majeure is *an irresistible force or…an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform an international obligation*. It is not possible then to lead back, within the frame of such definition, "*the protracted inability of the Italian authorities to ensure the proper functioning of the waste collection, treatment and disposal service"*, which protracted itself for several years.

136 See *supra*, footnote 114.

This circumstance represents the evidence of the recent trend, within the European legal debate, of the rise of a renovated attention towards fundamental rights and their protection and, implicitly, also of placing the human beings as the core of the entire system.

On this ground the ECJ took as certain the tie linking the *mala gestio* of waste and the health's danger for people, essentially then admitting a right for any person to live in a suitable wholesome state. On the contrary, the subsequent verdict of the ECtHR did not take advantage - as it was expected- of case 297/08 in order to finally introduce a right to an healthy environment. It instead appeared skeptical on this aspect, considering as not sufficient for violating art. 2 ECHR the mere persistence of waste inefficiencies, especially if not corroborated by unique medical evidences[137].

Therefore, even if the result was identical for both verdicts, the conceptual reasonings that led to Italy's condemn were distant from each other: while the ECJ's judgment considered that protecting the environment meant also protecting human beings that live in it, the ECtHR was more prudent, acknowledging a violation of private and family life but not, as well, a disrespect of art. 2 and thus curbing (at least for the moment) a further development in recognizing of a European right to an healthy environment[138].

Taking into account also this pronouncement of the European Court of Human Rights, in June 2013 EU Environment Commissioner pro tempore Janez Potocnik underlined the lack of real improvements in Campania, specifying that, even if it existed a serious risk for Italy to face the infliction of economic sanctions at the end of a possible second judgment ex art. 260 TFEU, such State could have avoided this negative consequence by implementing waste management plans, and thus, by both creating the installations needed in this sense and enforcing the processes of residues differentiated collection[139].

However those achievements, after three years from the first condemn, were not yet reached: in December 2013 Italy faced a new proceeding in accordance with par. 2 art. 260 TFEU [140].

137 C. Feliziani, "Il diritto fondamentale all'ambiente salubre nella recente giurisprudenza della Corte di Giustizia e della Corte Edu in materia di rifiuti. Analisi di due approcci differenti", *Riv. it. dir. pubbl. communit.*, 6/2012, 1003.

138 However, the ECtHR judgment does not fail to provide little progresses in this sense, with regard to two particular aspects. First of all, concerning the right to an healthy environment, the Court admitted that environmental deterioration could eventually lead to a violation of the Convention; secondly, in relation to the "victim" state useful in order to apply to the Court, it widened its notion, allowing applications coming not only from inhabitants of the interested areas, but also from people who in those placed "just" worked.
See: L. Baroni, "La gestione dei rifiuti", cit., 1210.

139 L. Baroni, "La gestione dei rifiuti", cit., 1202.

140 European Court of Justice, 16th July 2015, C-653/13, *Commission v. Italy*, *http://curia.europa.eu/juris/liste.jsf?language=it&num=C-653/13*.

15. A second – and heavier – condemn for Italy ex art. 260 TFEU.

The object of this second trial was, on the one hand, to ascertain Italy's default in complying with the previous judgment and, on the other hand, the imposition of a lump sum and a penalty payment[141].

In relation to art. 4, the Commission declared that the accumulation of "Ecobales" (both in the streets of the cities and in the storage facilities) kept on occurring also during the 39 months that followed the Court's award, increasing the size of the problem[142]. Dealing with art. 5 instead the EU executive body pointed out that the shortage of facilities, at the date of the default determination, was still the main character of the (insufficient) waste system of region Campania, and thus the goal of self-sufficiency had not been accomplished yet[143].

However, following in certain respects the Italian defense, the Commission admitted that Italy had made some progresses in order to take back to conformity the situation, even if those steps forward could not be considered satisfactory.

In its decision to condemn Italy, the Court underlined how a Member State failure has to be ascertained at the date of expiration of the deadline fixed by the Commission in its letter of formal notice.

In particular, at the date of the 15th January 2012, it was well-established that the Italian Republic had not taken enough measures in order, on the one hand, to avoid neither a danger for human health nor a prejudice for the environment and, on the other hand, to make sure the waste disposal system of Campania was actually self-sufficient. On this point instead, it had become very clear that, in 2012, more than 20% of urban waste of the Region was still sent, during 2012, to other Italian region, as well as to other EU countries (mainly Germany) for its treatment and recovery. Even if this "method" avoided the onset of new crisis, it showed the impossibility to consider the region autonomous in this field[144].

For those reasons the Court believed that imposing an economic penalty on the Italian Government represented an appropriate financial instrument in order to grant a complete compliance with the prescription of the case C-297/08. The sum, in accordance with the criteria of duration and entity of the violations, as well as with

141 Namely, recalling a precedent verdict (European Court of Justice, 4th July 2000, *Commission v. Greece*, *https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A61997CJ0387*),the Commission considered the violation of art. 4, Dir. 2006/12/EC as particularly relevant and thus proposed the application of both sanctions. With regard to the daily penalty it suggested that the sum (obtained through specific calculations set in its Communication "Application of art. 260 TFEU" of the 13th December 2005 and amounting to 256 819,20€) should have been separated in three portions, each related to a specific failure, in order to condemn Italy to pay 85 606,40 €, until, respectively, it actually put into service an adequate number of landfills, it created enough waste-to-energy plants and, finally, it realized installations aiming to organic waste recovery.

142 The process of disposal of those waste bales will likely take from 10 to 15 years, as the Commission (par. 20) and the Italian Republic itself (par. 22) recognized.

143 L. Baroni, "La gestione dei rifiuti", cit., 1212.

144 Furthermore, considering that Campania's waste production formed 1/10th of the national one, such deficiencies could negatively affect the entire Italian system. See: par. 47.

the one of State's capacity to fulfill the economic obligation, was established to be 120 000 € per each day of delay in the implementation of the necessary measures in order to conform with the award[145]. In addition, reminding its legitimacy to sanction a Member State also with a lump sum, the Court took into account the features of Italian failures, as well as its behavior[146] and decided to condemn the Nation to the payment of 20 millions of euros to a specific EU fund.

According to the writer's opinion, what appears the most significant in this pronouncement is the fact that the Court reached its conclusions taking also into account several others decisions that had recently confirmed the Italian default on waste management[147]. This consideration indeed shows the importance of the addressed thematic, which, according to the point of view of the Court, could not be handled "on its own" but had actually to be framed within the totality of verdicts that deepened the issue.

Among those verdicts, one in particular played an essential role[148], both because of its timing and the matter it dealt with.

16. History repeats itself: two earlier verdicts that should have guided the Italian behaviors regarding waste management.

The case at hand was solved less than one year before C-653/2013 and it consisted of an action for failure pursuant to art. 260, par. 2 TFEU. Also this time, the Italian Republic was accused of not having complied with a precedent verdict of the ECJ.

However, in this occasion the time that passed between the first ruling and the beginning of the second failure procedure was almost two times longer than the 39 months which separated, respectively, the sentence pronounced at the end C-297/08 from the Commission's new letter of formal notice that would, eventually, have led to the emission of the award of the 16th July 2015. Such persistent situation witnessed even more the great difficulties the Italian Government faced in order to align national discipline regarding landfills to the obligations stemming in this field from the European Community, and it also constituted a fertile soil for the following CJEU verdict.

Furthermore, to some extent the bad practices evidenced by the Commission in the rulings that it is about to deal with are not completely over yet, showing how waste management still represents for Italy an hard task to fulfill.

145 The amount described was divided in three parts (each of which was 40 000€), ascribable to each one of the categories in which the system was lacking (landfills; incinerators; installation aiming at treating organic refuses).

146 Which, as it is pointed out in par. 92, emerged also from another verdict released few time before, further analyzed.

147 L. Baroni, "La gestione dei rifiuti", cit., 1216.

148 European Court of Justice, 2nd December 2014, C-196/13, *Commission v. Italy*, *http://curia.europa.eu/juris/liste.jsf?language=it&jur=C&num=C-196%2F13&td=ALL*.

As it has just been said, the verdict C-196/2013 originated after more than six years of Italian noncompliance with the award released in 2007 by the ECJ in conclusion of the proceeding n. 135.

The latter one stemmed from various allegations the Commission moved against Italy in relation to several violations regarding three different directives on the waste legislation: Dir. 75/442/EC, Dir. 91/689/EC and Dir. 1999/31/EC[149].

The straw that led to the beginning of the proceedings sprang from a report of the State Forestry Corps in which it was highlighted the existence of an enormous number of illegal and uncontrolled dumps all over the Italian territory[150].

The EU Commission, informed of this unfortunate situation, required clarifications to the Italian government. The latter one however remained silent, not answering neither to the letter sent by the Commission according to art. 258 TFEU (at that time still art. 226 TEC) nor to the reasoned opinion issued by the same Body five months later, thus legitimizing the Commission to bring an action before the European Court of Justice[151].

The Italian Republic however challenged the entire proceeding, underlying its inadmissibility because of the "*general and undefined nature of the alleged failure to fulfill obligations*"[152], since the Commission did not properly identify neither the holders of the waste nor the operators of the landfills. Furthermore, not even the owners of the lands where the refuses were left over had been determined.

The Commission choice to analyze in one unique proceeding the waste disposal issue was not censored by the Court, which considered it conform to the objectives of easing controls, ensuring at the same time a complete check on the situation - which had a national impact.

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149 In relation to the first directive, this time (differently from the previous verdict, C-466, *supra)* the dispositions that the Commission assumed violated by Italian conduct were, respectively, art. 4 (adoption of the necessary measures in order to avoid any prejudice for human health as well as for the environment); art. 8 (that imposes to holders of waste to either handle them to a competent business for disposal or to autonomously dispose them, in accordance with the principles hereto); art. 9 (already mentioned with regard to C-466/99, see *supra*).
With regard to Dir. 91/689/EC, the questioned norm was the one set in art. 2, n. 1 (this directive deals with hazardous waste, and art. 2 imposes to Member States, for this type of residues, cataloging and identificative processes).
Finally, concerning Dir. 1999/32/EC, it was art. 14, lett. a) and c) that played a role. This directive regards dumps' discipline; in particular, art. 14 requests to those landfills which have obtained an authorization for disposing waste to equip themselves with a recovery plan that they need to submit to competent authorities for its approval within one year (lett. a); at the same time, the competent authorities must adopt a decision regarding the continuation of the dumps activities and, in case of a negative assessment, they have to adopt the necessary measures in order to close them (lett. c).

150 In particular, a survey of 1986 pointed out the existence of 5978 illegal landfills in the territories of 6890 Italian municipalities. A second study of ten years later revealed the decrease of the previous number (5422); this diminishing trend was confirmed also in 2002, year in which a third analysis identified 4866 landfills which were not up to standards. Instead, the amount of authorized disposal areas was only 1420.

151 European Court of Justice, 26th April 2007, C-135/05, *Commission v. Italy*, *http://curia.europa.eu/juris/liste.jsf?td=ALL&language=it&jur=C,T,F&num=C-135/05*.

152 European Court of Justice, 26th April 2007, C-135/05, cit., par. 18.

Not losing heart, Italy maintained that, in any case, the documents on which the Commission allegations were based could not be relevant, since the State Forestry Corp' s reports had not been realized in conjunction with the Environment Ministry, the only national Authority competent in this sense. Furthermore, the other "proofs" the Commission alleged[153] were too undetermined, and not corroborated with specific evidence.

However, as it has already been outlined by some scholars[154], the attempt of the Italian Republic to deprive of relevance the cited reports enclosed an inherent contradiction. This is so because acknowledging that these evidentiary sources were lacking in credibility would have meant that several other national judgments, based on these particular documents, were unfounded and thus had to be censured. The Court did not uphold this reconstruction also in light of another consideration: the State Forestry Corp, among different functions[155], displayed also the role of judicial police, specialized in the protection of the environment, as well as of the ecosystems, and thus it was legitimized by its own nature and purposes to conduct certain investigations and to form specific evidence on the results discovered in the frame of that activity.

The same considerations can be carried out with regard to the Parliamentary Commissions of Inquiry, which, being bodies set forth by the Constitution[156], hold the same investigation powers as Judicial authorities[157].

In addition the ECJ specified that, since the EU Commission does not possess proper inquiry powers, it can rely for investigations also on denounces deriving from both private and public organizations active in the territory of the State[158], as long as the elements emerged by those censures are most likely to be relevant and suitable in showing a violation of the Community's obligations in the case examined. In this hypothesis, it is then the State's burden to disprove the evidences surfaced.

153 The defense of the State upheld that the reports of parliamentary commissions of inquiry and press articles could not represent a confession, as the Commission interpreted.

154 A. Gratani, "Per evitare l'inadempimento lo Stato deve dimostrare di aver correttamente attuato il diritto comunitario ambientale primario e secondario. Le denunce delle organizzazioni private o pubbliche, attive sul territorio nazionale, sono idonee a costituire elementi a carico dello Stato responsabile", *Riv. giur. ambiente*, 5/2007, 785.

155 This corp held also competences of judicial policy (also beyond the field of the environment, but after judge's assignment), public order and public security (together with the other State's police corps), as well as public aid. Furthermore, it had a strict link with the politic branche, participating in the coordination and planning of the police forces.
However, the Legge 7 agosto 2015, n. 124, Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche, *Gazzetta Ufficiale* n. 187, 13 agosto 2015, has rodere the suppression of this body and its absorption within another State's defensive Body.

156 Costituzione Italiana, art. 82, comma 2, *https://www.senato.it/documenti/repository/istituzione/costituzione.pdf*.

157 They are indeed allowed to summon and interview witnesses, as well as request documents, search people, dispose wiretaps and also operate seizures.

158 European Court of Justice, 26th April 2007, C-135/05, cit., par. 28.

In the dispute at hand Italy was not able to do so, since it did not question the merits of Commission's claims, but only certain quantitative aspects[159].

The Court then reached the conclusion of the occurred violations of art. 4 (Italy did not make sure that waste was being recovered or disposed without any prejudice nor to the environment neither to human health)[160], art. 8 (Italy did not take the necessary measures in order to impose to waste holders to either handle them to a private collector or to recover/dispose them on their own) and art. 9 (Italy did not ensure that all the installations dealing with waste had obtained before an authorization for these activities) of the Dir. 75/442/EC, as well as art. 2, par.1 (Italy was supposed to catalogue and identify any hazardous waste that had been lodged in the landfills) of the Dir. 91/689/EC and art. 14, lett. a) and c) (Italy did not grant that each operator of an already existing landfill respected his obligation to draft a reorganization plan of the installations that was necessary to allow State's competent authorities to decide, once for all, if the dump could stay open or had to close) of the Dir. 1999/31/CE[161].

Within the subsequent control regarding the implementation of the verdict, the Commission asked for the indication of the measures taken by the Italian government in order to remedy to the dangerous situation, but also in this occasion, after a correspondence of documents that lasted almost six years, it noticed that on the territories of 18 (out of 20) regions were still active 218 unauthorized landfills. Furthermore, among those, there were 16 dumps that contained hazardous waste which still did not respect art. 2, par. 1, Dir. 91/689/EC. Finally, the Italian Republic did not provide enough evidence that five landfills had been object of a reorganizing plan or of a closure order.

Although the criticisms earlier showed regarding its defense in the case C-135/05, the Italian Republic challenged again the admissibility of the appeal in as much as the State Forestry Corp's reports could not be taken as evidence on the ground of which it could be based an application.

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159 For example the exact number of abusive landfills, therefore implying the existence of abusive landfills!

160 Regarding this disposition, it appears interesting to underline that, even if the Court admitted that such norm does not indicate a concrete content of the measures that have to be taken in order not to incur in a violation, it is possible to identify a failure in the hypothesis in which a State's inactive behavior that tolerates inadmissible situations on a part of its territory which lasts for a protracted period, constitutes itself the proof of the failure to comply with art. 4.

See: European Court of Justice, 26th April 2007, C-135/05, cit., par. 37.

See also: European Court of Justice, 23 February 1994, Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia and others, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61992CJ0236&from=EN*, par. 12, in which art. 4 had been described as a norm that lacks of direct effect, since it "*essentially repeats the terms of the third recital in the preamble, indicates a programme to be followed and sets out the objectives which the Member States must observe in their performance of the more specific obligations imposed on them by Articles 5 to 11 of the directive concerning planning, supervision and monitoring of waste-disposal operations*". For these reasons, art. 4 is to be addressed to States only and it represents a limit to their activities; on the contrary, it does not confer to individuals rights that they can claim before the CJEU.

161 For the content of these norms, see *supra*, footnote 140.

In addition the State denounced that it was excluded that the Commission could broaden the scope of the plead by encompassing in it also dumps that were not comprised in the already mentioned documents[162]. Finally, the Government pointed out its diligence in the attempt to comply with the previous verdict and thus to put an end to the dangerous situation it faced before.

It is interesting to notice that the Court, analyzing the actual concrete waste situation in Italy, embraced all the Commission allegations[163] and specified again that a persistent situation of degradation constitutes itself a violation of art. 4, Dir. 75/442/EC, which, in order to protect human health and environment, implicitly imposes to Member States not only a mere closure of a non-functioning landfill, but also to "*determine whether it is necessary to clean up old illegal sites and, if so, to clean them up*"[164].

However he ECJ did not fail to evidence the progresses made in tackling the issue, but it also pointed out how the measures in this sense were weak and had been taken too slowly and over an excessively long period of time (more than seven years)[165].

In addition the Court, as later did also with regard to its verdict of the 16th July 2015[166], bore in mind the twenty and more infringement procedures Italy had faced, until that time, in the field of waste management and landfills legality[167], which constituted a clear "*indication that effective prevention of future repetition of similar infringements of EU law may require the adoption of a dissuasive measure, such as the imposition of a lump sum payment*" [168].

Indeed, on the one hand the CJEU condemned Italy to the payment of a penalty for delay amounting to 42.800.000,00€ for each semester of persistency of the failure[169]; on the other hand, the judges found also necessary to impose to the Italian government a lump sum, which corresponded to 40,000,000.00€.

162 The Court however did not uphold this censure, since in the case C-135/05 it was established a "general and persistent failure" which had not been ascertained only through the State Forestry Corp's reports. Therefore, other "*sites must be regarded as necessarily encompassed by the general and persistent failure to fulfill obligations established in the first action brought under Article 226 EC*".

163 See *supra*, footnote 82.

164 European Court of Justice, 2nd December 2014, C-196/13, cit., par. 53.

165 *Ibid.,* par. 103: "*That failure to fulfill obligations must therefore be held to have persisted for more than seven years, which is a considerable length of time".*

166 European Court of Justice, 16th July 2015, C-653/13, cit.

167 The first of these verdicts concerned five appeals promoted by the Commission against Italy for not having transposed several EU Directives issued in the field of waste. Among them it is possible to remind Dir. 75/440/EEC (regarding drinkable water), as well as Dir. 76/160/EEC (bathing water quality) and Dir. 75/442/EEC, already abundantly mentioned above.
For the full text of the verdict, see: European Court of Justice, 17th December 1981, Joined cases 30 to 34/1981, Commission v. Italy, http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-30%252F81&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=it&avg=&cid=9230153.

168 European Court of Justice, 2nd December 2014, C-196/13, cit., par. 116.

169 The fine was "dynamic", meaning that the amount would have decreased in relation to the increasing of the sites led back to conformity with the European standards.

17. Concluding notes.

The verdicts that have been so far analyzed show several and recurrent violations of EU dispositions, perpetrated by the Italian State, in the field of waste management. Those censures regarded both the failure of transposing directives as well as the adoption of legislative act which were in contradiction with European norms.

In particular, it has certainly appeared clear to the reader the costs that Italy faced as a consequence of its incautious behavior. With the benefit of the hindsight, it is easy to assert that the capital Italy had to correspond to the European Union in terms of economic sanctions would have been much more useful if, instead, had been invested for improving the entire system of waste recovery and disposal[170].

From such a good practice indeed, not only the State's funds would have benefit (it is to remind also that, as a fallout of Italian default, European Union decided not to correspond to it an high amount of funds)[171], but also, more generally, the entire Italian population, both in terms of economy and health. Namely, one of the biggest revenue for States are taxes. The entire tax system is (or, maybe, it should be said "ought to be") founded on a mutual gain: taxpayers pay levies in order to obtain services useful and needed for their life. When this dichotomy does not properly function (as for example in the field of waste, where the Italian State did not even offered the basic assistance in order, not to give a benefit, but simply to avoid a prejudice to citizens), then there is a short-circuit: citizens are contributing for the State expanses without receiving in return what they paid for.

The State has, ultimately, failed to be "democratic", in the sense that it is not representing anymore the needs of its community and it is not carrying out the functions that justify its existence.

Ad absurdum, it could be maintained that, in every hypothesis in which similar deficiencies can be ascertained, the State loses a portion of its legitimacy in people's eyes.

Only through transparency and certainty with regard to the planning of the measures the State can restore public confidence in its authorities[172].

For these reasons, and for the seriousness of the circumstances, the Italian Court of Audit started already in 2016 proceedings against the main perpetrators for the lack of landfills' rehabilitation, that have costed Italy tens of millions euros.

In the meanwhile, witnessing the *prima facie* ineffectiveness of these dissuasive remedies, the 21st of March 2019 Italy approached a new condemn according to art.

170 At the end of 2016, it emerged that the Italian Republic had already deposited in the EU coffers more than 114 millions of euros due to sanctions that has been inflicted to it. In particular, one-fourth of this amount was corresponded due to the penalties arising from the situation described in the region Campania.
See: L. Baroni, "La gestione dei rifiuti", cit., 1222.

171 See *supra*, footnote 123.

172 L. Baroni, "La gestione dei rifiuti", cit., 1222.

258 TFEU . The judgment concerned the violation of art. 14, lett. b) and c), of Dir. 1999/31/EC on waste landfills.

Differently from Case 196/13, at the end of which it was ascertained a violation of this Directive for not having the authorities complied with their obligation to adopt, for certain dumps, a decision regarding their authorization to functioning or their closure, the recent case at hand[173] deals with the so called obligations of completion. These duties impose to member States to actually take action in
order to implement the measure that the State has already adopted for a particular landfill[174].

The proceeding witnessed how the Italian Republic had not fulfilled, by the time of expiration of the fulfillment deadline imposed by the Commission, its obligation in this sense with regard to 44 dumps.

After one year from this verdict, the Commission will probably begin its routine controls with reference to the implementation of the award.

If history's main purpose is to raise awareness over past facts, in order to allow drawing conclusions that can be extremely helpful for the future, it is not specious to expect that, after three decades of non-compliance with EU waste legislation, followed by "countless" condemns, Italy has finally learned its lesson.

Besides, as ancient Latins used to say, *errare humanum est, perseverare autem diabolicum.*

173 European Court of Justice, 21st March 2019, C-498/17, *Commission v. Italy*, http://curia.europa.eu/juris/liste.jsf?language=IT&num=C-498/17.

174 The difference between the two judgments then lays in the fact that, while C-196/13 regarded an earlier in time duty (to adopt a decision, regarding each landfill, to close or to authorize the continuation of the activities), C-498/17's object concerns a later "step" (to concretely implement the decisions that have been already taken).