

Making Nature's Voice Heard in Criminal Proceedings

Jakob HAJSZAN

University of Vienna

ORCID: <https://orcid.org/0000-0001-5291-1410>

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As nature and parts thereof do not enjoy legal personhood in almost all EU-Member states, criminal cases concerning crimes against the environment and other crimes that cause harm to nature do not involve victims who could participate in the proceedings and demand compensation. This lack of participation and representation differs from other areas of procedural law: As litigation and participation of NGOs or other members of the public on behalf of the environment is quite frequent in environmental law and certain legal instruments such as the Aarhus Convention or certain EU-Directives even obligate states to grant participation rights in some administrative proceedings. However, some countries already allow environmental NGOs or other members of the public, including individuals, to participate in criminal proceedings on behalf of the environment. Furthermore, a planned new EU-Directive on environmental criminal law might bring an obligation to grant the public concerned appropriate rights to participate in proceedings regarding environmental crimes.

KEYWORDS: Criminal Environmental Law; Procedural law and the Environment; Collective remedies; Victim-status; NGO-participation; Public participation; Aarhus Convention

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1. Introduction

The number of cases of so-called climate litigation grew over the past years. Most of them involve humans claiming compensation because of environmental damages or demanding measures to restore or protect the environment and combat climate change. However, apart from those lawsuits brought by humans on behalf of themselves or future generations, cases are also brought on behalf of nature, certain landscapes or individual animals. In such cases, humans act as nature's representatives because nature not only cannot represent itself but neither constitutes a legal person in most countries and therefore cannot participate in court proceedings. Accordingly, criminal cases concerning crimes against the environment and other crimes that cause harm to nature – contrary to cases involving humans as injured parties – do not involve victims who could participate in the prosecution and demand compensation.

While litigation and participation in proceedings on behalf of the environment are quite frequent in environmental law and certain legal instruments obligate states to grant participation rights in some administrative proceedings, participation in criminal proceedings is rather uncommon. However, some countries already allow environmental NGOs (eNGOs) to participate in criminal proceedings on behalf of the environment and a planned new EU-Directive on environmental criminal law might bring an obligation to grant the public concerned appropriate rights to participate in proceedings regarding environmental crimes (see below 3.3.2).

2. Legal personhood or representation of nature?

2.1. Representation of nature in (criminal) proceedings internationally

Some countries outside the European Union recognised nature or certain landscapes as legal persons either by law or through court decisions. Because of their legal personhood, the authorities and courts have to regard nature's rights in their decision-making process and nature – through representatives – can participate in court proceedings. Most famously, Ecuador's constitution recognises and guarantees the right of nature to restoration and to integral respect

for its existence, maintenance and regeneration.¹ According to Art. 71 of the Ecuadorian constitution, all persons and communities may invoke these rights before the courts or other authorities.² However, this broad authorisation does not apply to criminal proceedings, because only directly affected persons are recognised as parties. As a result, in the first publicly known criminal case where an eNGO tried to participate on behalf of nature, a court denied the eNGO's request to represent sharks caught in illegal fisheries and only allowed them to submit *amicus curiae* letters.³ Other countries legally recognise the personhood of nature, e.g. Bolivia, Uganda and some municipalities in the United States,⁴ or certain parts of nature, e.g. New Zealand⁵ and recently Spain, which recognised the legal personhood of a coastal saltwater lagoon called '*mar menor*'⁶. Furthermore, the Constitutional Court of Colombia recognised the personhood of the *Atrato River*⁷ and the High Court of Uttarakhand in India recognised two glaciers and two rivers as legal persons.⁸

- 1 L. KOTZÉ, P. VILLAVICENCIO CALZADILLA, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, in TEL, 2017, vol. 6, p. 401-433, p. 422 ss; N. PAIN, R. PEPPER, *Can Personhood Protect the Environment? Affording Legal Rights to Nature*, in *Fordham Int'l L.J.*, 2021, vol. 45, p. 315-378, p. 335.
- 2 L. KRÄMER, *Rights of Nature and Their Implementation*, in JEEPL, 2020, vol. 17, p. 47-75, p. 50; C. KAUFMANN, P. MARTIN, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuits Succeed and Others Fail*, in *World Development*, 2017, vol. 92, p. 130-142, p. 132; M. WHITTEMORE, *The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, in *Pac Rim L & Pol'y J.*, 2011, vol. 20, p. 659-692, p. 668.
- 3 C. KAUFMANN, P. MARTIN, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuits Succeed and Others Fail*, cit., p. 136; E. WAGNER, W. BEGRTHALER, M. KRÖMER, L. GRABMAIR, *Eigenrechtsfähigkeit der Natur*, Jan Sramek Verlag, Vienna, 2022, p. 19 s.
- 4 E. WAGNER et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 23 ss with references.
- 5 D. BOYD, *The Rights of Nature*, ECW, Toronto, 2017, p. 131 ss; in depth K. SANDERS, *Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, in *J Envtl L.*, 2018, vol. 30, p. 207-234, p. 207 ss.
- 6 Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca, BOE-A-2022-16019, cf. M. BERTEL, *Spanien: Per Gesetz die größte Salzwasserlagune Europas „Mar Menor“ als Rechtssubjekt anerkannt*, in *Nachhaltigkeitsrecht*, 2023, vol. 3, p. 102-104; B. SORO MATEO, S. ÁLVAREZ, *The Mar Menor Lagoon Enjoys Legal Standing: and now, what?*, in *Verfassungsblog*, 14.10.2022. On the legislative proceedings leading to the granting of legal personhood T. VICENTE GIMÉNEZ, E. SALAZAR ORTUÑO, *La iniciativa legislativa popular para el reconocimiento de personalidad jurídica y derechos propios al Mar Menor y su cuenca*, in *Revista Catalana de Dret Ambiental*, 2022, vol. 13, p. 1-38.
- 7 Constitutional Court of Colombia, T-622/16, 10.11.2016; P. WESCHE, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision*, in *J Envtl L.*, 2021, vol. 33, p. 531-556.
- 8 High Court of Uttarakhand, Writ Petition (PIL) No. 126 of 2014, *Mohd. Salim v State of Uttarakhand & others*, 20.03.2017; Writ Petition (PIL) No. 140 of 2015, *Lalit Miglani v State of Uttarakhand & others*, 30.03.2017. The Supreme Court of India later stayed the *Mohd. Salim*-ruling, cf. E. O'DONNELL, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, in *J Envtl L.*, 2018, vol. 30, 135-144, p. 136 ss.

2.2. Granting rights to nature itself or others on nature's behalf?

Granting rights to nature itself would be of high symbolic power because it would create a new legal person and underline the importance of nature and its protection. The recognition of nature as a legal person however requires rules on the extent of its rights and obligations as well as provisions regarding the representation of nature or the environment. Therefore, the environment would need humans to represent it and exercise the rights on its behalf.⁹

Another possibility to ensure the safeguarding of environmental interests in criminal proceedings is the granting of participation rights to individuals, eNGOs or other legal entities. This already is the case in several fields of environmental law in Europe as required by Art. 9 of the Aarhus Convention (AC),¹⁰ EU-law¹¹ or certain national laws, e.g. the French Environmental Code¹². Furthermore, the European Commission intends to introduce compulsory public participation in environmental criminal law.¹³ This option requires less alteration of laws as already recognised legal persons would receive procedural rights. Therefore, this option would be easier to implement into the current legal order. In addition, it would not require additional rules on representation as individuals or NGOs are able to represent themselves, the latter through their members. Since granting procedural rights to existing persons – natural or legal – on behalf of the environment also achieves sufficient representation, granting rights to nature is not necessary.¹⁴

9 E.g. J. BÉTAILLE, *Rights of Nature: Why it Might Not Save the Entire World*, in *JEEPL*, 2019, vol. 6, p. 35-64, p. 55 s.

10 UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447; on the obligations under Art. 9 AC, I. HADJIYIANNI, *Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention*, in *Europ Public L*, 2020, vol. 26, p. 889-920, p. 892 ss; A. DANTHINNE, M. ELIANTONIO, M. PEETERS, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, in *RECIEL*, 2022, vol. 31, p. 411-420, p. 412 s.

11 E.g. Art. 11 Directive 2011/92/EU, OJ L 26/2012, 1; Art. 10, 12 Regulation (EC) No 1367/2006, OJ L 264/2006, 13; R. CARANTA, *Environmental NGOs (eNGOs) or: Filling the Gap between the State and the Individual under the Aarhus Convention*, in R. CARANTA, A. GERBRANDY, B. MÜLLER (eds.), *The Making of a New European Legal Culture: the Aarhus Convention*, Europa Law Publishing, Zutphen, 2017, p. 373-404; p. 413 ss.

12 Cf. J. BÉTAILLE, *Rights of Nature: Why it Might Not Save the Entire World*, cit., p. 51; on possibilities to claim damages E. FASOLI, *The Possibilities for Nongovernmental Organizations Promoting Environmental Protection to Claim Damages in Relation to the Environment in France, Italy, the Netherlands and Portugal*, in *RECIEL*, 2017, vol. 26, p. 30-37.

13 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851.

14 P. ELDER, *Legal Rights for Nature: The Wrong Answer to the Right(s) Question*, in *Osgoode Hall L J*, 1984, vol. 22, p. 285-295, p. 290 ss; and in depth J. BÉTAILLE, *Rights of Nature: Why it Might Not Save the Entire World*, cit., 51.

3. Representation of the environment within the European Union

While until today – apart from Spain – no European countries have recognised the legal personhood of nature or natural areas, there are certain forms of participation on behalf of the environment within the European Union: On one hand, because of the ratification of the AC by the EU,¹⁵ Art. 9 (3) AC in conjunction with Art. 216 (2) TFEU obligates Member States to guarantee that the public concerned has access to justice in certain matters of environmental law.¹⁶ This obligation mainly concerns matters of administrative law regarding the protection of nature or activities potentially affecting the environment but may also apply to criminal law under certain circumstances (see 3.3.1.). On the other hand, some European countries also allow the participation of eNGOs or individuals in certain criminal proceedings.¹⁷

3.1. Existing possibilities of participation on the behalf of the environment in selected European countries

In Spain Art. 125 of the Spanish Constitution as well as Art. 101 of the Spanish Criminal Procedure Act guarantee the right of every Spanish citizen to join criminal proceedings as a so-called *popular accuser* even if they are not affected by the respective crime in any way (*acción popular*).¹⁸ According to the jurisprudence of the Spanish Constitutional Court, the term *citizen* in Art. 125 of the Constitution includes not only individuals but also legal entities, therefore also eNGOs.¹⁹ However, the popular accuser cannot claim civil damages, this right is only granted to a person directly affected by the respective crime

15 A. DANTHINNE, M. ELIANTONIO, M. PEETERS, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, cit., p. 411.

16 Regarding the implementation into different legal systems cf. D. DRAGOS, B. NEAMTU, *Access to Justice under the Aarhus Convention: the Comparative View*, in R. CARANTA, A. GERBRANDY, B. MÜLLER (eds.), *The Making of a New European Legal Culture: the Aarhus Convention*, cit., p. 373-404; I. HADIJIYANNI, *Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention*, cit., p. 898 ss.

17 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, in *Opolskie Studia Administracyjno-Prawne*, 2022, vol. 20, p. 211-236, p. 231.

18 J. RIDAURA MARTINEZ, *La Acción Popular: ¿Uso o Abuso de un Derecho?*, in *Teoría y Realidad Constitucional*, 2022, num. 50, p. 219-246, p. 221 ss; P. CRESPO BARQUERO, *Artículo 125*, in M. RODRÍGUEZ-PIÑERO Y BRAVO FERRER, M. CASAS BAAMONDE (dir.), *Comentarios a la Constitución Española Tomo II*, Agencia Estatal Boletín Oficial del Estado, Madrid, 2018, p. 781-794, p. 789.

19 Spanish Constitutional Tribunal, STC 53/1983, 20.06.1983; STC 241/1992, 21.12.1992; STC 34/1994, 31.1.1994; N. JIMÉNEZ CARDONA, *La acción popular en el sistema procesal español*, in *Revista Chilena de Derecho y Ciencia Política*, 2014, vol. 5, p. 47-89, p. 61; E. MARTÍNEZ GARCÍA, *Las partes acusadoras*, in J.-L. GÓMEZ COLOMER, S. BARONA VILAR (cord.), *Proceso Penal*, tirant lo blanch, Valencia, 2nd ed. 2022, p. 73-88, p. 84 s.

who can join the proceedings as a so-called particular accuser.²⁰ Generally, the popular accuser cannot maintain the charge if both the public prosecutor and the particular accuser choose to drop their charges.²¹ If, however – because the crime in question protects meta-individual or collective rather than individual legal interests and therefore lacks directly affected victims who could join the proceedings as particular accusers – a case does only involve the public prosecutor and the accused, the popular accuser can insist on the opening of oral proceedings.²² The right to start proceedings as a popular accuser is reiterated by Art. 6 of the act granting legal personhood to the ‘*mar menor*’ lagoon, which states that any person can bring an action before the courts in order to enforce the rights of the ‘*mar menor*’.

Under French law, recognised eNGOs fulfilling certain requirements²³ can participate as civil parties in criminal proceedings regarding environmental crimes as stipulated by Art. L142-2 of the French Environmental Code.²⁴ Furthermore, according to Art. L142-3 eNGOs can act on behalf of multiple natural persons if they suffered individual damages caused by the same person and originating from the same acts. In addition to eNGOs Art. 142-4 empowers local authorities to participate as civil parties if crimes against the environment directly or indirectly inflict damage on territory forming part of their jurisdiction.²⁵

In Italy, the Supreme Court of Cassation opened the possibility for eNGOs to participate in criminal proceedings.²⁶ Therefore, eNGOs can constitute themselves as a so-called civil party (*parte civile*) according to Art. 76 of the Italian Code of Criminal Procedure if they not only pursue an interest merely

20 E. MARTÍNEZ GARCÍA, *Las partes acusadoras*, cit., p. 85 s; N. JIMÉNEZ CARDONA, *La acción popular en el sistema procesal español*, cit., p. 65 s.

21 Spanish Supreme Court, STS 1045/2007, 17.12.2007; STS 8/2010, 20.01.2010; P. CRESPO BARQUERO, *Artículo 125*, cit., p. 788; J. RIDAURA MARTINEZ, *La Acción Popular: ¿Uso o Abuso de un Derecho?*, cit., p. 240.

22 Spanish Supreme Court, STS 54/2008, 08.04.2008; STS 8/2010, 20.01.2010; P. CRESPO BARQUERO, *Artículo 125*, cit., p. 789; R. SÁNCHEZ GÓMEZ, *El Ejercicio de la Acción Popular a Tenor de la Jurisprudencia del Tribunal Supremo*, in *Lex Social*, 2016, vol. 6, p. 284-293, p. 288; J. TOMÉ GARCÍA, *La acción popular en el proceso penal: situación actual y propuestas para una futura reforma*, in J. CHOZAS ALONSO (cord.), *Los sujetos protagonistas del proceso penal*, Dykinson, Madrid, 2015, p. 263-314, p. 304.

23 Cf. J. BÉTAILLE, *Rights of Nature: Why it Might Not Save the Entire World*, cit., 51.

24 F. BIANCO, A. LUCIFORA, G. VAGLIASINDI, *Fighting Environmental Crime in France: A Country Report*, 2015, p. 43.

25 M. LUCAS, *La représentation de la nature par les collectivités territoriales devant le juge judiciaire à la lumière de l'article L.142-4 du Code de l'environnement*, in *VertigO*, 2015, Hors-Série 22.

26 E.g. Italian Supreme Court of Cassation (Cass.), 3rd Penal Section, n. 46746, 02.12.2004; 1st Penal Sec., n. 44528, 31.10.2019; 6th Penal Sec., n. 20517, 25.05.2022; F. BIANCO, A. LUCIFORA, G. VAGLIASINDI, *Fighting Environmental Crime in Italy: A Country Report*, 2015, p. 39. Critical N. FURIN, E. SBABO, *L'intervento delle associazioni ambientaliste nel processo penale: Persone offese e non parti civili*, in *Cassazione penale*, 2012, p. 2735-2750, p. 2748 s.

connected to the public interest of protecting the environment but made the protection of the environment the true purpose of their work and constituent element of the association. In those cases, the collective and diffuse interest in environmental protection becomes subjective and personified.²⁷ NGOs fulfilling those requirements, such as the *WWF*,²⁸ may claim compensation for damages directly affecting a subjective right inherent to the pursued aim.²⁹ Compensation for environmental damages only affecting the general public interest in the preserving of the environment on the other hand exclusively belong to the state.³⁰ Other territorial entities can only participate as a civil party if they suffer further and concrete pecuniary or non-pecuniary damages because of the criminal act against the environment (such as expenses for waste-removal or damages to the entity's image).³¹

3.2. Possibilities for NGOs to participate on behalf of the environment in Austria

3.2.1. Participation in criminal proceedings under the Code of Criminal Procedure

The Austrian Code of Criminal Procedure (StPO) specifies who can participate in criminal proceedings and what rights and remedies are at the disposal of the different participants. In addition to the prosecutor and the defendant, others can only be active participants if they are victims as defined by the law. § 66 StPO lists the rights of victims in criminal proceedings which include the right to inspect the prosecution and court files, the right to receive information on the progress of the proceedings, the right to file a petition for the continuation of discontinued investigations, and the right to be present at the hearing and to ask questions.³² In case the public prosecutor violates those rights, victims can raise an objection pursuant to § 106 StPO and if the court breaches said rights victims can file a complaint according to § 87 StPO. If victims chose to participate as a private party (*Privatbeteiligter*) and demand compensation for

27 Cass., 3rd Penal Sec., n. 46746, 02.12.2004; 3rd Penal Sec., n. 19439, 23.05.2012; 1st Penal Sec., n. 44528, 31.10.2019; 4th Penal Sec., n. 13843, 07.05.2020; M. PELISSERO, *Reati contro l'ambiente e il territorio*, Giappichelli, Torino, 2019, p. 470 s.

28 Cass., 6th Penal Sec., n. 20517, 25.05.2022.

29 Cass., 3rd Penal Sec., n. 14828, 16.04.2010; 3rd Penal Sec., n. 19439, 23.05.2012; 1st Penal Sec., n. 44528, 31.10.2019; 4th Penal Sec., n. 13843, 07.05.2020; M. PELISSERO, *Reati contro l'ambiente e il territorio*, cit., p. 471.

30 Cass., 3rd Penal Sec., n. 41015, 22.11.2010; 3rd Penal Sec., n. 20150, 16.05.2016; 3rd Penal Sec., n. 911, 12.01.2018; 1st Penal Sec., n. 44528, 31.10.2019.

31 Cass., 3rd Penal Sec., n. 20150, 16.05.2016; 3rd Penal Sec., n. 911, 12.01.2018; M. PELISSERO, *Reati contro l'ambiente e il territorio*, cit., p. 470.

32 H. HINTERHOFER, P. OSHIDARI, *System des österreichischen Strafverfahrens*, Manz, Vienna, 2017, para. 6.156 s; R. KIER, § 65 StPO, in H. FUCHS, E. RATZ (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2022, para. 2.

their damages, they enjoy the rights of victims and certain other rights as provided by § 67 (6) StPO. Those additional rights contain the right to request the introduction of evidence, the right to be notified of planned oral hearings, the right to file a petition for the continuation of proceedings discontinued by the court and to appeal acquittals.³³ Private parties can furthermore uphold the indictment as a subsidiary prosecuting party pursuant to § 72 (1) StPO if the public prosecutor withdraws the previously filed indictment. Apart from those parties, the StPO only confers singular rights to the public, such as the right to denounce crimes according to § 80 StPO or listen to public oral hearings as stipulated by § 228 StPO.³⁴

3.2.2. eNGOs as victims?

In order to play an active role during trials, eNGOs would have to be *victims*, which would also enable them to join as a private party. § 65 Num. 1 StPO defines the term of victim and in principle also includes legal persons.³⁵ § 65 StPO describes three groups of victims: Lett. a and b concern victims of crimes involving physical violence or threats and regards relatives of a person allegedly killed because of a criminal act and are not applicable on crimes only damaging the environment. Consequently, eNGOs or other people trying to act on behalf of the environment can only be victims according to lett. c. This definition encompasses anyone who might have suffered damage due to a criminal offense (first alternative) or whose legal interests protected by criminal law might have been infringed by said act (second alternative). However, doctrine and case law interpreted this provision narrowly and restrictively in order to secure a timely conducting of criminal investigations and possible trials.³⁶

The first alternative of § 65 Num. 1 lett. c StPO requires the existence of a damage, which means a claim under civil law. This claim may be either pecuniary or non-pecuniary. In the case of damages not covered by the protective purpose of the criminal provision (indirect damage), only losses that are explicitly compensable under civil law give rise to the status of victim.³⁷ Hence, eNGOs or individuals would be considered victims if they suffer direct damages caused

33 H. HINTERHOFER, P. OSHIDARI, *System des österreichischen Strafverfahrens*, cit., para. 6.183.

34 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 218.

35 Austrian Supreme Court of Justice (OGH), 17 Os 9/14y, 06.03.2014; Higher Regional Court (OLG) Vienna, 18 Bs 244/11f, 10.10.2011 (unofficial English translation); L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

36 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; R. Haumer, § 65 StPO, in A. BIRKLBAUER, R. HAUMER, R. NIMMERSVOLL, N. WESS (eds.), *Linzer Kommentar zur Strafprozessordnung*, Verlag Österreich, Vienna, 2020, para. 3; R. KIER, § 65 StPO, cit., para. 7.

37 OLG Vienna, 18 Bs 244/11f, 10.10.2011; R. Kier, § 65 StPO, cit., para. 22; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

by crimes against the environment. This would be the case if a criminal act affects land, plants or animals owned by the NGO or natural person.³⁸ Those damages fall within the scope of protection of the criminal offenses against the environment (§§ 180–183 Criminal Code [StGB]), because they not only protect the environment but furthermore the financial interest of those bearing compulsory costs of conservation, protection and restoration measures.³⁹ Furthermore, even the killing of wild animals might lead to the recognition of the status of victim because of a direct damage, e.g. the damage suffered by the operator of a national park legally obliged to replace the animal.⁴⁰ The financial interests of those who voluntarily remove pollution and restore the environment or expenses made by NGOs investigating environmental crimes on the other hand lay outside the scope of protection.⁴¹

In addition to persons suffering damages because of a criminal act, § 65 Num. 1 lett. c StPO further grants victim status to a person, who does not have a claim under civil law against the perpetrator, but whose other legal interests protected by criminal law may have been infringed.⁴² In addition to breaches of individual legal interests, the violation of general legal interests – such as the protection of the environment or the administration of justice – can potentially lead to victim status in the sense of criminal procedure law, if the criminal act also affects the position of individuals. Thus, a person who is wrongly accused is a victim of the crime of false accusation (§ 297 StGB), even though this provision protects the administration of justice.⁴³ However, the crimes against the environment in §§ 180–183 StGB protect the environment's function as a source of human life⁴⁴ and – such as the offenses in § 7 of the Trade in Endangered Species Act⁴⁵ – the public's idealistic interest in the preservation of certain species⁴⁶ as well as ecosystems⁴⁷ and are therefore

38 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

39 B. KOLLER, §§ 181f, 181g StGB, cit., para. 22; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 220.

40 OGH, 6 Ob 229/16v, 22.12.2016.

41 OGH, 7 Ob 47/97f, 26.02.1997; OLG Vienna, 18 Bs 244/11f, 10.10.2011; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 220.

42 G. KIRSCHENHOFER, § 65 StPO, in G. SCHMÖLZER, T. MÜHLBACHER (eds.), *StPO Band 1*, LexisNexis Vienna, 2nd ed. 2021, para. 6; R. KIER, § 65 StPO, cit., para. 7.

43 R. HAUMER, § 65 StPO, cit., para. 18 with references.

44 S. REINDL-KRAUSKOPF, F. SALIMI, *Umweltstrafrecht*, Verlag Österreich, Vienna, 2013, para. 9.

45 B. MASCHA, J. MOLTERER, § 7 ArtHG 2009 – eine Betrachtung des illegalen Artenhandels aus strafrechtlicher Sicht, in *Österreichische Jurist:innenzeitung*, 2020, p. 962-974, p. 963 ss.

46 OGH, 6 Ob 229/16v, 22.12.2016.

47 B. MASCHA, J. MOLTERER, § 7 ArtHG 2009 – eine Betrachtung des illegalen Artenhandels aus strafrechtlicher Sicht, cit., p. 963; S. REINDL-KRAUSKOPF, F. SALIMI, *Umweltstrafrecht*, cit., para. 8.

safeguarding a general legal interest.⁴⁸ Individual interests are only co-protected in rare cases.⁴⁹ Aside from the impairment of a legal interest, case law further requires a particular personal and concrete impact on the person who claims victim status.⁵⁰ The larger the group against which the offence in question is allegedly directed, the less likely this is to be the case.⁵¹ In view of the large number of natural and legal persons who pursue objectives related to the protection of the environment, a mere ideological interest in the protection of the environment or animals does not constitute a sufficiently concrete and personal affectedness.⁵² Even if certain circumstances, such as the eNGO's focus on the protection of the particular natural habitat affected by a criminal act, would constitute sufficient affectedness, this would still not lead to the victim status of eNGOs because of the lack of impairment of an individual legal interest.⁵³

Furthermore, according to case law, NGOs cannot base their victim status on Art. 9 (3) AC or the EU-Directives implementing the AC, because these instruments are not directly applicable in Austria and victim status can neither be achieved through an interpretation of national law in line with the AC or the directives, as their wording is vague and leaves a wide margin of discretion to Member States.⁵⁴ Therefore, it is only in very rare cases and under strict conditions that § 65 StPO grants victim status to eNGOs.⁵⁵

3.2.3. *Right to inspect files?*

In addition to victims, according to § 77 (1) StPO, any other person may inspect files on ongoing investigations and proceedings if they can prove a legitimate legal interest. However, if overriding public or private interests outweigh the interest in inspecting the files, the request must be denied.⁵⁶ A legitimate interest exists only if it has a basis in the legal order and exceeds a mere

48 S. REINDL-KRAUSKOPF, F. SALIMI, *Umweltstrafrecht*, cit., para. 9; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

49 See OGH, 6 Ob 229/16v, 22.12.2016.

50 E.g. OLG Vienna, 18 Bs 244/11f, 10.10.2011; R. KIER, § 65 StPO, cit., para. 31; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 221.

51 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

52 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

53 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 221 s.

54 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

55 Aarhus Convention Compliance Committee (ACCC), ECE/MP.PP/C.1/2014/3, 27.09.2013 para. 21.

56 E. LEITNER, § 77 StPO, in G. SCHMÖLZER, T. MÜHLBACHER (eds.), *StPO Band 1*, cit., para. 1 ss.; P. OSHIDARI, § 77 StPO, in H. FUCHS, E. RATZ (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2019, para. 1 ss.

economic interest or interests of private or public information, decency or ethics.⁵⁷ In addition, knowledge of the file must be likely to improve the applicants' position in other criminal, civil or administrative proceedings or to minimise the risk of an infringement of their rights.⁵⁸ Since the current Austrian legal system does not contain any provisions granting eNGOs a legitimate interest within the meaning of § 77 (1) StPO, and because in most cases the eNGOs do not participate in other proceedings in which knowledge of the files would improve their position, they are not entitled to inspect the files.⁵⁹

3.3. The Aarhus Convention and possible developments within EU-law

3.3.1. Existing obligation under the Aarhus Convention?

As the EU is a signatory to the AC, Member States are bound to comply with Art. 9 (3) AC according to Art. 216 (2) TFEU. This raises the question if said article is applicable on criminal proceedings and therefore obliges states to grant eNGOs access to justice. Art. 9 (3) AC in principle grants participation rights to challenge any act or omission by a private person or public authority that violate laws relating to the environment.⁶⁰ However, Art. 2 (2) AC exempts bodies acting in a judicial capacity from the term 'public authority'. Consequently, court rulings and decisions by the public prosecutor are not acts or omissions by public authorities as understood by Art. 9 (3) AC.⁶¹ A possible obligation to grant access to justice in criminal proceedings does therefore only extend to the challenging of acts or omissions violating laws relating to the environment committed by a private person.⁶²

Sufficient 'access to justice' requires the possibility to initiate proceedings effectively, participate in proceedings or make use of adequate remedies.⁶³ The mere right to denounce possible crimes however does not constitute an effective initiation of criminal proceedings.⁶⁴ According to the Aarhus Convention

57 OGH, 2 Ob 21/22k, 16.03.2022; OLG Vienna, 22 Bs 97/12v, 15.03.2012; W. BRANDSTETTER, M. ZEINHOFER, § 77 StPO, in A. BIRKLBAUER et al, *Linzer Kommentar zur Strafprozessordnung*, cit., para. 5.

58 OLG Vienna, 22 Bs 97/12v, 15.03.2012; P. OSHIDARI, § 77 StPO, cit., para. 2.

59 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

60 D. C. DRAGOS, B. NEAMTU, *Access to Justice under the Aarhus Convention: the Comparative View*, cit., p. 382, 389; A. OHLER, M. PEETERS, M. ELIANTONIO, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, in *JEEPL*, 2021, vol. 18, p. 370-389, p. 373.

61 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 214 s.

62 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215.

63 ACCC, ECE/MP.PP/C.1/2016/10, 29.11.2016, para. 85

64 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 59 ss; in-depth L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215 s.

Compliance Committee (ACCC) the term of ‘law relating to the environment’ also includes criminal law provisions aiming at the protection of the environment, such as the environmental crimes stipulated in §§ 180–183b StGB.⁶⁵ However, Art. 9 (3) AC does not require state parties to grant the public concerned the right to challenge acts or omissions relating to environmental laws through criminal proceedings as long as there are other possibilities to obtain administrative or judicial review, e.g. through environmental liability proceedings.⁶⁶ Consequently, an obligation under Art. 9 (3) AC to allow the public to appeal decisions to terminate criminal proceedings only exists in cases where the public has no other opportunity to initiate proceedings differently.⁶⁷

3.3.2. *Directive Proposal COM(2021) 851 and the Council’s general approach*

While only a few European countries currently allow eNGOs or individuals to participate in criminal proceedings regarding environmental crimes, a proposal for a new directive on the protection of the environment through criminal law contains a first step towards EU-wide public participation. According to Art 14 of the proposal, Member States shall ensure that members of the public concerned have appropriate rights, to participate in proceedings concerning the environmental offenses listed in the directive itself.⁶⁸ Art. 2 (4) of the proposal defines the term ‘public concerned’ and includes persons affected or likely to be affected by the offenses listed in the directive as well as persons having a sufficient interest or maintaining the impairment of a right and eNGOs. Recital 26 further states that Art. 2 (5) and Art. 9 (3) AC⁶⁹ have to be taken into account when determining the scope of the term ‘public concerned’. However, even

65 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 55; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215.

66 ACCC, ECE/MP.PP/C.1/2016/10, 29.11.2016, para. 77 s; ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 63–65; ECE/MP.PP/2008/5/Add.4, 29.04.2008, para. 28 ss; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

67 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013 para. 56; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222 s; E. WAGNER, W. BERGTHALER, S. FASCHING, *Umsetzung der Aarhus-Konvention in Umweltverfahren*, Trauner, Linz, 2018, p. 35.

68 P. SANDER, S. TOBER, *EU-Richtlinienvorschlag zum strafrechtlichen Schutz der Umwelt*, in *Zeitschrift für Wirtschafts- und Finanzstrafrecht*, 2023, vol. 9, p. 23-27, p. 26; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 212 s; F. ZEDER, *Neue Vorhaben der Union im materiellen Strafrecht, Teil 1: Umweltstrafrecht*, in *Journal für Strafrecht*, 2022, vol. 9, p. 146-150, at 150.

69 Regarding the different terms used in Art. 2 (5) (*public concerned*) and Art. 9 (3) AC – *public* according to Art. 2 (4) – cf. ECJ, C-826/18, *Stichting Varkens in Nood and Others*, 14.01.2021, para. 31 ss; A. DANTHINNE, M. ELLANTONIO, M. PEETERS, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, cit., p. 413; J. JENDROŠKA,

though the proposal references the AC with regard to the definition of the public concerned, the content of the obligation under Art. 14 of the proposal is different from that of Art. 9 (3) AC. While access to justice within the meaning of Art. 9 (3) AC only includes the right to effectively initiate proceedings regarding acts of private persons that contravene national environmental law (see 3.3.1), Art. 14 of the proposal obliges Member States to grant broader rights of participation: Those may include, but are not limited to, the right to challenge decisions of the public prosecutor or the court. As the proposed Directive mentions the position of the civil party as an example, it can be concluded that the public concerned must also be able to participate actively in the criminal proceedings and to claim damages.

However, in its general approach⁷⁰, the Council intends to soften this obligation. Different from the Commission's proposal the text of the general approach only obliges those states whose criminal procedure codes already grant the public concerned certain rights in connection with other crimes.⁷¹ Apart from the group of the Member States concerned, the general approach also limits the scope of the rights to be granted. In contrast to the Commission's proposal, countries would not have to allow the public to participate, for example as a civil party, but only to grant them appropriate procedural rights. The granting of a possibility to claim damages would therefore not be obligatory. The report of the Legal Affairs Committee of the European Parliament on the other hand follows the Commission's proposal and even suggests including information rights for the public concerned in addition to participation rights and implementing measures to facilitate the access to justice.⁷²

4. Possible participation of the public concerned in criminal proceedings in the future

4.1. Possibilities of implementation regarding Art. 14 Directive Proposal COM(2021) 851 in Austria

If Art. 14 of the Commission's proposal is adopted, the Austrian legislator would have to reform the rules on standing in criminal proceedings. There are various ways of achieving the than mandatory participation of the public: One would be the granting of victim status in the sense of the Code of Criminal

Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas, in *JEEPL*, 2020, vol. 17, p. 372-408, p. 406.

70 General approach of the Council of the European Union, ST 16171 2022 INIT, 09.12.2022.

71 Cf. Art. 15 General approach.

72 See the proposed amendments to Art. 14 of the Commission's proposal (Amendments 121-123), Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, A9-0087/2023, 28.3.2023.

Procedure. To this end, the legislature may introduce a provision granting a civil claim to eNGOs in cases of environmental crimes, which would lead to victim status according to § 65 Num. 1 lett. c first alternative StPO. However, this way would not guarantee broad access to justice if the claim only encompasses investigation costs by eNGOs because the organisations would still have to be affected individually and individuals would be excluded.⁷³

Another possibility is the clarification that no impairment of a co-protected legal individual interest is necessary to consider someone a victim under § 65 Num. 1 lett. c second alternative StPO. This could probably be achieved by an Aarhus-compliant interpretation of § 65 StPO,⁷⁴ as it has been applied by the Supreme Administrative Court regarding the standing of eNGOs as parties in administrative proceedings concerning EU environmental law⁷⁵ since the ECJ's ruling in *Protect*⁷⁶. However, this interpretation would run contrary to the current opinion of the Higher Regional Court of Vienna⁷⁷ which stated that victim status cannot be achieved by an Aarhus-compliant interpretation of § 65 StPO.

Another way to comply with the obligation to provide the public concerned with adequate participation rights is to implement a specific provision establishing said rights.⁷⁸ Such a provision should include the rights and remedies granted as well as the scope of persons who can exercise these rights, which could be done by referring to other provisions of the Code of Criminal Procedure and to other laws, e.g. the Environmental Impact Assessment Act (UVP-G) which contains the requirements for the official recognition of eNGOs. This option may be preferable as the recognition as victim would not really be fitting and separate provision outlining the scope of rights and enabled persons would provide more clarity.

However, if the provision on public participation were to be adopted as proposed by the Council in its general approach (above 3.3.2), this would not require any changes to the Austrian Code of Criminal Procedure, as the Council's proposal would only apply to states already granting participation rights to the

73 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 225 s.

74 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 226 s.

75 E.g. Supreme Administrative Court (VwGH), Ra 2015/07/0055, 28.03.2018, para. 40 ss; Ro 2018/10/0010, 20.12.2019 para. 27; Ra 2019/10/0148, 16.02.2021 para. 26 s.

76 ECJ, C-664/15, *Protect*, 20.12.2017. Similar ECJ, C-240/09, *Bonn Bear I*, 08.03.2011. Both judgments require national courts to interpret national procedural law in accordance with Art. 9 (3) AC.

77 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; see 3.3.1. at the end.

78 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 227 s, regarding the right to appeal the termination of criminal investigations.

public and there are currently no procedural rights for the public concerned regarding any criminal offenses in Austria.

4.2. Represented parts of the environment

The offenses against the environment stipulated in the Austrian Criminal Code and the Commission's directive proposal not only protect the environment as a whole but further safeguard specific and separate parts of the environment. Therefore, if Art. 14 of the Commission's proposal would enter into force, the public would not always act on behalf of the whole environment but in some cases also on behalf of smaller parts thereof. For example, the existing § 181h, § 181i StGB (which transposed Art. 3 lett. h of Directive 2008/99/EC into Austrian law) and Art. 3 (1) lett. o of the Commission's proposal criminalise certain conducts harming single habitats within a protected site.⁷⁹ Furthermore, § 181f, § 181g StGB (killing of protected wild animals, transposing Art. 3 lett. f Directive 2008/99/EC) and Art. 3 (1) lett. e of the Directive proposal prohibit the killing or possession of a certain number of individuals belonging to a protected species of wild animals or even single wild animals.⁸⁰ In such cases, the eNGOs would act on behalf of a very small part of the environment, as it already is the case in some provincial hunting laws.⁸¹

4.3. Who should participate on behalf of the environment?

If individuals or legal entities are to be granted the right to participate in proceedings concerning environmental crimes, the question of the personal scope of application remains. Moreover, even if nature itself were to be granted procedural rights, it would still need to be represented since it cannot participate in the proceedings itself.⁸² When implementing the participation of nature or others on its behalf, there are different possibilities regarding the person able to participate. However, as the requirement of reasonable duration of criminal proceedings must be taken into account, the number of possible participants needs to be narrowed down in order to avoid extensively long proceedings.⁸³

79 S. REINDL-KRAUSKOPF, F. SALIMI, *Umweltstrafrecht*, cit., para. 8, 185 ss.

80 S. REINDL-KRAUSKOPF, F. SALIMI, *Umweltstrafrecht*, cit., para. 8, 174 ss.

81 E.g. § 3 Lower Austrian Hunting Act, cf. Provincial Administrative Court (LVwG) Lower Austria, LVwG-AV-1191/001-2019, 02.06.2020; § 54c Carinthian Hunting Act, cf. LVwG Carinthia, KLVwG-1924/4/2021, 19.11.2021; § 53a Tyrolean Hunting Act, cf. LVwG Tyrol, LVwG-2021/18/2929-11, 01.12.2021 regarding the waiving of hunting exemptions.

82 Recital 26 COM(2021) 851; M. MILLER, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*, in *UNH L Rev*, 2019, vol. 17, p. 355-377, p. 374.

83 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229. OLG Vienna, 18 Bs 244/11f, 10.10.2011 is also raising concerns regarding extensively long proceedings in case of the participation of eNGOs.

4.3.1. *Participation of individuals*

Countries granting legal personhood to nature sometimes empower any individual person to initiate – at least civil or administrative – proceedings on behalf of nature.⁸⁴ However, the unrestricted possibility of representation of the environment in criminal proceedings by any member of the public could raise certain difficulties. It could make investigations and proceedings inefficient, as a potentially very large number of individuals could participate. Moreover, different participants may express contradictory views and there would be no guarantee of the quality of the contributions. Therefore, the public entitled to intervene needs to be limited.

The Commission's directive proposal attempts such a restriction. However, the requirement of a 'sufficient interest' is very openly phrased and vague. Therefore, it does not really limit the number of possible participants. The scope of this prerequisite should hence be described in detail, e.g. through the restriction to interests recognised by law or the requirement of a geographical link to the areas affected by the respective crime.⁸⁵ In addition to a sufficient interest, the impairment of a right could be a condition to grant standing to individuals.⁸⁶ These requirements would be an appropriate limit on the number of potential participants and would avoid an excessively large number of parties being involved in the criminal proceedings.

4.3.2. *Participation of NGOs*

Another possibility to achieve the participation of the public in criminal proceedings regarding environmental crimes is the involvement of specialised and accredited NGOs. In accordance with the AC and the proposal for a new Directive against environmental crimes, the right to participate may be limited to organisations that promote the protection of the environment and meet proportionate requirements under national law.⁸⁷ Therefore, the standing in criminal proceedings could require an official recognition by public authorities such as the Minister of the Environment,⁸⁸ which in turn requires the fulfilment

84 Cf. C. KAUFMANN, P. MARTIN, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lamsuist Succeed and Others Fail*, cit., p. 132; M. Whittemore, *The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, cit., p. 668.

85 Art. 9 (3) AC allows States to lay down criteria that members of the public have to meet in order to enjoy the participation rights.

86 Cf. Art. 2 (4) COM(2021) 851.

87 Cf. Art. 2 (4) of the proposed Directive and Art. 9 (3) AC. Regarding the requirements for NGOs to participate in administrative proceedings in Austria see D. ALTENBURGER, § 19 UVP-G, in D. ALTENBURGER, *Kommentar zum Umweltrecht*, LexisNexis, Vienna, 2nd ed. 2020, para. 68 ss, and in Germany cf. A. OHLER et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., p. 377 s.

88 § 19 (7) UVP-G; in Germany the recognition is granted by the German Environment Authority or state authorities if the NGO is only active in one federal state, cf. § 3 (2) and (3) German Environmental Appeals Act.

of certain criteria. Such conditions could be that the organisation has to be active for a substantial time,⁸⁹ that it has to be a non-profit organisation⁹⁰ and has to pursue certain objectives, such as the protection of the environment in general, of specific components of nature – e.g., water, air or landscapes – and wildlife management.⁹¹ In Italy, NGOs can participate in criminal proceedings if environmental protection is the true purpose of their actions.⁹² Austrian law furthermore requires that the respective NGO has at least 100 members.⁹³ However, the ECJ has set certain limits on membership requirements, finding a 2,000-member threshold⁹⁴ excessively high under the previous Environmental Impact Assessment Directive⁹⁵.

The limitation of standing to NGOs meeting certain requirements and receiving an accreditation from the authorities could narrow the number of possible participants down. ENGOs have experience in environmental protection and sometimes in litigation. Therefore, the quality of their interventions is likely to be higher than that of individuals. However, the risk of conflicting opinions remains even with empowered NGOs, as different organisations could participate in the same case. If courts were authorised to choose a single representative for each case, this could avoid the problem of different participants. Moreover, as NGOs cannot be obligated to represent nature in criminal proceedings⁹⁶ or may not have sufficient financial resources, effective representation is not guaranteed.⁹⁷ Despite these concerns, the participation of eNGOs might be a more effective option than the participation of any individual. However, limiting

89 Cf. three years under Art. L141-1 French Environmental Code; § 3 (1) Num. 2 German Environmental Appeals Act or § 19 (6) Num. 3 UVP-G.

90 § 19 (6) Num. 2 UVP-G and § 3 (1) Num. 2 German Environmental Appeals Act, which both refer to the respective national Tax Code regarding the definition of non-profit aims.

91 § 19 (6) Num. 1 UVP-G and § 3 (1) Num. 1 German Environmental Appeals Act require the protection of the environment in general. Art. L141-1 French Environmental Code further specifies the pursued aims.

92 E.g. Cass., 4th Penal Sec., n. 13843, 07.05.2020; M. PELISSERO, *Reati contro l'ambiente e il territorio*, cit., p. 470 s. See also 3.1. above.

93 § 19 (6) UVP-G; cf. Austrian Federal Administrative Court (BVwG), W225 2232540-1, 16.09.2021; D. ALTENBURGER, § 19 UVP-G, cit., para. 73; P. LUEGER, B. SCHMIDTHUBER, *Einbindung der Öffentlichkeit in Umweltsachen durch Beteiligtenstellung*, in *Nachhaltigkeitsrecht*, 2021, vol. 1, p. 185-194, p. 189.

94 ECJ, C-263/08, *Djurgården*, 15.10.2009.

95 Art. 10a Council Directive 85/337/EEC, OJ L 175/1985, 40 as amended by Directive OJ L 156/2003, 17.

96 E. WAGNER et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 142.

97 A. OHLER et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., p. 378. The Legal Affairs Committee of the European Parliament tries to address this concern and suggests an amendment to the proposed directive, obligating Member States to facilitate the participation of NGOs and to establish networks of environmental lawyers who could assist the NGOs, Amendment 123 of the Report, A9-0087/2023.

participation rights to recognised environmental NGOs alone would not meet the requirements of Art. 14 of the proposed directive, as the public concerned must also include certain individuals.⁹⁸

4.3.3. *Participation of public authorities*

An additional possibility to achieve participation on behalf of the environment would be the authorization of public authorities. This would have been the case in Chile where the *defensoria de la naturaleza* could have filed constitutional actions to safeguard nature's rights, if the draft for a new constitution had been accepted. If only one authority is competent to represent nature, there would be no risk of conflicting interventions, as would be the case if the public were able to participate. Furthermore, if public authorities would act on behalf of the environment, the funding of the representatives would be guaranteed. Through sufficient funding the public authorities could provide interventions of a certain technical quality as they could hire experts and afford to employ sufficient and specialised personnel. If the participation rights were to be granted to authorities focused on environmental protection, responsible officials would likely have experience in climate and environmental protection, which in turn would contribute to the quality of interventions. The competent authorities can also be obliged to act *ex officio*, which would ensure participation.⁹⁹ However, particularly in investigations against government officials, the independence of public authorities may be questioned. Therefore, if public authorities should participate in criminal proceedings, they have to be sufficiently funded and independent.

The Austrian legal order already entrusts certain public authorities with the safeguarding of interest of the environment in some administrative proceedings: The Federal Government and the Provinces established authorities called Ombudsman for the Environment (*Umweltanwalt*).¹⁰⁰ According to § 19 (3) UVP-G, they have standing in environmental impact assessment proceedings and are entitled to claim the compliance with provisions serving to protect the environment and appeal administrative decisions.¹⁰¹ Similarly, according to § 41 (4) of the Animal Protection Act, the provincial Animal Protection Ombudsperson can participate in administrative criminal proceedings regarding transgressions of the Animal Protection Act. They can further inspect court files in criminal proceedings regarding the offense of animal cruelty

98 P. SANDER, S. TOBER, *EU-Richtlinienentwurf zum strafrechtlichen Schutz der Umwelt*, cit., p. 26.

99 E. WAGNER et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 142.

100 G. GRASSL, S. LAMPERT, *Aktuelle Entwicklungen zur Parteistellung des Umweltanwalts in UVP-Verfahren*, in *Zeitschrift für Verwaltungsgerichtsbarkeit*, 2015, vol. 2, p. 500-504, p. 501.

101 D. ALTENBURGER, § 19 UVP-G, cit., para. 30; G. GRASSL, S. LAMPERT, *Aktuelle Entwicklungen zur Parteistellung des Umweltanwalts in UVP-Verfahren*, cit., p. 501 ss. The ombudsman can also participate in some other environmental matters, cf. M. POINTINGER, T. WEBER, *Der Umweltanwalt – das unbekannte Wesen? in Recht der Umwelt*, 2015, p. 233-240, p. 239.

(§ 222 StGB) as provided by § 41 (8) Animal Protection Act in conjunction with § 77 (1) StPO.¹⁰²

From 1992 to 2010, the Animal Protection Act of the Swiss Canton of Zurich provided for an officially appointed attorney for animal protection in criminal matters who was not part of a public authority but was granted the right to participate in proceedings regarding the violation of animal protection provisions on behalf of the harmed animals.¹⁰³ In particular said attorney had the right to request the prosecution regarding certain crimes, to review files, request evidence and appeal court decisions,¹⁰⁴ but did not receive a compensation for their participation in the proceedings.¹⁰⁵ Since the introduction of the new Swiss Code of Criminal Procedure, the Cantons cannot grant private persons standing as a formal party and therefore Zurich abolished the animal protection attorney and could only reintroduce such a position as a public authority.¹⁰⁶

To a certain degree, the current Austrian Code of Criminal Procedure allows a public authority to intervene in criminal proceedings regarding environmental crimes. In proceedings which do not involve victims in the sense of § 65 Num. 1 StPO the so-called Commissioner for Legal Protection (*Rechtsschutzbeauftragter*) can appeal the decision of the public prosecutor to terminate the investigation as stipulated by § 195 StPO.¹⁰⁷ However this right to appeal can only be exercised in proceedings falling into the jurisdiction of the Regional Court sitting as a Court of Lay Assessors or as a Court of Jurors, accordingly – apart from some exceptions – the maximum penalty must supersede five years of imprisonment. Therefore, the Commissioner for Legal Protection can only appeal a termination of an investigation in alleged environmental crimes if the proceedings concern certain offenses committed with intent and the offender – at least negligently – caused the death of a person or inflicted serious bodily harm on a larger number of persons (e.g. § 180 (2) in conjunction with § 169 (3) StGB).

If the legislature wanted to allow public authorities to participate in criminal proceedings, it could authorize the respective Ombudsman for the Environment to appeal against the decision to terminate criminal proceedings for crimes against the environment pursuant to § 195 StPO, similar to the Commissioner for Legal Protection, regardless of the maximum penalty. As

102 E. WAGNER et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 163 s.

103 A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzsachen*, in *Schweizerische Zeitschrift für Strafrecht*, 1994, vol. 112, p. 64–86, p. 75; E. WAGNER et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 165.

104 A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzsachen*, cit., p. 76 ss.

105 High Court (OGer) Zurich, UK080085, 01.06.2008.

106 Swiss Federal Supreme Court (BGer), 6B_1060/2017, 14.06.2018; 6B_982/2017, 14.06.2018; see also OGer Berne, BK 17 5, 07.07.2017; BK 17 108, 11.07.2017.

107 H. NORDMEYER, § 194, in H. FUCHS, E. RATZ (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2017, para. 16; R. STEINER, § 194 StPO, in A. BIRKLBAUER et al, *Linziger Kommentar zur Strafprozessordnung*, cit., para. 31.

the public prosecution terminates a high number of investigations concerning environmental crimes, this could have an unneglectable potential to help the fight against destruction of the environment.¹⁰⁸ The mere empowerment of public authorities however would not meet the requirements of Art. 14 of the proposed directive, as it would not enable the public concerned to participate.

4.4. Information on ongoing investigations

If eNGOs or others could participate in criminal proceedings concerning environmental offenses, another issue is the question how representatives learn about investigations involving environmental crimes in order to participate in the respective criminal proceedings. If a wide spectrum of the public can participate or has other procedural rights, the prosecution and the courts face the difficulty of informing a potentially very large number of individuals about the ongoing investigation to guarantee them the possibility of exercising their rights. Personal notification, as it is compulsory regarding victims according to § 66 (1) StPO, would not be feasible for the authorities due to the large number of possible participants.¹⁰⁹ Therefore, the prosecution or the courts could publish information on ongoing investigations and dates of oral hearings via the Internet, as is the case in certain administrative proceedings where NGOs enjoy rights.¹¹⁰ The notification could include information on the possibility to exercise certain rights and a time limit within which possible participants have to express the intention to use those rights (otherwise they would be precluded). However, if Art. 14 as proposed by the Commission is adopted, such a restriction could be problematic concerning Art. 9 (3) AC and Art. 47 EU-CFR if it also includes the right to challenge the termination of the investigation or to appeal against the decision of the court.¹¹¹ Nevertheless, a formal act of joining the proceedings should be required for participation in the main trial phase, as it for example is required for popular accusers in Spain and would not infringe Art. 9 (3) AC.¹¹²

If the information on ongoing proceedings is publicly available, that could be problematic with respect to data protection and other rights of the accused. Therefore, the courts have to publish the information in anonymous form with the possibility for the concerned public to review the files after joining the

108 Similar L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 227.

109 OLG Vienna, 18 Bs 244/11f, 10.10.2011.

110 E.g. § 9 (4) UVP-G, D. ALTENBURGER, § 9 UVP-G, in D. ALTENBURGER, *Kommentar zum Umweltrecht*, cit., para. 16.

111 ECJ, C-664/15, *Protect*, 20.12.2017, para. 82 ss; C-197/18, *Wasserleitungsverband Nördliches Burgenland*, 03.10.2019, para. 34; A. OHLER et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., 387 s.

112 N. JIMÉNEZ CARDONA, *La acción popular en el sistema procesal español*, cit., p. 66.

proceedings. To narrow the reach of the publication, the possibility to access the information on ongoing investigations on the Internet could be restricted to accredited NGOs.¹¹³ However, this might not satisfy the obligations under Art. 14 of the directive proposal unless the participation of individuals who are part of the public concerned in the sense of Art. 14 is guaranteed in another way. If public authorities are able to participate, the public prosecutor could be obligated to notify them on the opening of an investigation in criminal proceedings.¹¹⁴ If the authority cannot participate but only appeal the decision to terminate the proceedings, the public prosecutor would have to notify them about the termination of the investigation.

4.5. What rights and remedies should the public have?

If individuals, eNGOs or public authorities have participation rights or other procedural rights in proceedings regarding environmental crimes, there are different options as to the extent of the granted rights. The scope of the rights granted could also vary depending on whether the procedure is in the investigation phase or in the trial phase.

4.5.1. Rights and remedies during the investigative phase

One already existing right of NGOs and individuals on behalf of the environment is the right to denounce crimes against the environment as well as all other crimes.¹¹⁵ If Art. 14 of the proposed directive would be adopted, it would be necessary to grant additional rights to the public concerned. They should at least have the right to inspect and review the court files such as victims or private parties.¹¹⁶ As the directive proposal explicitly lists participation as a civil party, Member States would also have to grant the public concerned the right to claim compensation for damages caused by the alleged crime. In addition, the public concerned should have the right to be informed of certain developments in the investigation, although this may depend whether the natural or legal person concerned has joined the proceedings. Like the popular accuser in Spain, the participating public could also be given the right to propose evidence and request certain investigative measures.¹¹⁷

Among the rights that could make the biggest difference is the right to appeal against the prosecution's decision not to prosecute but to close the case

113 Cf. § 54 (2) Carinthian Hunting Act; cf. LVwG Carinthia, KLVwG-1924/4/2021, 19.11.2021.

114 This was the case with the animal protection attorney in Zurich, cf. A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzsachen*, cit., p. 76.

115 E.g. § 80 (1) StPO; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 218.

116 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229.

117 J. TOMÉ GARCÍA, *La acción popular en el proceso penal: situación actual y propuestas para una futura reforma*, cit., p. 302.

(for example, the mentioned animal protection attorney in Zurich enjoyed this right).¹¹⁸ As a large number of investigations into alleged environmental crimes end in discontinuance, a remedy bringing the question of whether the termination was justified to the courts could be effective.¹¹⁹ Such a remedy is preferable to the right to insist on an indictment, as it is possible in Spain,¹²⁰ because a court is better able to assess the likelihood of success of the indictment than the participating public. This could avoid lengthy and costly criminal proceedings without prospect of success.

The right to appeal the termination of criminal proceedings according to § 195 StPO does not include cases where the public prosecutor did not initiate a criminal investigation but refrained from beginning a formal investigation as provided by § 35c of the Public Prosecutor's Office Act (StAG). Comprehensive control of prosecutions related to environmental crimes and full compliance with Art. 9 (3) AC may require the establishment of a possibility to appeal the decision of the public prosecutor not to initiate proceedings.¹²¹ However, such a right would contravene the intention of § 35c StAG and grant eNGOs broader rights than the victim of a crime and could therefore be problematic regarding the principle of equality enshrined in Art. 7 (1) of the Austrian Federal Constitution Act.

4.5.2. Rights and remedies during the trial phase

The participation of nature's representatives could take place in several ways if the prosecution goes to trial. It could either be limited to written submissions, which would allow the competent representative to deal with a larger number of cases at the same time. Oral participation, on the other hand, would allow for a swift response to procedural developments, thus would be more effective in the public eye. During oral hearings, the representatives of the environment should possess the right to be present and to question witnesses or expert witnesses and request new evidence or call witnesses.¹²² In order to ensure effective participation on behalf of nature, the representatives should further have the right to inspect the court files.¹²³ The participating public or authority could have the right to address the court with opening or closing statements.

118 OGer Zurich, UK080085, 01.06.2008; UK080014, 13.10.2009; A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 80.

119 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 227.

120 Cf. Spanish Supreme Court, STS 54/2008, 08.04.2008; STS 8/2010, 20.01.2010; P. CRESPO BARQUERO, *Artículo 125*, cit., p. 789.

121 L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 228.

122 A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 78 ss.

123 A. GOETSCHEL, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 76 s; L. SCHALK-UNGER, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229.

If members of the public could participate as civil parties ('private parties' under the Austrian Code of Criminal Procedure) – they could have the opportunity to appeal court verdicts acquitting the defendant or denying compensation for the damages to the environment caused by the alleged crime. However, this right might be restricted to certain causes for appeal and to cases where the denial of a motion brought by the private party might have had a negative effect on its claims for compensation, as it is the case in § 282 (2) StPO.¹²⁴ In cases where the accused is found guilty but the court denies a compensation, according to § 283 (4) in conjunction with § 366 (3) StPO the private party can just appeal the decision not to grant a compensation. In the appeal, the party can only make the argument that the facts regarding the amount of the compensation were already sufficiently investigated, and the court was therefore obliged to grant a compensation but cannot contest the fact-finding itself.¹²⁵ Granting a broader right to appeal to eNGOs or others when acting in proceedings regarding environmental crimes could violate the principle of equality and should therefore be avoided.

5. Conclusion

As criminal proceedings concerning environmental crimes and other crimes that cause harm to nature – contrary to cases involving humans as injured parties – do not involve victims, generally no one can participate in the prosecution and demand compensation. Some countries around the world therefore grant legal personhood to nature in order to allow the public to represent nature in court or administrative proceedings. Such a step requires unneglectable changes to the existing legal order and rules on representation. Granting NGOs, other members of the public or authorities the right to participate in proceedings regarding environmental matters would be easier and would also be sufficient and therefore is another – probably preferable – possibility to ensure representation of the environment.

While some countries in Europe already allow eNGOs or others to participate in criminal proceedings regarding environmental crimes, the current Austrian Code of Criminal Procedure – except on very rare occasions – does not grant eNGOs the possibility to take part in proceedings. NGOs or other members of the public neither can inspect court files regarding investigations in crimes against the environment. However, there might be future developments on an EU-level. In a proposal for a new environmental crimes Directive, the European Commission seeks to obligate all Member States to grant the public concerned appropriate rights to participate in proceedings concerning

124 H. HINTERHOFER, P. OSHIDARI, *System des österreichischen Strafverfahrens*, cit., para. 10.87.

125 H. HINTERHOFER, P. OSHIDARI, *System des österreichischen Strafverfahrens*, cit., para. 10.88.

environmental offenses. The Austrian legislature could fulfil such an obligation, for example, through recognising eNGOs as victims or introducing a separate provision granting them participation rights. In its general approach the Council softened this obligation and restricted it to Member States already granting the public concerned certain rights in proceedings concerning other crimes. Given the conflicting positions of the Commission, who has been joined by the Legal Affairs Committee of the European Parliament, and the Council of the European Union, the outcome of the drafting process remains open.