Systemic climate change litigation, standing rules and the Aarhus Convention: a purposive approach

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Abstract

This article explores whether an exceptional approach to standing rules is needed to square the gatekeeping function of the courts of states/international organisations that are signatories to the Aarhus Convention with the complexity and urgency of the climate crisis. The central claim is that standing rules do not necessarily need to be reconstructed to resolve this conflict. Rather, what European states and the EU need to do is take their procedural human rights obligations under the Aarhus Convention seriously.

1. Introduction

Climate change generally, but systemic mitigation cases[1] in particular, challenge doctrinal 'business as usual' and require courts to reflect on the outer boundaries of existing legal doctrines particularly in systemic mitigation cases.[2] One legal doctrine that raises particular difficulties is standing. Standing rules generally require a litigant to show that their personal interests have been directly affected or that they have suffered a particularised impairment of their rights before they are entitled to challenge an impugned decision before the courts. The 'indirect, intergenerational and community-wide nature of climate change'[3] means that these rules which require the identification of an individually affected litigant can be a major barrier in systemic mitigation climate cases. This is because those most adversely affected by climate change often have not suffered the particular climate harm yet or else belong to a cohort not well placed for reasons of time, resources, or expertise to commence proceeding.[4] As Fisher,

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[1] Systemic mitigation climate cases are legal cases that take a whole-of-system approach by challenging the overall ambition of a state or international organisation's framework climate mitigation policies. See: Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment 2021) 23. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf accessed: 14 July 2021.

[2] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) The Modern Law Review 173, 174.

[3] ibid,185.

[4] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) Journal of Human Rights Practice 1, 7-8.

Scotford and Barritt put it the 'peculiar form of presentation' afforded to parties in a courtroom setting is often ill-fitting in (systemic) climate cases.[5]

This article explores whether an exceptional approach to standing rules is needed to reconcile the gatekeeping function of domestic and regional courts like the Court of Justice of the European Union (CJEU) with the complexity and urgency of the climate crisis. The central claim of the article is that standing rules do not necessarily need to be reconstructed to resolve this conflict. Rather, what European states and international organisations like the EU need to do is take their procedural human rights obligations under the Aarhus Convention seriously. [6]

This article focuses primarily on signatories to the Aarhus Convention and examines concluded cases in the Netherlands, Ireland and the CJEU. The disproportionate responsibility of European countries for GHG emissions both historically and in contemporary times justifies a focus here on these EU-based litigation. There is also a practical dimension to this focus. While each of the cases selected here is rooted in a different legal tradition, they deal with a similar legal issue, namely the legality of framework climate mitigation policies.

Section 2 unpacks some of the key issues that standing rules present. Section 3 introduces the Aarhus Convention, explains the need to interpret its provisions purposively,[7] and explores the status of the Convention under EU law. Section 4 draws on a purposive reading of the access to justice provisions of the Aarhus Convention and the objectives of effective environmental protection and the right to an effective remedy that flow from EU law to examine developments in European systemic mitigation cases. It analyses how the courts have dealt with standing requirements; whether these approaches comply with the access to justice provision and reflect what the Aarhus Convention is trying to achieve; and if not, whether there are opportunities, particularly based on a purposive interpretation of the Aarhus Convention, for courts to move in such a direction in future. Section 5 concludes.

2. The standing hurdle in systemic mitigation cases

The strict application of traditional legal doctrines like standing has the potential to preclude litigants from securing remedies to prevent or compensate for climate-related harms, thereby

[5] Fisher, Scotford, and Barritt (n 2) 186.
[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998 38 ILM 517 (Aarhus Convention).
[7] Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing,2020).

denying access to justice.[8] Standing rules usually require litigants to demonstrate that their personal interests have been directly affected or that their rights have been impaired in a tangible sense.[9] Standing is a major challenge in systemic mitigation cases as the 'indirect and cumulative' causes of anthropogenic climate change coupled with its 'indirect, multi-scalar and differentiated' impacts make it difficult to discern whose interests or rights should be considered by a court.[10] Everyone is affected by climate change and by the same logic everyone is potentially affected by a particular state's climate mitigation policies (albeit to varying degrees). Yet, those most affected, the 'core victims of climate *in*justice,' are often the voiceless 'other' in western legal systems. [11] Women, older adults, children, people of colour, disabled people, people living in poverty, citizens of third countries particularly in the Global South, indigenous communities, future generations, nature – those who belong to this category of 'other' – are marginalised in western legal systems due to its systemic exclusion of those who do not conform to the model of law's person.[12]

Systemic mitigation cases advance (albeit indirectly) the interests of the core victims of climate injustices and, as such, are public interest cases *par excellence*. A problem, however, is that climate change produces pervasive yet diffuse and indirect impacts for which there often is not an ideal or obvious litigant.[13] Many of this core group of victims have not even been born yet and will live far away from Europe in countries in the Global South. If it is necessary to wait for harm to occur to these hypothetical litigants, an adequate and effective remedy (presumably in the form of some kind of protection from climate harm) may be impossible[14] particularly in light of the growing risk of abrupt and irreversible impacts from overshooting climate tipping points. In these circumstances who, if anyone, is in a position to take such cases? Is it only individuals who are entitled to litigate? In circumstances where those most vulnerable to the impacts of climate change are often 'othered' in law, can a non-governmental organisation (NGOs) take a public interest case on their behalf? And if so, can an NGO challenge a government's mitigation policies by relying on personal fundamental rights if strictly speaking

[8] Adelmant, Alston and Blainey (n 4) 7-8.
[9] Fisher, Scotford, and Barritt (n 2) 185.
[10] ibid,178-179
[11] Anna Grear, 'Towards Climate Justice: A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterns of Hierarchies, Directions for Future Law and Policy' (2014) 5 Journal of Human Rights and the Environment 103, 117.
[12] ibid, 129.
[13] Ronán Kennedy, Maeve O'Rourke and Cassie Roddy-Mullineaux, 'When is a Plan Not a Plan? The Supreme Court Decision in Climate Case Ireland' (2020) 2 Irish Planning and Environmental Law Journal 60.
[14] Barry Kellman, 'Standing to Challenge Climate Change Decisions' (2016) 46 Environmental Law Reporter News and Analysis 10116, 10117.

the NGO, as a corporate entity, does not itself enjoy those rights? Does the magnitude and urgency of the climate crisis justify adopting an exceptional approach to standing requirements before regional courts like the CJEU? Can systemic mitigation cases be accommodated within existing standing rules, particularly if procedural human rights obligations under the Aarhus Convention are taken seriously?

These questions pose fundamental challenges for European legal order as well as western legal orders more generally. One practical way to make legal subjectivity more inclusive and ensure access to justice for the core victims of climate injustices – who have been othered in law – may be to expand the rules of standing.[15] It will be seen in the next section that inclusive standing rules would not require courts of states and international organisations that are signatories to the Aarhus Convention to stretch the existing doctrine of standing to snapping point or even to break new ground. It will become clear that what is needed instead is a more serious engagement with the access to justice provisions, the wider purposes of the Aarhus Convention and existing jurisprudence that supports a purposive interpretation.

3. The Aarhus Convention

Forging inclusive approaches to access to justice does not therefore require us to re-invent the wheel. The UNECE's Aarhus Convention, which entered into force on 30 October 2001,[16] is already firmly aimed at increasing the wider public's involvement in achieving environmental protection and is inherently rights-based.[17] There are currently 47 parties to the Aarhus Convention including the European Union and its Member States.[18] The Aarhus Convention has been ratified by the Netherlands, Ireland and the EU.[19] The Aarhus Convention has also been ratified by most of the Parties to the ECHR – Turkey and Russia are notable exceptions.[20] Even though not all of the Parties to ECHR have signed up to the Aarhus Convention, it has

[15] Grear, 'Towards Climate Justice'(n 11)129.
[16] Aarhus Convention, Status of Ratification < https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification> accessed: 26 February 2021.
[17] Suzanne Kingston, Veerle Heyvaert, Aleksandra Čavoški, *European Environmental Law* (Cambridge University Press 2017), 169.
[18] ibid.
[19] Aarhus Convention, Map of Parties, https://unece.org/environment-policy/public-participation/aarhus-convention/map-parties accessed: 26 February 2021.
[20] ibid. See also: Council of Europe, 'Chart of signatures and ratifications of Treaty' https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=ZNayeY6Z accessed: 13 April 2021.

had a 'significant influence' on the European Court of Human Right's (ECtHR) environmental jurisprudence.[21]

The Aarhus Convention is an ambitious environmental and human rights treaty based on three pillars, which correspond to three interrelated procedural environmental rights: access to environmental information, public participation in decision-making, and access to justice.[22] Underpinning these three pillars are a range of purposes which can help elucidate the vision behind the Convention's three procedural rights and provide meaning where the black letters of the Convention's text leave uncertainty.

Barritt offers two justifications for a purposive approach to understanding the Aarhus Convention.[23] First, as an international treaty it is subject to the interpretive rules of the Vienna Convention on the Law of Treaties which stipulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and *purpose*.'[24] Second, as a hybrid environmental-human rights treaty a purposive or even emergent purposes (or 'living document') approach is apposite as human rights instruments are frequently interpreted in this way to secure the highest level of protection for human rights.[25] One important source for gleaning the purposes of an international treaty is a treaty's preamble.[26] Many different purposes can be discerned from the preambular text to the Aarhus Convention: promoting environmental citizenship, transparency in environmental decision making, intergenerational justice, sustainable development, and environmental education.[27] However, the three purposes focused on for present purposes (because of their relevance to the issue of standing) are the promotion of environmental rights,

[21] Alan Boyle, 'Human Rights or Environmental Rights: A Reassessment' (2007) 18 Fordham Environmental Law Review 471, 477-478. See for example: *Taşkin et al. v Turkey,* App no. 46117/99 (ECtHR, 10 November 2004) [99]-[100]; *Tătar v Romania* App no. 67021/01 (ECtHR, 27 January 2009), [118]; *Demir and Baykara v Turkey* App no. 34503/97 (ECtHR 12 November 2008), [83].

[22] For an excellent overview of how the Convention operates in practice and a novel perspective on the interpretive significant of the Convention's underlying purposes from which this section draws, see: Áine Ryall, 'The Relationship between Irish Law and International Environmental Law: A Study of the Aarhus Convention' (2019) 41(2) Dublin University Law Journal 163; Áine Ryall, 'Careful What You Wish For: Amending the Rules Governing Judicial Review in Planning Matters' (2019) 4 Irish Planning and Environmental Law Journal 151; and Barritt (n 7).

[23] Barritt (n 7) 23-25.

[24] Article 31(1) of the Vienna Convention on the Law of Treaties 1155 UNTS 331; see also: Barritt (n 7) 23-25.

[25] Barritt (n 7) 24-25.

[26] Article 31(2) of the Vienna Convention (n 24) and Barritt (n 7) 25.

[27] Barritt (n 7) 14.

government accountability in environmental decision making, and environmental stewardship.[28]

Guaranteeing environmental rights is undoubtedly a central purpose woven through the entirety of the Convention. In addition to the three procedural environmental rights enshrined in the Convention, the Preamble recognises that 'every person has the *right* to live in an environment adequate to his or her health and well-being.'[29] Article 1 sets out the overall objective and makes clear that the three procedural rights guaranteed under the Convention are not an end in themselves but are a means of 'contribut[ing] to the protection of the *right* of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[30] Barritt suggests that this substantive environmental right referred to in the Preamble and Article 1 might be understood as a moral claim that underpins and informs the operation of the three procedural rights.[31] The substantive right to an adequate environment might also be understood as a device that allows the Convention to respond to international legal developments that are pushing for the recognition a fully-fledged substantive environmental right at the international level.[32]

A closely related aim to promoting environmental rights, which is also referenced in the preamble, is the furthering government accountability in environmental decision-making.[33] The Preamble states that effective judicial mechanisms should be accessible to the public, including NGOs, so that the legitimate interests of the public/NGO are protected, and the *law is enforced*.[34] This particular aim around the rule of law and legal accountability for governments is strongly reflected in the procedural right of access to justice enshrined in Article 9. Whilst the Convention does not explicitly refer to environmental stewardship, the preambular text recalls Principle 1 of the Stockholm Declaration which states that humans 'bears a solemn responsibility to protect and improve the environment for present and future generations'.[35] The Preamble to the Aarhus Convention also affirms the need to 'protect, preserve and improve' the environment as well as the need for 'sustainable and

[28] The promotion of environmental rights and stewardship are two of the purposes focused on by Barritt. The present paper supplements these two purposes with another central purpose: legal accountability for governments in environmental decision making.
[29] Recital 7 of the Preamble to the Aarhus Convention (emphasis added) (n 6).
[30] Article 1 of the Aarhus Convention (n 6) (emphasis added)
[31] Barritt (n 7) 154
[32] ibid.
[33] Recital 10 of the Preamble to the Aarhus Convention (n 6).
[34] ibid, Recital 18 of the Preamble (emphasis added).
[35] ibid, Recital 1 of the Preamble.

environmentally sound development.'[36] The Preamble also explicitly recognises the important role individuals and NGOs can play in environmental protection. Additionally, each of the procedural rights appear to be strongly influenced by stewardship ideas and values.[37]

The promotion of environmental rights, government accountability in environmental decision making, and environmental stewardship are clearly at the heart of the Aarhus Convention. Examining Article 9 – the pillar of most importance for present purposes – in light of these three purposes allows us to see the potential for the Convention to be a powerful tool for vindicating the rights and interests of the voiceless 'other' in law who are some of the most vulnerable to climate harms. A purposive approach to Article 9 not only supports inclusive standing rules in systemic climate cases, but it also goes one step further by legally mandating them.

Article 9(2) stipulates that 'the public concerned' shall have access to a review procedure 'to challenge the substantive and procedural legality of any decision, act or omission' that engages the right to participate guaranteed under the Convention. The 'public concerned' is defined in Article 2(5) as 'the public affected or likely to be affected by or having an interest in the environmental decision-making; for the purposes of the definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.' Article 9(2) affords parties some measure of discretion in determining the appropriate standing requirement ('sufficient interest' or 'impairment of a right') but insists that any standing requirements must be consistent with the objective of delivering 'wide access to justice.'[38] An NGO that meets the requirements set out in Article 2(5) is automatically deemed to have standing for review procedures under Article 9(2). Even though Article 2(5) provides a definition of the 'public concerned' whether this definition is given a broad or narrow interpretation depends on how closely one is concerned with the broader purposes the Convention is trying to achieve.[39] For example, the interpretive consequence of the stewardship purpose in the Convention for the terms 'public concerned' is that it supports an expansive interpretation that would or should arguably allow members of present generations to represent and defend the interests of nature or future generations in court.[40] The stewardship purpose also points towards a broad interpretation of 'sufficient

[36] ibid, Recital 5 of the Preamble.
[37] Barritt (n 7) 34.
[38] Áine Ryall, "Careful What You Wish For (n 22).
[39] Barritt (n 7) 22.
[40] ibid, 168-169.

interest,' a term left undefined in the Convention and therefore requires interpretation. A stewardship driven interpretation of 'sufficient interest' would not just be confined to personal interests but also allow encompass stewardship interests.[41] Nature and future generations – core victims of climate injustices that otherwise enjoy limited legal protection – become indirect beneficiaries of the Convention's procedural rights when a purposive approach is taken to the Convention.[42] When the Convention is understood as an instrument designed to further legal accountability in environmental decision-making, a wide interpretation of these terms that leaves the doors of the courtroom open to individuals and NGOs is fitting.

Article 9(3) provides for a general right of access to a review procedure to challenge acts or omissions by private persons and public authorities which breach provisions of national law relating to the environment. The right under Article 9(3) is vested in members of the public 'where they meet the criteria, if any, laid down in national law.' Article 9(4) contains overarching minimum standards for these review procedures, which must 'provide adequate and effective remedies… and [must] be fair, equitable, timely and not prohibitively expensive.' Article 3(5) also makes clear that the Convention sets the floor rather than the ceiling for procedural environmental rights. Whilst these minimum standards might appear open-ended, understanding the Convention as being firmly aimed at advancing a substantive environmental right and furthering legal accountability supports an interpretation of Article 9(4) whereby states would be held to a high standard in terms of providing 'adequate and effective remedies.'[43] The 'adequate and effective remedies' standard takes on an additional layer of gravity and urgency when interpreted through the a purposive lens of vindicating a substantive rights to an adequate environment[44] and ensuring that governments can be made legally accountable in environmental matters like the adequacy of its overall approach to reducing emissions. It is clear that by interpreting the access to justice pillar purposively, the Convention can provide a clear legal pathway towards inclusive standing for systemic mitigation cases.

Several findings of the Aarhus Convention Compliance Committee (ACCC) in relation to access to justice for NGOs also broadly align with this purposive approach. The ACCC, which was established in 2002,[45] is a quasi-judicial body charged with overseeing the implementation

[41] ibid.
[42] ibid,157-158.
[43] ibid, 161.
[44] ibid.
[45] Article 15 of the Aarhus Convention provides for a "non-confrontational, non-judicial and consultative" arrangement for reviewing compliance. At its first session, the Meeting of the Parties established the Compliance Committee by its decision I/7 on Review of Compliance.

of the Convention. The ACCC has stated that for standing requirements to be 'in accordance with the *spirit* and principles of the Convention,' standing rules should be decided and applied 'with the objective of giving the public concerned wide access to justice under Article 9(2).'[46] Any standing rules should 'be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.'[47] The ACCC observed in the context of Article 9(3) and the measure of discretion State parties enjoy when setting standing rules for NGOs:

> On the one hand, the Parties are not obliged to establish a system of popular action ('actio popularis') in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause 'where they meet the criteria, if any, laid down in its national law' as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging act or omissions that contravene national law relating to the environment.[48]

According to the ACCC, the language of Article 9(3) indicates a measure of self-restraint not to adopt too strict criteria.[49] In other words, access to a review procedure should be the presumption rather than the exception.[50] While State Parties may employ criteria – such as being affected or of having an interest in order to challenge a decision – this 'presupposes that such criteria do not bar effective remedies for members of the public.'[51] The ACCC has restated these findings elsewhere[52] and emphasised that national standing rules cannot be so strict as to 'effectively bar all or almost all *environmental organisations* or other members of the public from challenging acts or omissions that contravene national law relating to the environment.'[53] In assessing a State Parties compliance with Article 9(3), the ACCC looks at the general picture ie how the standing rules operate in practice but also reads Article 9(3) 'in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that

[46] Case ACCC/C/2008/31 Germany, [71] (emphasis added).
[47] ibid.
[48] Case ACCC/C/2005/11 Belgium, [35].
[49] ibid, [36].
[50] ibid.
[51] ibid.
[52] Case ACCC/C/2008/32 European Union (Part I), [77]-[78].
[53] Case ACCC/C/2006/18 Denmark, [29] (emphasis added).

effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.'[54]

Given all three of the jurisdictions discussed in section 4 are EU-based (the EU and two of its Member States), it is necessary to consider the status of the Aarhus Convention under EU law. The Aarhus Convention is recognised as 'an integral part' of the EU legal order[55] and is binding on both the Member States and the EU institutions by virtue of Article 216(2) of the Treaty on the Functioning of the European Union (TFEU). The Aarhus Convention has been implemented in the Member States of the EU by Directive 2003/4/EC on access to environmental information and Directive 2003/35/EC on public participation.[56] The access to justice obligations arising under these directives mirror those under articles 9(1)[57] and 9(2) of the Convention.[58]

While the EU has not legislated to give effect to article 9(3) at the Member State level,[59] the CJEU has continued to champion its effective implementation at Member State level by placing a particular emphasis on taking a purposive approach to the Convention. In *LZ I*, the CJEU reasoned that it had jurisdiction to rule on whether or not article 9(3) has direct effect notwithstanding the fact that there are no EU legislative measures giving effect to article 9(3) within the Member States.[60] The CJEU's rationale being that the dispute (which concerned the entitlement of an NGO to participate in administrative proceedings granting a derogation from the provisions on species protection under the Habitats Directive 92/43/EEC) related 'to a field covered in large measure by [EU law].'[61] This expansive interpretation lends force to Article 9(3) in the absence of EU legislation. Within the EU virtually all environmental disputes are

[54] ibid, [30].
[55] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125, [30] (*LZ1*) .
[56] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice [2003] OJ L 156.
[57] Article 9(1) (n 6) relates to access to a review procedure for a person whose request for access to environmental information has been ignored, wrongfully refused, or inadequately answered.
[58] Áine Ryall, "'Careful What You Wish For' (n 22)1.
[59] ibid. In 2003, the Commission proposed a Directive on access to justice at the Member State level but scrapped the proposal in 2014 due to resistance from some Member States. See: European Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 final. See also: Council Decision 2005/370/EC [2005] OJ L 124/1, wherein the European Council in ratifying the Aarhus Convention made a declaration with specific reservations concerning Article 9(3).
[60] *LZ 1*(n 55) [30],[31],[43]]
[61] ibid, [40].

'covered in a large measure' by an EU directive meaning that Article 9(3) will almost always come within the scope of EU law too.[62] In *LZ I*, while the CJEU found that Article 9(3) does not have direct effect under EU law,[63] it also held that domestic courts must give effect to the obligations created by Article 9(3) through the doctrine of consistent interpretation.[64] Reminiscent of purposive approach outlined above , the CJEU explained that this involves national courts interpreting national law, to the fullest extent possible, in a manner consistent with the *objectives* of article 9(3) and the *objective* of effective judicial protection of rights conferred by EU law.[65] The CJEU has also stressed that even though Article 9(3) is not directly effective, Article 9(3) (as well as Article 9(4)) 'are intended to ensure effective environmental protection.'[66] In *Protect Natur*, the CJEU confirmed that if it is impossible for national procedural law to be read in a manner consistent with the objectives of Article 9(3), then a national court must disapply the conflicting provision of domestic law.[67] A broad approach to consistent interpretation was also taken by the CJEU in *NEPPC* where the court appeared to hold that the duty applies not just to national environmental law within the scope of EU environmental law but all national law relating to the environment.[68] Thus the interpretation of Article 9(3) by the CJEU insofar as it pertains to Member States has a strong purposive undertow. Not only could the environmental protection/stewardship and legal accountability/effective judicial protection purposes inform the operation of the Aarhus Convention at the Member State level, the CJEU already has made clear that a purposive interpretation of Article 9(3) is legally required.

This stands in sharp contrast to the operation of Article 9(3) at the EU level. Despite the arguably demanding approach taken by the CJEU (and European Commission[69]) in terms of what is required by Member States with respect to Article 9(3), the CJEU has indicated that the European Union institutions and bodies (including itself) are not constrained by Article

[62] For criticism of the *LZ 1* judgment, see: Jan Jans, "Who is the Referee? Access to Justice in a Globalised Legal Order: ECJ Judgment C-240/09 Lesoochranárske zoskupenie of 8 March 2011" (2011) 4(1) Review of European Administrative Law 85, 91-92.
[63] *LZ I* (n 55) [45].
[64]ibid [47]; Case C-470/16 *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* EU:C:2018:185, [57]-[58] (NEPPC).
[65] *LZ I* (n 55) [50]-[51]; *NEPPC* (n 64) [57]-[58] (emphasis added).
[66]*LZ I* (n 55) [46]. *NEPPC* (n 64) [53].
[67] Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* EU:C:2017:987,[54]-[58].
[68] *NEPPC* (n 64) [57]. See also: *North East Pylon Pressure Campaign Ltd v an Bord Pleanála No.5* [2018] IEHC 622, [32].
[69] European Commission, 'Communication on 'Improving Access to Justice in Environmental Matters in the EU and its Member States' COM(2020) 643 final.

9(3) in the same way. Standing rules for NGOs to bring a direct challenge at the EU level under Article 263(4) TFEU have long been regarded as 'excessively restrictive.'[70] According to the CJEU's now infamous *Plaumann* judgment from 1963, a private person (like an NGO or individual) only has standing to challenge an EU measure directly before the CJEU where they are uniquely affected by the measure in question.[71] To implement the Aarhus Convention with respect to the EU institutions and bodies, the EU adopted Regulation 1367/2006/EC (the Aarhus Regulation[72]), which created a two-stage right of access to justice for NGOs (but not individuals) at the EU level to implement the obligations arising from Article 9(3) of the Convention. First, an NGO that satisfies certain criteria,[73] but not an individual is entitled to request an internal review by an EU institution or body which has adopted an administrative act under environmental law.[74] An 'administrative act' is defined as 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.'[75] Second, the NGO that made the initial request is entitled to institute proceedings before the CJEU 'in accordance with the relevant provisions of the Treaty.'[76] The review procedure, which was billed as an attempt to tackle the obstacles of standing for private persons in environmental cases at the EU level,[77] has nevertheless been 'interpreted restrictively' by the CJEU.[78] In the *Vereniging Milieudefensie* and *Stichting Natuur en Milieu* joined cases, the CJEU had an opportunity to consider whether the Aarhus Convention and Aarhus Regulation would have any tangible impact on the interpretation of Article 263(4) of the TFEU.[79] The CJEU ultimately held that Article 9(3) of the Convention

[70] Attila Panovics, 'The Missing Link: Access to Justice in Environmental Matters' (2020) 4 EU and Comparative Law Issues and Challenges Series 106, 116.
[71] Case C-25/62, *Plaumann v. Commission* ECLI:EU:C:1963:17. The CJEU held that 'persons …may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually.' For discussion see: Alison Hough, A Chance for Enhanced Environmental Accountability? The Aarhus Regulation Review (EJNI Access to Justice Observatory, Technical Report 2021) .
[72] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13
[73] Article 11(1) of the Aarhus Regulation.
[74] ibid, Article 10(1),
[75] ibid, Article 2(1)(g)..
[76] ibid, Article 12(1)..
[77] Benedikt Pirker, 'Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?' (2016) 25 RECIEL 81, 86.
[78] Panovics (n 70)117.
[79]Joined cases C-401/12P to 403/12P *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4. For discussion see: Ludwig Krämer, 'Access to Environmental Justice: the Double Standards of the ECJ' (2017) 14 Journal for European Planning and Environmental Law 159, 181.

could not be used as a reference criterion for assessing the legality of the review procedure under the Aarhus Regulation on the basis that it lacks clarity and precision.[80] This results in an uneven implementation of the Aarhus Convention where the Member State national courts are required to interpret national law to the 'fullest possible extent' in conformity with the objectives of Article 9(3) but the European institutions are not themselves deemed to be bound by the objectives.[81] This matter has been examined by the ACCC.[82] In 2017, the ACCC found that the Aarhus Regulation and *Plaumann* jurisprudence were incompatible with Articles 9(3) and 9(4) of the Convention due to the very limited possibilities they provide for members of the public and NGOs to directly access the CJEU.[83] In October 2020, the European Commission published draft legislation designed to amend the Aarhus Regulation in light of the findings of the ACCC.[84]

In February 2021, advice issued by the ACCC made clear that the Commission's legislative proposal still falls short of what is required by the Convention in part because the Aarhus Regulation amendment leaves unaltered the restrictive *Plaumann* standing rule and continues to deny individuals access to the EU courts.[85] In July 2021 following trialogue negotiations, a political agreement[86] was reached introducing, amongst other things, a "complex and limited" review procedure for individuals.[87] In October 2021, the amended Aarhus Regulation came into effect[88] but the extent to which it is complies with the Convention and its wider purposes still remains in doubt.

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[80] *Vereniging Milieudefensie* (n 79) [61], [68]. For discussion, see: Benedikt Pirker, "Cases C-401 to 403/12 and C-404 to 405/12: No review of legality in light of the Aarhus Convention" (*European Law Blog*, 29 January 2015)

[81] For discussion see: Krämer (n 79) 181-182.

[82] Case ACCC/C/2008/32 European Union (Part II), [81].

[83] ibid, [121]-[122]

[84] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies' " COM (2020) 642 final. For discussion see: Hough (n 71).

[85] ACCC/M/2017/3 European Union [36]-[42]. For discussion see: Hough (n 71)

[86] Council of the EU, "Council and Parliament reach provisional deal on access to justice in environmental matters" (Press Release12 July 2021).

[87] Alison Hough, Analysis of the Revised Proposal to amend the Aarhus Regulation agreed 12th July 2021 (EJNI Access to Justice Observatory, Final Summary Report 2021).

[88] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies L 356/1 (Amended Aarhus Regulation).

It is worth briefly drawing some threads together. First, inclusive approaches to standing to ensure wide access to justice for the core victims of climate injustices, those traditionally 'othered' by law, are not just aspirational but can be measured against a concrete legal yardstick, the access to justice provisions of the Aarhus Convention. Second, interpreting the access to justice provisions purposively reveals the enormous potential of the Aarhus Convention to be a tool that allows legal orders to respond in a nuanced and creative way to the challenges posed by the climate crisis without rupturing existing legal doctrines like standing. Third, a purposive approach to the Aarhus Convention finds support not only in the interpretive rules of the Vienna Convention and 'living document' understanding of human rights instruments but also from the existing interpretive practice of the ACCC and the CJEU at Member State level. The ACCC has emphasised a purposive approach based on 'wide access to justice' and made clear that parties to the Aarhus Convention may not maintain standing rules that 'cause an excessive burden' or 'significantly restrict access to justice' for NGOs (article 9(2)), nor requirements that 'bar or effectively bar NGOs' from challenging a potential breach of national law relating to the environment (Article 9(3)). A purposive understanding of the access to justice provisions of the Aarhus Convention by domestic and regional courts would not require judges rebuild the standing doctrine from the ground up, but to use the Convention as a starting point for including perspectives of those most vulnerable and at the same time typically excluded from legal proceedings. Within the European Union legal order, the Aarhus Convention represents a high-water mark in terms of access to environmental justice for the public and NGOs, but importantly the Convention only sets a minimum standard in terms of access to environmental justice. State parties and the EU are entitled to adopt standing and admissibility rules that facilitate *wider* access to justice for individuals and NGOs. At the Member State level, the CJEU has defended a purposive understanding of Articles 9(3) and 9(4) through the doctrine of consistent interpretation. By contrast, the CJEU has not pushed for any sort of purposive understanding of Article 9(3) at the EU level and the amended Aarhus Regulation (discussed further in section 4.3) has stopped a long way short of establishing a more inclusive approach to standing before the CJEU.

4. Standing in systemic mitigation cases: through a purposive Aarhus Convention lens

Let us now consider how courts have dealt with standing requirements in European systemic mitigation cases through this purposive Aarhus Convention lens.

4.1. *Urgenda*

The *Urgenda* judgments have been described as the 'holy grail'[89] of systemic climate litigation. The case was taken by Dutch NGO, Urgenda and 886 individual co-plaintiffs.[90] *Urgenda* involved a challenge to the adequacy of the Netherlands' mitigation policies in part on grounds that they contravened Article 2 (right to life) and Article 8 (the right to respect for private and family life and home) of the ECHR. The Netherlands is a monist state. Article 93 of the Dutch Constitution provides that provisions of treaties that are 'binding on all persons' are directly effective and Article 94 provides for the supremacy of these treaty provisions over conflicting national law. Certain rights under the ECHR, notably Articles 2 and 8 are recognised as binding on all persons[91] and can therefore be directly invoked by individuals or legal persons like NGOs before the Dutch courts.[92] In December 2019, the Dutch Supreme Court upheld the finding of the Court of Appeal that Articles 2 and 8 impose positive obligations on the government to take 'reasonable and suitable measures'[93] to 'do its part' to avert dangerous climate change.[94] The Supreme Court held that the state's obligations arise even when it comes to environmental dangers that threaten large numbers of people and even if the risk will only materialise decades from now.[95] The Supreme Court found that the repeated endorsement in UNFCCC/Kyoto COP decisions of the urgent necessity for developed countries to reduce emissions by at least 25-40% by 2020 established a high degree of consensus,[96] which had to be taken into consideration when interpreting the state's positive obligations under Articles 2 and 8 ECHR.[97] The Supreme Court held that while Articles 2 and 8 ECHR must not result in 'an impossible or disproportionate burden,'[98] the government had not substantiated why a reduction of at least 25% was impossible or disproportionate.[99] The Supreme Court thus upheld the mandatory order requiring the state to reduce Dutch GHG emissions by at least 25% by the end of 2020, relative

[89] Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9 Transnational Environmental Law 347, 360-368.
[90] These co-plaintiffs fell away from the proceedings after the District Court rejected their claim on the basis that they did not have sufficient own interests distinct from Urgenda. See: *Urgenda Foundation v State of the Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7196 [4.109]
[91] Hanneke van Schooten and James A Sweeney, "Domestic Judicial Deference and the ECHR in the UK and Netherlands" (2003) 11 Tilburg Foreign Law Review 439, 453.
[92] Douglas Maxwell, "(Not) Going Dutch: Compelling States to Reduce Greenhouse Gas Emissions through Positive Human Rights' [2020] Public Law 620, 627.
[93] *Netherlands v Urgenda Foundation* (20 December 2019) ECLI:NL:HR:2019:2006 [5.3.2]-[5.3.3]
[94] ibid, [5.7.1].
[95] ibid, [5.3.1]-[5.3.2], [5.6.2].
[96] See generally *Demir* (n 21) [85]-[86] which was cited as supporting the 'common ground' method of interpreting the ECHR.
[97] *Urgenda*, Supreme Court Judgment (n 93) at [6.1]- [7.5.3].
[98] ibid, [5.3.4].
[99] ibid, [7.5.3].

to 1990 levels, in line with the IPCC's advice of a 25-40% reduction for developed countries by 2020 to limit warming to +2°C above pre-industrial levels.[100]

Article 3:303 of the Dutch Civil Code allows an individual or legal person to bring an action to the civil court if they have sufficient interest in the claim.[101] Article 3:305a of the Dutch Civil Code is the 'class action' provision and entitles a foundation with full legal capacity to bring an action to protect the similar interests of other persons, insofar as the foundation represents those specific interests based on the objectives formulated in its articles of association.[102] Article 3:305a was designed to allow class actions including those that purport to act on behalf of an indeterminable group of individuals, even if a significant proportion of those whose interests the collective action is meant to represent might disagree with the objectives of the action.[103]

The government had not challenged Urgenda's standing to represent the rights and interests of current generations of Dutch citizens with regards territorial emissions in the Netherlands.[104] The government deferred to the court on the possibility that Urgenda could act on behalf of future generations of Dutch citizens but disputed Urgenda's standing to litigate on behalf of current and future generations in other countries.[105]

The Supreme Court – echoing the Court of Appeal[106] – found that Urgenda had standing to defend the interests of current inhabitants of the Netherlands.[107] The Supreme Court said that the interests of such inhabitants were 'sufficiently similar' to lend themselves to a class action under Article 3:305a.[108] The Supreme Court cited Articles 2(5) and 9(3) of the Aarhus Convention as well as Article 13 ECHR (right to an effective remedy) in support of its findings.[109] The Supreme Court also endorsed the Court of Appeal's finding[110] that Article 34

[100] ibid, [7.5.1].
[101] Article 303, Dutch Civil Code.
[102] Article 305a, Dutch Civil Code.

[103] See: *Urgenda*, District Court judgment (n 90) at [4.6]; *State of the Netherlands v Urgenda Foundation* (9 October 2018) ECLI:NL:GHDHA:2018:2591 [38] ; *State of the Netherlands v Urgenda Foundation* (13 September 2019) ECLI:NL:PHR:2019:1026 [2.5].
[104] *Urgenda*, District Court judgment (n 90) [4.5].
[105]ibid.
[106] *Urgenda*, Court of Appeal judgment)(n 103) [37].
[107] *Urgenda*, Supreme Court Judgment (n 93) [5.9.2]
[108] ibid.
[109] ibid.
[110] *Urgenda*, Court of Appeal judgment (n 103) [35]-[36]

ECHR was no barrier to an NGO instituting rights-based proceedings before a domestic court.[111]

At first instance, the District Court had held that Urgenda had standing to represent the rights and interests not just of Dutch citizens alive today but also of people outside the Netherlands and of future generations.[112]According to Burgers and Staal this was a remarkable finding because the unborn are not strictly speaking recognised as a legal subject under Dutch law, making it difficult to understand how a legal claim could be pursued on their behalf.[113] The Court of Appeal and Supreme Court sidestepped this thorny question by emphasising the known 'real and immediate' threat climate change poses to current generations of Dutch residents.[114] Both the Supreme Court and the Court of Appeal zeroed in on the risk of severe and rapid sea level rise, presumably a 'real and immediate' risk for those alive today as it could make certain regions in the Netherlands uninhabitable over the next few decades.[115] This approach is unsurprising given that the rights of future generations and extraterritorial human rights obligations have long been regarded as controversial.[116] The superior courts' rulings regrettably do not shed light on whether the amorphous interests of those within this category of 'other' are (at least in some way) cognisable to the courts. However, a co-benefit of the inclusive standing rules for environmental class actions in the Netherlands was that the interests of the 'other' were, at least, indirectly protected by the court's mandatory order.

It is noteworthy that the Supreme Court placed reliance on Article 9(3) of the Aarhus Convention to support its conclusion that Urgenda was entitled to bring these proceedings in the public interest.[117] While the Supreme Court did not say so in as many words, this reference might potentially be understood as an application of the strong interpretative obligation

[111] *Urgenda*, Supreme Court Judgment (n 93)[5.9.3]. Article 34 sets out the admissibility criteria for an application before the ECtHR and requires a complainant to demonstrate that they are a 'victim' of a violation of the ECHR by a contracting state.
[112] *Urgenda*, District Court judgment (n 90)[4.7]- [4.9].
[113] Laura Burgers and Tim Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands" (2019) 49 Netherlands Yearbook of International Law 2018: Populism and International Law 223, 228.
[114] *Urgenda*, Court of Appeal judgment (n 103) [37],[42],[43]. *Urgenda,* Supreme Court Judgment (n 93) [5.2.2]-[5.3.2], [5.6.2].
[115] *Urgenda*, Court of Appeal judgment (n 103) [44]. *Urgenda,* Supreme Court Judgment (n 93) [5.6.2]. See also: André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (EJIL Talk, 6 January 2020)
[116] John H Knox, 'Climate Ethics and Human Rights' (2014) 5 Journal of Human Rights and the Environment 22, 31-33; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights' (2019) 9 Climate Law 244.
[117] *Urgenda*, Supreme Court Judgment (n 93) [5.9.2].

established by the CJEU in relation to Article 9(3).[118] The approach adopted to standing in *Urgenda* seems compatible with Article 9(3) of the Convention in that clearly, it did not operate to 'effectively bar' NGOs from taking systemic climate litigation in the public interest. The very fact that Dutch law facilitates class actions particularly in the field of public interest environmental law, might be seen as a concrete example of what an expansive approach to standing rules – imbued with a recognition of the importance of environmental stewardship and legal accountability in line with the spirit of the Aarhus Convention – could look like.

4.2. *Friends of the Irish Environment ('Climate Case Ireland')*

Friends of the Irish Environment, known colloquially as *'Climate Case Ireland,'* was similarly a high-profile case in which a non-profit company, FIE brought judicial review proceedings challenging the Irish government's 2017 National Mitigation Plan (NMP).[119] FIE argued that the NMP was *ultra vires* the Climate Action and Low Carbon Development Act 2015 (2015 Act) and violated the constitutional rights to life, bodily integrity, and an environment consistent with human dignity and Articles 2 and 8 ECHR.[120] The nub of FIE's argument was that it was unlawful to adopt a Plan that was not designed to achieve significant emissions reductions in the short term.[121] FIE relied in this regard on the fact that the NMP envisaged a significant increase in emissions, despite the fact that successive Irish governments had endorsed the IPCC's advice that developed countries' GHG emissions needed to fall by at least 25-40% compared with 1990 levels by 2020 to limit warming to +2°C above pre-industrial levels.[122]

In September 2019, the High Court dismissed FIE's case finding that the NMP was *intra vires* the 2015 Act because the government enjoyed 'considerable discretion' in formulating climate policies.[123] In July 2020, the Supreme Court reversed the decision quashing the NMP on the basis that NMP fell 'a long way short of the sort of specificity required' to comply with the

[118] *NEPPC* (n 64) [57]-[58]. Here the CJEU took a very broad approach to the duty of 'consistent interpretation' in that it appeared to hold that the duty applies not just to national environmental law within the scope of EU environmental law but all national law relating to the environment.
[119] *Friends of the Irish Environment CLG v Government of Ireland* [2019] IEHC 727.
[120] Ibid at [12]-[13]. The alleged violation of Articles 2 and 8 arose via the government's statutory obligation to perform its functions in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights. See section 3 of the European Convention on Human Rights Act 2003.
[121] ibid, [85].
[122] ibid, [19], [21].
[123] ibid, [112].

2015 Act.[124] Having determined that the NMP should be quashed on the basis that it was *ultra vires,* the Supreme Court acknowledged that it did not need to consider the rights-based dimension of the case.[125] The Court nevertheless addressed the issue of NGO standing to litigate personal rights that the NGO did not itself enjoy as the issue was likely to be of importance in future cases.[126]

It is important to highlight that court discretion is built into the Irish rules on standing, which are understood as 'rules of practice'[127] which may be relaxed 'when the justice of the case so requires'[128] or where there are 'weighty countervailing considerations' justifying a departure from ordinary standing rules.[129] The ordinary standing rules require a plaintiff to show that his/her rights or interests are 'adversely affected or in real and imminent danger.'[130] The Supreme Court found that in circumstances where FIE did not itself enjoy the rights in question, it did not *prima facie* have standing.[131] The issue then became whether FIE's case came within one of the exceptions that would allow a corporate body to have standing to maintain a claim based on the rights of others.[132] One recognised exception is include where those prejudicially affected are not in a position to assert their constitutional rights adequately, or on time. [133] Another is where the impugned provision is operable against a grouping which includes the challenger or with whom the challenger shares a common interest – particularly in cases where due to the subject matter it is difficult to differentiate between those affected and those not affected.[134]

The Supreme Court referred to two cases where exceptional conditions were met: *Society for the Protection of the Unborn Child (SPUC)* and *Irish Penal Reform Trust*.[135] In *SPUC,* a 'pro-life' NGO was deemed to have standing to seek an injunction restraining the publication of information relating to abortion services on the basis that it had a '*bona fide* concern and interest' and the nature of the constitutional right engaged (the right to life of the unborn) meant

[124] *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49, [6.46].
[125] ibid, [6.49].
[126] ibid.
[127] *Cahill v Sutton* [1980] IR 269, 285.
[128] ibid.
[129] ibid.
[130] ibid, 286.
[131] *FIE*, Supreme Court Judgment (n 124) [7.5].
[132] ibid.
[133] *Cahill* (n 127) 285.
[134] Ibid.
[135] *FIE*, Supreme Court Judgment (n 124) [7.12].

it would be impossible for rightsholders to bring proceedings themselves.[136] In *Irish Penal Reform Trust,* an NGO was granted standing to challenge the constitutionality of systemic deficiencies in Irish prison conditions on the basis that those whose rights are impacted, prisoners with psychiatric illnesses, were amongst the 'most vulnerable and disadvantaged members of society.'[137] The High Court stated that if a person is not in a position to adequately assert their constitutional rights for whatever reason, standing rules may be relaxed 'provided the relevant person or body is genuine, acting in a *bona fide* manner, and has a defined interest in the matter in question.'[138]

The Supreme Court surmised that exceptions must be limited to situations 'where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.'[139] The Supreme Court found that the present case was a 'far cry' from *SPUC* and *Irish Penal Reform Trust.*[140] It was critical of the fact that a natural person had not been joined and expressed the view that a risk of cost exposure for an individual was not a good enough excuse.[141] The Supreme Court noted that there was no suggestion that the potential class of individual litigants suffered from any vulnerability that would inhibit them from maintaining the rights-based claim.[142] The Supreme Court said that if it were to hold that FIE had standing, litigants would only be deemed not to have standing where they bring an action on a purely 'meddlesome basis.'[143] This would amount to an unjustifiable extension of standing rules.[144]

The Supreme Court's 'considerable conservatism' having heard submissions on behalf of FIE that 'the realities of the Irish litigation landscape, and of climate change, warranted a grant of standing to FIE in order to ensure access to justice regarding (potential) rights violations,'[145] stands in marked contrast to the High Court. While the High Court dismissed the alleged rights

[136] *SPUC v Coogan* [1989] IR 734, 742.
[137] *Irish Penal Reform Trust Ltd and Others v Governor of Mountjoy Prison and Others* [2005] IEHC, [34].
[138] ibid, [30].
[139] *FIE,* Supreme Court Judgment (n 124) [7.21].
[140] ibid [7.22].
[141] ibid. For context, in *Klohn v. An Bord Pleanala* (No.] 3) [2011] IEHC 196, which has been described as a "common-or-garden" planning judicial review case that involved a four-day hearing, Mr Klohn faced a bill of €86,000 after he lost his case in the High Court (excluding the fees charged by his own legal advisors which ran to the tune of €32,550.) See: Garrett Simons, 'Unresolved issues under the Planning and Development (Amendment) Act 2010' (Round Hall CPD Conference, Dublin, 10 November 2012).
[142] *FIE* Supreme Court Judgment (n 124) at [7.18].
[143] ibid [7.22].
[144] ibid.
[145] Kennedy (n 13).

violation on the basis that it was not the NMP that put rights at risk,[146] it did recognise FIE's standing to raise fundamental rights arguments based on the constitutional and environmental importance of these issues and the fact that these issues affected both the interests of FIE's members and the public at large.[147] The High Court seemed to appreciate that a rigid approach to standing for FIE – with its strong track record in environmental litigation – could stymie important environmental public interest cases in future. The High Court's approach to standing seemed compatible with the 'wide access to justice' benchmark of Article 9(2) and the effective judicial protection/legal remedies objectives that flows from Article 9(4) and EU law more generally. The High Court's approach to standing would have left the door open for an NGO with a *bona fide* concern and interest to be a mouthpiece for the vulnerable and systematically excluded 'other' in future cases.[148] In this way, the High Court's approach chimed strongly with the stewardship and accountability that form the foundation of the access to justice pillar. While an inclusive approach to standing for NGOs like FIE does not necessarily offer direct legal protection to those core victims of climate injustices, it allows the legal system to indirectly promote their interests by removing barriers to genuine, environmental public interest litigation. By contrast, the Supreme Court's judgment restricts this possibility by limiting the categories of prospective litigants.

It is doubtful that the FIE case was in fact all that different from *SPUC* and *Irish Penal Reform Trust*.[149] Like the unborn in *SPUC* and the prisoners in *Irish Penal Reform Trust,* those whose rights and interests are endangered by inadequate climate mitigation policies, the 'other,' are also in an 'extremely disadvantaged position' in terms of accessing the courts.[150] In refusing FIE standing to raise these fundamental rights issues, there is a 'real risk' important rights will not be protected in Ireland in the context of a worsening climate crisis. The Supreme Court correctly identified that the potential class of individual litigants could be vast, but failed to tease out what this might mean in practice. The idea of joining a youth applicant, who may well be alive in 2100 when temperatures could up to 4.8°C higher than pre-industrial levels,[151] was mooted by the court at the hearing.[152] There is certainly a global trend of rights-based

[146] *FIE*, High Court Judgment (n 119) at [133].
[147] ibid, [132].
[148] See generally: Adelmant, Alston and Blainey (n 4) 7-8.
[149] Orla Kelleher, "A critical appraisal of *Friends of the Irish Environment v Government of Ireland"* (2021) 30 RECIEL 138, 145.
[150] *FIE*, Supreme Court Judgment (n 124) [7.17].
[151] IPCC, *Summary for Policymakers. In: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), 8.
[152] Orla Kelleher, Notes of Supreme Court Hearing, 22 and 23 June 2020.

climate litigation involving young people seeking to hold governments accountable for climate harm to current and future generations.[153] However, prohibitive legal costs[154] mean that these kinds cases would be difficult to replicate in Ireland, a point raised by counsel for FIE at the hearing.[155] Protective costs orders are available in limited circumstances pursuant to Ireland's limited implementation of the Aarhus Convention, but these rules remain uncertain in scope and may not cover all aspects of a systemic climate case raising fundamental rights.[156] The grant of civil legal aid in Irish environmental cases is – in the words of the Supreme Court – 'an extreme rarity.'[157] While the Supreme Court did not see costs exposure as a good excuse,[158] it is questionable whether it would be appropriate to expose a youth plaintiff (or anyone from the category of vulnerable 'other') to the risk of facing the state's legal bill, which in the Irish context could run to more than one hundred thousand euro.

The Supreme Court acknowledged but did not comment upon the High Court's finding[159] that the Irish courts were not entitled to rule on the applicability ECHR to climate harms ahead of the ECtHR.[160] On the issue of ECHR standing, the Supreme Court accepted that a person might have standing to raise the issue of a potential violation of the ECHR before the national courts even if that same person might not satisfy the admissibility criteria before the ECtHR.[161] However, the Supreme Court expressed the view that where the party in question did not have constitutional standing and where the rights under the Irish Constitution and the ECHR are the 'same or analogous,' then it is difficult to see how a party could have standing to maintain the ECHR aspect of their claim.[162] Accordingly, the Supreme Court concluded that FIE did not have standing to maintain the ECHR dimension of its claim.[163] It is unclear whether the constitutional rights to life and bodily integrity are the same or analogous to Articles 2 and 8 ECHR, at least in terms of scope, in environmental public interest litigation. In Ireland, these constitutional rights have yet to successfully be invoked in an environmental case.[164] By

[153] Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot* (Grantham Research Institute on Climate Change and the Environment 2020).
[154] See (n 141).
[155] Kelleher, 'Notes' (n 152)
[156] See: sections 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011.
[157] *Conway v Ireland, the Attorney General* [2017] 1 IR 53, 69.
[158] *FIE* Supreme Court Judgment (n 124) [7.22].
[159] *FIE*, High Court Judgment (n 119) [139].
[160] *FIE* Supreme Court Judgment (n 124) [5.18].
[161] ibid [7.23].
[162] ibid.
[163] ibid.
[164] ibid [8.14], [8.17] where the Supreme Court did acknowledge the possibility of constitutional rights playing a role in environmental proceedings.

contrast the ECtHR, in the absence of a substantive environmental right, has built up an extensive environmental jurisprudence based on Articles 2 and 8.[165] Had Ireland signed and ratified Protocol 16 to the ECHR,[166] this could have allowed the Supreme Court to get around the fact that the ECtHR has not yet ruled on climate change and tease out for itself the ECHR dimension of the case, via a request to the ECtHR for an advisory opinion.

The Supreme Court's approach to standing has been criticised for its failure to consider the nature of the rights at issue, the scale of the climate crisis, and the magnitude of the threat posed to those rights by climate change when analysing FIE's standing.[167]The Supreme Court could have taken account of the unique and existential threat runaway climate change poses, the difficulties in identifying the model litigant, the inequality of arms, and the immense emotional and financial toll of taking on the state through the courts. The Supreme Court's finding that FIE could not litigate personal rights entirely downplays the vulnerability of individuals litigating against the state and the unique difficulty of identifying a suitable litigant.[168] Those most vulnerable to the impacts of climate change are systemically locked out from the courts. Even if a young plaintiff were to have been joined, the state would most likely have argued that their specific interests were not adversely affected or in real and imminent danger. A young plaintiff may well have withdrawn from the proceedings in any event, deterred by the state's approach to costs at the outset (as raised by counsel for FIE at the hearing). [169] The state said in its first response to the proceedings that it would pursue FIE for the costs of dealing with FIE's initiating affidavit, regardless the outcome of the case.[170]

The Supreme Court would not have opened the floodgates if it had granted FIE standing. Nor would it have ended up adjudicating on a hypothetical fundamental rights case. At hearing, the Supreme Court was exposed to extensive evidence of the damaging effects a failure to reduce emissions in the short term poses to life, human health, and the environment in Ireland and globally.[171] This evidence was unlikely to be very different had an individual litigant been attached to the proceedings. The Supreme Court seemed intent on circumventing the

[165] See generally: ECHR, "Factsheet- Environment and the ECHR" (July 2021) https://www.echr.coe.int/documents/fs_environment_eng.pdf accessed: 6 August 2021.
[166] Protocol 16 allows the 'highest courts and tribunals' to ask the ECtHR for a non-binding advisory opinion relating to the interpretation or application of ECHR rights, before the domestic court rule on the matter itself.
[167] Adelmant, Alston and Blainey (n 4) 6.
[168] Kennedy (n 13).
[169] Kelleher, 'Notes' (n 152).
[170] Ibid.
[171] ibid.

fundamental rights issues raised, and to do this, it followed its now common practice of deciding the case on procedural grounds or on the narrowest point to avoid the thornier questions.[172]

One major problem with the Supreme Court's approach is that it seems to fall foul of Articles 9(2), 9(3) and 9(4) of the Aarhus Convention and jars with the wider purposes the Convention is designed to achieve. The Supreme Court's approach seems to require an NGO to show both a sufficient interest *and* an impairment of rights, which is more exacting than the standing requirements laid out in Article 9(2). This approach also sits uneasily with the overarching objective of Article 9(2) of securing 'wide access to justice.' The Supreme Court's approach to standing also goes against the environmental rights and stewardship vision at the heart of the Convention by making it very difficult for an NGO to defend human or environmental rights on behalf of the vulnerable 'other' based on their environmental or stewardship concerns alone. In many cases it would be impossible for an NGO to show sufficient interest *and* suffer an impairment of their own rights directly. It must be conceded that FIE was still entitled to challenge the legality of the government's adoption of the NMP on statutory rather than fundamental rights grounds. However, the relevant statutory language could of course be changed by the legislature, serving to undermine the Supreme Court's judgment – indeed, whether government amendments subsequently proposed to Ireland's Climate Action and Low Carbon Development Act 2015 could have this effect was recently raised during the pre-legislative scrutiny process.[173] Restrictive standing requirements along with limited (and potentially not cost protected) grounds of review seem to 'significantly restrict' and 'effectively bar' NGOs from securing an effective remedy in respect of decisions, acts or omissions within the scope of Article 9(2) and 9(3) of the Aarhus Convention.

It is worth noting that the *Friends of the Irish Environment* judgment could be understood as an Article 9(2) case (because the NMP had been subject to a formal public consultation as

[172] See for example: *P v Judges of the Circuit Court* [2019] IESC 26 where the Irish Supreme Court dismissed a constitutional challenge to section 11 of the Criminal Law Amendment Act 1885 which criminalises gross indecency between males on the basis that the appellant did not have standing. The Court emphasised that the appellant could only challenge the constitutionality of the provision insofar as it applied to his own personal circumstances. See also: *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 where Grace was deemed to have standing to challenge a windfarm development even though she had not participated in the planning process because she lived close to the European site potentially affected by the development and was involved in local environmental groups, but the Supreme Court left unresolved the more interesting question of whether Sweetman who had no physical proximity to the site also had standing.

[173] Section 4(7) of the the Climate Action and Low Carbon Development (Amendment) Bill 2020. For discussion see: Dr Andrew Jackson, 'Presentation to the Joint Committee on Climate Action Pre-legislative scrutiny of the Climate Action and Low Carbon Development (Amendment) Bill 2020' (21 October 2020).

envisaged by the participation provisions of the Convention) and/or an Article 9(3) case (because the NMP involved an act or omission of a public authority that contravened provisions of national law relating to the environment). As alluded to above, the Aarhus Convention has not fully been made part of Irish law by the Irish Parliament and an individual/NGO cannot directly rely on the provisions of the Convention before the Irish Courts.[174] However, the Environment (Miscellaneous Provisions) Act 2011, which attempted align aspects of Irish law with Convention obligations, requires 'judicial notice' to be taken of the Convention[175]and the Irish Supreme Court has previously indicated the appropriateness of having regard to the findings of the ACCC when interpreting the Convention.[176] The Supreme Court was addressed on the status of the Convention in Irish law at the hearing.[177] The present author would argue that it was certainly possible for the Irish Supreme Court in *Friends of the Irish Environment* to interpret standing rules in a manner that was much more compatible with the access to justice provisions and wider purposes of the Convention. The option, of course, remains open for a communication concerning Ireland's compliance with the Convention to be made to the ACCC.

There are also serious questions about the compatibility of the Supreme Court's line of reasoning with EU law. In *LZ 1*, the CJEU made clear that a strong duty of consistent interpretation applies to Article 9(3) at the Member State level: national courts are required to interpret national law (e.g., standing rules) to the 'fullest possible extent' consistently with the *objectives* of Articles 9(3) and 9(4) (eg, the promotion of environmental protection or stewardship, legal accountability, and environmental rights as well as effective judicial protection/remedies). It is certainly arguable, in line with the reasoning in *LZ1*, that *Friends of the Irish Environment* was an environmental dispute 'covered in a large measure' by EU (climate) law such that the strong duty of consistent interpretation with the objectives of Articles 9(3) and 9(4) ought to have applied. The Irish Supreme Court surely could have interpreted Irish standing rules, which are just rules of practice, in a manner consistent with the objectives of the Convention without doing violence to the doctrine of standing but opted instead for a retrograde interpretation that seems to pay no heed to the strong duty of consistent interpretation. There could certainly be an issue of non-compliance with EU law if the Supreme Court replicated the approach to standing it adopted in *Friends of the Irish Environment* in a

[174] *Conway v Ireland, the Attorney General* [2017] IESC 13 [2.15]. For discussion see: Áine Ryall, 'The Relationship between Irish Law and International Environmental Law: A Study of the Aarhus Convention' (2019) 41(2) Dublin University Law Journal 163.
[175] Section 8 of the Environment (Miscellaneous Provisions) Act 2011.
[176] *Conway* (n 174) [4.13].
[177] Kelleher, 'Notes' (n 152).

case involving a challenge to a decision based squarely on EU law. The Supreme Court's approach to standing, if not revisited, certainly has potential to undermine the access to justice provisions and wider ambition of the Aarhus Convention.

4.3. *Carvalho ('The People's Climate Case')*

Carvalho and Others v The European Parliament and the Council, or the '*People's Climate Case'*, also had seismic potential. The case was taken by 36 applicants (children and their parents) who work in the agriculture and tourism sector from various countries within and outside the EU, and a Swedish association that represents young indigenous Sami.[178] The applicants claimed that the EU's then 2030 climate target to reduce domestic GHG emissions by 40% by 2030, compared to 1990 levels, was too low to stave off dangerous climate change and threatened the plaintiffs' fundamental rights of life, physical and mental integrity, occupation, property and equal treatment (based on age and as between persons in the developed states of the EU and persons living in less developed countries) as enshrined in the Charter of Fundamental Rights of the EU.[179]

The applicants asked the EU General Court to declare null and void the emission target provisions[180] of the Emissions Trading System Directive,[181] the Effort Sharing Regulation[182] and the Land Use, Land-Use Change, and Forestry Regulation.[183] The applicants argued that the level of ambition contained in the EU's 2030 climate and energy framework was insufficient and as such contravened higher-ranking laws.[184] The applicants contended that the

[178] Case T-330/18 *Armando Ferrão Carvalho and Others v The European Parliament and the Council* (EGC, 8 May 2019) [1].
[179] ibid [30]. See also: 'Case T-##/18. Application for Annulment and Application/Claim for Non-Contractual Liability and Application for Measures of Inquiry', http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180524_Case-no.-T-33018_application-1.pdf [251]-[253].
[180] Case T-330/18 *Carvalho* (n 178) at [22].
[181] Article 1 of Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L 76/3.
[182] Article 4(2) and Annex I of Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L 156/26.
[183] Article 4 of Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1.
[184] Case T-330/18 *Carvalho* (n 178) [23].

EU's failure to adopt sufficient emission reduction measures had caused and would continue to cause the plaintiffs damage.[185] The applicants sought an injunction compelling the Council and Parliament to adopt measures 'requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate.'[186]

In May 2019, the General Court dismissed the action on the ground that the applicants did not meet the requirement of 'individual concern' under Article 263(4) TFEU as interpreted by the well-settled *Plaumann* line of case law.[187] In March 2021, the Court of Justice dismissed the appeal against the order of the General Court.[188] The Court of Justice agreed with the finding of the General Court[189] that an alleged infringement of the appellants' fundamental rights is not sufficient in itself to render the appellants 'individually concerned,' and to find otherwise would run the risk of making the requirements of Article 263(4) TFEU meaningless and of creating *locus standi* for all.[190]

The appellants had also raised the point that the *Plaumann* test should be adapted to ensure adequate judicial protection against serious infringements of fundamental rights.[191] The appellants put forward several arguments in support of this claim.[192] First, the *Plaumann* test is not specified in the wording of Article 263(4) and the Court has relaxed the test in other cases to ensure effective judicial protection.[193] Second, the CJEU should interpret Article 263(4) TFEU in accordance with the constitutional traditions of the Member States, none of which impose such restrictive standing requirements.[194] Third, the right to bring an action directly before the CJEU must be given a purposive interpretation; to do otherwise would result in a 'paradoxical, or even illogical' situation where a failure by the EU to fulfil its legal obligations has serious and widespread consequences but no one is in a position to challenge

[185] ibid [24].
[186] ibid [22]. See however: Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)' COM/2020/80 final. See also: Frédéric Simon, 'EU Parliament votes for 60% carbon emissions cut by 2030' (euractiv.com ,7 October 2020)
[187] Case T-330/18 *Carvalho* (n 178) [50].
[188] Case C-565/19 P *Armando Ferrão Carvalho and Others v The European Parliament and the Council* (CJEU, 25 March 2021)
[189] Case T-330/18 *Carvalho* (n 178) [48], [50].
[190] Case C-565/19 P *Carvalho* (n 188) [48].
[191] ibid [53].
[192] ibid.
[193] ibid [54], [57], [58].
[194] ibid [55]

this failure because no one can satisfy the 'individual concern' requirement.[195] Fourth, alternative remedies of the plea of invalidity under Article 277 TFEU or the preliminary reference procedure under Article 267 TFEU would not afford the appellants an effective remedy as the Commission is not empowered to adopt implementing measures to reduce emissions at an EU wide level and a preliminary reference would be fruitless where the appellants alleged that it is the EU legislature violating their fundamental rights.[196] The CJEU held that while Article 263(4) TFEU 'must be interpreted in light of the fundamental right to effective judicial protection, such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty.'[197] The CJEU also found that the association representing young indigenous Sami did not have *locus standi* because they were not 'individually concerned,' on the same basis.[198]

The CJEU's findings are clearly in conflict with the Aarhus Convention's wider aims and the access to justice pillar of the Convention. These findings operate to significantly restrict, and effectively bar access to the EU courts for NGOs and individuals, contrary to Articles 9(2) and 9(3), and weaken the legal accountability and stewardship purposes of the Convention. The *Carvalho* appeal offered the CJEU an unprecedented opportunity to rethink the *Plaumann* formula in an era of accelerated climate breakdown and the inclusion of fundamental rights in the EU legal order. The CJEU could have taken into account the fact that environmental harms more generally, but climate harms in particular, do not lend themselves well itself to identifying an 'individually concerned' litigant. The Court could have modified the *Plaumann* test, which is itself only an interpretation of the term 'individual concern' in Article 263(4) predating both the Charter and the EU's accession to the Aarhus Convention. One alternative interpretation of 'individually concerned' would be to accept an actual or potential violation of fundamental or individual rights protected under the Charter as satisfying the standing requirement. This view is supported by Krämer who argues that it would be 'an intellectual error' not to appreciate that the fundamental rights enshrined in the Charter are by their very nature *individual* rights and that a person or NGO alleging that their fundamental rights are violated must be understood as 'individually concerned,' irrespective of whether others' rights are also infringed.[199] Another

[195] ibid [56]
[196] ibid [59]-[62].
[197] ibid [78].
[198] ibid [86].
[199] Ludwig Krämer, "Climate Change, Human Rights and Access to Justice" (2019) 16 Journal of European Environmental and Planning Law 21, 32-34.

interpretation proposed by Advocate General Jacobs in *UPA* in order 'to avoid… a total lack of judicial protection' is that a person should be regarded as 'individually concerned' where a 'measure has, or is liable to have, a substantial adverse effect on his interests.'[200] The CJEU has evidently declined to follow this interpretation[201] or Krämer's rights-based interpretation, even though either interpretation would be likely to bring its jurisprudence in line with Article 9(3) of the Convention. The CJEU's entrenched *Plaumann* jurisprudence is placing the EU on a collision course with the ACCC and the Convention itself. Remarkably, there was no reference to the Convention in the CJEU's judgment. Nor was there any engagement with the ACCC's recent restatement that the *Plaumann* formula is inconsistent with Article 9(3) of the Aarhus Convention but that the 'individually concerned' criterion itself could still be brought in line with the Convention if it were to be interpreted in a broader fashion.[202]

Admittedly, the provisional agreement between the European Parliament and Council on the European Climate Law that amends the EU's 2030 target to a net emissions reduction of at least 55% relative to 1990 does partially reflect the remedy sought in *Carvalho*.[203] Although the applicants seemed to be seeking a more ambitious target of a 55-60% reduction in *absolute* GHG emissions rather than a 55-60% reduction in *net* GHG emissions. It is certainly arguable that the *Carvalho* case applied pressure on the EU to raise its ambition, even if the proceedings were formally unsuccessful. However, wider access to justice issues remain, and are likely to come into sharper focus in coming years as the at least 55% reduction in net emissions by 2030 is incompatible with the +1.5°C guardrail of the Paris Agreement and will thus fail to contribute adequately towards preventing dangerous climate change.[204] But worryingly, if the CJEU and EU legislature continue on this trajectory – by refusing to re-examine the *Plaumann* jurisprudence in light of the climate crisis or widen access to justice under the Aarhus Regulation – virtually no one will be in a position to challenge the compatibility of these 2030

[200] Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:197, [60], [62].
[201] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462; Case C-583/11 *P Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625. See also: Lena Hornkohl, 'The CJEU dismissed the People's Climate Case as inadmissible: the limits of Plaumann is Plaumann' (europeanlawblog.eu, 6 April 2021).
[202] ACCC/M/2017/3 European Union [37].
[203] Council of the European Union, 'European climate law: Council and Parliament reach provisional agreement' (Press release 5 May 2021).
[204] Carbon Action Tracker, *'EU27'* (*Climate Action Tracker*, December 2020) https://climateactiontracker.org/countries/eu/ accessed: 15 April 2021; Climate Analytics, 'EU 2030 emissions reduction target needs to be brought into line with the Paris Agreement 1.5°C limit' (*Climate Analytics*, December 2020) https://climateanalytics.org/publications/2020/eu-2030-emissions-reduction-target-needs-to-be-brought-into-line-with-the-paris-agreement-15c-limit/ accessed: 15 April 2021.

targets with higher ranking norms. The present approach results in a 'perverse effect' [205] where the more serious the harm, and the more people whose rights are adversely affected, the less judicial supervision there is available at EU level. Meaningful accountability for the consequences of failing to set targets in line with the Paris Agreement temperature goals is likely to become increasingly important for the millions of victims of climate *in*justices. In the meantime, there is little doubt that the EU's standing rules for direct challenges before the CJEU *do* cause an excessive burden, and *do* significantly restrict, and effectively bar access to justice for NGOs and individuals, contrary to Article 9(2) and 9(3) of the Aarhus Convention.

The recently amended Aarhus Regulation still does not bring the EU institutions into full compliance with the Convention and its wider purposes. The newly introduced Article 11 (1) states that for a member of the public to have standing, they would need to demonstrate an impairment of their rights caused by the alleged contravention of Union environmental law *and* that they are directly affected by such impairment in comparison with the public at large; or a sufficient public interest and that the request is supported by at least 4000 members of the public residing or established in at least 5 member states, with at least 250 members of the public residing or established in each of those member states.[206] Additionally, a member of the public needs to be represented by an NGO or a lawyer to be entitled to request an internal review of administrative acts.[207] Recital 18 indicates that "an impairment of rights" may include "an unjustified restriction or obstacle" to the exercise of rights.[208] Recital 19 suggests that the CJEU should not apply its *Plaumann* jurisprudence when interpreting the "directly affected" criterion and that it should instead be understood as an "imminent threat" to the individual's "health or safety or a prejudice to a right to which they are entitled pursuant to Union legislation".[209]Whilst the side-lining of the *Plaumann* interpretation is to be welcomed, the newly introduced conditions are more exacting than the criteria laid down in Articles 9(2) and 9(3) and jar with the stewardship and legal accountability purposes underpinning the Convention.

[205] Gerd Winter, "Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation" (2020) 9 Transnational Environmental Law 137, 158.
[206] Article 11(1) of the Aarhus Regulation. This provision will not take effect until 18 months after the entry into force of the amendments. For discussion see: Hough (n 87).
[207] Article 11(1)(b) of the amended Aarhus Regulation (n 88).
[208] ibid. Recital 18.
[209] ibid. Recital 19.

The public interest standing criteria is cumbersome and is likely to make it difficult for the core victims of climate injustices to organise themselves to access the General Court or CJEU. The EU's failure to respect the ACCC's findings and bring its *acquis* into full compliance with the Convention, seriously undermines the authority and effectiveness of the ACCC, which has been key to the successful implementation of the Aarhus Convention. The EU's persistent non-compliance creates a dangerous precedent that could legitimize the actions of other State Parties if they renege on their access to justice obligations in future.[210] These developments have potential to put paid to a purposive approach to the Convention and to the emergence of the sort of inclusive standing rules needed to strengthen legal protection for the core victims of climate injustices.

5. Conclusion

Standing rules frequently pose a major hurdle in systemic mitigation cases. The net result of restrictive standing rules is that the core victims of the climate crisis – those living in poverty; older persons; disabled persons; future generations of humans; non-human animals and living ecosystems – are denied any kind of legal protection from climate harms. Broadening standing rules is unlikely to fully overthrow the anthropocentricity of Western legal thought, but it could put us on the pathway to more radical reconfigurations[211] of law's person by heightening our awareness of the injustices of anthropocentric, exclusionary, and hierarchical legal thinking. This article has shown that developing inclusive standing rules for systemic mitigation cases does not require European domestic or regional courts to stretch existing standing rules to breaking point but instead to engage seriously with the existing access to justice obligations and wider purposes of the Aarhus Convention.

Unlike the Dutch courts in *Urgenda*, the Irish Supreme Court and the CJEU have not adopted an inclusive approach to standing in systemic mitigation cases that is sensitive to the realities of climate change. This is so notwithstanding the firm legal basis for adopting inclusive approaches to standing under the Aarhus Convention. The approach to standing of the Dutch courts in *Urgenda* facilitated wide access to justice and could provide a template for standing

[210] For example, the Irish government has recently announced that it is thinking of increasing the financial risk for those challenge planning decisions by judicial review. See: Colm Keena, 'Bigger Cash Risk Proposed for Challenges to Planning Decisions" (*Irish Times*, 5 July 2021)

[211] For a discussion of such radical reconfigurations see: Sam Adelman, 'A Legal Paradigm Shift Towards Climate Justice in the Anthropocene" (2021) 11(1) Oñati Socio-Legal Series 44, 55-59 and Anna Grear "Towards a New Horizon: in Search of a Renewing Socio-Juridical Imaginary" (2013) 3(5) Oñati Socio-Legal Series 966, 981-985.

rules that are suitable for realising the environmental stewardship and accountability purposes of the Aarhus Convention. It is imperative that the Irish superior courts re-evaluate their position on standing in systemic mitigation cases to bring what are just "rules of practice" in line with the access to justice provisions and wider aims of the Aarhus Convention. The EU legislature has an unprecedented opportunity to lead through a purposive implementation of the Aarhus Convention. The co-legislators could have made the European legal order a more inclusive forum for vindicating the interests of the core victims of climate injustices. However, for the Aarhus Regulation to meaningfully support public interest environmental litigation, like systemic mitigation cases, the excessive hurdles for accessing the General Court and the CJEU must be removed and the environmental rights, stewardship and accountability purposes that form the bedrock of the Aarhus Convention should be carefully integrated. A purposive understanding of the Aarhus Convention is clearly an important piece of the puzzle for reconciling standing rules with the urgency and complexity of the climate crisis, and it is important that State parties and the EU come to appreciate this sooner rather than later.

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