Articles

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Cost Recovery of Preventive and Remedial Measures against Environmental Damage from the Polluter through Tort Law: European Spill Over, Troubled National Waters?

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Abstract: When it comes to environmental damage, a basic tenet is that the polluter should pay. Nonetheless, public authorities regularly incur clean-up costs. Environmental damage often transcends the individual polluter, affecting a plurality of personal and/or public goods. Its diffuse extent and complex nature make environmental protection a collective interest. Thus, it comes as no surprise that public authorities can be legally obliged to take preventive and remedial measures against environmental damage. However, when public authorities act on such a legal obligation, the question arises: whose burden are the costs of the measures taken? The emergence of the polluter pays principle indicates a preference to allocate the costs to those who elicit the legal obligation.

What role has tort law to play in this regard? Even though it is certain that public authorities are not exempt from tortious liability themselves, doubts exist whether they can claim in tort as wronged parties. Public authorities represent society and embody the public interest. Tort law, however, seems to mainly focus on private interests. Nevertheless, the Belgian transposition of the European Environmental Liability Directive, which obliges the polluter to pay for the prevention and remedial measures, allows for a claim in tort. This contribution inquires whether such a claim allows for the recovery of all costs mentioned in the directive, even general expenses. From a comparative law perspective it examines how the polluter pays principle, advocated for on the international legal scene, is to be imbedded in national tort law. In particular, it examines whether national tort law acts as a straitjacket for the principle, or whether the principle might, conversely, serve as a crowbar to break open this field of law to allow compensation for harms

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that traditionally would not be eligible for damages. It finds the principle has a harmonising influence but is not absolute.

I Introduction

The European Environmental Liability Directive (ELD) conveys a clear message: the polluter must bear the costs of all necessary preventive and/or remedial measures taken against environmental damage or the threat thereof.[1] Together with the proliferation of (strict) environmental liability regimes, the polluter pays principle (PPP) indicates that modern society, in which technological progress has increased the risk of environmental damage, wishes to avoid at all costs that it ultimately picks up the check of pollution.[2] From an equity standpoint it would be unsatisfactory that those who did not contribute to the pollution should be financially responsible for it.[3] Therefore, whenever public authorities[4] are forced to take remedial or preventive measures against environmental damage, the ELD obliges them to recover the expenditures of those measures from the polluter.[5]

Unlike its title suggests, the ELD does not establish a civil liability regime. Although the directive uses language that is typical to civil liability it is, in essence, an administrative regime.[6] The directive is firmly rooted in the realm of public law, excluding claims of private parties and barring harms such as perso-

1 Recitals 2 and 18 *juncto* arts 1 and 8 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage [2004] OJ L 143/56.

2 The emergence of strict liability regimes, which do not require the finding of a fault, attest to a change in societal mentality concerning the allocation of environmental loss. See *L Krämer*/*E Orlando*, Principles of Environmental Law (2018) 273 f. Compare with *M Wilde*, Civil Liability for Environmental Damage. Comparative Analysis of Law and Policy in Europe and the US (2013) 158.

3 Council recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters [1975] OJ L 194/1, § 1; *A Bleeker*, Does the Polluter Pay? The Polluter-pays Principle in the Case Law of the European Court of Justice (2009) 18 European Energy and Environmental Law Review (EEELR) 289, 291.

4 In this contribution the term 'public authority' is understood broadly as each body that, by means of collective financing through tax revenue, is enabled by society to carry out the legal obligations for which it has been established As the emphasis in this definition lies on the execution of those legal obligations, the definition is of a functional nature and is thus not limited to what is sometimes called 'core' public authorities. The latter are public authorities by virtue of their very nature.

5 Art 8(2) ELD.

6 *G Van Calster*/*L Reins*, The ELD's Background, in: L Bergkamp/B Goldsmith (eds), The EU Environmental Liability Directive (2013) 9 f, § 1.02; *E Brans*, Fundamentals of Liability for Environ-

nal injury, property damage and pure economic loss from its scope.[7] The advantage of an administrative law approach is that the ELD shifts the primary responsibility for preventive and remedial measures to the operator.[8] Damage can be swiftly mitigated by allowing public authorities to force the polluter to take the required measures, or to take matters into their own hands, immediately after the occurrence of damage, rather than at the whim of the polluter or only after possibly lengthy judicial procedures.

The ELD is construed as public, not private law. Nonetheless, the Belgian, more specifically the Flemish, implementation of the directive does not limit itself to that intention. It contains an optional procedure for cost recovery. Flemish public authorities can choose an administrative procedure by issuing a writ of enforcement (*dwangbevel*), but they may also claim in tort on the basis of articles 1382 and following of the Belgian Civil Code (BCC) concerning non-contractual liability arising out of damage caused to another.[9] Neither procedure is given preference, nor are their specifics explained in much detail. This dual implementation raises no eyebrows from a European angle as directives are only binding to the result to be achieved and leave to the national authorities the choice of form and methods to do so.[10]

However, the private law approach does beg some interesting legal questions. How neatly does the ELD, inspired by public law, fit the framework of a private law tort suit? Does tort law act as a straitjacket,[11] or, conversely, does the ELD

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mental Harm under the ELD, in: L Bergkamp/B Goldsmith (eds), The EU Environmental Liability Directive (2013) 37 f, § 2.25.

7 Recitals 11 and 14 *juncto* art 3(3) ELD. See also the explanatory memorandum to the proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage COM (2002) 17 final OJ C 151E/132, under heading 5, for the twofold justification for this omission of the European Commission.

8 *Brans* (fn 6) 38, § 2.26.

9 Articles 15.8.13 and 15.8.16 decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid, *Belgisch Staatsblad (BS)* 3 June 1995, p. 15.971 (decree of 5 April 1995 laying down general provisions on environmental policy) *juncto* arts 1382–1383 and 2277*ter* Burgerlijk Wetboek van 21 maart 1804, *published* 3 September 1807 (Civil Code).

10 Article 288 Treaty on the Functioning of the European Union [2012] OJ C 326/47.

11 It can be noted that tort law seems to mainly focus on the protection of private interests. Also, environmental damage often transcends the individual polluter, affecting a plurality of personal and/or public goods. Its diffuse extent and complex nature make environmental protection a collective interest. These characteristics mean that proving the prerequisites of tortious liability can be challenging (eg proof of causation). Furthermore, the PPP embodies aims of the general interest. This raises the question whether private tort law imposes itself improperly as an instrument of enforcement of the principle, instead of public law (see *Wilde* (fn 2) 158 *juncto* 221 ff; see also *L Bergkamp*, De vervuiler betaalt dubbel (1998) 171). The focus of tort law on private interests deserves

serve as a crowbar to break open tort law to allow compensation for harms that traditionally would not be eligible for damages? A recent Belgian line of case law that has found its way up to the Court of Cassation – the highest judicial court – twice already illustrates the interesting interaction of the ELD with national tort law.[12] A pesticide company incidentally, yet wrongfully in breach of its emission permit, leaks a highly toxic chemical into a river. The substance damages the water and the wildlife it contains. It also poses a serious threat to public health. Since it is the duty of public authorities to protect the environment on their territory and to safeguard the health of their citizens, they are legally obliged to take preventive and remedial measures against the leak. Therefore, the public authorities quickly dam the spreading of the toxins. Afterwards, they monitor the quality of the water by regularly taking samples. They also task forest rangers with guarding the riverbanks, even outside normal working hours, to prevent swimmers and fishers from coming into contact with contaminated water. The public authorities wish to recover the costs of all those measures on the basis of a statute that explicitly contains the PPP. That statute is the implementation of the Water Framework Directive (WFD) [13], which is related to the ELD as the latter also covers damage to waters that fall under the former's scope.[14] Relying upon the cost allocation to the polluter in that statute, the public authorities initiate a claim in tort on the basis of articles 1382 and following BBC.

To fully grasp the issues that come up in the case, a brief intermezzo is required about the possibility of cost recovery by public authorities through tort law in Belgium. After a long and confusing evolution of the matter, the Court of Cassation

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some nuance. In Belgium, legal entities (eg NGO's or consumer associations) may claim in tort as the representatives of a collective 'general' interest (see GwH 21 January 2016, no 7/2016; art 17 Gerechtelijk Wetboek van 10 oktober 1967, *BS* 31 oktober 1967, 11.360 (Belgian Judicial Code)). Still, it is required that the 'general' interest on which the entity bases its claim is of a particular nature that is separate from the 'truly general' general interest as promoted by public authorities (see *M Denef/J Theunis*, Optreden in rechte van een VZW, in: J Christiaens/M Denef/K Geens (eds), De VZW (2015) 339 f, § 28; *W Buelens*, De vergoeding van de morele schade van een vereniging door de aantasting van een (niet-toegeëigend) milieubestanddeel: ook door middel van het herstel in natura van het milieu? (Annotation of Antwerp 12 October 2016), (2018) 8 Revue Générale de Droit Civil (RGDC) 444 f § 5).

12 In chronological order: Civ Liège 7 September 2011, unpublished; Liège 24 April 2013, unpublished; Cass 7 May 2015, C.14.0011; Mons 30 November 2016, (2017) Revue générale des assurances et des responsabilités (RGAR) 15396; Cass 1 June 2018, C.17.0465.F.

13 Article 6, 5° decreet van 18 juli 2003 betreffende het integraal waterbeleid, *BS* 14 November 2003, 55.038 (decree of 18 July 2003 concerning the integrated water policy); Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for community action in the field of water policy [2000] OJ L 327/1.

14 Article 2(5) ELD.

nowadays holds that expenses incurred in the fulfilment of a legal obligation can be eligible for compensation.[15] When ruling over a claim for cost recovery the judge must interpret the statute that contains the legal obligation and determine whether it follows from the content or purport of the statute that the expenditure should be definitively borne by the public authority itself.[16] If the answer is in the affirmative, the public authority incurs no damage. Conversely, if it is clear that the public authority can, or even should, recover the costs of the expenditure from someone else, those costs form a head of damage. In essence, judges need to search for the intended cost allocation of a legal obligation between society and the individual.

Back to the case under discussion, the defence of the polluting pesticide company against the cost recovery of the public authorities through a claim in tort is that the PPP is too vague to determine the cost allocation. Furthermore, it argues that even if the principle could serve that purpose, tort law allows only for the recovery of public expenditures that are made specifically because of the behaviour of the wrongdoer (that is, 'extra-ordinary costs'), because only those costs meet the requirements of damage and causality. Other costs that would have been incurred even in the absence of any wrongful behaviour, are non-eligible for damages (that is, 'ordinary costs') (paragraph III.A below explains in more detail why this would be the case but, in short. ordinary costs do not meet the but for-test which is the sole test of causality in Belgian tort law). Therefore, the pesticide company argues it cannot be held to compensate all costs incurred by the public authorities (for example, it dismisses compensation for wages paid to the forest rangers during normal working hours). The latest judgment of the lower courts rendered by the court of appeal of Mons (*Bergen*) on 30 November 2016 disagrees on the vagueness of the

15 The meaning of the existence of a legal obligation for a claim in tort casts a long shadow on Belgian jurisprudence. In the past it has been defended that the damage occurred by public authorities is not the result of the behaviour of the wrongdoer, but of the obligation in and of itself. Consequently, the legal obligation as an 'independent legal cause' (*zelfstandige juridische oorzaak*/*cause juridique propre*) breaks the causal link (rather, there exists no causal link). It has also been argued that the public authorities do not suffer any damage insofar as their obligation is not secondary to a primary obligation of the wrongdoer. The idea underling this jurisprudence is that by setting up public bodies, assigning them tasks and granting them certain powers and taxpayers' money to fulfil those task, the legislature has chosen to place all the measures those bodies have to take into society's sphere of risk. The people as a whole absorb the costs of the services rendered. In the United States this train of thought is succinctly formulated by one of the seminal cases on the American 'free public services-doctrine', *City of Bridgeton v BP Oil, Inc*, 369 A.2d 49, 146 N.J. Super. 169: 'It cannot be a tort for a government to govern'. Naturally, this of course begs the question: when exactly does a government 'govern'? See for an overview and discussion of Belgian law on the matter *C Borucki*, Kostenverhaal door de gemeente: de veiligheidsverplichting uit artikel 135, § 2 Nieuwe Gemeentewet en de leer van de juridisch zelfstandige oorzaak, (2018) 1 RGDC 22, 22 ff.

16 See for a recent example Cass 24 February 2017, C.16.0309.N.

PPP, yet concurs with the polluter that compensation is solely possible for the extra-ordinary costs.[17] Next, the Court of Cassation also dismisses the alleged vagueness of the PPP by considering that it is clear from the statutory article containing the PPP that the costs of measures taken by public authorities should not be borne definitively by them. In addition, the Court quashes the lower judgment, because it does not grant damages for the ordinary costs.[18]

From a national perspective, this judgment of the Court of Cassation raises the question whether it is in accordance with the core concepts of tortious liability in Belgian law. From a supranational perspective, art 2(16) ELD draws attention. This article mentions that the costs to be borne by the polluter are all costs which are justified by the need to ensure the proper and effective implementation of the directive. That includes all administrative legal and enforcement costs, the costs of data collection, monitoring and supervision and other general costs. The Flemish legislature opposes general costs to the 'actual' costs of the preventive and remedial measures.[19] This extensive definition of costs comprises expenses such as building costs or wage costs.[20] This raises the question whether Belgian tort law should allow for cost recovery of ordinary costs even if this would mean breaking with current legal practice (which would be the case if the defence by the polluting pesticide company holds true).

This contribution explores how the decision of the Court of Cassation is to be understood and examines how European legislation might stretch the prerequisites of national tort law. It does so by focusing on the question of whether the polluter is in the right. This focus allows for a structure in three parts. The first two sections explore whether the PPP is indeed too vague and, if so, with regards to what exactly. The first section treats the PPP as a means to determine civil liability itself. The following section delves into the assessment of the allocation of loss and accompanying cost recovery based on the principle. Finally, the third section examines to what extent tort law limits the cost recovery of ordinary public ex-

17 Mons 30 November 2016, (2017) *RGAR* 15396.

18 Cass 1 June 2018, C.17.0465.F.

19 Ontwerp van decreet tot aanvulling van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid met een titel XV Milieuschade, tot omzetting van de richtlijn 2004/35/EG van het Europees Parlement en de Raad van 21 april 2004 betreffende milieuaansprakelijkheid met betrekking tot het voorkomen en herstellen van milieuschade, *Parlementaire Stukken (ParlSt)* Vl.Parl. 2006–07, no 1252–1, 22 (draft decree supplementing the decree of 5 April 1995 laying down general provisions on environmental policy with a Title XV on environmental damage, transposing the ELD).

20 *P De Smedt*, Het plichten- en rechtenkader van de exploitant in de implementatiewetgeving van Richtlijn 2004/35. Sluitstuk van het 'vervuiler betaalt'-beginsel?, in: H Bocken/R Slabbinck (eds), Omzetting en uitvoering van de richtlijn milieuschade (2008) 150, § 31.

penditures. From a comparative law perspective, the contribution researches the harmonising influence of the PPP on national tort law.

II Polluter pays principle as a ground for civil liability

Before this contribution digs deeper into the specifics of tort law, the PPP calls for a clarification of its content. The origin of the principle, as an explicit concept,[21] can be traced back to the recommendations of the International Organisation for Economic Cooperation and Development.[22] It was developed as an economic principle to protect international free trade back in 1972, when environmental awareness was on the rise. Originally, it meant that polluting goods and services may not profit from state aid, which could disrupt the world market.[23] It urged states to ensure that polluters themselves – and only them – invested in more environmental friendly techniques.[24] Thus, a first aspect of the PPP is its distributive quality. It leads to the internalisation of the negative economic externalities[25] of a good or service in terms of its environmental impact.[26] The price of each good or service

21 Several authors point out that the ratio of the polluter principle has been implicitly present in legal thinking for quite some time and can even be found in Plato's dialogues (Nomoi, 8,845(e)). See among others *B Luppi*/*F Parisi*/*S Rajagopalan*, The Rise and Fall of the Polluter-pays Principle in Developing Countries, (2012) 32 International Review of Law and Economics (IRLE) 135, 135, fn 1. An international example of this legal thinking preceding the guiding principles of the OECD can be found in the *Trail Smelter Arbitration*, a trans-boundary pollution case involving the states of Canada and the United States. It is argued that the arbitration tribunal was the first to formulate the PPP as a general principle of international law, see Trail Smelter Case (United States, Canada), 11 March 1941, (1941) 35 American Journal of International Law (AJIL) 716 f; *S Gaines*, The Polluter-Pays Principle: From Economic Equity to Environmental Ethos, (1991) 26 Texas International Law Journal (TILJ) 463, 468.

22 First mentioned in OECD, Guiding Principles concerning International Economic Aspects of Environmental Policies, adopted on 26 May 1972, C (72) 128.

23 *O Vicha*, The Polluter-pays Principle in OECD Recommendations and its Application in International and EC/EU law (2011) 2 Czech Yearbook of Public & Private International Law (CYIL) 57, 60.

24 *S Bell*/*D McGillivray*/*O Pedersen*, Environmental law (2013) 231.

25 Externalities are the side effects of economic activities, where the market mechanism falls short of matching supply and demand. This mismatch can lead to a difference between the social cost and the cost for the individual buying a good or service. See famously *A Pigou*, The Economics of Welfare (1960) 183, § 10.

26 *D Shelton*, Equity, in: D Bodansky/J Brunnée/E Hey (eds), The Oxford Handbook of International Environmental Law (2007) 656; *N de Sadeleer*, The Polluter-pays Principle in EU Law – Bold Case Law and Poor Harmonisation, in: I Backer/O Fauchald/C Voigt (eds), Pro natura : festskrift til

should reflect the costs of all measures necessary for the protection of the environment so that polluters can invest in that protection themselves and/or so that part of the profit can flow to the public authorities responsible for that protection. The latter can be done by way of an environmental tax, for example.[27]

Since its emergence the PPP has evolved into a legal principle that wishes to prevent and combat environmental damage.[28] It has found its way into the realm of law and is now firmly rooted in all layers of the multi-levelled legal order as a basic tenet of environmental policy.[29] It has done so to the extent that the Interna-

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Hans Christian Bugge (2012) 405 and 408 f; *P Dupuy/J Vinuales*, International Environmental Law (2015) 71 f; *D Langlet/S Mahmoudi*, EU Environmental Law and Policy (2016) 55; *G Van Calster/L Reins*, EU Environmental Law (2017) 37.

27 An environmental tax is a levy on environmentally harmful goods or services of which the main purpose is to finance the environmental policy of public authorities. Such a levy passes on (part of) the public expenditures for environmental investments, such as waste processing installations, to the polluter who creates (in part) the need for them, see *K Bonte*, Milieuheffingen & -subsidies (2012) 5. In order to prevent the environmental tax from constituting a disguised form of state aid, the European Court of Justice has ruled that Member States are, in principle, not allowed to subject certain goods or services to an environmental tax and at the same time exempt other goods or services from that tax that have a comparable environmental impact, see ECJ 22 December 2008, C-487/06, ECLI:EU:C:2008:757, § 86. It is worth mentioning that, according to the Court of Cassation, it is not problematic that the external cost is ultimately borne by the final consumer, even though an environmental tax primarily targets the producer, see Cass 20 October 2006, F.05.0075.N; Cass 21 December 2017, F.16.0096.N. This is in line with the logic of the PPP as the final consumer can be considered to be contributing to a polluting act and, therefore, a polluter. The OECD speaks of a 'user pays' principle as a variant of the PPP.

28 See *in extenso N de Sadeleer*, Environmental Principles. From Political Slogans to Legal Rules (2002) 33 ff. See also *Vicha* (fn 23) (2011) CYIL 57, 57 ff on the evolution of the PPP in the recommendations of the OECD.

29 International: eg, principle 16 UN Rio Declaration, A/CONF.151/26. European Union: The PPP was integrated into the constituent treaties of the EU by the Single European Act [1987] OJ L 169/1 in 1986, but already featured in the EU's first environmental action programme for 1973–76. As part of article 191 TFEU it is nowadays a cornerstone of European environmental policy. A number of specific legislative instruments reflect the PPP in a more concrete manner, such as the ELD.
Belgium: Belgian environmental policy is structured in the same way as the European level. In the federal state of Belgium, a number of general legislative acts contain the environmental policy of the member states, including the PPP, which are exemplified by specific legislation. See eg for Flanders the general decree on environmental policy mentioned in fn 9 and the specific decree concerning water policy in fn 13. Other: The International Law Commission provided in 2006 already an overview of other national manifestations of the PPP, see ILC, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries (2006) II-2 Yearbook of the International Law Commission (YILC) 59, 74, § 13, fn 401. See also *Wilde* (fn 2) 180. In February 2020 the International Bar Association issued a 'Climate Change Justice and Human Rights Task Force Report' called the 'Model Statute for Proceedings Challenging Government Failure to Act on Climate Change', which mentions the PPP in art 1(i) as

tional Law Commission considers the principle essential for the prompt and adequate compensation for harm as result of accidents involving a hazardous activity.[30] Some treaties even brand the PPP a general principle of international environmental law,[31] although its status as a rule of international customary law is disputed as its binding appearances are relatively regional or limited to a specific context.[32] Over the years, the focus of the principle has shifted from its distributive to its curative aspect. This second aspect relates to the public measures that aim to prevent and remedy environmental damage as well as the civil liability that may result from the PPP.[33] For this contribution it is of interest to what extent those two sub aspects dovetail with one another.

The existence of the PPP is generally undisputed. Nonetheless, its broad formulation makes its practical application more contentious. The principle itself does not clarify who the polluter is, which pollution the polluter should pay for

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one of the sustainable development principles. General: Miligan and Macrory call the principle an 'ubiquitous' feature of environmental laws, policies and decisions at the supranational and national level, see *B Miligan/R Macrory*, The History and Evolution of Legal Principles concerning the Environment, in: L Krämer/E Orlando (eds), Principles of Environmental Law (2018) 30. Jurisprudence: It must be noted that jurisprudence relies less frequently on the principle as such when compared to, for example, the precautionary principle, yet the PPP's omnipresence manifests itself here too. Famously, the Indian Supreme Court noted in 1996 already that the PPP had become a firmly entrenched part of the environmental law of the country, see *Vellore Citizen's Welfare Forum v Union of India*, [1996] AIR SC 2718. The Supreme Court of Canada has done the same, see *Imperial Oil Ltd v Quebec (Minister of the Environment)*, [2003] 2 SCR. 624, 2003 SCC 58, § 23; *Orphan Well Association v Grant Thornton Ltd*., [2019] SCC 5, § 29. In a 2017 judgment, the British Privy Council points out that the PPP is 'firmly established as a basic principle of international and domestic environmental laws', see *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago)* [2017] UKPC 37, § 2. In Belgium, the Court of Cassation, less outspoken than the courts mentioned before, only mentions the principle when the legislative act to which the case pertains, contains it explicitly, see eg Cass 1 February 1996, (1996) Arresten Cassatie (Arr Cass) 67. The Belgian Constitutional Court holds that taxation based on the principle is possible when its underlying distinction is justified. The restriction of pollution is a legitimate aim in that sense, see eg GwH 20 September 2006, case 143/2006, § 4.2 ff.

30 ILC (fn 29) (2006) II-2 YILC 59, 61, § 2.

31 Convention on the Transboundary Effects of Industrial Accidents, adopted 17 March 1992; Protocol on Preparedness, Response, and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol, IMO, London), adopted 15 March 2000; Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, adopted 21 May 2003.

32 See recently *P Sands/J Peel*, Principles of International Environmental Law (2018) 240. Contrary, see *Trail Smelter Case* (fn 21); *Legality of the Threat or the Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226 (July 8), dissenting opinion of Judge Weeramantry.

33 *de Sadeleer* (fn 26) 412 and the references mentioned therein.

nor how much is to be paid.[34] Therefore, the German view on the alleged vagueness of the principle is resolute. It is chiefly an economic and not a legal principle.[35] It is not, of itself, functional to determine civil liability, meaning to determine when someone is liable, nor to assess the allocation of loss, meaning to determine what losses a liable person should compensate. To those ends it requires normative, legal concretisation first.[36] Presumably it is this general formulation of the PPP that substantiates the defence of the polluter in the Belgian case.

The court of appeal of Mons dismisses the polluter's defence. It states that the PPP is part of 'supranational, ecological public policy' and cannot be branded too vague without gainsaying that fact.[37] It must be agreed with the court that there exists such a thing as an ecologic public policy. The concept of public policy or *ordre public* concerns the body of principles that underpins a legal system, which is crucial for the functioning of human society. It addresses the values that tie a nation together and reflects the essential interests of the state and the legal foundations on which the moral and social order rest.[38] Importantly, public policy is a fluctuating concept, given life by the *Zeitgeist*. Its ecological pillar is the set of rules, of which the need is accepted and recognised by society, to protect the environmental standards that are essential to allow a good functioning of society and to shelter the environment in order to preserve all ecological processes that

34 *Bleeker* (fn 3) 289, 289 and 293; *de Sadeleer* (fn 26) 409 ff and 412 ff; *L Krämer*, AEUV Artikel 191 (ex-Artikel 174 EGV), in: H Von Der Groeben/J Schwarze/A Hatje (eds), Europäisches Unionsrecht (2015) § 55; *Langlet/Mahmoudi* (fn 26) 56; *A Epiney*, AEUV Art. 191, in: M Beckmann/W Durner/T Mann/M Röckinghausen (eds), Landmann/Rohmer – Umweltrecht (2012) § 39.

35 *Krämer* (fn 34) § 55. See also *M Nettesheim*, AEUV Art. 191, in: E Grabitz/M Hilf/E Nettesheim (eds), Das Recht der Europäischen Union (2011) § 110. Contrary, see *W Kahl*, AEUV Art. 191 (ex-Art. 174 EGV), in: R Streinz (ed), EUV/AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europaïschen Union (2012) § 97.

36 *J Scherer/F Heselhaus*, Umweltrecht, in: M Dauses/M Ludwigs (eds), Handbuch des EU-Wirtschaftsrechts (2010) § 46; *Nettesheim* (fn 35) § 110; *Epiney* (fn 34) § 39; *P-C Storm*, Umweltrecht (2015) § 27; *W Durner*, Umweltvölkerrecht, in: M Beckmann/W Durner/T Mann/M Röckinghausen (eds), Landmann/Rohmer – Umweltrecht (2015) § 67 with reference to BVerwG Münster 4 June 1982, 4 C 28/79, (1983) Neue Zeitschrift für Verwaltungsrecht (NVwZ) 292; *M Kloepfer*, Umweltrecht (2016) 197, § 110. See also for a French denial that the principle in and of itself has legal effects, *X Prétot*, Le principe pollueur-payeur fait-il obstacle à la gratuité des interventions du service d'incendie et de secours? (Annotation of CAA Bordeaux 29 April 2016), (2016) La semaine juridique-Edition adminstrations et collectivités territoriales 2249–1, 2249–4.

37 Mons 30 November 2016, (2017) *RGAR* 15396.

38 See Cass 9 December 1948, (1948) I Pasicrisie belge (Pas) 699; Cass 29 April 2011, C.10.0183.N; *H Capitant*, Introduction à l'étude du droit civil (1898) 26 f; *H De Page*, Traité élémentaire de droit civile belge, I, Les personnes – La famille (1962) 111, § 91.

enable life, the fundamental seed that sprouts all human rights.[39] Environmental legislation aims to enforce respect for the 'laws' of nature that uphold the viability of ecosystems to which mankind belongs.[40] The growth of environmental declarations at the international level and environmental legislation at the national level indicate that legal thinking is evolving from an anthropocentric to a more ecocentric vision.[41] With that evolution in mind, the concept of the ecological public policy means, in essence, that awareness of the human impact on the environment has become part of society's (legal) mores. The PPP is an abundant manifestation thereof.

That abundance is also reflected in international treaties[42] and national legislation[43] that translate the PPP in terms of civil liability, often strict liabili-

39 France: *M-C Vincent-legoux*, L'ordre public écologique en droit interne, in: M Boutelet/J-C Fritz (eds), L'orde public écologique (2005) 83 ff; *M Prieur*, Droit de l'environnement (2011) 68 f, § 64; *N Belaïdi*, Identité et perspectives d'un ordre public écologique (2014) 68 Droit et Cultures (D&C) § 3; *J Hauser/J-J Lemouland*, Ordre public et bonnes mœurs, Répertoire de droit civil (2015) § 51. Belgium: *B Jadot*, Ordre public ecologique et droit acquis (1983) 7 Administration Publique Trimestriel (APT) 22, 22 ff, § 1; *J-F Neuray*, Droit de l'environnement (2001) 58; *C Vandewal*, 'Ik droom van groene weiden'. Overwegingen omtrent het strafrechtelijk beleid inzake het leefmilieu (2003) Tijdschrift voor Milieurecht (TMR) 548, 555. General: see Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 7 February 2018, § 47 *juncto* §§ 108 ff; Corte Suprema de Justicia de la Républica de Colombia 5 April 2018, STC4360–2018. Both Courts consider that the right to a healthy living environment is undeniably linked with fundamental human rights. All human rights depend on the protection of the right to life, which can only be guaranteed in a healthy living environment.

40 *Prieur* (fn 39) 69, § 64. See also *B Drobenko*, Environnement, Répertoire de la responsabilité de la puissance publique (2016) § 4.

41 See also *J-C Fritz*, Genèse et prospective des préoccupations écologiques, in: M Boutelet/J-C Fritz (eds), L'orde public écologique (2005) 21 ff; *S Borràs*, New Transitions from Human Rights to the Environment to the Rights of Nature, (2016) 5 Transnational Environmental Law (TEL) 113, 113 ff.

42 International Convention of 9 November 1969 on Civil Liability for Oil Pollution Damage (CLC). This convention precedes the explicit PPP of the OECD. In all likelihood, this explains why the convention has no explicit reference to the principle. It does not remain silent, however. The preamble to the convention shows a conviction that victims of oil pollution should not bear the damage themselves, which corresponds with the PPP. See *J Adshead*, The Application and Development of the Polluter-Pays Principle across Jurisdictions in Liability for Marine Oil Pollution: The Tales of the 'Erika' and the 'Prestige', (2018) Journal of Environmental Law 1, 8; Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, adopted on 10 December 1999. Mention can also be made of the Lugano convention, which is a convention with a broad scope of application, but which has not entered into force because of a lack of ratifications, see Convention of 21 June 1993 on Civil Liability for Damage resulting from Activities Dangerous to the Environment , ETS No. 150.

43 See eg wet van 22 juli 1974 op de giftige afval, *BS* 1 March 1975, 2.365 (law concerning toxic waste). This law that holds the polluter liable for any damage resulting from toxic waste is based on the principle that 'he who is the primary cause of the pollution, and only he, has a duty to com-

ty.[44] Whenever such a specific treaty or national statute applies and is sufficiently precise regarding the requirements for liability, the PPP clearly acts as a ground for liability, that is, a justification for holding that the polluter is liable, and cannot be sidelined as too vague. In the case before the court of appeal of Mons such a specific regime applies too. Hence, the court need not refer to such a broad notion as public policy. It could have limited itself to referring to the articles implementing the WFD and ELD, which concretise the PPP. Even though the ELD principally concerns the question of cost recovery through public law, the directive could effectively serve as a (strict[45]) liability[46] regime even in private tort law. It is hard to imagine that tort law would reject an application of notions and language that the ELD has borrowed from it. Besides specific regimes, liability can also result from the breach of specific environmental norms that impose or prohibit certain behaviour and which (in)directly implement the general environmental principles.[47]

It is possible to argue that the PPP can give rise to liability, meaning that it justifies holding a polluter liable, even outside explicit mentions. The principle is not a general principle of law *sensu stricto*, that is, a formal principle of law, in Belgium, because it has not been recognised as such by the highest courts. Hence, in the absence of its articulation in a specific legal text, a violation of the principle cannot be invoked autonomously to argue a wrongful act or omission by the alleged wrongdoer. However, as a part of the ecological public policy it can be seen as a general principle of law *sensu lato*, that is a substantive principle of law. General principles of law as a substantive source of law are on the one end the foundations of a legal system. They contain the ethical, moral, philosophical and political views that are common in society and characterise it.[48] On the other

pensate for the damage caused by it' (author's translation), see memorie van toelichting bij de wet op de giftige afval, *Parl.St*. Kamer 1973–74, no 684–1, 4 (explanatory memorandum to the law concerning toxic waste).

44 The PPP then serves as a justification for liability, see *E Orlando*, Liability, in: L Krämer/E Orlando (eds), Principles of Environmental Law (2018) 274. See also *W Amos/I Miron*, Protecting Taxpayers and the Environment through Reform of Canada's Offshore Liability Regime (2013) 9 McGill Journal of Sustainable Development Law (MJSDL) 3, 12 and 14.

45 For damage caused by occupational activities mentioned in Annex III to the ELD, see art 3(1) a.

46 For damage caused by other occupational activities than those mentioned in Annex III to the ELD, see art 3(1) b.

47 For example, the objective of environmental permits is to protect both humans and the environment against unacceptable risks and nuisance caused by exploiting certain activities. This broad objective aims to contribute to the general objectives of environmental policy, so that the polluter pays principle plays at least latently, see *L Lavrysen*, Handboek milieurecht (2016) 423, § 274.

48 *J Gijsels*, 'Rechtsbeginselen' zijn nog geen recht, in: M Van Hoecke (ed), Algemene rechtsbeginselen (1991) 39; *A Lenaerts*, Fraus omnia corrumpit in het privaatrecht (2013) 71, § 82.

hand, they also act as mortar, which structures the rule of law. General principles *sensu lato* give substance to the legal order, fill in gaps and irregularities and can even correct, or 'level', the application of statutes without being part of legislation in a formal sense.[49] The PPP can fulfil this role.[50]

Referring back to the German view that the PPP must be concretised in order to have effect, it must be acknowledged this vantage point is not unfounded yet is in need of nuance. In those fields of law that contain a strict principle of legality, such as penal[51] or taxation[52] law, it is not precise enough without clarification by the legislature. This is not necessarily the case for tort law, which does not contain such a principle. A successful tort claim requires a fault, or equated legal fact, of one or more identifiable polluters, a concrete damage and a causal link between both. Those conditions can be filled in on the basis of broad notions, such as the general duty of care. General principles of law *sensu lato* can colour in that duty. The notions ecological public policy, legal principles *sensu lato* and general duty of care all share a common denominator: they refer to the social order and good morals of a society at a given time. After all, the general duty of care obliges all ordinary, normally prudent and reasonably forethoughtful persons to live by the rules of conduct that society considers essential and appropriate.[53] Consequently, the PPP can guide judges as a social compass when they concretise vague, general principles into a binding judgment between parties.[54]

49 *M Van Hoecke*, Algemene rechtsbeginselen als rechtsbron, in: M Van Hoecke (ed), Algemene rechtsbeginselen (1991) 15 ff and 22; *A Bossuyt*, 'Algemene rechtsbeginselen', (2002–03) Jaarverslag van het Hof van Cassatie van België 1593, § 3; *P Marchal*, Principes généraux du droit (2014) 34 ff, § 25–2 f.

50 *de Sadeleer* (fn 28) 258; *J Verschuuren*, Sustainable Development and the Nature of Environmental Legal Principles (2006) 9 Potchefstroom Electronic Law Journal (PELJ/PER) 1, 39. See also *A Waite*, The Quest for Environmental Law Equilibrium (2005) 7 Environmental Law Review (ELR) 34, 35 ff.

51 'Nullum crimen nulla poena sine lege', see eg art 15 International Covenant on Civil and Political Rights of 19 December 1966, *BS* 6 July 1983, 8.815; art 7 Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950 in Rome, *BS* 19 August 1955, p 5.029; arts 12(2) and 14 of the Belgian Constitution; art 2(1) Strafwetboek van 8 juni 1867, *BS* 9 June 1867, 3.133 (Belgian Penal Code).

52 'No taxation without representation', see eg arts 170 and 172 of the Belgian Constitution.

53 This is more evident in older definitions of the concept of fault, where the general duty of care is described, for example, as the general rules of 'civil cohabitation', see the definitions cited by *H Bocken*, Het aansprakelijkheidsrecht als sanctie tegen de verstoring van het leefmilieu (1979) 37, § 22. See also the same author at 59, § 59.

54 *Gijsels* (fn 48) 41. See also *G Wiarda*, Drie typen van rechtsvinding. Rechters als spreekbuis der wet, als wetsvertolkers en als 'goede mannen' oordelend naar billijkheid, in: X (ed), Een bundel

It must be noted that judges are obliged to rule in all cases that come before them, even if they only have vague standards at their disposal to weigh up the interests between the parties, lest there be denial of justice.[55] One might fear that allowing judges to rely on general principles, poses the risk of a *gouvernement de juges*. This is especially the case with principles such as the PPP that stem from a change in morality rather than the 'internal structure and coherence' of the legal system.[56] This fear is, however, unwarranted regarding the PPP, as judges can rely on its legal application in other cases by the legislature.[57] The principle would not appear out of the blue in judgments applying it.

The foregoing does not lead to the conclusion that all polluting behaviour is wrongful based on the general duty of care. The foreseeability of damage, in particular, can hinder liability.[58] Furthermore, the general PPP is vague in the sense that it itself gives little indication as to when pollution meets the threshold of wrongfulness. It does not delimit the concept of pollution. The economic side of the principle also explicitly covers legitimate pollution. More subtly, its legal side balances the need for security of a society with other societal interests, such as technical innovation, thus guarding over the 'optimal' level of pollution. In that regard it is not unimportant to realise that almost every form of human activity involves pollution.[59] Still, a judge can be of the opinion that the facts of a concrete

gedachten (1963) 138; *P Popelier*, Beginselen van behoorlijke wetgeving in de rechtspraak (1995) Tijdschrift voor privaatrecht (TPR) 1049, 1051, § 6.

55 *Wiarda* (fn 54) 143; *Bocken* (fn 53) 62, § 35.

56 *P Van Orshoven*, Non scripta, sed nata lex, in: M Van Hoecke (ed), Algemene rechtsbeginselen (1991) 76 f, § 14; *F Vanistendael*, Algemene rechtsbeginselen in het belastingsrecht, in: M Van Hoecke (ed), Algemene rechtsbeginselen (1991) 227, § 7.

57 *Van Orshoven* (fn 56) 78 f, § 16.

58 In particular, the application of the general duty of care on historical acts of pollution poses problems. The spirit of the times in which the pollution took place shapes that duty of care. Taking that factor into account can lead to the conclusion that the historic pollution is not wrongful, even though nowadays that would certainly be the case, see in detail *C Borucki*, Aansprakelijkheid van de bewaarder van de gebrekkige zaak bij verontreinigde gronden: wie maakt aan de saneringskosten definitief zijn handen vuil? (Annotation of Cass 22 February 2018) (2018) Milieu- en energierecht (MER) 173, 177 ff, §§ 15 f.

59 For example, shoe soles wear off while hiking in the woods, which causes minute parts of the material out of which they are made to end up in nature. However, it is unlikely that a legal system would consider the hiker to be liable and hold him or her liable to restore the damage caused. This form of pollution is unavoidable and at the same time it causes little, if any, actual damage. The hiker's behaviour does not warrant liability, because it does not harm interests worth protecting.

case justify liability on the basis of the principle. Increasing environmental awareness will make courts apply the general duty of care more stringently.[60]

In sum, notwithstanding that a breach of the PPP by itself does not automatically constitute wrongful behaviour, the principle can influence a violation of the general duty of care. Even though the PPP might be vague, and though it might not be a generally binding international rule, its legal effects can be fostered by national judges, who have to reach fair decisions in concrete cases. The vague principle can trickle-down from the international level and, in turn, reemerge as a set of concrete rules developed by national courts, which might cross-fertilise between jurisdictions and different levels of governance.[61] It is to be acknowledged that this concretisation and cross-boundary influence in such event is limited to specific legal settings. The general vagueness of the principle hinders a universal identity of the principle that can be directly translated in all jurisdictions in all matters.[62] In that regard, the field of tort law has to its advantage that its basic principles of loss allocation ('the loss lies where it falls' balanced with 'do no harm upon another') and basic prerequisites (fault or equated fact, damage and causal link between both) are familiar to many jurisdictions, common and civil law alike. In any case, one harmonisation by the PPP is unquestionable: the principle is an overarching societal objective towards the realisation of law, which moulds society's expectations towards the behaviour of potential polluters throughout the world.[63]

60 *B Gille*, Bodemsanering: wie betaalt de rekening?, in: M Deketelaere (ed), Recente ontwikkelingen inzake de aansprakelijkheid voor milieuschade (1993) 39; *E Bauw*, Buiten-contractuele aansprakelijkheid voor bodemverontreiniging (1994) 133 f.

61 See also *B Preston*, Leadership by the Courts in Achieving Sustainability (2010) 27 Environmental and Planning Law Journal (EPLJ) 1, 4 (open access version).

62 For a detailed and thorough analysis of the problems concerning the universality of environmental principles and their comparative influence, see *E Scotford*, Environmental Principles and the Evolution of Environmental Law (2017) 27 ff. A remark is that universality and uniformity are not the same. Relative differences do not exclude similarity.

63 See also *A Marong*, 'From Rio to Johannesburg': Reflections on the Role of International Legal Norms in Sustainable Development (2003) 16 Georgetown International Environmental Law Review (GELR) 21, 56 f, who acknowledges that while the distinction between binding and non-binding norms is useful, that distinction is largely rhetorical with respect to the role of law in sustainable development. The author is justly not convinced that the usefulness of certain principles depends on their status as a rule of customary international law, yet advocates to approach them as a societal objective.

III Polluter pays principle as a right to cost recovery

When the ELD applies, it follows undeniably from the rationale of the directive and the explicit right of redress it contains that the public authorities do not bear the damage of prevention and remedial measures definitively themselves, because of the PPP.[64] Meaningfully, the European Economic and Social Committee notes that '[o]ne of the core aims of liability actions must be recovery of the costs of repairing the damage by the competent authority. If this is not the case, the public will bear the costs involved.'[65] Therefore, according to the general case law of the Court of Cassation public authorities can recover the costs through tort law.

The question arises whether the PPP by itself leads to the same conclusion. The principal feature of the principle is that it contains primary prevention and remedial obligations for the polluter.[66] Public authorities act only in a subsidiary manner when the polluter does not first comply with those obligations. Subsidiarity was already the driving motive for the economic understanding of the principle. The subsidiary character is an important indication that the damage does not definitively rest with the public authorities.[67]

Another indication thereof is the scope of damage traditionally understood under the PPP. An international legal tradition recognises that the environmental damage that polluters have to bear themselves includes the costs of reasonable prevention and remedial measures. Sometimes those costs are even the sole objective of international treaties, remaining silent about personal damage. The ELD serves as a prime example. The CLC, one of the first international treaties dealing with environmental liability, is of interest. The notion of damage in that treaty has

64 The Flemish legislature notes that the article containing the right to cost recovery truly and effectively implements the PPP, see draft decree, earlier fn 19, 67.

65 Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage' COM (2002) 17 final OJ C 241/166, § 4.2.2.

66 This is evident in the ELD, eg, see *Brans* (fn 6) 38, § 2.26. The Flemish legislature speaks of a 'principal' obligation, see the draft decree in footnote 64, 59.

67 See also *T Robert*, De nieuwe cassatierechtspraak over de doorbreking van het oorzakelijk verband door een eigen juridische oorzaak: samen met de doorbrekingsleer ook het secundariteitscriterium definitief verworpen? (Annotation of Cass 10 December 2001) (2003) 7 RGDC 524, 528 f, §§ 8 ff and 533, § 18; *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheidsrecht (2009) 860, § 1348.

inspired the definitions in later conventions.[68] From the very start, the drafters included the costs of reasonable remedial and prevention measures in the convention, not only by public authorities but by individuals too.[69] The reimbursement of those costs was one of the goals of the convention, as the law at that time did not provide for an adequate means to do so.[70] The existence of a legal tradition is substantiated by more than this single treaty. Many other treaties include reasonable costs for prevention and remedial measures in their notion of damage.[71] As a result, the concept of environmental damage incorporates the right of cost recovery to the extent that it has become part of international ius commune.[72] A manifestation thereof can be found in the Draft Common Frame of Reference.[73]

Finally, even if the statute containing the legal obligation does not explicitly contain the PPP, it can still be used to interpret that statute. As mentioned, it is characteristic of legal principles that they are a tool to interpret legislation. Whenever legislation is unclear or deficient for the case at hand, general principles can fill in the pieces that are missing to reach a well-founded judgment. As to the PPP, the fact that the legislature relies on the principle as a guideline for policy reinforces its interpretative potential.[74] Applications of the PPP in specific legislation strengthen that potential even further, by perpetuating its status as a general principle of law. It must be assumed that the PPP is latently present in legislation dating after the incorporation of the principle in the general environmental policy, except for explicit derogation. With older legislation, judges need to examine whether the legislature was mindful of the PPP or its underlying principles, which spurred its explicit development, when creating a legal obligation for public authorities. For example, even though the PPP was only adopted as a guiding

68 *G Betlem*, Kostenverhaal door milieuorganisaties, in: J van Buren-Dee/M van Gestel/E Hondius (eds), Privaatrecht en Gros (1999) 139.

69 *N Healy*, The CMI and IMCO Draft Conventions on Civil Liability for Oil Pollution (1969) 1 Journal of Maritime Law and Commerce (J Marit Law Commer) 93, 98.

70 Remarkably, in the aftermath of the same environmental disaster that spurred the CLC, the major oil companies of the world adopted the Tanker Owners Voluntary Agreement Concerning Liability For Oil Pollution, the preamble of which states that the companies recognise the need to 'provide an adequate means for re-imbursing Governments which incur expenditures to avoid or mitigate such damage, as well as Tanker Owners who, on their own initiative, incur such expenditures'. The oil companies were principally concerned with their responsibility concerning those expenditures.

71 Exemplary are the treaties mentioned earlier in fn 42.

72 *Betlem* (fn 68) 145.

73 Article VI-2:209 stipulates that burdens incurred by public authorities in restoring environmental damage is *legally relevant damage* to the authorities concerned.

74 See earlier fn 29.

principle by the Flemish legislature in 1995, the principle justified the recoverability of clean-up costs even before that date. In 1988 Bocken wrote about cost recovery through tort law: 'in light of the "polluter pays" principle, it does not seem to be the case with remedial measures carried out by the government [that the government should also bear the economic burden]'.[75] The Belgian (albeit federal) law concerning toxic waste in fn 43 is a prime example thereof. In 1976, the federal legislature also stipulated that, on the basis of the same (non-explicit) principle as in that law, the Belgian State and the local municipalities are required to recover from the owners of polluting products the costs of interventions by firefighters or by the civil protection service to halt pollution caused by those products.[76]

The pillars on which the PPP rests, namely, equity and fairness, have been part and parcel of law since the dawn of ages. The principle is merely a catchphrase once thought up and repeated since. Used almost as a mantra, it evokes a certain intuitive image of justice, which predates its surge in legal lingo. It is, therefore, not unrealistic that the legislature was moved to enact older legislation by what, in hindsight, is the modern PPP. A question that surpasses the limits of this contribution is the role that teleological interpretation plays in this regard.

IV Cost recovery of extra-ordinary public expenditures

A Speed bumps in tort law

From the previous sections it can be concluded, with the case law of the Court of Cassation in mind, that the costs of measures taken by public authorities that fall under the ELD undeniably constitute damage that can be recovered. However, the ambit of recoverability through tort law is a thornier issue, in particular regarding the ordinary expenses of public measures, which fall under the notion of damage of the ELD.

75 *H Bocken*, Aansprakelijkheid voor milieuschade (1987–88) 51 Rechtskundig Weekblad (RW) 1269, 1271 (author's translation).

76 Memorie van toelichting bij het wetsontwerp betreffende de budgettaire voorstellen 1976–77, *Parl St* Kamer 1976–77, no 1004–1, 31–32 (explanatory memorandum to the proposal of law concerning the budgetary propositions 1976–77). This obligation to recover costs can be found today in art 2*bis*.2 wet van 31 december 1963 betreffende de civiele bescherming, *BS* 16 January 1964, 422 (law concerning the civil protection).

Seemingly, tort law allows only for the recovery of public expenditures that are made specifically because of the behaviour of the wrongdoer (that is, in the case underlying this contribution, extra-ordinary costs). Both the requirements of damage and causality inhibit recovery of costs that would have been incurred even in the absence of any wrongful behaviour (namely, the ordinary costs).

As regards the requirement of damage, compensation is not possible because of the principle of full compensation. Tort law seeks to put an injured party in the position they would have been in had the tort not occurred. Reaching this result requires compensation solely for the extra-ordinary expenses of public measures. In the hypothetical situation without wrongful behaviour the ordinary costs would have been made too. The right to full compensation is limited to the actual damage and cannot additionally benefit the wronged party.

Regarding the requirement of causation, the fact that the public authorities would have incurred expenses regardless of the behaviour of the wrongdoer, indicates that the latter's behaviour was not a necessary condition for the damage to occur. Consequently, in Belgian law no causal link exists, because the '*condicio sine qua non*' or but-for test is not met. Belgian law is traditionally said to strictly adhere to the 'theory of equivalence of conditions' in regard to non-contractual liability arising out of damage caused to another.[77] It regards every circumstance without which the concrete harm would not have ensued in the manner that it has occurred as a cause. Thus the assessment of causation is limited to the but-for test or, in other words, the theory of equivalence of conditions does not distinguish between cause in fact and legal cause.

The judgment of the Court of Cassation of 1 June 2018, which quashes the judgment of the court of appeal of Mons because it awards damages only for the ordinary costs, contains no explanation of the reasoning followed by the Court. Older case law suggests that one reason why it overrides the lower court relates to the principle of full compensation, despite the above. The reasoning behind this earlier case law can be understood more easily by studying foreign counterparts. The theory of the 'independent legal cause' (see earlier fn 15) has muddied the Belgian legal waters. A comparison with foreign legal systems, sufficiently similar

77 Cass 4 december 1950, (1951) I Pas 201. See for merely exemplary doctrine: *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996–2007, 1, Le fait générateur et le lien causal (2009) 322 ff, §§ 388 ff; *Vansweevelt/Weyts* (fn 67) 775, § 1236; *S Stijns*, Leerboek Verbintenissenrecht – Boek 1bis (2013) 109, § 138; *P Van Ommeslaghe/H De Page*, Traité de droit civil belge, II/2, Droit des obligations – sources des obligations (2013) 1608 ff, § 1092; *H Bocken/I Boone/M Kruithof*, Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels (2014) 65, § 100.

regarding this topic of tort law, allows for a clearer view when diving into the matter.

B Abstract assessment of damages

As far as the concept of damage is concerned, Belgian case law considers that the fact that a public authority would in any event incur certain costs does not preclude compensation thereof. Belgian law accepts the *existence* of the harm, which lies in the lost advantage that is the unavailability of government equipment and personnel for the regular activities. As an existing, concrete harm neither the causal link nor the notion of damage principally hinder compensation. However, the fact that the public authority would have incurred the costs of a legal obligation makes it difficult to determine the precise *extent* of the damage. The comparison between the actual and the hypothetical situation of the public authority does not reveal any difference upon which the estimation of damage can be based. Belgian law therefore relies on an abstract assessment of damages.

In the Netherlands too the High Council, the highest judicial court, explicitly accepts that the fact that a public authority would have incurred expenses anyway, does not necessarily hinder the award of damages.[78] From its case law doctrine deduces that the Council allows for a degree of abstraction from the concrete, factual course of a case when assessing damages, for reasons of pragmatism and reasonableness.[79] To a certain extent the damage is not assessed on the basis of what actually happened, but on what could have happened. The justification is that the duty of a wrongdoer to compensate damage arises immediately at the moment that the damage occurs, not post factum when the wronged party takes concrete action.[80] This is evident in the case of property damage. The depreciation of the property is what constitutes damage, so that harm is already suffered before any concrete repair. Thus, when public authorities charge their own

78 The Netherlands: HR 16 June 1961, (1961) Nederlandse Jurisprudentie (NJ) no 444, 980; HR 19 December 1975, (1976) NJ no 280, 809; HR 2 April 1976, (1976) NJ no 532, 1575; HR 24 June 2016, ECLI:NL:HR:2016:1278. Belgium: cf Cass 21 December 1993, (1993) Arr Cass no 536, 1087; Cass 18 October 1994, (1994) Arr Cass no 437, 851; Cass 9 February 2006, C.05.0172.N. See also about public works companies, Cass 28 June 1991, (1990–91) Arr Cass no 562, p 1069.

79 *S Lindenbergh*, Annotation of HR 24 June 2016 (2017) NJ 2239, 2340, § 7. This case law regarding abstract assessment of damage has been consolidated in art 6:97 Dutch Civil Code.

80 HR 16 June 1961, (1961) NJ no 444, p 980; *A Bloembergen*, Schadevergoeding bij onrechtmatige daad (1965) 57, § 41 and 63, § 46; *S Lindenbergh*, Abstracties bij vaststelling van schade, in: C Klaassen/J Spier (eds), Preadvies voor de Vereniging voor Aansprakelijkheids- en Schadevergoedingsrecht (2013) 24.

staff with repairing the property damage, a court may consider the costs that a third-party repairer would normally charge, to assess damages *ex aequo et bono*.[81] Besides the repair of property damage, it is also established case law that the reasonable costs of reasonable activities to prevent, repair or recover the costs of wrongfully caused damage are eligible for compensation.[82] Here too, the underlying reasoning is that the party causing the damage is obliged to provide for compensation from the outset, so that all actions taken after the occurrence of damage are to be considered as harm. The High Council interprets the notion of damage on which that obligation of compensation rests, broadly. It includes general expenses.[83] Once more: the actual harm that public authorities incur is the unavailability of personnel and material to carry out the regular tasks, because they are, instead, occupied by repairing the wrongful damage.[84] Belgian case law points out that the costs caused by wrongful behaviour do not fall under the scope of regular activities.[85]

The foregoing is rooted in the unsettling rejection of cost recovery to the benefit of the wrongdoer, merely because of 'coincidences' on the part of the wronged party. Concretely: wrongdoers would be lucky to escape their obligation to compensate damage merely because public authorities do not outsource any tasks and because their personnel succeed in completing the job within working hours.[86] Had the public authorities chosen an external, rather than internal, method of prevention or remediation, then the costs would have been recoverable, but now the internalisation of the costs stands in the way. However, it would be un-

81 The Netherlands: HR 16 June 1961, (1961) NJ no 444, 980. Belgium: cf Cass 28 June 1991, (1990–91) Arr Cass no 562, 1069; Cass 21 December 1993, (1993) Arr Cass no 536,1087.

82 See the case law cited by *Lindenbergh* (fn 79) (2017) NJ 2239, 2340, § 9.

83 The Netherlands: *Betlem* (fn 68) 144. Belgium: cf Cass 9 February 2006, C.05.0172.N, although this case concerns repair of property damage. Germany: The Bundesgerichtshof also considers that regarding in-house repair, general costs constitute harm, see BGH 3 February 1961, VI ZR 178/59, (1961) Neue Juristische Wochenschrift (NJW) 729 (note: in this case, the Bundesgerichtshof ruled that compensation for those costs was not possible because the reparation was not carried out in-house); BGH, 28 February 1969, II ZR 154/67, (1969) NJW 1109; BGH 19 November 2013, VI ZR 363/12, (2014) NJW 1376.

84 The Netherlands: HR 19 December 1975, (1976) NJ no 280, 809; HR 24 June 2016, ECLI:NL:HR:2016:1278. Belgium: cf Cass 28 September 1982, (1982–83) Arr Cass no 149, 149; Cass 28 February 1984, (1983–84) Arr Cass no 381, 811; Cass 4 September 1984, (1984–85) Arr Cass no 2, 2; Cass 4 September 1984, (1984–85) Arr Cass no 3, 6.

85 See Antwerp 4 January 1983, (1984–85) RW 2683; Corr Mechelen 19 December 1986, (1988–89) RW 234. See also Brussels 16 January 2003, (2005) Iuvis 1420.

86 Gerechtshof Den Haag 25 November 2014, ECLI:NL:GHDHA:2014:4215 (confirmed in cassation), § 2.15; *E van Orsouw/M Hiel*, De berekening van interne loonkosten: hoe concreet is concreet? (Annotation of HR 24 June 2016, part II) (2016) Maandblad voor Vermogensrecht (MvV) 321, 326.

just to 'punish' the wronged party for exercising, in a reasonable manner, its freedom to choose between different methods of action when confronted with either property damage or a legal obligation. It must be noted that the employment of own personnel and material can be advantageous to the wrongdoer too, especially in the case of environmental damage where swift action can limit the spreading of pollution.

However, the concept of abstract compensation of damage is not without critique. It is argued that by paying too much attention to the hypothetical options that could have been chosen by the wronged party, one loses sight of the fact that compensation in tort is only possible for damage that was actually suffered. One could forget that there is no profiting wrongdoer; simply non-existent damage.[87] In turn, a dismissal of abstract compensation, using the concept of damage actually suffered, runs up against the difficulty that the notion can cover a wide range of damage depending on what one wishes to see as 'real'.[88] There is no denying this assessment is normatively coloured. Reasonableness, whatever one understands thereunder, comes into play.[89] This normative question, and the way in which the PPP might help to answer it, is addressed in more detail further on. In any case, it can be pointed out that this critique confuses an abstract *notion* of damage with the abstract *assessment* of damages. Allowing for an abstract notion of damage immediately affects tort law itself, as it invokes an irrefutable presumption of damage. Regarding the acceptance of an abstract assessment of damages, it remains possible for the parties to demonstrate that the concrete damage suffered is higher or lower (up to the point that no damage occurred at all) than what the judge assesses.[90]

C Collective causality

The abstract compensation allows for the recovery of part of the ordinary expenses of public measures. For example, in the case at hand, the wage costs of the forest rangers during normal working hours are recoverable. However, it must be borne in mind that that recovery requires a lost advantage. As a result, some

87 See *van Orsouw/Hiel* (fn 86) (2016) MvV 321, 326. See also *W van der Grinten*, Annotation of HR 10 June 1988 (1988) NJ 3426, 3427, § 4.

88 *Lindenbergh* (fn 80) 21.

89 *Lindenbergh* (fn 80) 26 f.

90 See *in extenso E Dirix*, Abstracte en concrete schade (2000–01) 64 RW 1329; *B Weyts*, 'Economische schade', (2013) Tijdschrift voor Belgisch handelsrecht (TBH) 1014, 1028, § 37.

general expenses remain excluded from reimbursement. What about the costs of the water quality samples that would have been taken in any event to monitor the water quality for signs of other/future pollution? The samples are not 'missed' yet are also used for the regular activities. Once more, an individual causal link lacks between the pollution and the public expenses. Nonetheless, causality exists. Although the behaviour of an individual polluter is not directly causally linked, there is a causal link with the whole of (potential) polluters. The expenses are made because of the risks that that group create. In other words, there is a collective causality.

Inspiration for this collective causality with general expenses can be found in the context of copyright infringement. In Germany, where the vantage point for liability is also the but-for test,[91] the Federal Court of Justice (*Bundesgerichtshof*), one of the highest judicial courts, considers that it is fair to spread the whole of the costs of expensive enforcement mechanisms to monitor the protection of musical works only among those who commit an unlawful infringement, because they are the ones who create the need for the mechanism, and not also among the copyright holders and legitimate licence holders.[92] Therefore, German copyright collectives may charge a double rate for unlawful performances or reproductions of protected material relative to the single rate for authorised use of protected material in order to recover the enforcement costs. In the Netherlands and Belgium similar case law rendered by the lower courts can be found.[93] The Court of Justice of the European Union also acknowledges that a single rate might not guarantee reimbursement of the costs linked to protection against copyright infringement of which the European Enforcement Directive (on intellectual property rights) speaks to ensure an effective implementation of the directive – much like

91 See *A Staudinger*, BGB § 823 Schadensersatzpflicht, in: R Schulze (ed), Bürgerliches Gesetzbuch – Handkommentar (2019) § 47.

92 BGH 24 June 1955, I ZR 178/5, (1955) JurionRS 10435, § 24; BGH 10 March 1972, I ZR 160/70, 59 Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) no 50, 286.

93 The Netherlands: As the costs of legal protection against infringements of intellectual property rights are caused by all possible infringers together, it is fair to charge a proportional share of each individual infringer, see Rb Den Haag 18 February 1941, (1941) NJ no 487; Rb Den Haag 27 May 1941, (1941) Berichten Industriële Eigendom (BIE) no 71, 92; Rb Roermond, 17 September 1987, (1988) Intellectuele Eigendom en Reclamerecht (IER) no 27, 70; Rb Den Haag 3 September 1997, (1998) IER no 19, 115. See also for the costs of an amicable settlement, Hof Amsterdam 1 December 1988, (1990) BIE no 84, 264. Belgium: The court of appeal of Ghent considered that the double rate covers the harm suffered because of the necessary employment of personnel to combat infringements, see Ghent 2 March 2009, 2006/AR/115, www.juridat.be. See also Antwerp 5 October 2009, (2010) Intellectuele Rechten/Droits Intellectuels (IRDI) 217, annotation F Petillion.

the costs mentioned by the ELD.[94] It rules, therefore, that the directive does not exclude national legislation imposing a double rate.[95]

The reasoning of the *Bundesgerichtshof* in the matter is perspicuous. The double rate is reasonable because the enforcement mechanism to protect musical works is necessary to prevent the frequent and widespread violation of intellectual property rights from making those rights void of purpose.[96] It should be noted the Court delimits its case law strictly, rejecting an extension of it to other rights, even other intellectual property rights.[97] Nevertheless, the similarities between the strict enforcement of intellectual property rights and monitoring of environmental damage raises the question whether an analogy is possible. Similar to copyright holders, citizens contribute to a preventive and restorative mechanism that is required because of potential pollution by a select group.[98] Likewise, the mechanism wishes to protect the right to a healthy environment of the same fate envisioned by the protection of intellectual property rights: becoming useless. The immense scale of agricultural and industrial activities, and the associated threat of environmental damage, requires a permanent and extensive protection to preserve that right. The fact that one mechanism is needed because of occurring violations and the other only by threat of damage is irrelevant, as the difference can be explained by the strongly preventive approach underlying environmental policy. Support for this analogy can be found at the Dutch High Council, which rules that the costs of collective measures to prevent environmental damage may be attributed to the polluter for wrongful pollution in proportion to the total of all (including lawful) emissions.[99] Those measures are taken not only with

94 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45.

95 ECJ 25 January 2017, C-367/15, ECLI:EU:C:2017:36, §§ 25 *juncto* 30.

96 BGH 22 January 1986, I ZR 194/83, (1986) NJW 1405, § 33.

97 BGH 6 March 1980, X ZR 49/78, 77 BGHZ no 4, 16; BGH 22 January 1986, I ZR 194/83, (1986) NJW 1405.

98 An extension of the analogy of legitimate users of intellectual property rights to legitimate operators ('legitimate polluters') would consist in arguing that public authorities would either increase the price of individual emission permits or increase the overall tax burden of the exploitation sector, in the same way as authors' associations would increase the cost of licences in general for all users.

99 HR 23 September 1988, (1989) Tijdschrift voor Milieuschade en Aansprakelijkheidsrecht (TMA) 12. See also the following case concerning illegal subletting by a social housing tenant, in which the court held that the damage caused to a social housing company (in the form of extra expenditures to sufficiently mitigate the unwanted social consequences of the wide scale practice) is partly caused by a single social housing tenant, who can therefore be held liable, Gerechtshof Amsterdam 9 September 2008, ECLI:NL:GHAMS:2008:BF1347, § 4.8 (upheld in cassation, see HR 18 June 2010, ECLI:NL:HR:2010:BM0893).

a view to monitoring the overall environmental impact of all activities together, but also for any damage that might be caused by individual, wrongful activities. Hence, it cannot be earnestly held that the behaviour of individual polluters does not necessitate the collective measures.

As Belgian law currently stands, it is unwelcoming to collective causality. As mentioned, lower case law accepts the possibility of charging a double rate for copyright infringement. Different case law accepts a collective causality regarding general expenses in other contexts too.[100] However, the Court of Cassation explicitly rejects the compensation of costs connected to the 'general battle against infringements of intellectual property rights'.[101] No case on collective causality regarding environmental damage has yet reached the Court.

The PPP, in particular its articulation on the European level, might change this suspicious attitude towards collective causality with general expenses in the context of environmental damage. Similar to the Enforcement Directive, the ELD mentions that the recovery of those costs from the polluter is necessary for the effective implementation of the directive. The fact that both the Dutch and the German 'circumventions' of the causal link and the notion of damage are grounded in reasonableness shows that there is a certain normative component in the attribution of the general expenses of a legal obligation to a single offender.[102] This can be related with the distinction between cause in fact and legal cause.[103] The Belgian legal system too is confronted with a policy choice. On the one hand, the costs can be borne by everyone, all potential injured parties, by holding on to liability claim, in which the but-for test in principle limits the damage that can be compensated. This is only different if Belgian law, following foreign examples, accepts collective causality. Social developments, such as the rise of the PPP, may lead to the conclusion that it is desirable that certain costs, which would not have been eligible for compensation in the past, should nowadays be reimbursable through tort law. Nonetheless, as mentioned in the introduction, the European Union does not impose such an evolution on national tort

100 Corr Ghent 27 June 1941, (1942) RGAR 3780; Pol Hollogne-Aux-Pierres 28 May 1938, (1938) RGAR 2747. See also Kh Ghent 26 March 1953, (1953–54) RW 752. See also, regarding the expenses of public works companies that have to hire additional staff because of the regularity of public utilities requiring reparation after wrongfully caused damage, Ghent 25 November 1980, 8D Rechtspraak. Bedrijfsfederatie der Voortbrengers en Verdelers van Electriciteit in België (BFE) 52; Kh Ghent 11 June 1980, 8D BFE 36. Contrary, see Vred Ghent 17 November 1980, 8D BFE 46.

101 Cass 23 May 2009, P.09.0121.F. See also Brussels 3 March 2010, 2007/AR/565, www.juridat.be (author's translation).

102 See in detail *Lindenbergh* (fn 80) 21 ff and 25 ff.

103 The but-for test concerns factual causation, that is a 'historical reconstruction' of all circumstances of the case.

law. Still, this could be a spill over effect. On the other hand, the legislature can choose to have the damage borne by all potential polluters through targeted taxes. The but-for test then does not prohibit that even legitimate polluters, who may never commit an unlawful act, financially contribute to the taxed risk created by their activities. That contribution is simply a part of the costs of operation in a certain industry. This policy choice reflects the broad nature of the PPP, which does not stand in the way of either option. The first choice corresponds to the curative aspect of the principle, whereas the distributive aspect coincides with the second choice. Many arguments can be raised both in favour of and against exclusive or mixed reliance on private and/or public law.[104]

V Conclusion

The PPP has become an ubiquitous feature of environmental law. One harmonisation by the PPP is, therefore, unquestionable: the principle is an overarching societal objective towards the realisation of law, which moulds society's expectations towards the behaviour of potential polluters throughout the world. It has become rooted in modern society's mores, nestling itself as an intuitive catchphrase in legal lingo. Even though it is in itself vague, it can act as a social compass for judges to establish tortious liability, even outside the violation of legal norms explicitly containing it. It is important to stress the guiding nature of the principle: liability is what magnetically pulls the principle but is not an absolute destination. Furthermore, no vagueness exists concerning the possibility of cost recovery based on the principle. The PPP both in its economic and legal meaning establishes a primary obligation on polluters themselves to take measures against environmental damage and the threat thereof. Therefore, subsidiary action by public authorities is a key aspect of the PPP. Also, the multitude of treaties that incorporate the costs of remedial and preventive measures in the notion of damage attest to the existence of an international ius commune, which allows for cost recovery. Hence, the harmonising influence of the PPP is strongest when it comes to the possibility of cost recovery from the polluter.

Nonetheless, that influence hits an outer limit in Belgian tort law. The ordinary costs of public measures against environmental damage remain unrecoverable when they are not the result of an advantage lost because of the unavailability of public means. When these costs stem from means that remain usable for

104 See in detail *Bergkamp* (fn 11) 171 (in favour of public law with a residual role for private tort law).

regular activities, no causal link with an individual pollution or damage exists. Foreign legal systems accept the possibility of collective causality between public measures and the whole of potential wrongdoers who necessitate their need. The Dutch High Council does so concerning environmental damage. However, as it currently stands, the Belgian legal system is unwelcoming of the idea of collective causality with general expenses. The ELD imposes that general expenses are to be recovered from the polluter but does not demand reimbursement through a claim in tort. Nonetheless, the directive and the PPP it contains can have a spillover effect. It might change the attitude towards which costs public authorities should reasonably no longer bear when a polluter can be held liable. For the time being the general acceptance of collective causality in Belgium remains untested waters.