ANTI-SLAPP MECHANISMS MONITORING STUDY

Belgium

Justice and Environment 2021

Udolni 33, 602 00, Brno, CZ | +36 1 322 84 62 | info@justiceandenvironment.org
www.justiceandenvironment.org | FB: /justiceandenvironment | TW: JustEnviNet

Introduction

Justice and Environment (J&E) is participating in a European anti-SLAPP NGO coalition called CASE (www.the-case.eu) in order to investigate legal challenges faced by environmental activists and other watchdogs throughout Europe. Significant research has been published on this topic already (e.g. by the Law Clinic of the University of Amsterdam) but J&E would also like to contribute to the analysis of SLAPPs via its own means.

A SLAPP case consists of four components:

* legal proceedings (generally civil lawsuits but also criminal complaints where these can be pursued privately)

* filed by a private party (generally corporations or wealthy individuals, including government officials acting in a private capacity)

* with the intent to silence another private party (generally activists, journalists, NGOs, or other public watchdogs)

* in response to acts of public participation (including advocacy or criticism).

Our targets are the anti-SLAPP mechanisms enacted in Member State legislation or case law. We are not researching SLAPP cases. We are researching anti-SLAPP mechanisms in the law (or case law). We are looking for procedural rules or decisions, not limited to environmental ones.

Questions and Answers

1. Has law or case law defined SLAPP cases in any way? (e.g., by a court judgment calling a case frivolous or vexatious for having certain features, etc.)? If yes, in what way?

No, in Belgium SLAPP is not defined by the law. The expression “SLAPP” is not used at all in Belgian legal literature and is only rarely used in the press, almost exclusively by NGOs like Greenpeace. Nevertheless, the Belgian law has a legal basis for abusive litigation (*cfr* question 2).

2. Is there any law or case law that puts limits on cases with SLAPP characteristics (e.g., by defining lawful causes or capping the amount of compensation, etc.)? If yes, in what way?

Belgian procedural law offers a protection against abusive lawsuits. This mechanism can help to limit prosecutions with SLAPP characteristics[1].

Indeed, thanks to the article 780bis of the Belgian Judicial Code, if the prosecutor uses his right to prosecute in a way that does not comply with the law, he can be sentenced to a fine and to pay damages.

> *"The party who uses the proceedings for manifestly dilatory or **abusive purposes** may be **fined** from 15 euros to 2500 euros, without prejudice to any damages claimed. In this case, the same decision will be taken insofar as a claim for **damages** for **reckless and vexatious litigation**. (…)".*

The abuse of process was generalized in 2007[2]. Previously, this possibility only existed at the appeal level.

This safeguard to the right to sue exists in fact for two purposes: to protect the public service (and thus the community) and to protect the other party from unjustified litigation. The first reason is to avoid clogging up the judicial system because the legislator aims for quick, efficient and inexpensive justice (the reality is that the Belgian judicial system is overwhelmed and therefore slow). The second reason is the one interesting us: the protection from unjustified litigation.

Article 780bis provides thus a dual sanction for manifestly dilatory or abusive procedure and abusive and reckless litigation.
The first one is the fine intended to punish the prejudice caused to the public service of the administration of justice by manifestly suspensive or abusive acts, in particular for manifestly delaying or unlawful purposes.

The second sanction takes the form of an additional compensating damage to compensate the damage suffered by a litigant as a result of the other's abuse of process.

Whether for the civil fine or for damages, the use of the right to act or defend oneself in court must have manifestly exceeded the limits of the normal use of this right by a normally prudent and diligent person in the same circumstances. In other words, in order to be condemned, the party must have committed a fault[3].

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[1] Report EU-CITIZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS : "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union, A comparative study" written by J. Bayer, P. Bárd, L. Vosyliute, N. C, Luk pp. 121-130 https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf
[2] Through the *Law of 26 April 2007 amending the Judicial Code with a view to combating the backlog of cases*.
[3] https://www.justice-en-ligne.be/-Les-abus-de-procedure-

According to the classic conditions of extra-contractual liability, the victim of procedural abuse must prove the existence of a fault on the part of the opposing party and of damage, causally linked to this fault.

As far as civil fines are concerned, it is usually the judge who, when identifying a possible procedural abuse, issues a first judgment drawing the parties' attention to the issue and gives them the opportunity to explain themselves, in writing and at a second hearing.

3. If there are anti-SLAPP mechanisms in law or case law, are they effective, i.e., do they slow or stop the filing of lawsuits with the intention of silencing private parties?

In Belgium, there are no explicitly anti-SLAPP mechanisms in law or case law. Speaking about art. 780bis of the judicial Code (abuse of process), it is often mobilised and can be examined *ex officio* by the judge. In 2017, for example, authors were able to collect and study almost two hundred decisions applying Article 780bis of the Belgian Judicial Code (which has only existed since 2007)[4].

4. Is there law or case law to protect whistle-blowers? If yes, does that contain any reference to SLAPP cases and if yes, in what way?

In Belgium, no general legislation has been passed concerning whistle-blowers. Some whistleblowing protection mechanisms are provided in different legal areas but none regarding specifically public participation. Furthermore, the rules governing whistleblowing do not cover disclosure to the general public but only denunciation to targeted actors.

First, there is legislation specific to the public sector and then legislation in the world of work.

The duties and the protection in the public sector

Regarding the public sector, the Belgian code of criminal procedure requires workers to notify the public prosecutor of breaches on criminal matters brought to their attention. Indeed, article 29.1[5] forces the public sector worker who acquires knowledge of a criminal offense in the performance of their duties to inform immediately the public prosecutor[6].

Furthermore, in regard of the public sector, several normative texts regulate the protection of whistle-blowers working at the federal level, as well in the Flemish Region (federated entity in

[4] Stassin, M., « L'amende civile », J.T., 2017/9, n° 6679, p. 165-172.

[5] Article 29.1 Belgian code of criminal procedure: *"Any constituted authority, any official of public officer […] who in the performance of their duties will acquire knowledge of a crime or a misdemeanor, will be required to give immediate notice to the […] court in which the crime or the misdemeanor was committed or in which the accused could be found, and to transmit to this magistrate all information, minutes and documents relating thereto".*

[6] Article on LexGo.Be written by F. Coton and W. Saint-Remy https://www.lexgo.be/fr/articles/droit-du-travail-et-de-la-securite-sociale/droit-du-travail/lanceurs-d-aoalerte-un-m-canisme-interne-obligatoire-d-s-d-cembre-2021,133714.html; Thesis written by C. Doyen https://dial.uclouvain.be/memoire/ucl/fr/object/thesis%3A14091/datastream/PDF_01/view

northern Belgium). Unfortunately, today, no such system exists for civil servants in the Walloon and Brussels administrations (the two other federated entities).

In the Flemish Region, the decree of 7th May 2004 establishes the Flemish mediation service with regard to the protection of officials of the Flemish administration who report irregularities[7]. Moreover, the decree of the Flemish Government of the 13th of January 2006, concerning the status of the staff of Flemish authorities' services incorporates this protection. This decree also provides two procedures[8] to launch the alert in case of irregularities noted by the staff member in the performance of his duties.

Regarding the workers of the federal administration, a text protecting whistle-blowers in the public sector has been adopted on 15th September 2013, related to the denunciation of a suspected violation of integrity within a federal administrative authority by a member of its staff[9]. It creates a cascading system of denunciation to different actors largely inspired by the Flemish system.

The procedure developed to denounce a suspected violation of integrity is quite complex[10], but there are some advantages for the whistle-blowers. First of all, confidentiality is guaranteed at

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[7] Article 17bis of the decree of 2004 provides that the Flemish Government can conclude a protocol with the Flemish mediation service: "*In addition to the length of the protection period, this protocol include at least as protective measures the stay of disciplinary proceedings, rules on the allocation of the burden of proof and the possibility of a voluntary transfer of staff member*".

[8] One procedure provides that the civil servant can lodge his complaint internally, by reporting the facts to a functional manager or by directly informing *Spreekbuis* – the counter of well-being and integrity at work of the Flemish authority- or *Audit Vlaanderen*. He will not be able to be the subject for a disciplinary sanction or any other form of sanction for having denounced or published irregularities, unless it is in bad faith, or its declaration is false. The other procedure provides that the official can denounce an irregularity, writing or orally, at the Flemish mediator. According to Article 3.2 of the decree of 1998 the Flemish mediator is in charge of analyzing the denunciations made up by the staff of the administrative authorities of the Flemish Community and the Flemish Region on irregularities committed within the administrative authority where they are employed when they believe that after notification to their hierarchical superior and then to Internal Audit, he did not response or he responds insufficiently to their communication within thirty days, for the sole reason of the publication or denunciation of these irregularities, they are or will be subject to disciplinary punishment or some other form of public of hidden sanction. In any case, the recourse to the Flemish mediator is the last solution resort.

The Flemish mediator examines the admissibility and the manifest merits of the denunciation and decides whether or not to grant protection to the staff member. In that case, the period of protection begins with the first denunciation and ends two years after the end of the investigation carried out by the Flemish mediator. It is up to the authority to prove the absence of a causal link between the measure and the denunciation of the irregularity. If the Flemish mediator considers that such a link exists, he asks the authority to review its measure.

[9] By suspected breach of integrity is meant the suspicion of execution of omission by a member of staff of an act constituting an offense against the laws, orders, circulars, internal rules and procedures which are applicable to the administrative authorities bodies and members of their personnel involving an unacceptable risk for human life, health or safety for the environment or clearly showing a serious breach of professional obligations or to the good management of a federal administrative authority.

[10] In this case, the law provides a cascading whistleblowers system. The staff member must notify his functional superior or a hierarchical superior of the existence of a breach suspected of integrity within the federal administrative authority in which he operates on duty. If he does not wish to inform one of them, he can contact the person of trust. Finally, in certain cases, the denunciation can be made to the central point of contact. This is the case when there is no such person of trust within the federal administrative authority where the staff member is busy or when the staff member suspects the most senior supervisor of this administrative authority to be involved in the infringement. The staff member who has received a favorable opinion confirms the denunciation of the suspected breach of integrity of federal mediators. These will then inform the highest hierarchical superior of the federal administrative authority concerned by the denunciation. Federal mediators, possibly assisted by experts, conduct an investigation on the suspected breach of integrity. After the investigation, the federal mediators communicate the report to the official highest hierarchical level of the federal administrative authority or, if the latter is involved

every step of the procedure. In fact, unless the staff member expressly specifies that he wants to report publicly, the complaint is confidential, and the identity is kept secret. Second of all, the whistle-blower and those associated with the investigation are protected against any measure that can be taken in order to create a prejudice on working conditions, as for instance the dismissal.

However, one must be aware that the procedures can be complex and that only part of the public sector is targeted[11]. If the official who publicly denounces an offense does not comply with the complex procedure provided by the law, then he does not benefit from the protection. In addition, the same protection does not apply if the staff member made a dishonest or false statement.

To be noted that officials who invoke this procedure are exempt from the obligation provided at Article 29 of the Belgian Code of Criminal Procedure, according to which they must inform the public prosecutor the crimes and offenses brought to their attention.

The protection of the worker

Concerning labour law, three instruments can be invoked for the protection of whistle-blowers.

First, article 16 of the Law of 3rd July 1978 related to the employment contract provides that the employer and the worker bound by an employment contract owe each other mutual respect and consideration. This article can also be connected with Article 1134.3 of the Belgian Civil Code which enshrines the principle of execution in good faith of legally informed agreement. Moreover, "manifestly unreasonable dismissal" is prohibited[12].

Secondly, the Law of 4th August 1996 related to the welfare of workers during the performance of their work transposing the directive 89/391/ECC of the Council of 12ve June 1989[13]aims at promoting workers safety and health at work. More specifically, Chapter Va, integrated in 2002, contains specific provisions on the prevention of psychosocial risks at work including stress, violence and moral or sexual harassment at work.

This Law provides that any harmful action or termination of the contract cannot be taken against a worker as a result of a complaint he submitted for being victim of unjustified discrimination. If the worker is subject to such a measure, he can ask his employer to be reinstated, in the absence of such a request, the employer must pay the compensation for the worker affected by the measure[14].

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in the suspected breach of integrity, to the minister responsible for the federal administrative authority where there was the suspected breach of integrity. The member of the staff who denounced the suspected breach of integrity is informed, as well as all staff members who were associated with the survey.

[11] Cobbaut, E., « Les lanceurs d'alerte : un objet juridique non identifié ? », A&M, 2018-2019/1, p. 41-70.

[12] Convention Collective de travail n°109 (Collective Work Agreement n° 109).

[13] Council Directive (89/391/EEC) of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health workers at work https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN

[14] Art. 32 tredecies

Finally, the law of 10 May 2007 can also be an instrument of protection for whistle-blowers to the extent that it protects the worker from discrimination based on philosophical, political or religious beliefs.

Conclusion

"However, these provisions do not provide a sufficient level of legal certainty and may only protect whistle-blowers who only protect whistle-blowers who have already been subjected to retaliatory measures[15]." As a reminder, unfortunately in Belgium the implementation of the Whistle-blower Directive[16] has not taken place yet, but its transposition is provided by the 17th of December 2021.

5. If, as mentioned above, there is law or case law to protect whistle-blowers, does this law in practice actually stop or slow SLAPP lawsuits?

As noted above, in Belgium, there are some procedures applicable to protect whistle-blowers, but there no link to SLAPP cases. Moreover, the Whistle-blower Directive has not been implemented yet.

6. Are there any additional laws in your jurisdiction which might protect parties against SLAPP suits, even if they were not designed for that specific purpose?

A priori, we have not identified any instruments other than those mentioned above.

7. Which laws in your jurisdiction, civil or criminal, are commonly weaponized as SLAPPs to silence parties? Do you have any notable examples where these laws have been abused?

One of the most common legal grounds for a SLAPP case can be found in defamation-related legislation[17]. Defamation and slander, under Article 443 of the Penal Code, can be weaponized as SLAPPs to silence parties.

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[15] Cobbaut, E., « Les lanceurs d'alerte : un objet juridique non identifié ? », A&M, 2018-2019/1, p. 41-70.

[16] Directive (EU) 2019/1937 of the EU Parliament and the EU Council of 23 October 2019 on the protection of persons who report breaches of Union law, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937

[17] Article UNIA "*Qu'est-ce qu'un délit de presse et dans quels cas est-il poursuivi?*" https://www.unia.be/fr/domaines-daction/medias-et-internet/journaux-livres-et-periodiques/delit-de-presse; Paper "*Protecting public watchdogs across the EU: a proposal for an EU anti-SLAPP Law*" authored by an expert working group composed of Dr. Linda Maria Ravo, expert consultant to the Civil Liberties Union for Europe (Lead Author and Principal Investigator), Dr. Justin Borg-Barthet, Senior Lecturer, Centre for Private International Law, University of Aberdeen (Co-Investigator) and Prof. Dr. Xandra Kramer, Professor at Erasmus School of Law, Erasmus University Rotterdam and at the Faculty of Law, Economics and Governance of Utrecht University (Co-Investigator) https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/Anti_SLAPP_Model_Directive.pdf ; Report "*3rd International Press Freedom Seminar: Off/online Intimidation of Journalists*" written by Ingrida Milkaite (UGent) and Argyro (UGent) https://biblio.ugent.be/publication/8635675/file/8686622.pdf.

Article 443 of the Belgian Penal Code[18] consists of *"maliciously attributing a precise fact to another person that may damage that person's honour or expose him/her to public contempt*".

A practical example in which defamation and slander are used as an instrument to silence parties is during investigative journalism[19]. Notably, a journalist or an activist, who is investigating on an issue (often related to environment), publishes a document or an article on the internet or in a journal, in which he describes the current situation, explaining that a multinational corporation is violating several norms related to the environment.

The multinational corporation concerned decides to subpoena the author of the publication for defamation and slander under article 443 of the Penal Code because, according to that corporation, the publication is libellous and slanderous. In reality, the publication is nor libellous or slanderous, but article 443 of the Penal Code is used in this case by the corporation as an instrument to prohibit any other publication from that journalist or activist about that environmental issue.

Another instrument used to silence parties is the recourse to articles 1382 and 1383 of the Belgian Civil Code. According to these articles, everyone is bound to act lawfully or with care and attention. In particular, in relation to journalists, each publication must be able to stand the test of the criterion of lawfulness or care. Moreover, journalists have the duty to investigate the reliability of sources and the veracity of the facts discussed.

Concerning the practical example, the previous multinational corporation that subpoenas the author of the publication for the information provided in its publication can likewise subpoena that author for unlawfulness information provided in the publication, under articles 1382 and 1383 of the Belgian Civil Code.

Unfortunately, nowadays there are not a lot of notable examples where these laws have been abused, but Greenpeace wrote a detailed report[20], in which there is an example of one case related to a journalist, David Leloup, who has been subpoenas for his investigative activity.

[18] Article 443 of the Criminal Code: "*One who, in the cases indicated below, has wrongly imputed to a person a specific fact which is such as to infringe upon or expose the person's honor to the public and whose legal evidence is not reported, is guilty of libel when the law admits evidence of the alleged fact, and defamation when the law does not allow such evidence".*

[19] Paper "*Strategic Lawsuits Against Public Participation threaten human rights and democracy. The EU must act*" written by L. Hueting, P. Milewska, T. Seipp of the European Centre for Press and Media Freedom https://ruleoflaw.pl/strategic-lawsuits-against-public-participation/; *« Colloque Sénat de la Belgique "La Liberté de la Presse au 21e Siècle »* pp. 48 et 60 https://www.senate.be/event/20191129-Free_press/colloque-la-liberte-de-la-presse-au-21e-siecle.pdf

[20] Report "*SLAPPs: How the rich and powerful use legal tactics to shut critics up*" written by Greenpeace European Unit https://www.greenpeace.org/eu-unit/issues/democracy-europe/4059/how-the-rich-and-powerful-use-legal-tactics-to-shut-critics-up/

8. Has international legislation played a role in SLAPP lawsuits in your jurisdiction? (e.g., European Union GDPR) If yes, to what end?

No, the mechanisms that we exposed (abuse of law and protection of whistle-blowers) do not appear to have been influenced by international law. In the Courts, there are not invoked alongside international protections.

((The International Convention of Aarhus played an important role concerning the broad access to the court for environmental matters. For instance, in 2019, the Belgian Constitutional Court[21] overturned a provision of a decree because it deleted a mechanism for citizens to take legal action. In that case, the Court reversed that rule because Belgium approved the Convention of Aarhus. Moreover, in that case, the Constitutional Court also declared that there is the European Commission's EU Biodiversity Strategy, which is very useful to improve access to national courts, both for NGOs and citizens in environmental matters.))

9. In SLAPP cases, do litigants tend to invoke due process rights? If yes, how do judges weigh the right to due process when balanced against concern about frivolous suits?

As explained, the right to a fair trial is the only weapon in domestic law that can be imagined to be mobilised against SLAPPs. Nevertheless, there is not in Belgium any relevant case-law concerning particularly SLAPP lawsuits.

10. Is there a need to reform legislation on a national level to prevent frivolous or SLAPP cases? If yes, what might that look like?

There is already a regime in place to protect against abusive litigation in general, but specific legislation for SLAPPs would be welcome. For example, to fit in with the current system, the penalty of damages and a possible fine could be increased if it can be proved to be a SLAPP

As for the preventive aspect, it is urgent to implement the Whistle-blower Directive. Indeed, there is no provision to protect whistle-blowers who expose a problem to the general public, and they are vulnerable to being sued for defamation.

11. Are there rules codified into professional or bar association codes of conduct which could prevent or punish lawyers from filing SLAPPs? If yes, are these rules typically enforced?

[21] Cour Constitutionnelle, Arrêt n°131/2019 du 10 Octobre 2019 https://www.stradalex.com/fr/sl_src_publ_jur_be/document/cconst_2019-131 ; Persbericht "*Vlaanderen snoert betrokken burgers the mond: milieubeweging trekt naar het Grondwettelijk Hof*" written by Sarah Jacobs https://www.greenpeace.org/belgium/nl/persbericht/22220/vlaanderen-snoert-betrokken-burgers-de-mond-milieubeweging-trekt-naar-het-grondwettelijk-hof/

In Belgium, two bar associations exist (Order of the Flemish Bars + Order of the French- and German-speaking Bars of Belgium), each having a Code of conduct[22].

The two Codes have a lot in common, including referring to several principles such as dignity, probity and rectitude. These principles serve to ensure the proper practice of the profession in the service of justice. Moreover, these principles include the duty of loyalty and confraternity to promote fair and proper administration of justice and to organize themselves in order to avoid any unnecessary delay during a case. If the lawyer is not able to properly justify the reason for which he proposed the disruptive litigation conduct on behalf of the litigant, he risks a disciplinary sanction.

Concerning the application of these rules, they are typically enforced, especially due to the disciplinary sanctions envisaged as a result of the violation. The bar has been entrusted by the State with the responsibility for the discipline of its members. This means that the initiative to prosecute belongs exclusively to its authorities (bar presidents or presidents of disciplinary boards) and that the judgment of professional misconduct is the exclusive responsibility of the disciplinary boards, which are composed, in the first instance, solely of lawyers and, in appeal, of lawyers presided over by a magistrate[23].

The matter is dealt with in Chapter IV of Title I of Book III of the Judicial Code. It has been profoundly reworked by the law of 21 June 2006, of which the Community Orders were the instigated and drafted by the Community Orders.

The Council may, by reasoned decision, warn, reprimand, suspend for a period not exceeding one year or strike off the lawyer concerned. It may attach to its sanction ancillary penalties, such as a ban on taking part in elections to the Bar or ineligibility to hold office as President of the Bar, member of the Council of the Bar, member of the General Council or member of the Board of Directors of the French and German-speaking Bars or of the Flemish Bar Association. It may decide to make its sentence public by deciding on the form of this publicity. It may also suspend the pronouncement of the sentence or postpone the execution of the sanction, if necessary, under the specific conditions it sets. Finally, it may order the lawyer to pay the costs of the investigation and the hearing[24].

The Bar Associations are therefore the only bodies competent to impose disciplinary sanctions on an erring lawyer. As the lawyer is only the representative of his client in legal proceedings,

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[22] Flemish Code of Ethics for Lawyers:https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Belgium_OVB_Code_of_Ethics_for_Lawyers.pdf
French- and German-speaking Code of Ethics: https://avocats.be/sites/default/files/code_octobre-2013.pdf

[23] https://avocats.be/sites/default/files/CHAP%2013%20L%27AVOCAT%20ET%20LA%20DISCIPLINE%20290316.pdf

[24] Art. 460 of the judicial Code

he can never be personally and directly condemned by the judge for a procedural abuse in the context of his mission of representation.

12. What are the broad takeaways from SLAPP lawsuits in your jurisdiction? Are there unwritten norms or patterns which the cases tend to follow?

No lawsuits have been reported against SLAPP in Belgium so far. For this reason, there are not unwritten norms or patterns which the cases tend to follow.

13. Based on your experience, what types of advocacy action can best prevent the initial filing of SLAPPs? What types of advocacy actions can be best for getting such suits dismissed once they are filed?

First, it is essential to underline that there are a lot of associations in Belgium whose aim is to protect the environment and raise awareness of this issue among citizens and politicians. Despite this fact, we only found information about SLAPPS at Greenpeace. It would therefore be important to first communicate the issue of SLAPPs to these associations so that they can relay it through their usual networks.

It is, above all, necessary to raise awareness about the very concept of a SLAPP case and its characteristics. It is important to share cases in the form of stories and to raise awareness about the consequences of such prosecutions. This is the first step in preparing for the implementation of new legislation on SLAPPs.

Contact information

Association Justice and Environment, z.s.
European Network of Environmental Law Organizations
33 Udolni, 602 00 Brno, Czech Republic
Birgit Schmidhuber, Csaba Kiss
Co-leaders / Aarhus Convention Topic Team
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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