



Explanatory Report to the Convention on the Protection of Environment through Criminal Law

Strasbourg, 4.XI.1998

1. The Convention on the Protection of the Environment through Criminal Law, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee of Crime Problems (CDPC), was opened for signature on 4 November 1998.

2. After declassifying the text of the Convention in 1995 with a view to a wider consultation, and on the basis of that committee's discussions, the Committee of Ministers adopted the Convention while taking into account the observations made by the Parliamentary Assembly, which was consulted in 1996.

3. The explanatory report's purpose is to facilitate the understanding of the Convention's provisions.

I. Historical background

The work of the expert committee

Following the adoption of Resolution No 1. by the 17th Conference of European Ministers of Justice (1990, Istanbul) the Committee of Ministers of the Council of Europe set up a new selected committee of experts in 1991 under the name of "Group of Specialists on the protection of the environment through criminal law" (PC-S-EN). The Committee was later transformed into a traditional committee of experts (PC-EN). It started its work in October 1991 and completed it in December 1995. It held seven plenary and ten working group meetings.

The Committee's terms of reference were as follows:

"The project group is invited to examine the conclusions of the 17th Conference of European Ministers of Justice (Istanbul, 5-7 June 1990), recommending the development of common guidelines for the purpose of combating environmental impairment, and more particularly, to examine the following questions taking into account the work of the PC-S-EN :

a. drawing up of a list of offences the purpose of which would be to provide for adequate criminal law protection for water, soil, the air, the flora and the fauna and other components of the environment meriting protection, and also for man in his environment;

b. applicability of the concept of endangerment offences (concrete, abstract or potential), irrespective of the damage actually done;

c. defining the relationship between criminal law and administrative law in the environmental sphere;

d. allowing the offender's actions to avert danger or damage arising from his offence to be taken into account in decisions on prosecutions or punishment;

e. the applicability of the European Criminal Law Conventions to environmental crime, international co-operation, jurisdiction, conflicts of competence, the place of the commission of the offence and other relevant questions concerning international criminal law relating to the environment.

The project group should make a Recommendation containing guidelines or a Convention, if appropriate."

At its first meeting (October 1991), the Committee decided to draft a binding international treaty. The Committee adopted the draft Convention and the draft explanatory report relating thereto at its last meeting (December 1995), which were then transmitted to the CDPC for its approval. The draft Convention and the explanatory report were approved by the CDPC in June 1996 and adopted by the Committee of Ministers in September 1998.

The Committee based its work on reports submitted by the experts and scientific consultants. The Committee's main objective was to establish a set of provisions which should be implemented by the criminal law of contracting states. They address first conduct which, in the opinion of the Committee, represents the greatest danger to the environment, including human beings, and should therefore be criminalised; the Convention then deals with questions related to jurisdiction, sanctions and other measures, corporate liability and certain procedural issues; finally it sets out principles of international co-operation, taking into account other relevant instruments (cf. commentary on Article 12).

The Convention aims at a better protection of the environment by using the solution of last resort, the criminal law, for deterring and preventing conduct which is most harmful to it. To this end, the Convention seeks to harmonise national legislation in the particular field of environmental offences. It creates obligations for contracting States to introduce, if necessary, new elements or to modify existing criminal law provisions, on the understanding that the harmonisation of legislation in this area also enhances international co-operation. The extent to which States will enact new legislations or amendments to existing laws will however depend on both the use they will make of reservation possibilities, offered by the Convention in respect of certain provisions, and the compatibility of their existing criminal law provisions with the Convention.

II. Introduction

Autonomous offences and unlawful conduct

National legislatures worldwide have addressed environmental exploitation through a more or less comprehensive network of administrative laws. These laws have made fundamental determinations as to the extent of permissible pollution and acceptable risks in most environmental areas, frequently leaving to the administrative agencies the task of establishing the allowable level of pollution in individual cases. Therefore, a close relationship exists between administrative laws and criminal law, no matter which type of legal system is involved. This is especially the case in countries, where penal and administrative law are traditionally interconnected.

In the area of environmental protection, where criminal law and administrative law are generally linked, administrative laws may clarify the allowed use of the environment. This can be done either by statutory provisions, provisions in subsidiary legislation, such as ordinances or regulations or by administrative decisions aimed at protecting the environment. As a rule, polluting conduct for which a person or a corporate body may be held responsible under

criminal law presupposes infringements of such provisions and is therefore "unlawful" in this respect. However, it is open to member States to restrict the application of administrative law, for example in cases where an administrative decision was taken in violation of substantive administrative law ("abuse of law").

However, compliance with environmental administrative law cannot always preclude criminal liability. A permit may legalise certain acts, but does not grant absolute rights to the polluter.

Administrative consent must not be available, or if granted, irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk thereof. There is a consensus among member States that the concrete endangerment of life and of physical integrity of natural persons should, at least in certain areas, constitute a criminal offence. An "autonomous" offence should accordingly be established, i.e. where the behaviour causes, or creates a significant risk of, death or serious injury to any person, when committed intentionally or with negligence.

III. Commentary

SECTION I – USE OF TERMS

Article 1 – Definitions

Only two terms are defined under Article 1, as all other notions shall be addressed at the appropriate place in the Explanatory Report.

The term "unlawful" is used in Article 2, paragraphs 1/b-1/e and Article 4, paragraphs a-g. It has a broad scope of application. It relates to behaviour prohibited by laws and statutes and also to external subsidiary legislation introduced by governmental bodies with a view to implementing laws and statutes and by decisions taken by relevant authorities, in the area of the protection of the environment, particularly of the environmental media (air, soil, water) as well as of the fauna and flora. Internal administrative rules inside organisations are not included in this definition.

The term "water" is used in Article 2, paragraphs 1/b-1/e and Article 4, paragraph a. The definition given in Article 1 corresponds to the definition used by most international treaties regarding the protection of the environment and includes natural water bodies, such as groundwater and surface water, lakes, rivers including coastal waters, seas and oceans, but excluding water e.g. in swimming pools, tap water or water in sewage systems.

SECTION II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Intentional offences

Article 2 covers the most serious environmental offences which, whether by an act or an omission, are committed "intentionally". This mental element bears upon all elements of the offences specified under 1/a – 1/e. If the same conduct is the consequence of negligence, Articles 3 and 4 apply, the latter being also applicable to other, in general, less serious offences as well.

Paragraph 1

The Contracting States are obliged to establish the "hard core" of offences dealt with in Articles 2 and 3 as "criminal offences". They should usually carry at least as an alternative sanction the sanction of imprisonment (cf. Article 6, 2nd sentence).

Article 2 contains specific environmental offences with an emphasis on the protection of environmental media, i.e. of the air, the soil and water, but also including the protection of

human beings, protected monuments, other protected objects, property, animals and plants from environmental dangers. The first two offences are pollution offences, the latter ones primarily cover pre-stages where the illegal handling of dangerous installations and of specific dangerous substances (radio-active substances, hazardous waste) is likely to cause death or serious injury to persons or damage to the environment.

Paragraph 1/a

The first offence deals with the most serious violations of the environment, namely the intentional pollution of environmental media, creating intentionally at least a significant danger of death or serious injury to persons. It is formed as a so-called autonomous offence (cf. Introduction).

The polluting conduct is described as "the discharge, emission or introduction of a quantity of substances or ionising radiation" into one of the three environmental media (cf. also the definition of "pollution" by reference to the introduction of substances in Article 1 (4) of the UN Convention on the Law of the Sea – UNCLOS - and the definition of "discharge" in Article 2 (3) (a) of the International Convention for the Prevention of Pollution from Ships, 1973). It also includes cases of dumping. The enumeration of different alternatives, even if they may overlap, shall guarantee that all sorts of polluting activities are included. They are different in form, depending on the state of substances (solid, liquid or gaseous) and on the media they enter. "Ionising radiation" is added, because not in all cases substances which are discharged etc. are its source.

All media are put on the same footing, although in the past water pollution offences were dominant. In many member States, however, a stronger protection of the air and recently of the soil, has been introduced. By "air" is meant the air outdoors or outside (i.e. outside buildings and installations) as being one of the objects of environmental protection. The preservation of clean air inside buildings belongs to the area e.g. of working place and health protection laws and regulations. The "soil" embraces the upper crust of the earth, as far as it serves ecological purposes.

The polluting conduct must be intended intentionally to cause "death or serious injury to persons" (cf. Article 7 (1) (a) of the Convention on the Physical Protection of Nuclear Materials) or "a significant risk of" causing it, requiring a causal link between these two elements of the offence. National offences may link such "result" to (negative) changes of the quality or the properties of environmental media as the usual consequence of the conduct described above. Even without actually injuring or killing a person, the offender is liable if he intentionally created, taking all circumstances of the case into consideration, a concrete danger, i.e. an immediate and substantial risk for a person. Such so-called endangerment offences are known in the criminal law of many member States and also in international conventions (cf. Article 1 (e) of the European Convention on the Suppression of Terrorism).

Paragraph 1/b

The second offence is the main pollution offence as the first one has a very limited scope. It differs from the latter in two aspects.

It is not restricted to pollution endangering persons, but is applicable to pollution causing "substantial damage to protected monuments, other protected objects, property, animals or plants". It goes beyond the scope of the general damage provision in criminal law in so far as the objects mentioned do not necessarily belong to another person. On the same footing with the alternative of "damaging", the causation of a "lasting deterioration" of these objects is also included here. Moreover, as regards persons, it is sufficient that the polluting conduct is "likely to cause death or serious injury to any person" which is wider than "creating a significant risk of causing" in paragraph a). A lower and more general degree of risk is sufficient.

The reference to a likelihood of damage or harm or even only of danger is known in international conventions (cf. Article 1 I (4) UNCLOS (see also Article 218 II); Article 7 (1) a of the Convention on the Physical Protection of Nuclear Materials; Article 2 I (b) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents).

The second difference is the additional requirement of an infringement of legal provisions ("unlawfulness"), i.e. either of statutory provisions, provisions in sub-laws, such as ordinances or regulations ("Verordnungen" in Germany) or in administrative decisions; the latter may be part of an administrative act taken by an administrative authority and which contains binding specific orders or prohibitions related to a specific situation. Only those provisions are referred to here which serve the purpose of the protection of the environment but do not exclude the possibility of serving other purposes as well.

The term "property" in this paragraph refers to all kinds of tangible objects, goods, which are not covered by "protected monuments, other protected objects, animals or plants".

Paragraph 1/c

Paragraph 1/c contains the offence of intentional illegal handling of hazardous waste in a dangerous manner.

"Wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (Article 2, paragraph 1 of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their disposal; cf. also Article 1 a) of Council Directive 75/442/EEC on waste). Orientation concerning the notion of "hazardous" waste is given in Article 1, paragraph 1 (together with the appendix) of the Basel Convention and Article 1, paragraph 4 of the Council Directive 91/689/EEC (together with the appendix). Highly radioactive waste is also included.

The offence includes all important phases of illegal handling of such waste. Examples of disposals, such as deposit, surface impoundment, release into a water body, incineration or treatment (biological, physico-chemical) and storage (permanent or not) are given in Appendix IV of the Basel Convention (cf. also Appendix IIA of the Council Directive 75/442/EEC). The terms import and export include all transboundary movements (cf. Article 1, paragraph 3, Article 9 of the Basel Convention, Council Regulation (EEC) No. 259/93) and the term "transport" in addition of course shipments of waste within a Contracting State.

As an obligation for criminalisation should only be introduced for rather serious offences, the unlawful conduct as described is only a criminal offence if death or serious injury to any person or to the environment is likely to occur. However, this does not prevent Member States from going further and from punishing already the unlawful conduct as such, if committed in a blameworthy manner (cf. Article 4, paragraph 1 c).

Paragraph 1/d

Paragraph 1/d deals with the intentional illegal operation of a plant in which dangerous activity is carried out and is likely to cause serious damage to persons or the environment. The notion of "a plant in which a dangerous activity is carried out" is determined by national law. It might include nuclear plants or chemical plants where hazardous substances are processed. As in paragraph 1c, the offence requires a violation of administrative law and a likelihood of damage. Its scope of application does not include effects occurring solely inside the plant.

Paragraph 1/e

Paragraph 1/e extends the offence in Article 7 (paragraph 1/a) of the Vienna Convention of Physical Protection of Nuclear Materials in two ways: it is applicable not only to nuclear

material but also to other hazardous radioactive substances such as Caesium and Strontium. Additionally, it includes the case where the conduct is likely to cause serious damage to animals or plants. The remaining part of the subparagraph is similar to paragraph 1/c.

Paragraph 2

This paragraph provides for the criminal liability of participants in intentional offences as described in paragraph 1 of Article 2.

Article 3 – Negligent offences

Paragraph 1

This paragraph of Article 3 extends the scope of Article 2 to those cases where the offence is committed "with negligence". If, in relation to one, several or even all substantial (objective) elements of the offences in Article 2, the mental element of intention is missing, but negligence can be established, Article 3 shall apply. The standard of such a duty aiming at avoiding the damage or the risks by acts as described in Article 2 is influenced by the required ordinary diligence often laid down in legal, administrative or technical rules, or rules generally acknowledged in the specific professions concerned. This is also the case in relation to the offence in Article 2, paragraph 1/a, as these rules, whether they are legal or non-legal, would not allow the creation of such high risks (cf. the commentary on Art. 2).

Paragraph 2

This paragraph allows States to restrict the application of Article 3 to offences committed with gross negligence. The concept of "gross negligence" requires a serious violation of duties of care. The legislation of several countries provides for this form of negligence in the field of environmental criminal law.

Paragraph 3

In order to meet the concern of certain member States whose legislation includes endangerment (Article 2, paragraph 1 a.ii), only as an intentional offence, a possibility of reservation has been included in this Article. Reservation is also allowed concerning the pollution offence in Article 2, paragraph 1 b, when committed with negligence, but only when it relates to damage to protected monuments, other protected objects or property. This possibility therefore does not apply when the offence relates to damage caused or likely to be caused to environmental media, animals or plants.

Article 4 – Other criminal offences or administrative offences

This article extends the scope of the Convention to a wide range of environment-related illegal behaviours. The "unlawfulness" is always determined by reference to "infringement of the law, an administrative regulation or a decision taken by a competent authority" (cf. comments on Article 2, paragraph 1b).

The Contracting States have the choice to impose criminal sanctions and/or measures, as it is foreseen by Articles 5 to 7 for the offences in Articles 2 or 3, or administrative sanctions and/or measures. The latter may include administrative fines, but also confiscation and reinstatement of the environment (Articles 7 and 8). Other measures of a punitive nature could be e.g. the withdrawal of a permit, the prohibition to continue environmentally dangerous processes or an order to reduce the discharge of pollutants, professional disqualification or even – in minor cases – a simple warning the violation of which could then lead to a fine. What sanctions or measures are used will to a great extent depend on the seriousness of the wrongdoing and of the degree of culpability.

There are member States which consider the level of qualifying elements in Articles 2 and 3 as being too high and too severe and therefore go further in their criminal law. This is especially the case of water pollution, illegal export and import of hazardous waste (on the basis of the Basel Convention) and its illegal disposal.

Often other criteria are used in national law to distinguish between offences as this is done in this Convention between Articles 2 and 3 as well as Article 4. Distinctions depend on the structure of the national law, e.g. whether petty offences still belong to the area of criminal offences (as the lowest category) or to the area of administrative offences (such as the German "Ordnungswidrigkeiten" with non-penal administrative fines as sanctions).

The different categories of offences in Article 4 belong to the so-called abstract endangerment offences where the protected legal interests include the preservation of a certain standard of the quality and of ecological functions of the environmental media and the control interests of the administrative authorities.

Paragraph a

Paragraph a covers the intentional or negligent pollution of the environmental media. As in Article 2 (paragraphs 1/a and 1/b), the substances or the radiation must "enter" these media as a result of illegal conduct. National legislations may decide whether to establish already the discharge etc. as a criminal offence or only as an administrative offence ("Ordnungswidrigkeit", etc.). The criminalisation of such conduct may be made dependent on a pollution with a lesser likelihood of damages or a lower deleterious effect than in Article 2.

Paragraph b

Paragraph b deals with the illegal causation of noise. As such, it is mostly considered as a minor offence. If qualified by additional elements like those in Article 2 (paragraph 1/a), it might be classified as a criminal offence. The obligation imposed by paragraph b may also be met in national law by the establishment of an offence which is not defined by express relation to violation of administrative law.

Paragraph c

Paragraph c is also related to Article 2 (paragraph 1/c), as is paragraph a to Article 2 (paragraph 1/b). It is a general waste offence which also covers very minor cases. It extends the scope of Article 2 (paragraph 1/c) to non-hazardous waste, infringements of law and regulations in general and the violation of conditions imposed by an administrative decision. Mere negligence is sufficient.

Paragraph d

Paragraph d extends the scope of protection afforded by Article 2 (paragraph 1/d) to cases where a plant is operated unlawfully, without regard in general whether there is any dangerous activity carried out by the plant. On the other hand, the likelihood of causing damage is not required under this provision and even cases involving mere negligence are covered by it.

Paragraph e

Paragraph e supplements Article 2 (paragraph 1/e), as do paragraphs c and d. Chemicals which are hazardous (as determined by national, international or supranational law, including EC legislation) are added.

Paragraph f

Paragraph f has no reference to Article 2. It includes in the Convention illegal behaviour related to specific areas in nature which deserve special protection. Examples are on the one hand national parks and nature reserves, as well as water conservation areas such as water protection zones, including drinking water reservoirs. "Other protected areas" are those which need protection due to their environmental quality, i.e. particular beautiful landscapes or biotopes or due to certain dangers like smog-zones or the preservation of certain high standards as in spa resorts.

Paragraph g

Paragraph g deals with the violation of wild flora and fauna species laws and regulations. An important international basis in this respect is the (Washington) Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), implemented in the European Union by EC legislation and generally by national law. Article VIII of this Convention imposes the obligation "to penalise trade in, or possession of, such specimens, or both; and to provide for the confiscation or return to the State of export of such specimens". According to Article 1 (c) of the CITES Convention "trade" means export, re-export, as defined in Article 1 (d), import and introduction from the sea, as defined in Article 1 (e).

This paragraph has, however, in relation to the Convention CITES, a wider scope of application. It applies not only to international trade but also to trade within a Contracting State. In addition, it includes the illegal catching, damaging and killing covered also by national hunting law. Conducts described in this paragraph are in virtually all member States an offence sanctioned at least by fines but often by criminal measures, though in this case they may require additional qualifying elements (e.g. that the protected animal is threatened by extinction or that the perpetrator acted in a professional manner with the aim to make illegal profits).

Article 5 – Jurisdiction

Paragraph 1/a

The Convention obliges Contracting Parties to establish their jurisdiction over the criminal offences enumerated in the Convention. Paragraph 1 lays down the principle of territoriality. Transboundary pollution may, however, raise a problem with regard to territorial jurisdiction. In some cases, it is difficult to define exactly the place where the offence was actually committed, since the constitutive elements of the offence were completed in several countries at the same time.

"In many member states, albeit not in all, for the purpose of allowing the exercise of jurisdiction in accordance with the principle of territoriality, the place of commission is determined on the basis of what is known as the doctrine of ubiquity: it means that an offence as a whole may be considered to have been committed in the place where a part of it has been committed. According to one form of the doctrine of ubiquity, an offence may be considered to have been committed in the place where the consequences or effects of the offence become manifest. The doctrine of effects is accepted in several member states of the Council of Europe" (Council of Europe Report on extraterritorial criminal jurisdiction, op. cit. page 8-9).

It means that wherever a constituent element of an offence is committed or an effect occurs, that is usually considered as the place of perpetration. In this context, it may be noted that the intention of the offender is irrelevant and does not affect the jurisdiction based on the territorial principle.

Paragraph 1/b

Paragraph 1/b introduces the traditional principle of flag which, from the point of view of environmental protection, is very important. Although the high seas and the airspace above the high seas cannot be subject to claims of any state, the pollution occurring on board may seriously affect both the State which owns or operates them and other states whose environmental interest may be affected. Article 5 refers to "ships" instead of "vessels" because the former term is used by most of the relevant international instruments, including the UN Convention on the Law of the Sea (UNCLOS, 10 December 1982) and the London ("Marpol") Convention for the prevention of pollution by ships (2 November 1973).

Paragraph 1/c

The nationality theory is also based upon the state sovereignty: it provides that nationals of a state are obliged to comply with the domestic law even when they are outside its territory. However, there are several interpretations as to the scope of this principle. It may suggest that all offences perpetrated abroad are punishable, but it may also be interpreted in a restricted way: only those offences are punishable which are also punishable by the law of the place where they have been committed. The requirement of double criminality has been included in this Article to deal with offences under Article 4 and those offences under Articles 2 and 3 which are committed on the territory of a non-Contracting State. Where the Contracting States to this Convention have criminalised the intentional and negligent offences under Articles 2 and 3 of this Convention, the requirement of double criminality, if the offence is committed on the territory of a Contracting State, should be satisfied.

The high seas are not subject to the sovereign claims of any State. Similarly, the airspace above the high seas does not belong to any State. There are also some specific environments, such the Arctic, the Antarctic and the outerspace, which cannot be submitted to the exclusive control of any State. In this respect the Convention does not require double criminality in those cases where the offender is punishable under the principle of nationality. It is worth mentioning that these problems can generally be solved by applying the principle of the flag as well.

Paragraph 2

This paragraph is based on the principle of "extradite or punish". It creates an obligation for the Contracting Parties to establish jurisdiction over cases where extradition of the alleged offender was refused. The typical example of this case is the refusal of the extradition of the own nationals.

Paragraph 3

Jurisdiction is traditionally based on territoriality or nationality, while the principle of flag allows States to exercise "quasi-territorial" jurisdiction over offences committed by ships (or aircrafts) flying their flag or registered in their territory. In the field of environmental protection, these principles may, however, not always suffice to exercise jurisdiction, for example over pollution cases occurring on the high seas. Paragraph 3 of this Article therefore allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well. Among them, the universality principle would permit states to establish jurisdiction over serious environmental offences, regardless where and by whom they are committed, because they may be seen as threatening universal values and the interest of mankind. So far, this principle has not yet gained a general international recognition, although some international documents make reference to it.

Current international law and, in particular, the recent UN Convention on the Law of the Sea ("UNCLOS", see e.g. Articles 216 – 218) indicate some possible new ways of enforcing international environmental norms. The port-State, under certain conditions, would be able to exercise jurisdiction over offences committed by non-nationals beyond the limits of traditional

territorial jurisdiction. Thus, when a ship flying the flag of State X is voluntarily within a port or at an off-shore terminal of State Y, the latter State may institute proceedings in respect of a discharge seaward of State Y's Exclusive Economic Zone, in violation of applicable international rules.

Likewise, the shipment of waste principle would allow any State to establish jurisdiction over cases of marine pollution by dumping when the acts of loading of wastes or other matter occurred within its territory or at its off-shore terminals. The requirements for claiming jurisdiction under this principle are similar to those of port-State principle: the acts must have occurred within the Exclusive Economic Zone of coastal State and must have violated applicable international rules.

Paragraph 4

Because of the problems mentioned under paragraphs 1 and 2, the Contracting Parties are entitled to make a reservation with regard to paragraphs 1/c and 2.

Article 6 – Sanctions for environmental offences

This article is closely related to Articles 2 and 3 defining the serious environmental offences which, according to this convention, should be made punishable under criminal law. In accordance with the obligations imposed by those articles, it obliges explicitly the Contracting Parties to provide for criminal sanctions in their criminal laws that are adequate to the seriousness of the offences (1st sentence). According to the 2nd sentence this obligation implies that imprisonment and pecuniary sanctions shall at least be available as a possible sanction. Reinstatement of the environment is indicated as possibility for which the Parties at their discretion may provide.

Because the offences referred to in Article 4 shall be made punishable under either criminal or administrative law, this article is not directly applicable to those offences. In so far as these offences are made criminal, this article may be applied accordingly. Sanctions applicable to legal persons will be dealt with under Article 9.

It is obvious that the obligation to make serious environmental offences punishable under criminal law would lose much of its content if it were not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that imprisonment and pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the Article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It can of course not be the aim of this Convention to give detailed provisions regarding the criminal sanctions to be linked to the different offences mentioned in article 2 and 3. On this point the Parties inevitably need the discretionary power to create a system of criminal offences and sanctions that is in coherence with the existing national legal systems.

The obligation this Article imposes is restricted by referring to the necessary accordance with relevant international instruments. This reference was made especially with a view to Article 230 of the United Nations Convention on the Law of the Sea by which Article the imposition of other than monetary penalties is excluded (with an exception specified in the 2nd paragraph of that article). Where applicable, this Article should also be taken into account when imposing sanctions.

Apart from imprisonment and pecuniary sanctions other sanctions and measures may correspond to the seriousness of the offence. As an example, reinstatement of the environment is mentioned in the second sentence of this article. Pecuniary sanctions refer of course to the fine as a traditional criminal law sanction. In addition to fines, other financial sanctions may also be conceivable. Taking into account that the relevant offences should be criminalised on an adequate level, the height of the financial sanction foreseen should be sufficiently deterring. The level of the financial sanction may be adjusted to the seriousness of the offence which may be determined by mental elements. In another approach, it can be

related to the profitable character of the offence and thereby have a necessary preventive effect. In combination with an obligation to reinstate the environment or to take measures preventing future offences, a system in which the fine is not (completely) fixed in advance, such as e.g. the daily fine, may be considered an effective instrument. A more detailed examination of the subject can be found in the Report of the European Committee on Crime Problems on the contribution of criminal law to the protection of the environment (1978). Confiscation as a criminal sanction or measure forms the subject matter of Article 7 of this convention.

In so far as provision is made for the availability of imprisonment as a possible sanction the Article further leaves open the option to provide for alternative sanctions. In that case only those alternative sanctions shall be taken into account which have an equivalent preventive and deterrent effect. The special character that environmental offences may have calls for a careful consideration of alternatives to imprisonment. Taking into account that these offences may – of course depending on their specific content – in quite a number of cases be perceived as technical defaults almost inevitably occurring in a complicated industrial process, there may be good reasons not only to confront the offender with the traditional criminal response but to frame the sanctions in accordance with the nature of the offence and the offender.

Community service may be an interesting example of an alternative sanction. When taken as an obligation imposed on the offender to work for the benefit of the community its form may be chosen in such a manner that the work to be performed contributes to the protection of the environment. Consideration can also be given to further possibilities provided by some legal systems such as the limitation of the right of the offender to continue activities in a certain profession or position, the withdrawal of a license or permit, the limitation or denial of financial or other facilities (related to the conduct of business in which the offence was committed) provided by public authorities, etcetera.

Reinstatement of the environment (cf. also Article 8) is explicitly indicated as a possibly suitable measure to be imposed as a consequence of an environmental offence. There are legal systems in which the liability for environmental (or comparable) offences is a sufficient condition for a judicial or administrative decision to order the offender to take the necessary steps to repair the damage caused to environmental interests or to create a situation which approaches the environmental conditions prior to the offence. It is clear that measures aiming at this effect are valuable from different points of view and therefore deserve serious consideration. On the one hand this kind of reaction to an offence has a positive value because it is not merely a retributive reflection of disapproval of the offence. On the other hand its positive value consists of the improvement of the environmental conditions that were damaged by the forbidden act.

The idea that steps taken by the offender leading to reduction of the danger or damage to the environment resulting from the offence should be taken in account in decisions in the criminal proceedings was already laid down in Resolution 1 of the 17th Conference of European Ministers of Justice held in 1990. The Committee has considered taking up a provision on this subject in this Convention. Taking in view however that this topic is one of application of criminal law rather than one of legislation, it was decided not to deal with the subject in this article. The present article leaves the Contracting Parties to ensure that the courts are able to determine the appropriate sanctions, taking in account possible measures of reinstatement of the environment carried out by the offender. It does not affect the power of courts to decide whether or not to start or continue a criminal prosecution according to the reinstatement of the environment by the offender. The possibilities in this respect are determined by the national legal systems.

Article 6 presupposes that the national legal systems leave the court some discretionary power in determining the appropriate sanction in the relevant cases. It cannot be determined, by this Convention, the degree to which reinstatement should influence the decision about the concrete sanction nor the forms to be chosen to express that reinstatement has been taken in account. Taking into account however the obligation mentioned in the first sentence of this

article, the effects connected with the reinstatement should be limited in so far as the resulting sanctions even in these cases must adequately reflect the seriousness of the offence.

The reasons to leave court the stipulated discretionary power are obvious. In the tradition of criminal law, spontaneous efforts of the offender to reduce the negative effects of his offence are viewed as indicating a positively valued feeling of social responsibility – provided of course that the efforts are of some significance. In view of the interest of protection of the environment, it is clear that the imposition of criminal sanctions should, where appropriate, prevent counterproductive effects and rather provide stimuli for measures leading to reinstatement of the environment.

Article 7 – Confiscation measures

Paragraph 1 of this article prescribes a general obligation for Contracting Parties to provide for adequate legal instruments to ensure that confiscation of instrumentalities, proceeds, related to the value of offences mentioned in Articles 2 and 3, is possible thereof. The second paragraph allows the Contracting Parties to make a partial reservation in respect of this obligation.

This article must be examined in view of the background of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990). The Convention is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime. Taking into account that quite a number of environmental offences are committed either directly to gain illegal profits, e.g. illegal transportation and dumping of waste, or indirectly to save expenses, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available in this field too. Apart from the expected preventive effect, the contribution of these measures to the restoration of fair economic competition may also be a reason in favour of adopting them in this Convention. The possibilities for international co-operation provided by the Convention make the implementation of the first paragraph of this article all the more important.

This article refers to Articles 2 and 3. In so far however as the offences mentioned in Article 4 are made criminal Contracting Parties may consider to provide for confiscation possibilities in relation to those offences too.

Paragraph 1

It is important to note that – although an explicit provision in this respect is not taken up in the Convention – the implementation of this paragraph presupposes the existence of legal instruments allowing the Contracting Parties to take the necessary provisional steps before measures leading to confiscation can be imposed. The effectiveness of confiscation measures depends in practice on possibilities to carry out the necessary investigations as to the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited. In combination with these investigations, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent that it disappears before a decision on confiscation has been taken or executed (cf.. Articles 3 and 4 in the Money Laundering Convention).

It is clear that the use of confiscation measures may be more effective if the financial and economic expertise needed for the relevant investigations and provisional measures is available to the police, the prosecution and the judiciary. In this respect, the problem of assessing the size of the expenses saved by committing environmental offences instead of complying with environmental regulations must be given attention. Although it is quite well conceivable that proceeds from a number of environmental offences can be calculated with acceptable precision, for other cases reasonable estimations, possibly based on expert opinions, will be inevitable. In so far as solutions to this problem can be laid down in legislation at all, it will be on a national level.

As was mentioned before, this article is related to the Money Laundering Convention. Article 1 of this Convention therefore is instrumental in the interpretation of the terms confiscate, instrumentalities, proceeds and property, used in this article. By the word "confiscate" reference is made to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences established in accordance with Articles 2 and 3. The term "proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such an offence. It may consist of any "property" in the interpretation that the term is being given below.

In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Confiscation may be possible of objects that (directly) form the proceeds of the offence or of other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds. "Property" therefore has to be interpreted, in this context, as including property of any description, whether corporal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Paragraph 2

This paragraph offers the possibility to the Parties to make a reservation concerning the applicability of paragraph 1. The declaration by which the reservation is made may bear upon the offences for which confiscation measures are applicable, or upon (the categories of) objects relevant in this respect. In both situations – or in a combination thereof – the declaration must contain the necessary specifications.

The possibility of making a reservation is included in this Convention since the national law of the member States shows considerable differences in the way confiscation measures are regulated. These differences for instance bear upon the provisions in legal systems that aim at the deprivation of illegally gained profits. This aim may be reached by determining the amount of the fine according to the amount of the profit or by imposing separately a measure obliging the offender to pay an amount equal to the profit gained. Differences also exist in respect of the possibilities for confiscation especially with a view to claims for compensation by the injured party and to the criteria – such as the culpability of the offender or the nature of the offence or the severity of the sanction – that determine the cases in which confiscation measures are applicable. Furthermore, the member States may find reasons to have special regulations for confiscation related to environmental offences taking in account the special characteristics some of these offences have. It is to be noted that this reservation clause is consistent with Article 2 of the Money Laundering Convention that provides for possible reservations too.

Taking into account that confiscation measures (of some kind) related to a conviction for a criminal offence are generally foreseen by the criminal legislation, there seems to be no need for reservations resulting in case of the complete exclusion of the application of paragraph 1. Due to considerations of consistency in the legislation and other elements of legislative policy or considerations with regard to practical problems in implementing certain forms of confiscation, member States may feel the necessity to exclude in a more general way the confiscation of the categories of objects mentioned in paragraph 1.

Article 8 – Reinstatement of the environment

This article is formulated as an optional (opting in) provision. Such a flexible approach seemed necessary as legislations of only a limited number of member States provide for the possibility of the reinstatement of the environment within the frame of the criminal proceedings, especially before the stage of the trial. It is inspired by the underlying philosophy of some existing legislations which recognise the advisability of solving litigations either by

making use of different means of reparation, including the reinstatement of the environment, or the compensation of victims, before the prosecution of the offence or during the trial.

Paragraph a

Paragraph a provides for a general possibility of the reinstatement of the environment, in particular in cases where it is advisable to manage the situations of conflict rather than to impose traditional criminal sanctions. "Measures of reinstatement" means any reasonable measures aiming at to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of those components into the environment.

In view of the differences regarding the application of this measure in member States, this paragraph does not determine the different stages of the criminal proceedings where the reinstatement of the environment can be ordered. It can take place prior to prosecution, e.g. when the offender had no intention to commit an offence and the damage caused to the environment is relatively insignificant. It can also take place at the trial stage. Both alternatives are left to the discretion of the competent national authorities, which should duly take into account the consent of the offender, if appropriate. The "competent authority" may include, in accordance with national law, judicial and administrative authorities, as well as prosecutors.

The implementation of a measure of reinstatement of the environment may be made subject to specific conditions such as the absence of criminal records on the charge of the prosecuted person, consultation of the victims, associations, services or bodies entitled to lodge a claim before the criminal justice. If the reinstatement of the environment is ordered prior to criminal prosecution, the necessary period of time must be left for the offender to comply with such an order. If it is executed properly, criminal prosecution shall not take place. At the trial stage, the reinstatement of the environment can be imposed by decision of the competent judicial authority as the only sanction, or may be combined with a complementary sanction usually pronounced by criminal courts (fines, withdrawal of a permit, etc.).

Paragraph b

In order to ensure the effective implementation of the measure of the reinstatement of the environment by the offender, the competent judicial authority has to provide for a procedure of control. This may take the form of a procedure of adjournment of the trial permitting to control the actual execution of the reinstatement of the environment, but can also consist in a decision of conviction, adapted to the situation and in conformity with judicial traditions of member States. Paragraph b provides for a possibility and not an obligation for the judicial authorities to ensure by additional sanctions the effective implementation of the order of reinstatement of the environment, if it has not been carried out properly or the conditions thereof have not been respected (the offender appeared to be of bad faith). For example, the competent judicial authority shall have the possibility to decide that the measure should be implemented by the offender at his own expenses or impose additional sanctions.

Article 9 – Corporate liability

Article 9 deals with the liability of legal persons. It is a fact that a major part of environmental crimes is committed within the framework of legal persons, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organisation, it becomes more and more difficult to identify a natural person who may be hold responsible (in a criminal law sense) for the offence. Furthermore, if an agent of management is sentenced, the sanction can easily be compensated by the legal person.

The international trend at present seems to support the general recognition of corporate liability in criminal law, even in countries which only a few years ago formally adopted the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent tendencies, e.g. the recommendations of international institutions (see 1994 AIDP Recommendations – Portland/Rio de Janeiro) and Recommendation No. R (88) 18 of the Committee of Ministers of the Council of Europe. The provision leaves, however, open to the States to impose "criminal or administrative sanctions or measures on legal persons" corresponding to their legal traditions.

Article 9, paragraph 1 refers to corporate liability of legal persons. This type of liability necessitates clarification regarding its three conditions. The first condition is that an environmental criminal offence must have been committed, as specified in Article 2 (intentionally) or Article 3 (by negligence). The second condition is that the offence must have been committed "on behalf of" the legal person. The third condition, which serves to limit this liability, requires the involvement of "an organ, a member of its organs or other representatives" in the criminal offence, assuming that those physical persons referred to are legally or by fact in such position which may engage the liability of the legal person. Violations of the supervisory duties are in this respect sufficient.

Article 9, paragraph 2 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

Article 9, paragraph 3 states that each Party "may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of this Article or any part thereof or that it applies only to offences specified in such declaration". The reason of providing such a possibility is that irrespective of the mentioned international tendencies regarding corporate liability in criminal law, some member States still address these problems (or part of them) in administrative law or in civil law, therefore they cannot entirely apply these principles.

Article 10 – Cooperation between authorities

Paragraph 1

A comprehensive system of administrative regulations and case-law for environmental protection apply in most countries. The system contains a great variety of obligations and responsibilities, concerning prohibitions against pollution, permissions to start and carry on different kinds of activities, reports to the authorities responsible for environmental protection and acceptance of control, levels of pollutants and so on. The criminal legislation for environmental protection is to a great extent linked to administrative rules and other norms. Nevertheless, the most serious environmental violations are in some countries independent from administrative law, which means that they are punishable even if the dangerous activity does not contravene any administrative rule. But even in these cases, the administrative system has an important role to play in relation to the perpetrator. As regards environmental offences, criminal law interventions may depend on the facts established by the administrative authority.

The above structure of penal law in the environmental field is reflected in this draft convention (cf. the "autonomous" offence in Article 2 1/a and the dependent ones in Article 2 1/b-e).

There was an agreement in the Committee which drafted the Convention that, due to important divergences between domestic administrative legislations, the co-operation between the authorities responsible for environmental protection and the investigating and prosecuting authorities should be decided and regulated, as a whole, at a national level.

However, it was also agreed that one important aspect of this type of co-operation, the issue of providing information to the law enforcement authorities by authorities responsible for environmental protection, should be included in the Convention. Such information is obviously necessary for the law enforcement authorities and it is available primarily from the authorities responsible for environmental protection.

Paragraph 1/a

Taking into account the above circumstances, Article 10 paragraph 1/a lays down that the authorities responsible for environmental protection shall have an obligation to inform the investigating and prosecuting authorities in cases where there are reasonable grounds to believe that an offence enumerated in Article 2 has been committed. The information shall be given on the initiative of the authority responsible for environmental protection.

The authorities responsible for environmental protection mentioned are not defined in the Article. It is a question left to the national legislature. The Committee had in view those authorities that have a supervisory and controlling competence in the field of environmental protection.

The terms "reasonable grounds" mean that the obligation to inform has to be observed as soon as the supervisory authority considers that there is a likelihood that an environmental offence has been committed. The Committee was of the opinion that the level of likelihood should be the same as the one that is required for starting a police investigation or a prosecutorial investigation.

The obligation to inform without request is proposed to encompass only serious offences. Reference is therefore made only to Article 2.

Paragraph 1/b

This paragraph concerns the obligation to inform on request. The paragraph lays down that the authorities responsible for environmental protection shall provide the investigating and prosecuting authorities with all necessary information, in accordance with safeguards and procedures established by national law. What is considered as "necessary information" should be decided by the requesting authority.

The Committee recognised that in some countries there could be secrecy problems connected with a transfer of information from authorities responsible for environmental protection to law enforcement authorities. It considered, however, that a provision on information provided by the environmental authorities in accordance with a legally established obligation, as is the case here, could not constitute a breach of any restriction on disclosure of information or involve the authority in liability of any kind. Special considerations could be taken into account at a national level as to secrecy for the purposes of protecting national or other essential interests.

Paragraph 2

The Committee also recognised that an obligation to provide information without request could raise problems in some countries. A possibility of reservation is therefore laid down in paragraph 2. As to the information given on request, no possibility of reservation was considered to be needed, because the obligation is subject to national law.

Article 11 – Rights for groups to participate in proceedings

In some countries, legislative measures have been taken to enable groups, foundations and associations (non-governmental organisations, hereafter "NGOs") aiming at environmental protection to participate in proceedings concerning environmental offences. The content of this right, however, varies a great deal from one State to another. In other countries, this right is not known or currently envisaged to be established. It seemed to the Committee that the recognition of this right for NGOs had an increasing importance. It should be mentioned that in this context, Resolution (77) 28 of the Council of Europe on the contribution of criminal law to the protection of the environment already referred to the subject.

The main reason for allowing NGOs access to environmental proceedings is that criminal law in the environmental field protects interests of a highly collective nature, in view of the fact that the various forms of pollution potentially affect the interest not only of single individuals, but also of groups of persons.

The question of giving NGOs access to criminal proceedings remains controversial. Only a few countries have recognised such right. Therefore, as mandatory provisions were found inappropriate, the Committee drafted the Article in a facultative form.

According to Article 11, each Party may grant the NGOs the right to participate in criminal proceedings concerning serious environmental offences as defined in Articles 2 and 3 of the Convention. The voluntary character of the Article is defined by the use of the words "may grant". Which NGOs will have a right to participate in proceedings and what will be the exact content of its rights is a question left for the national legislature. The proposed wording of the paragraph indicates that the NGOs mentioned should be to a certain extent established organisations with statutes and a clearly expressed aim to protect the environment.

As a consequence of the facultative form of this Article, any Contracting Party will be entitled to stipulate any condition limiting the number of NGOs which will have the access to proceedings or the right to participate in them.

SECTION III – MEASURES TO BE TAKEN AT INTERNATIONAL LEVEL

Article 12 – International co-operation

This Section on measures to be taken at international level has been subject to lengthy and thorough discussions within the Committee. These deliberations concentrated upon the question whether or not it was advisable to provide for a substantial and rather detailed section covering several topics in the field of international co-operation in criminal matters. While discussing the possible content of such a section the Committee reached the conclusion that it was not probable that the envisaged section would offer more possibilities for international co-operation than are already taken up in the existing relevant conventions of the Council of Europe. Taking this into account, the majority of the Committee shared the opinion that there are insufficient reasons to expect that Parties will be prepared to accept specific obligations concerning international co-operation in criminal matters in relation to environmental offences.

In relation to this expectation it was also noted that the development of international instruments on specific fields might reduce the willingness to accede to general conventions. With a view to the application in practice, a limitation of relevant international instruments was considered to be desirable too. Due to these considerations this Section is limited to the present Article.

The first paragraph of this Article bears upon the international co-operation in criminal matters. It imposes a general obligation on the Contracting Parties to afford each other all possible co-operation within the limits of the (bi- and multilateral) agreements to which they have acceded and their national law. The reference made to instruments on international co-

operation is formulated in a general way. It includes of course the Council of Europe Conventions on extradition (ETS 24), mutual assistance in criminal matters (ETS 30), the supervision of conditionally sentenced or conditionally released offenders (ETS 51), the international validity of criminal judgements (ETS 70), the transfer of proceedings in criminal matters (ETS 73), the transfer of sentenced persons (ETS 112), the laundering, search, seizure and confiscation of the proceeds of crime (ETS 141). Other international treaties, including maritime conventions such as the UN Convention on the Law of the Sea, but also the Vienna Convention on the Physical Protection of Nuclear Materials may be relevant in respect of international co-operation.

The second paragraph of the Article is meant to stimulate the Parties to render each other assistance in investigations and proceedings relating to acts that are made liable to administrative sanctions and measures according to Article 4 of this Convention. This form of international co-operation should be considered in the case where the relevant offence is not a criminal one in both Parties concerned as well as in the case where the relevant offence is made criminal by one Party but not by the other.

Taking into account that the instruments on international co-operation in this field have not yet reached the degree of development that exists in the field of criminal offences, it is not feasible to extend the scope of this Convention to obligations concerning administrative offences. With a view to already developed instruments like the EC-regulation 1468/81 (L 144), the Schengen-Treaty (art. 50) and the Council of Europe Convention on the obtaining abroad of information and evidence in administrative matters (ETS 100) a tendency to further progress in international co-operation is demonstrable. It will be clear that the aim of this Convention calls for the joined effort of the Parties to assist each other in enforcing environmental legislation.

SECTION IV – FINAL CLAUSES

Articles 13 to 21

With some exceptions, the provisions contained in this Section are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

Article 13 – Signature and entry into force

Article 13 has been drafted on several precedents established in other Conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS No. 141), which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible. The provision in Article 13 is intended to apply to one non-member State, i.e. Canada, which was represented on the Committee of Experts by an observer and was actively associated with the elaboration of the Convention. Other non-member States that do not fall under the scope of Article 13 may be invited to accede to the Convention in conformity with Article 14.

Article 14 – Accession to the Convention

The Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties, invite any non-member State to accede to the Convention.

Article 15 – Territorial application

Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the Convention for any Party to exclude from the application of this instrument parts of its main territory and that there would be no need to lay this down explicitly in the Convention.

Article 16 – Relationship to other conventions and agreements

In conformity with the 1969 Vienna Convention on the law of treaties, this Article is intended to ensure the co-existence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements (cf. the conventions referred to in the commentary under Article 12) relating to matters dealt with in the Convention. The drafting permits the a contrario deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

As regards the range of possible sanctions for environmental offences, the accordance with other international instruments is provided for in Article 6.

Article 17 – Reservations

This article lays down on a restrictive basis the reservations which can be made to the Convention.