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WORKING PAPER ON PROTECTING THE ENVIRONMENT THROUGH CRIMINAL LAW

Document prepared by Ms Véronique Jaworski, Senior Lecturer, University of Strasbourg,
Researcher at the SAGE political social sciences laboratory

www.coe.int/cdpc | DGI-CDPC@coe.int

The Convention on the protection of the environment through criminal law was opened for signature by member States of the Council of Europe and non-member States having participated in its preparation on 4 November 1998. However, the threshold of three ratifications required for its entry into force has never been attained. The Convention has been ratified by just one Council of Europe member State: Estonia in 2002. A number of reasons specific to the domain of the environment and the situation at that time could be put forward to explain the failure of this convention which remains unimplemented. Developments in the environmental situation and the challenges now facing us (global warming, erosion of biodiversity, depletion of natural resources, increasing environmental crime etc) are now prompting us to consider devising a new text.

From the environmental law viewpoint, one of the primary difficulties is that **a sizeable arsenal of instruments exists but it is disjointed and devoid of specific criminal provisions,** made up of numerous environmental regulatory texts, scattered across different levels. Since the second half of the 20th century, environmental law has seen a real proliferation of international and European texts. There are now over 300 multilateral international treaties focusing on issues affecting entire regions if not the whole planet and more than 900 bilateral international treaties on transfrontier pollution[1]. Within the EU framework, over 250 texts, mainly directives, lay down standards and limits in the area of the environment, with the directive of 19 November 2008 seeking to harness criminal sanctions to them to ensure compliance. Given this tangle of supranational texts lacking overall coherence, it would seem a wise move to introduce a unified criminal law mechanism with a view to adopting common definitions of criminal offences and related sanctions to achieve a minimum degree of harmonisation in Europe, as the current arsenal of instruments comprises a whole host of general texts that do not contain a specific criminal law mechanism to ensure compliance with the norms they lay down, which seriously compromises their effectiveness.

As regards protection under criminal law, **the domain of the environment appears to be a vast and complex area, and above all difficult to transpose in terms of criminal legislation and to unify.** Environmental issues present specific characteristics that are difficult to reconcile with the universal principles of criminal law. The main stumbling block for a general criminal law text is the definition in clear and precise terms - to avoid arbitrariness (principle of the legality of criminal offences and penalties) - of what constitutes damaging the environment, the point at which it becomes grave and serious (principle of necessity of punishment) and the "price" of nature (principle of proportionality of punishment). The fact that there are diverse domestic criminal law systems employing differing legal notions, combined with the sectoral nature of legislations intended to cover the multiple areas of the environment in domestic and international law, makes it difficult to achieve the coordination and alignment needed to achieve balanced drafting of unified criminal law and its integration in the different domestic legal orders of European States. Given such normative diversity, common denominators should be identified in what already exists in domestic criminal law systems, which could then be supplemented with innovative repressive elements in response to today's environmental challenges and the growth of environmental crime.

Finally, it should be noted that, **seen against the situation prevailing at the time of the negotiations and its adoption, the 1998 Convention was a ground-breaking text.** It is understandable that some States, deeply attached to their national sovereignty, may have felt destabilised by such an innovative convention, which was the first supranational text to envisage treating actions causing damage to the environment as criminal offences. On the one hand, criminal law is intrinsically sovereign and, on the other hand, the environment will therefore be preferably guaranteed at domestic level by sanctions under administrative or civil

[1] V. M. Prieur, Droit de l'environnement, Précis Dalloz, 8e éd., 2019 ; R. Romi, Droit international et européen de l'environnement, LGDJ Montchrestien, Domat Droit public, 3e éd., 2017 ; C. Roche, L'essentiel du droit de l'environnement, Gualino, Lextensoéditions, 11éd., 2020-2021.

law. The 1998 Convention, a visionary text in both those areas, proposed a new path for protection that States were to incorporate in their school of thought and with which they had to take the time to familiarise themselves so that they could adopt and implement it. Devising a new text would make it possible to respond to present-day societal claims expressed in public opinion and integrate recent developments in domestic justice to promote environmental protection (eg the "Urgenda" case in the Netherlands). It would then be feasible to lay down the foundations for a European criminal law reflecting the developments in our societies and taking account of progress made in domestic prosecutions to encourage the stepping up of environmental protection policy, including through stricter criminal law measures covering the most serious acts of environmental damage.

I- FOCAL POINTS AND GENERAL PRINCIPLES

Any legal text has to be drafted in compliance with and as a reiteration of the general principles that govern the sphere in which it operates. A future convention on the environment and its protection under criminal law would therefore have to combine the fundamental principles of criminal law and of environmental law.

With regard to the former, the offences and punishments laid down are governed by the **cardinal and universal principle of the legality of criminal offences and penalties** which means that they must be defined clearly and precisely. The choice of sanctions must be made in keeping with the **principles of being necessary and proportionate.** The criminal law response must reflect the seriousness of the offence committed and be based on a gradation of main sanctions depending on whether the act in question was intentional or negligent or on the damage caused. Tailoring the sanctions to fit the offences in this way makes it possible to meet the demands laid down by the Council of Europe in other criminal law conventions, requiring them to be "effective, proportionate and dissuasive", and to establish a minimum common level of criminal punishment. Solidarity between the States and the existence of common rules for developing **international cooperation in the criminal law field** form the foundation of a harmonised sanctions mechanism. This cooperation is particularly crucial not only because environmental crime often has an impact beyond the borders of the country where it is committed but also because it is increasingly taking the form of international trafficking.

Regarding the specific domain of the environment, recognition of **the general interest of protecting the environment** is the core principle. With the acceleration of degradation phenomena, the issue and urgency of environmental challenges have changed. Given the common interest – legally recognised – constituted by the preservation of the environment and, with it, human health, security and world peace[2], the States are called to respond by renewing the legal bases of international cooperation in this area. **New essential values**, **such as the safety of the planet, the balance of the biosphere, biodiversity and ecosystems,** are emerging in the sphere of law and require strengthened protection including by means of unified and appropriate criminal law. In step with this development, the aim is therefore to establish a foundation common to the States, laying down minimum rules for more effective environmental protection.

To tackle multifaceted environmental crime, both national and transnational, the criminal law mechanism must take an **approach that is both sectoral and systemic**, to cover the full range of conduct and activities that cause or may cause the most serious damage to the environment. To be comprehensive, the definition of offences would comprise both

[2] 1992 Rio Declaration on environment and development and Agenda 21; United Nations Environment Programme (UNEP); Treaty on the functioning of the EU (TFEU); Additional Protocol (I) to the Geneva Conventions etc

offences of non-compliance with pre-established special rules – of a legislative or administrative nature -, relating to specific "unlawful" acts, and **general offences endangering the planet.**

On the one hand, existing **specific offences, by environmental sector** (water, air, fauna, flora, waste, pollution etc) are to be added to and precisely defined, in line with the universal principle of the legality of criminal offences and penalties. The unlawful nature of the acts criminalised refers to the infringement not only of laws but also of administrative rules, with which criminal law will associate sanctions to ensure their application. It is important, therefore, that States maintain, improve or introduce an administrative framework governing the various human activities that are likely to have a serious impact on the environment.

On the other hand, for conduct not falling within this first group of criminalised acts, **more general offences of endangering the environment** should be established to cover the most serious instances of massive damage to the environment for which, for the time being, there are no sufficiently dissuasive sanctions. The aim is to have an appropriate response to the global challenges produced by extremely grave situations, such as clearance of rainforests, which are reaching the point of no return, the pollution of ground and water resulting from oil drilling or the environmental danger from tankers transporting hazardous substances which enter protected marine areas.

II- MODEL PROVISIONS FOR INTERNATIONAL COOPERATION

Drawing on the model provisions for Council of Europe criminal law conventions (doc. CDPC (2017) 15 and CDPC (2017) 14), the general principles that are to govern international cooperation in criminal law matters are as follows:

1 The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in pursuance of relevant applicable international and regional instruments and arrangements agreed on the basis of uniform legislation or reciprocity and their domestic law, to the widest extent possible, for the purpose of investigations or proceedings concerning the criminal offences referred to in accordance with this Convention, including seizure and confiscation.

2 If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such a treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by the domestic law of the requested Party, consider this Convention as the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences referred to in this Convention and may apply, *mutatis mutandis*, Articles 16 and 18 of the United Nations Convention against Transnational Organized Crime (UNTOC) to this effect.

III- WORK OF THE EU ON ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LAW

Directive 2008/99/EC of the European Parliament and the Council on the protection of the environment through criminal law was adopted on 19 November 2008 after prolonged negotiations, drawing directly on the text of the Council of Europe Convention. At that time, the pre-Lisbon Treaty EU did not have competence in criminal law matters. The issue of the environment opened up new prerogatives for the Union, with a notable judgment handed down by the CJEU on 13 September 2005, Commission v/Council, recognising the Commission's power to impose the obligation on the Member States, through a directive, to provide for

criminal sanctions where these are indispensable and necessary to ensure that the community rules laid down, in this case on environmental protection, are fully effective. In 2007, the Treaty of Lisbon validated the possibility for the Union to legislate on criminal matter. But negotiations on the directive adopted in 2008 had commenced well before the Treaty of Lisbon and, as a result, its content is lightweight and no more than tentative. In particular, the defining of criminal offences merely adds criminal sanctions to administrative sanctions and does not cover stand-alone crimes and offences against the environment. Nor are the difficulties linked to the increased involvement of organised crime groups and the need to promote more transfrontier cooperation sufficiently expanded upon.

In the second half of 2019, the Finnish Presidency of the European Union (of its Council) made public two key documents on the state of play of the fight against environmental crime in the Union: on 4 October, a presidency report on EU environmental criminal law, and on 15 November, the final report of the eighth round of mutual evaluations on environmental crime (https://www.consilium.europa.eu/en/meetings/jha/2019/12/02-03/). At the end of 2019, the Commission also launched a public consultation for the evaluation of the directive, which closed on 2 January 2020 and involved a number of associations, such as "Notre affaire à tous" and "End Ecocide EU" as well as the Union's environment policing cooperation networks. Finally, on 19 December 2019, the European Economic and Social Committee gave its opinion on the directive.

The different departments of the European Commission are now in the process of finalising the evaluation of the directive, on the basis of the various evaluations and contributions received (accessible on the public consultation website, summary of opinions of 7/2). One of the main challenges is to both transpose the directive and effectively implement it. It would appear that the public authorities, police services and courts in the different Member States do very little to address environmental crime. At the end of this evaluation, the Commission will have three options to choose from:

1/ Scale up efforts to transpose and implement the 2008 directive in unchanged form;

2/ Partially amend the directive, particularly with a view to improving and harmonising the definition of environmental crime throughout the Member States as well as the scale of criminal sanctions;

3/ Adopt a more and ambitious innovative approach, seeking to recognise and prosecute damage to the environment as a stand-alone offence, including by recognising the crime of ecocide at European level.

On 10 September 2020, the European Commission issued a statement to the effect that the scope of criminalisation of offences should be broadened at European level, which suggests that it is leaning towards the third option of a new, more ambitious text. This is a direction that the Council of Europe should also take, bearing in mind that environmental issues go beyond the borders of the EU.

From the beginning, with the Council of Europe's 1998 Convention and the EU's 2008 directive, the two institutions have ultimately been working in the same direction where the protection of the environment through criminal law is concerned.