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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

DRAFT FEASIBILITY STUDY ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

Document prepared by the
Working Group on the Environment and Criminal Law (CDPC-EC)

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Table of Contents

Introduction

1. With the acceleration of degradation phenomena (climate change, erosion of biodiversity, depletion of natural resources, destruction of habitats, etc.), the environmental problems and issues have evolved, highlighting the importance of this situation. This issue is recognised as topical on many sides, including by the IPBES on biodiversity[1] and the COP 26 on climate change.

2. Environmental crime is likely to take many forms, which the law needs to identify, define and criminalise in a clear, effective and proportionate manner, fully respecting the principle of legality. However, any strategy to combat crime involves many actors and various policy areas. Among the latter, the use of criminal measures and mechanisms alone cannot guarantee the success of such a strategy. Criminal law is only one instrument among others and in addition to that it is an instrument of last resort, but it is also a particularly important one for its repressive and preventative functions.

3. The Council of Europe has been a pioneer in this field, adopting on 4 November 1998, a Convention on the Protection of the Environment through Criminal Law (ETS No.172) (hereafter "1998 Convention") which was the first international, legally-binding instrument mandating criminalisation of behaviour that is environmentally damaging. However, it should also be kept in mind that this instrument did not enter into force as the threshold of three ratifications required for its entry into force has never been attained[2].

4. Nonetheless, the text inspired the work of the European Union which led to the adoption of Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law.

5. Following its decisions taken at the Plenary meeting held on 3 and 4 November 2020, the European Committee on Crime Problems (hereafter the CDPC) set up an ad hoc Working Group on the Environment and Criminal Law (hereafter the CDPC-EC). The Working Group was entrusted with the task of carrying out a Feasibility Study to assess whether the elaboration of a new Council of Europe instrument on the protection of the environment through criminal law, to replace the 1998 Convention, is feasible and appropriate.

6. The CDPC-EC Working Group comprised of 32 experts representing 23 states[3] and the European Union, as well as one Scientific Expert, held four meetings, online.

7. The purpose of this Feasibility Study, prepared by the Working Group, is therefore, to list the main elements that can serve as a basis for reflection, discussion and ultimately a decision on whether the elaboration of a new convention on the protection of the environment, prepared within the Council of Europe, notably under the auspices of the CDPC, is feasible and appropriate. In the first part, the appropriateness of adopting a new instrument will be examined: the analysis of the failure of the 1998 Convention, the position taken by the Parliamentary Assembly of the Council of Europe and legislative work by the European Union, the role of the Council of Europe and the reasons for a possible new instrument and the question of its added value (1). In the second part, the legal issues to be discussed and

1 IPBES (2019): Global assessment report on biodiversity and ecosystem services, available at https://www.ipbes.net/global-assessment

2 Only Estonia ratified the Convention in 2002.

3 Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, the Netherlands, North Macedonia, Portugal, Romania, Russian Federation, Slovenia, Spain, Switzerland, Turkey, Ukraine.

included in the possible drafting of a new convention and the different options for dealing with these will be presented (2).

1. A new Council of Europe Convention on the Protection of the Environment through Criminal Law?

8. Criminal law is a regalian matter falling under the sovereignty of each state. Where necessary, the drafting of general minimum standards should be part of a common and collaborative international framework. The establishment of a common international framework should be founded upon the lessons learned from the past and the feasibility and appropriateness of such an instrument in today's context.

1.1. The Analysis of the Failure of the 1998 Convention on the Protection of the Environment through Criminal Law

9. At their first meeting, the experts of the Working Group emphasised the importance of understanding why the 1998 Convention was not successful and never entered into force to identify the challenges faced by an environmental crime convention and avoid the drawing up of an instrument that yet again risks to fail. In order to address this issue, each delegation was invited to submit responses to the following contribution points:

> *1. Please specify the reasons **why** your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic);*
>
> *2. Please identify **the specific elements** (and/or possible articles) of the 1998 Convention that your State considers to be **relevant** today and should **remain** in a possible new convention;*
>
> *3. Please specify the **connection or interdependency (if any) between criminal law and administrative law** within your domestic law in the context of the environment (in order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?).*

10. The second meeting of the Working Group was thus dedicated to the presentation and examination of the responses received in the document titled 'Compilation of Contribution Points' (see Appendix 1), prepared by the CDPC Secretariat.

11. Regarding the first point concerning the failure of the 1998 Convention, many states noted that they had difficulty when trying to determine the specific reasons why the Convention was not signed and/or ratified in each respective state. More specifically, many delegations expressed that the work of the European Union on the Directive on the Protection of the Environment through Criminal Law (2008/99EC) could have overshadowed the Council of Europe Convention at that specific time. The importance of close collaboration and co-ordination with the European Union in the current work of the CDPC-EC was, therefore,

emphasised. Additionally, the Working Group noted that the existence in the 1998 Convention of provisions establishing 'stand-alone' offences that are completely separate from administrative law was often considered problematic in each domestic system.

12. The analysis of the responses to the second contribution point (*specific elements and/or possible articles of the 1998 Convention that should remain in a possible new convention)* is available under *Chapter 1.3 Paragraph 24.*

13. The responses to the third contribution point *(the connection or interdependency between criminal law and administrative law),* underlined that the legal systems of states mainly provide for a substantive interdependency between administrative law and criminal law. Consequently, the lack of connection between the two in the 1998 Convention may have hindered its success (see also *Chapter 1.3 Paragraph 26*).

14. Based on the responses received by delegations, it is clear that it was not the nature of the instrument that hindered the success of the Convention but rather the contextual and basic structural elements, including the aforementioned relation between administrative environmental law and criminal law, as well as some far-reaching provisions that were a challenge.

1.2. The Need for a New Convention on the Protection of the Environment through Criminal Law

15. A new Council of Europe Convention on the Protection of the Environment, founded on the lessons learned from the 1998 Convention, laying down a common framework for national legislations could provide a general basis of pan-European criminal law, in full respect of national legal frameworks, making it possible to harmonise the states' general approach to combat and prevent environmental illegal activities.

16. A new convention could represent an added value to what is already achieved at national level alone. Basic common rules seem to be crucial in order to effectively combat and prevent environmental crime and contribute to discouraging the phenomenon of "environmental dumping": the practice whereby criminals carry out their acts in states where environmental legislation is less strict, less controlled or not enforced.

17. Furthermore, a new convention would provide an opportunity to respond to the current societal demands, bearing in mind, however, that public debate on topical phenomenon and issues is, of course, important, but underlining at the same time that criminal law policies should not be decided on the basis of public demands.

18. Environmental pollution and offences are often transboundary in nature. Environmental crime frequently has extraterritorial effects and increasingly takes the form of international trafficking[4]. Environmental crime is estimated as the world's fourth largest criminal enterprise[5], with criminals exploiting the differences in approaches taken by countries. What may

4 a) EUROPOL European Union Serious and Organised Crime Threat Assessment (SOCTA) (2021), p.54, available at: *https://www.europol.europa.eu/publication-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-socta-2021*
b) UNEP Global Environmental Alert Services (GEAS), (2012), Transnational Environmental Crime- a common crime in need of better enforcement, p.3, available at: *https://wedocs.unep.org/rest/bitstreams/14319/retrieve*
5 UNEP – INTERPOL Report: Value of Environmental Crime up 26%, (2016), Available at: *https://www.unep.org/es/node/8026*

constitute a crime in one country, may not in another, effectively enabling criminals to go "forum shopping"[6]. The global impact of the resulting damage and degradation, as well as the development of forms of criminality in this domain, such as organised crime on a transnational scale, lead to a broader view and a systemic approach in dealing with these problems. The existence of a common and general understanding of what might be the criminal and administrative measures in response to environmental crime seems appropriate to ensure a reinforced and impactful response to this form of criminality.

19. Establishing minimum standards between states on such existing and developing environmental matters would, therefore, further facilitate the capacity for more efficient and effective law enforcement prosecution. On this basis, the exchange of information, exposure to best practices and specialisation training for law enforcement would simultaneously improve and promote greater international co-operation.

20. The effectiveness of the fight against environmental crime, in all its dimensions and in particular across borders, depends *also* and amongst others on effective international co-operation between states. Such co-operation is essential to ensure that the relevant national authorities involved in the prevention and the fight against environmental crimes "speak the same language". A new legal instrument would be an opportunity to lay down common rules for such enhanced international co-operation, drawing from existing international instruments of the Council of Europe.

21. It is important to bear in mind that the Council of Europe has historically been concerned with many major issues facing European countries. It is part of its mission to develop common responses to the political, social and legal challenges of its member states[7]. However, if we take into account the increasing concerns related to the protection of the environment (also through criminal law) and the development of environmental problems which are taking on a systemic and global dimension, we are faced with challenges and risks which go beyond the simple ecological crisis, which are multidirectional and intergenerational.

22. The Council of Europe, whose criminal law conventions are recognised as efficient in general, and whose work in the field of protection of the environment through criminal law has been longstanding, is particularly well placed to propose a renewed common framework, adapted to current and future challenges. Because of the large number of its member states (47 countries) that extend beyond Europe, its influence is such that the instruments it develops, may carry considerable weight across borders, in line with the transboundary nature of the environmental challenge that needs to be met. The adoption of a new convention in this field, in addition to its highly symbolic dimension on the international scene, in parallel with other (regional) initiatives, could have a knock-on effect at the national level and inspire other international instruments. Therefore, the question of a new convention by the Council of Europe deserves to be considered highly appropriate in the context of a general dynamic of discussions and negotiations to respond to this urgent situation.

23. The Council of Europe was set up to secure democracy based on the freedom of the individual and to prevent a recurrence of the mass human rights violations committed during the Second World War. The Council covers all major issues facing the European countries,

6 UNEP-INTERPOL, Rapid Response Assessment, The Rise of Environmental Crime: A growing threat to natural resources, peace, development and security, (2016), p.20-22, p. 25, p., p.39, Available at: *https://wedocs.unep.org/bitstream/handle/20.500.11822/7662/The_rise_of_environmental_crime_A_growing_threat_to_natural_resources_peace%2C_development_and_security 2016environmental_crimes.pdf.pdf?sequence=3&isAllowed=y*

7 See the Council of Europe Budapest Convention and the Istanbul Convention for example.

other than military defence, and aims to promote democracy, human rights and the rule of law, and to develop common responses to political, social, cultural and legal challenges in its member states. The task of promoting adherence to the rule of law becomes particularly important when developing environmental regulation and the protection of the environment is a priority for the Organisation.

1.3 The Feasibility and Appropriateness of a New Convention on the Protection of the Environment through Criminal Law

24. Following the examination of the replies to the second contribution point submitted by the Working Group (*The identification of **the specific elements** (and/or possible articles) of the 1998 Convention that are considered to be **relevant** today and should **remain** in a possible new convention)*, the experts of the Working Group emphasised that lessons can and should be learnt from the failure of the 1998 Convention, acting as a basis for possible future negotiations of a new convention. The Working Group agreed that the following articles contained in the 1998 Convention would be suitable to remain in a possible new Council of Europe Convention, possibly subject to certain changes:

- Article 5 – Jurisdiction;
- Article 6 – Sanctions for environmental offence;
- Article 7 – Confiscation measures;
- Article 8 – Reinstatement of the environment (provided it remained optional);
- Article 9 – Corporate liability;
- Article 10 – Co-operation between authorities;
- Article 11 – Rights for groups to participate in proceedings (provided it remained optional);
- Article 12 – International co-operation.

25. Such changes may include the incorporation of optional provisions that ensure the text is flexible enough to accommodate existing domestic legal situations. On the other hand, some elements of the 1998 Convention were noted as potentially challenging and thus, too difficult to remain in a possible new convention.

26. As mentioned earlier in this document, one of the key issues and major challenges that was raised by the Working Group is the substantiative interdependency and the link between administrative and criminal law and measures in each domestic legal system. The Working Group highlighted that these aspects are, as a general rule, interdependent in environmental matters, since the failure to comply with administrative regulations is, in most member states, one of the constituent elements of a criminal offence. Thus, the existence of administrative regulations is a prerequisite for the possibility of making the violation of the rules laid down in a criminal offence. In the event of non-compliance with these obligations and standards, proportionate offences are established with the possibility of applying penal or administrative sanctions. Thus, criminal law is very often ancillary to administrative environmental law. However, in very few member States, some offences are defined not in relation to a failure to comply with an administrative regulation but in relation to the damage caused to the environment. These offences (serious misbehaviours) are traditionally very few in number. The Working Group, therefore, repeatedly stressed the fact that when drafting a possible new convention, the experts of the future Drafting Committee will need to maintain the substantive interdependency of administrative and criminal law and find the most appropriate solution,

bearing in mind the widely shared view of the member states on the essential interdependency of administrative environmental law and criminal law.

27. The experts also emphasised the importance of ensuring that sanctions are proportionate and in respect of national legal systems, in which it was agreed by the Working Group that the aforementioned CDPC Model Provisions should be utilised to guide such discussions. In particular, with regards to Article 8 on sanctions and measures and Article 12 on international co-operation, as key elements of a possible new convention, as cited below[8]:

'Article 8 – Sanctions and measures

1 Each party shall ensure that the criminal offences referred to in [Articles x, y of] this Convention, when committed by natural persons, are punishable by effective, proportionate and dissuasive sanctions, which take into account the seriousness of the offence. [These sanctions shall include, for criminal offences in accordance with Articles [x] and [y], penalties involving deprivation of liberty that may give rise to extradition.]

2 [Each party shall ensure that legal persons held liable in accordance with Article 7 (Liability of Legal Persons) are subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal monetary sanctions [, and could include other measures, such as:

a) [temporary or permanent disqualification from exercising commercial activity;
b) exclusion from entitlement to public benefits or aid;
c) placing under judicial supervision;
d) a judicial winding-up order].]

3 [Each Party shall take the necessary legislative and other measures, in accordance with domestic law, to permit seizure and confiscation of:

i. instrumentalities used to commit criminal offences referred to in [Articles x, y of] this Convention;
ii. Proceeds derived from such offences, or property whose value corresponds to such proceeds.]

Article 12 – International co-operation in criminal matters

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

8 European Committee on Crime Problems (CDPC) Model Provisions for Council of Europe Criminal Law Conventions (2016), Available at: *https://rm.coe.int/european-committee-on-crime-problems-cdpc-model-provisions-for-council/1680713e9b*

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 on Transnational Organized Crime (UNTOC) to this effect[9]].'

28. As for the provisions related to sanctions and international co-operation contained in the possible future Council of Europe Convention on environment, the Working Group agreed with the general approach of the CDPC namely, that "in future negotiations on any new criminal law convention the Model Provisions for Council of Europe criminal law conventions which contains "standard language" should be used". The full text of the "model provisions" is intended to set out a "model Convention" and follows, in principle, the structure of some recent Council of Europe criminal law conventions. Future negotiators of draft criminal law Conventions may use this model text as guidance in their work. Many of these standard provisions can be used by negotiators without adjustments.

1.4. The Parliamentary Assembly of the Council of Europe

29. The Parliamentary Assembly of the Council of Europe held its Fourth Part Session on 27-30 September 2021 in which an entire day was dedicated to debates on matters related to the environment, human rights, the rule of law and democracy.

30. On 29 September 2021, Rapporteur Mr Ziya Altunyaldiz (Turkey, NR) for the Committee on Legal Affairs and Human Rights presented Resolution (No.2398) and Recommendation (No.2213) from the Report titled "Addressing issues of criminal and civil liability in the context of climate change" (Doc. 15362) (See Appendix 3), which makes specific reference to the work of the CDPC-EC and the failure of the 1998 Convention. This report is dedicated to addressing the legal responsibility of the environmental situation and thus the essential role of criminal and civil law in "climate litigation". The Recommendation (Rec. 2213) specifically states that the Parliamentary Assembly "recommends that the Committee of Ministers draft without delay, a new legal instrument to replace the Convention on the Protection of the Environment through Criminal Law (ETS No.172)", calling on member states to reflect on the need to replace this treaty to ensure that they are equipped to respond to the current challenges posed by climate change.

31. Following this presentation, the Parliamentary Assembly proposed reinforcing civil and criminal liability for "acts that might have an impact on climate change or cause severe environmental damage" and highlighted the need to "pursue a unified criminal policy to protect the environment and to adopt common definitions of environmental crimes and sanctions thereto".

32. The Resolution (No. 2398) and the Recommendation (No. 2213) were adopted unanimously by the Parliamentary Assembly and further decided to establish a parliamentary network under its auspices, whose task would be to follow action by national authorities to meet the commitments made in response to the climate crisis.

9 United Nations Convention on Transnational Organized Crime (UNTOC) (2004), Available at: *https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf*

33. Such discussions and decisions by the Parliamentary Assembly of the Council of Europe underline the importance of the work of the CDPC-EC and support the possible elaboration of a new convention on the Protection of the Environment through Criminal law, as a matter of priority.

1.5. The European Union

34. Within the European Union, over 250 texts, mainly directives, lay down standards and limits in the area of the environment. The Council of Europe 1998 Convention has had a significant influence on some of these instruments, namely, Directive 2008/99EC of the European Parliament and the Council on the Protection of the Environment through Criminal Law.

35. This Directive lays down the minimum rules to be followed by European Union member States in the field of environmental criminal law. The aim is to "achieve the effective protection of the environment through more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species"[10].

36. This Directive has undergone evaluation and public consultation in 2019/20, in which the results were published in October 2020. Based on the results of the evaluation, the Commission has proposed to revise the Directive. The Executive Summary of the Evaluation highlights some objectives that may be, but are not limited to, possible areas for improvement[11]:

1. *Measures could be considered to gather statistics and data on environmental crime in a consistent manner throughout the European Union and reported to the Commission;*
2. *The interpretation of some legal terms needing further definition in practice could be facilitated;*
3. *More could be done to standardise the level of sanctions across the Member States, in respect of the Member States' national legal traditions and criminal law systems;*
4. *Additional sanctions and sanctions linked to the financial situation of legal persons could be considered;*
5. *The scope of the Directive could be extended to cover more or new areas of environmental crime;*
6. *The Directive could do more to address cross-border co-operation and organised crime;*
7. *Measures to improve practical implementation could be considered (e.g. specialisation of practitioners).*

10 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, Available at: *EUR-Lex - 32008L0099 - EN - EUR-Lex (europa.eu)*

11 European Commission Staff Working Document, Evaluation of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive), SWD (2020) 259 final of 28 October 2020 (part I, part II, executive summary)

37. On 15 December 2021, the European Commission adopted a proposal for a new EU Directive on environmental crime[12]. The proposal sets new EU environmental criminal offences, including illegal timber trade, illegal ship recycling or illegal abstraction of water. In addition, the proposal clarifies existing definitions of environmental criminal offences, providing for an increased legal certainty.

38. The Commission proposes to set a common minimum denominator for sanctions for environmental crimes. The proposal also provides for additional sanctions, including the restoration of nature, exclusion from access to public funding and procurement procedures of the withdrawal of administrative permits. It aims at making relevant investigations and criminal proceedings more effective and provides for support of inspectors, police, prosecutors and judges through training, investigative tools, coordination and co-operation, as well as better data collection and statistics. The Commission proposes that each member state develops national strategies that ensure a coherent approach at all levels of enforcement and the availability of the necessary resources. The proposal will help cross-border investigation and prosecution. Environmental crimes often impact several countries (for example, the illicit trafficking of wildlife) or have cross-border effects (for example, in the case of cross-border pollution of air, water and soil). Law enforcement and judicial authorities can only tackle these crimes when they work together across borders.

39. Given the activities carried out by the European Union in the field of environmental crime, and notably the aforementioned work on the proposal for a new EU Directive, it will be essential to maintain regular contacts between the two Organisations and coordinate their efforts, as far as possible, in order to avoid contradictions between the work of the European Union on the one hand and, on a pan-European scale, of the Council of Europe on the other. This should be facilitated by regular exchanges between the different groups of exerts, Committees and Secretariats of the two Organisations.

2. Main elements of a new Council of Europe Convention on the protection of the environment through criminal law

40. With the objective being to avoid repeating the mistakes of the past (the non-ratification of the 1998 convention), it is a question of finding elements capable of increasing the attractiveness of a new convention which would be the common base for member states, laying down minimum standards for more efficient and above all, effective environmental protection. In this perspective, certain needs can be identified and formalised. Following the traditional structure of Council of Europe instruments including the CDPC Model Provisions for Council of Europe Criminal Law Conventions, the following proposed points, based on the 1998 Convention and the discussions held in the CDPC-EC, could thus serve as a basis for future discussions and negotiations on the content of a new convention on the protection of the environment through criminal law.

12 Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and replacing Directive 2008/99/EC, (2021), available at: *https://ec.europa.eu/info/sites/default/files/1_1_179760_prop_dir_env_en.pdf*

2.1. Purpose, scope and terminology

2.1.1. Purpose of the instrument

41. Two main objectives can be identified, outlining the guidelines for a new convention on the protection of the environment through criminal law:

1° Strengthen the **fight against environmental crime**, both national and transboundary.

2° Establish **minimum rules** to guide states in their national legislation.

42. These general objectives can be discussed, modified and completed by the states.

2. 1. 2. Scope of the instrument

43. In determining the specific scope and definition of conduct that the Parties to a new convention would be required to criminalise, in compliance with the legality principle, it should be considered that the criminalisation of such conduct should always be seen as the “last resort”.

44. It is important to define the exact scope of a possible new Council of Europe Convention on the protection of the environment through criminal law to ensure that the principle of national sovereignty which governs criminal matters is fully respected.

45. Based on the different functions of criminal law, a new convention in this field should include provisions and measures for both the prevention and the repression of the most serious environmental offences.

46. Prevention can result from the preventative measures, both from an individual point of view (deterring the offender from committing/repeating the crime) and from a collective point of view (discouraging the social group).

47. Restorative measures fall under the civil or administrative law branch. However, in some national legislations, we can observe provision on restoration located in the criminal law framework. "Restoration measures" or "environmental compensation measures", might, therefore, be considered for discussion when drafting a possible Convention, as an optional solution.

48. As highlighted in the aforementioned contribution points submitted by several experts of the Working Group, close coordination and collaboration with the normative revision currently being carried out in parallel by the European Union is essential in the future work of the Council of Europe. From this point of view, it can, for instance, be noted that among the possible improvements suggested by the European Commission's Working Document, is the enlargement of the scope of the future text to be proposed *"to cover more areas of environmental crime, or emerging areas"*[13]. It could be appropriate to consider this prospect of enlargement also in the context of a new Council of Europe Convention, taking into account,

13 European Commission Staff Working Document - Summary of the evaluation of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 28 October, SWD (2020) 260 final, available at: *Commission Staff Working Document Executive Summary of the evaluation of the directive 2008/99/EC*

in particular, organised or large-scale crime, such as global crimes with substantial and widespread ecological impacts.

2.1.3. Terminology of the instrument

2. 1. 3. 1. Definitions

49. The establishment of common definitions of some terms, understood and used by all, seems to be essential in the possible drafting of a new convention. This should include a translation of the environmental challenges that states are currently facing, that justifies enhanced protection through unified criminal and administrative standards. The definitions of these key concepts and terms in the possible future negotiations of a new convention, would thus make it possible to focus the criminal response by identifying the most serious forms of environmental crimes.

50. Therefore, a new convention should start by stating the basic environmental terms to which it refers to, to be discussed and defined at a later stage. It should be noted that, given the constant evolution of environmental legislation, some important terms do not appear in the text of the convention adopted more than twenty years ago, in 1998. The following terms could thus be discussed in possible future negotiations for a new convention, for example:

- **Environment;**
- **Waste;**
- **Biodiversity;**
- **Habitat;**
- **Ecosystems;**
- **Legal person;**
- **Unlawful;**
- **Victim.**

2.2. Substantive criminal law: offences, perpetrators, penalties

2.2.1. Substantive criminal law

51. The system of incriminations included in the 1998 Convention has already been the subject of discussions within the Working Group and raises a number of fundamental questions both in its theoretical conception and in its implementation within each state.

52. The current text (Articles 2 to 4) contains special incriminations by environmental sector (water, air, fauna, flora, waste, pollution, etc.) which it would seem appropriate to examine, discuss and, where necessary, redefine more precisely.

53. As a rule, the unlawfulness of acts incriminated requires, in addition to the other elements of the offence, a breach of administrative norms. An effective criminalisation of environmental offences depends, therefore, on states maintaining or establishing an adequate

administrative framework to regulate the various human activities that are likely to impact the environment.

54. In these cases, where criminal law refers to administrative law, it seems necessary to clarify the relationship between criminal and administrative sanctions and to specify the articulation between administrative and criminal law. In particular, one might ask, in the possible future negotiations of a new convention, whether a coordination of sanction networks, with a sharing of competences between administrative and judicial authorities, might be desirable and feasible.

55. Within the Working Group, delegations expressed their reluctance regarding the issue of stand-alone or more general offences. Since the objective is to find a common denominator for the various states, ensuring respect for domestic legal systems, it is appropriate to discuss this issue.

56. Generally speaking, the question is how to appropriately deal with the most serious, large-scale attacks on the environment.

2. 2. 2. Persons responsible

57. Possible future negotiations of a new convention could include discussions on liability of legal persons, in line with Article 7 (Liability of Legal Persons) of the CDPC Model Provisions for Council of Europe Criminal Law Conventions.

2. 2. 3. Sanctions

58. With reference to the general requirements laid down by the Council of Europe in the aforementioned CDPC Model Provisions, penalties must be "effective, proportionate and dissuasive".

59. Measures, in place of, or complementary to financial penalties such as bans, suspensions, etc. in line with Article 8 (Sanctions and measures) of the CDPC Model Provisions, could also be considered.

60. In addition, a general increase in the severity of punishment in cases of repeated offences could be justified, in that it would strengthen the deterrent function of the criminal response to a crime that is taking root and persisting. Similarly, when “the offence was committed in the framework of a criminal organization”[14], this could be considered as an aggravating circumstance.

61. Finally, the measures of confiscation and reinstatement of the environment, which are found in the current convention because they have a utilitarian character, would deserve to be discussed. If they are retained in a new convention, they should remain optional.

14 European Committee on Crime Problems Model Provisions (CDPC) (2016), Article 9, “Aggravating Circumstance”, p.19, available at: https://rm.coe.int/european-committee-on-crime-problems-cdpc-model-provisions-for-council/1680713e9b

2.3. Procedural law and international co-operation

62. Because environmental damage often concerns more than one country, pollution and nuisance know no borders and illicit trafficking is generally international, it is important to utilise existing common rules for international co-operation including the European Convention on Mutual Assistance in Criminal Matters (ETS No.30)[15] and its additional protocols thereto and, where necessary, to facilitate the procedural path leading to the referral to the criminal court and the conviction of those responsible for the offences covered by a new convention. The ultimate aim is to ensure that criminal justice is effective wherever it is delivered.

2. 3. 1. International judicial co-operation

63. It is important to specify and utilise common rules for judicial co-operation between all States Parties with regard to the exchange of information, investigations (enquiry, investigation), criminal prosecutions and judicial proceedings concerning the offences covered by the convention. Such co-operation should be as broad as possible, as far as international instruments and the domestic law of the States Parties allow.

64. With the same objective of effectiveness in mind, specialisation, or at least training in environmental matters, for the various actors involved in the repression process (investigators, magistrates, various authorised agents) appears to be essential in the face of highly specialised and technical environmental criminal law.

2. 3. 2. Civil society participation

65. Finally, with a view to promoting legal action against environmental crime, the 1998 Convention provided, in Article 11, for *actio popularis* (popular action) on an optional basis, which allows associations, foundations and NGOs to participate in environmental proceedings and, where appropriate, to bring cases directly before the criminal courts.

66. The question thus arises whether it is appropriate to maintain such a provision in a new instrument. However, the creation of this provision in a new convention would have to take into account the particularities of the various national criminal law systems, provide for sufficient flexibility and remain as an optional solution.

67. Generally speaking, the *actio popularis* is advocated in environmental law as being particularly appropriate since it is the right to take legal action in defence of a common interest, namely the safeguarding of the environment. Such an action, open to associations and NGOs specialising in environmental protection, would facilitate access to the courts, the initiation of criminal proceedings against environmental offenders, at least in systems that give the public prosecutor the right to choose not to refer the matter to the criminal courts.

68. Possible future negotiations of a new convention may, therefore, include a discussion on the opportunity for this to be legally regulated in order to ensure its effective application on the one hand and the feasibility of maintaining such an instrument in view of the differences

15 European Convention on Mutual Assistance in Criminal Matters (ETS No.30), available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=030

between domestic legal systems on the other. Where appropriate for the effective implementation of the possible new convention, states parties might be invited to provide for such an action in their domestic law, by designating, precisely, the holders of this action (associations, foundations, NGOs, etc.) and by specifying the strict conditions to be met in order to justify a legitimate interest in taking action (statutory object referring to environmental protection, duration of existence of the body, etc.).

2.4. Prevention measures

69. In accordance with most of the conventions drawn up by the CDPC, it would seem appropriate also in the case of a new convention to include some provisions on preventive measures. Chapter V of the CDPC Model Provisions for the Council of Europe Criminal Law Conventions foresees the drafting of provisions on prevention, both, on the domestic and international level, however, due to the very different nature of possible prevention measures that may be appropriate considering the purpose and scope of the convention, this model text does not provide any specific suggested wording. The Working Group considered that it would not be up to it at this stage to identify these measures and that it was wiser to leave the national experts appointed in the framework of the negotiations of the new convention to examine the nature and the substance of the preventive measures.

2.5. Monitoring mechanism of the legal instrument

70. Finally, the issue of monitoring the implementation of the possible new Council of Europe Convention should be considered. The latter would clearly benefit from a monitoring mechanism, ensuring its implementation.

71. Despite the fact that most monitoring committees can only produce non-binding opinions, they nevertheless play a crucial role in producing a compendium of best practices which could later serve as a model for others. These opinions could also be used by other Council of Europe bodies, such as the European Court of Human Rights, in their future case law. Costs for and administrative burden on states caused by a mechanism should also be taken into account.

3. Appendix

3.1. Appendix 1 : Compilation of Contribution Points

Strasbourg, 2 September 2021 CDPC(2021)7

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

WORKING GROUP OF EXPERTS ON THE ENVIRONMENT AND CRIMINAL LAW (CDPC-EC)

Compilation of Contribution Points

Document prepared by the CDPC Secretariat

Directorate General I – Human Rights and Rule of Law

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Contents

I. Background

Following the first meeting of the Working Group on the Environment and Criminal Law (CDPC-EC), which took place on 20-21 April 2021, it was decided that the members of the Working Group would submit Contribution Points to identify the specific reasons why the existing 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law (CTS. 172) was unsuccessful in each respective State. These Contribution Points will be examined in the second meeting of the Working Group on 15 June 2021, to determine the way forward in this domain.

II. The Contribution Points

1. Please specify the reasons **why** your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

2. Please identify **the specific elements** (and/or possible articles) of the 1998 Convention that your State considers to be **relevant** today and should **remain** in a possible new Convention.

3. Please specify the **connection or interdependency (if any) between criminal law and administrative law** within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

***

1. Veuillez spécifier les raisons pour lesquelles votre État n'a pas signé ou ratifié la Convention de 1998 sur la protection de l'environnement par le droit pénal (par exemple, des raisons politiques ou circonstancielles ou des éléments spécifiques de la Convention qui ont été considérés comme problématiques).

2. Veuillez préciser **les éléments** (et/ou éventuellement les articles) **spécifiques** de la Convention de 1998 que votre Etat considère comme **pertinents** aujourd'hui et qui devraient être **maintenus** dans une éventuelle nouvelle convention.

3. Veuillez préciser **le lien ou l'articulation (le cas échéant) entre le droit pénal et le droit administratif** dans votre droit national dans le contexte du droit de l'environnement. (Pour qu'une infraction environnementale soit poursuivie, faut-il qu'il y ait violation du droit administratif de l'environnement ou existe-t-il des infractions "autonomes" qui criminalisent les dommages causés à l'environnement dans votre système de droit interne).

1. Austria

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

Austria cannot clearly specify the reasons, why the 1998 Convention has not been signed. On one hand - at that time and due to the progressive regulations of the Convention - it seemed that the reactions of other member states were to be awaited. On the other hand on national level there has not been seen a need of action – what became a matter of fact later on, due to the Environmental Crime Directive 99/2008 and its transposition.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

In perspective of Austria a "new" Convention should orientate itself on the EU-Directive 99/2008. This could possibly help to get all those CoE-member states "on board", which are not EU-member states at the same time.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

Austrian environmental law is primarily a matter of administrative regulation. It is a matter of administrative law to define for example a threshold of pollutant emissions per day, an industrial plant is allowed to emit. Also industrial law as a whole regulates how for example an industrial plant has to be operated.

Criminal law on the other side is not for improvement, but to avoid damage to the environment. Criminal law is mostly to set accompanying measures to these administrative provisions. However, there is also a supplementary role for criminal sanctions. However, criminal law is last resort.

The key strategy of the Austrian federal legislature to coordinate these two dimensions of environmental law is the concept of "administrative dependence" of environmental criminal law

Thus, criminal sanctions are attached to environmental pollution under violation of environmental regulations or without a governmental permission. If administrative law doesn´t cover a certain kind of damage to the environment, this is problematic.

2. Belgique/Belgium

English translation below

1. Veuillez spécifier les raisons pour lesquelles votre État n'a pas signé ou ratifié la Convention de 1998 sur la protection de l'environnement par le droit pénal (par exemple, des raisons politiques ou circonstancielles ou des éléments spécifiques de la Convention qui ont été considérés comme problématiques).

La Convention a été signée par le Belgique le 07 mai 1999. Cependant, suite à des raisons circonstancielles et au manque de succès de la Convention, la Belgique ne l'a finalement pas ratifiée.

2. Veuillez préciser les éléments (et/ou éventuellement les articles) spécifiques de la Convention de 1998 que votre Etat considère comme pertinents aujourd'hui et qui devraient être maintenus dans une éventuelle nouvelle convention.

Il est actuellement difficile de se prononcer sur les éléments spécifiques qui devraient être maintenus dans une éventuelle future Convention. En effet, la Belgique souhaite d'abord se concentrer sur les travaux qui sont en cours au niveau de l'Union Européen avant de se positionner sur le contenu d'une éventuelle Convention. Toutefois, la Belgique considère que le renforcement de la coopération internationale serait un véritable atout pour une éventuelle nouvelle Convention.

3. Veuillez préciser le lien ou l'articulation (le cas échéant) entre le droit pénal et le droit administratif dans votre droit national dans le contexte du droit de l'environnement. (Pour qu'une infraction environnementale soit poursuivie, faut-il qu'il y ait violation du droit administratif de l'environnement ou existe-t-il des infractions "autonomes" qui criminalisent les dommages causés à l'environnement dans votre système de droit interne).

En Belgique, le droit de l'environnement est un droit transversal qui englobe différentes branches classiques du droit, dont le droit pénal. Il est caractérisé par un ancrage fort au niveau administratif dans la mesure où il édicte une série de règles imposant aux personnes morales et privées des obligations et des normes à respecter en lien avec la protection de l'environnement. Ces règles sont édictées principalement sur base du droit européen de l'environnement. En cas de non-respect de ces obligations et normes, des incriminations sont établies avec la possibilité d'appliquer des sanctions pénales ou administratives. Ainsi, le droit pénal est accessoire au droit administratif de l'environnement et peut être qualifié de droit pénal de l'environnement. Cependant, le droit pénal général reste d'application et se juxtapose au droit pénal spécial de l'environnement : les principes généraux du Livre 1er continuent par exemple à s'appliquer sauf exception. Le droit pénal belge en matière d'environnement est ainsi un droit hybride composé de règles issues tant du droit pénal général que du droit pénal de l'environnement. Les deux types de droit s'imbriquent donc mutuellement.

Actuellement, il n'y a pas de droit pénal de l'environnement autonome des normes de droit administratif mais la Belgique souhaite analyser les possibilités d'inscription du crime d'écocide dans le droit pénal belge.

English translation

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

The Convention was signed by Belgium on 7 May 1999. However, due to circumstantial reasons and the lack of success of the Convention, Belgium did not ratify it.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

It is currently difficult to decide on the specific elements that should be maintained in a possible future Convention. Indeed, Belgium wishes to focus first on the work underway at EU level before taking a position on the content of a possible Convention. However, Belgium considers that the strengthening of international cooperation would be a real asset for a possible new Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

In Belgium, environmental law is a cross-cutting law that encompasses various traditional branches of law, including criminal law. It is characterised by a strong anchoring at the administrative level insofar as it lays down a series of rules imposing obligations and standards on legal and private persons in relation to environmental protection. These rules are mainly based on European environmental law. In the event of non-compliance with these obligations and standards, incriminations are established with the possibility of applying penal or administrative sanctions. Thus, criminal law is ancillary to administrative environmental law and can be called environmental criminal law. However, general criminal law remains applicable and is juxtaposed to special environmental criminal law: the general principles of Book 1, for example, continue to apply, with some exceptions. Belgian environmental criminal law is thus a hybrid law consisting of rules from both general criminal law and environmental criminal law. The two types of law are therefore mutually intertwined.

Currently, there is no environmental criminal law that is independent of administrative law standards, but Belgium wishes to analyse the possibilities of including the crime of ecocide in Belgian criminal law.

3. Croatia

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

In regard with the question 3., concerning connection or interdependency between criminal law and administrative law within the domestic law in the context of the environment in the Republic of Croatia, we inform that in order to prosecute an environmental offence as a criminal offence, it requires for the breach of administrative environmental law (we have different laws on environment which prescribe misdemeanours) to be made, but in a more severe form, so the criminal protection is necessary.

But, since as one of the environmental criminal offences we have also prescribed, for instance, the criminal offence of the illegal hunting and fishing, and the criminal offence of animal torture, these are examples of 'stand-alone' criminal offences in our Criminal Code.

In regard the questions the 1998 Convention on the Protection of the Environment through Criminal Law we will contribute our answers as soon as received by the Directorate which is in charge of all the conventions and their ratification in our Ministry, if not sooner, during the second meeting of the Working Group on 15 June 2021.

4. Czech Republic

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic)

Unfortunately, we were unable to trace the exact historical reasons why the Czech Republic did not sign the Convention. However, we believe that the main reason was the existence of an autonomous criminal offence in Article 2 (1) (a) of the Convention (for details see answer to question 3). Even nowadays, the existence of an autonomous criminal offence in a new instrument would still be problematic to us.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

As a member state of the European Union, the Czech Republic implemented the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. All offences constituted in Article 2 of the 1998 Convention, except the autonomous one, are relevant today.

The Reinstatement of the environment (article 8) and Rights for groups to participate in proceedings (article 11) should remain optional in the possible new Convention. The corporate liability (article 9) is relevant and it should remain with a choice of administrative or criminal liability.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

In the Czech Republic, criminal liability in the field of the environment is dependent on a breach of provisions contained in special environmental laws. The Criminal Code does not contain 'stand-alone' criminal offences that would criminalize damaging the environment.

Criminal offences expressed in Chapter VIII of the Criminal Code (Criminal offences against Environment) contain references to a conflict with another legal regulation. Therefore, in order for criminal liability to arise, there must be a violation of a special legal regulation to which the given merit of the criminal offence expressed in the Criminal Code refers.

To provide you with a broader context, criminal liability is not the only instrument being used in the Czech Republic in case of an infringement of environmental (sectoral) legislation. Sectoral legislation often contains administrative offences in case of its less serious infringement. It is crucial that the new instrument allows the necessary flexibility to apply criminal or administrative sanctions in the event of environmental offences.

5. Finland

NOTE: The views presented below by the Finnish Delegation are preliminary at this point.

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

From the view point of the Finnish legislation, the substance of the 1998 Convention was not a problem, with the exception of the stand-alone offences mentioned in point 3. The Finnish legislation was already at that point modern and thorough as regards the provisions on environmental offences. The criminalizations on environmental offences go beyond the standards set in the Convention and EU law. The ratification of the Convention would have resulted in only some rather minor amendments to the Finnish Criminal Code (39/1889).

In 2005 the Finnish Government had already presented to the Parliament a draft bill in order to implement the Convention as well as the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law but due to the developments in EU law it was concluded that the Government proposal had to be withdrawn. After the judgement by the Court of Justice of the European Union in September 2005 (C-176/03; given before the treaty of Lisbon), the European community had the competence in matters concerning environmental crimes.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

No significant needs for updating the Convention have been identified from the point of view of the Finnish legislation at this point.

According to the notion of the Finnish delegation, the elements having to do with stand-alone offences may have affected the willingness of some States to ratify the Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

There are no stand-alone environmental offences in the current Finnish Criminal Code. The penal provisions in the Criminal Code are intrinsically connected to the provisions in the environmental legislation. This principle is deep-rooted in the Finnish framework for environmental criminalizations.

From the Finnish point of view, deviation from the principle of interdependence between criminal law and environmental law could be problematic as from the point of view of legal certainty, predictability, the principle of legitimate expectations and certain constitutional rights. Finland would probably have constitutional problems if these so-called autonomous offences were to be presented.

6. France

English translation below

1. Veuillez spécifier les raisons pour lesquelles votre État n'a pas signé ou ratifié la Convention de 1998 sur la protection de l'environnement par le droit pénal (par exemple, des raisons politiques ou circonstancielles ou des éléments spécifiques de la Convention qui ont été considérés comme problématiques).

En premier lieu, les articles de la convention imposant l'incrimination de certains comportements (articles 2, 3 et 4 notamment) ont posé difficulté dans la mesure où ils ne reprennent pas nécessairement la condition d'illicéité du comportement incriminé. La convention envisage un droit pénal autonome, sans référence au respect de la règlementation administrative. Une telle approche ne semble pas envisageable.

En second lieu, de telles incriminations font peser une responsabilité pénale lourde sur les acteurs privés, y compris lorsqu'ils se conforment à la règlementation.

En dernier lieu, l'Union européenne s'est ensuite emparée du sujet, faisant rapidement de la convention un instrument moins prioritaire.

2. Veuillez préciser les éléments (et/ou éventuellement les articles) spécifiques de la Convention de 1998 que votre Etat considère comme pertinents aujourd'hui et qui devraient être maintenus dans une éventuelle nouvelle convention.

Les articles 6, 7, 8, 9, 10, 11 et 12, dans leur principe, apparaissent pertinents, ce qui ne signifie toutefois pas qu'ils ne devraient pas être par ailleurs amendés dans leurs rédactions actuelles.

3. Veuillez préciser le lien ou l'interdépendance (le cas échéant) entre le droit pénal et le droit administratif dans votre droit national dans le contexte de l'environnement (pour poursuivre une infraction environnementale, faut-il enfreindre le droit administratif de l'environnement ou existe-t-il des infractions "autonomes" qui criminalisent les dommages à l'environnement dans votre système de droit intene).

En règle générale, le droit pénal et le droit administratif sont interdépendants en matière environnementale, le manquement à la réglementation administrative étant un des éléments constitutifs de l'infraction pénale : ainsi, l'existence d'une réglementation administrative est un préalable à la possibilité d'ériger en infraction pénale la violation des règles édictées. Il en est ainsi, par exemple, des infractions définies aux articles L. 173-1 à L. 173-3 du code de l'environnement. Ce lien se justifie par le fait que les activités humaines ont toutes des conséquences sur l'environnement et qu'il revient donc aux pouvoirs publics de déterminer celles qui sont acceptables ou non, plutôt que de faire peser sur les acteurs économiques un risque pénal excessif pour une activité qui était autorisée au moment des faits.

Pour autant, certaines infractions sont définies non par rapport à un manquement à une réglementation administrative mais au regard des dommages causés à l'environnement. Ces infractions sont traditionnellement très peu nombreuses.

English translation

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

Firstly, the articles of the Convention imposing the criminalisation of certain conduct (in particular Articles 2, 3 and 4) have caused difficulties insofar as they do not necessarily include the condition of illegality of the offending conduct. The Convention envisages an autonomous criminal law, without reference to compliance with administrative regulations. Such an approach does not seem feasible.

Secondly, such incriminations place a heavy criminal responsibility on private actors, even when they comply with the regulation.

Finally, the European Union has subsequently taken up the issue, rapidly making the Convention a lesser priority instrument.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Articles 6, 7, 8, 9, 10, 11 and 12, in principle, appear to be relevant, but this does not mean that they should not be amended in their current wording.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

As a general rule, criminal law and administrative law are interdependent in environmental matters, since failure to comply with administrative regulations is one of the constituent elements of a criminal offence: thus, the existence of administrative regulations is a prerequisite for the possibility of making the violation of the rules laid down a criminal offence. This is the case, for example, of the offences defined in Articles L. 173-1 to L. 173-3 of the Environmental Code. This link is justified by the fact that all human activities have consequences on the environment and that it is therefore up to the public authorities to determine which ones are acceptable or not, rather than placing an excessive criminal risk on economic actors for an activity that was authorised at the time.

However, some offences are defined not in relation to a failure to comply with an administrative regulation but in relation to the damage caused to the environment. These offences are traditionally very few in number.

7. Georgia

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment.

(In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

With regard to signing and ratification of the "Convention on the Protection of the Environment through Criminal Law", it should be mentioned that the official internal procedures for signing and ratification of the Convention have never been launched. The ratification of the Convention has become priority for Georgia, after "protection of environment and human rights" was declared as one of the priorities during Georgia's presidency of the Council of Europe.

Administrative and Criminal Liabilities

Administrative offences, as well as administrative penalties, the procedure for their imposition and the administrative bodies (officials) authorised to impose administrative penalties are determined by the Administrative Offences Code of Georgia, adopted by the Parliament of Georgia (1984). On the other hand, the Criminal Code of Georgia establishes grounds for criminal liability, defines which acts are criminal and determines an appropriate punishment or any other type of a penal sanction. Both, Administrative Code and Criminal Code of Georgia establish administrative/criminal liability in the field of environmental protection. Chapter VII Administrative Offences Code, among others, deals with the offences in the area of environmental protection and natural resources management. Section 10 of the Criminal Code of Georgia sets liability for the crimes against environmental protection and natural resources use.

There are two types of crimes, certain crimes envisage imposing administrative penalties as a preliminary requirement for qualifying action/or failure to act as criminal offence. These are the following crimes:

- **Article 293(1) – Pollution of the Sea** - Illegal discharge into the sea from a ship, other floating facility, platform or other structure artificially constructed in the sea of substances harmful to the human health or to living marine organisms, or other waste or materials, as well as contamination of the sea in violation of the procedure for their burial [of waste] that endangers human health or living marine organisms, or interferes with the lawful use of the sea, committed after an administrative penalty for such act has been imposed;
- **Article 296 – Violation of the legislation related to Georgia's continental shelf, territorial waters or the Special Economic Zone -**
  1. Unlawful erection of structures on the continental shelf, in the territorial waters or adjacent zones of Georgia, unlawful establishment of a safety zone around an artificial island, structure or equipment around the above structures or in the Special Economic

Zone, or violation of the safety regulations for construction, reconstruction, operation, protection, demolition or conservation of the structures, or for sea navigation after an administrative penalty for such violation has been imposed, –

2. Exploration or prospecting of the continental shelf or the Special Economic Zone of Georgia without appropriate permission or the exploitation of their natural resources after an administrative penalty for the same violation has been imposed;

- **Article 299 – Use of mineral resources without an appropriate licence -** Use of mineral resources (except for fresh groundwater) without an appropriate licence, committed after an administrative penalty for such an act was imposed, or use of mineral resources without an appropriate licence that has resulted in substantial damage;
- **Article 300 – Illegal fishing -** Fishing using electric current, an electric-shock device or other prohibited means, explosive or poisonous substance, other means of mass destruction of fish or other living organisms of water, or illegally fish or other living organisms of water from a water craft with the total capacity of 100 tons or less and with the length exceeding 8 meters, or with the total capacity of more than 100 tons using fish-catching devices, or catching of fish or other living organisms of water included in the Red List of Georgia, after an administrative penalty for such violation has been imposed;
- **Article 303 – Illegal felling of trees and bushes:**

  1. Illegal felling of trees and bushes by a person on whom an administrative penalty was previously imposed for committing an administrative offence under Articles 64^{1}(1), 66(2) 15^{1}(2) or Article 15^{11}(2) of the Administrative Offences Code of Georgia, or illegal felling of trees and bushes that has resulted in substantial damage,

  2. The same act committed repeatedly,

  3. Illegal felling of trees and bushes, which are included in the Red List of Georgia, on the lands or protected areas of the state forest fund by a person on whom an administrative penalty was previously imposed for committing an administrative offence under Article 64 ^{1}(2) of the Administrative Offences Code of Georgia;
- **Article 304^{1} – Transportation of round timber (log), tree-plants or firewood in violation of the statutory procedure -** Transportation of round timber (log), a tree-plant or firewood in cases defined by the legislation without an appropriate document and/or marking with a special sign by a person on whom an administrative penalty was previously imposed for committing an administrative offence under Article 128^{2}(5), (7) or (8) of the Administrative Offences Code of Georgia;
- **Article 306 – Activities conducted without an environmental impact permit -** Conduct of activities without an environmental impact permit, committed after an administrative penalty for such an act has been imposed;
- **Article 306^{1} – Conducting activities under the Environmental Assessment Code without the screening decision or environmental decision** - Conducting an activity subject to the screening procedure without the screening decision, which has resulted in significant damage, or conducting an activity subject to the environmental impact assessment without an environmental decision under the Environmental Assessment Code, committed after an administrative penalty for such act was imposed.

With regard to other crimes, the dividing line between administrative and criminal liability is the scale of the damage. For instance, fishing using electric current, an electric-shock device or other prohibited means, explosive or poisonous substances, other means for mass destruction of fish or other living organisms of the water, or catching of fish or other living organisms of the water included in the Red List of Georgia causes administrative liability (article 86(9)), however if that offence resulted in significant damage, it would be punishable under the Criminal Code of Georgia (article 300(2)). Before fully enacting the new law of

Georgia “On Environmental Liability” (adopted by the Parliament of Georgia on March 2, 2021), the methodology for calculating environmental damage is determined by the Governmental Decree – technical regulations (N54, approved on 14 January, 2014). Technical regulations, along with the methodology for the calculation of damage, define the criteria for deeming environmental damage as significant. For instance, the damage would be significant, if the damage caused by the land pollution equals to or exceeds 10 000 gel (article 3 (9)).

There are relatively minor offences, that are only envisaged by the Administrative Code – for instance, administrative offences for submitting required information with delay or with substantial inaccuracies. On the other hand, there are ‘stand-alone’ offences that criminalise damaging the environment, e.g. **article 287[1]** – Violation of the saw mill registration requirements.

Environmental Liability

In order to improve environmental governance, Ministry of Environmental Protection and Agriculture of Georgia, developed a draft law “On Environmental Liability”, which was adopted by the Parliament of Georgia on March 2, 2021. The new law is fully in line with the obligations under the EU-Georgia Association Agreement and respective EU directive (Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage). It will fully enter into force on July 1 2023 (partial enforcement is envisaged by July 1 2022).

The new law aims to develop a system of environmental liability based on “polluter pays principle” and serves the elimination/mitigation of environmental harm. The law introduced a completely new mechanism of environmental responsibility, according to which a person who causes significant damage to the environment, is obliged not to pay the monetary compensation, but to take necessary remedial measures to restore the environment in accordance with a pre-defined plan-schedule. In accordance with article 3 (c) of the law, significant damage is negative environmental impact caused by illegal activity and/or industrial accident. Annex I to the law defines detailed criteria which needs to be met in order for the damage to be qualified as significant. As mentioned above, in case the damage occurs the person responsible for the damage is obliged to restore the environment to baseline condition, close to baseline condition or carry out remedial measures on alternative site.

Another concept introduced by the law is the strict environmental liability – there is no need to prove the fault when significant environmental damage is caused by the activities listed in annex II to the law.

When the significant environmental damage is caused by illegal activity, it is punishable under the Criminal Code (article 306[2]). The criminal liability of the person responsible for significant damage does not preclude his/her environmental liability.

Thus, it is important to take into consideration two liability regimes, on the one hand criminal/administrative liability and on the other hand, environmental liability while discussing the elements of the Convention.

8. Germany

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

Germany signed the Convention on 4 November 1998. Ratification initially was scheduled to take place during the 14th legislative term (1998 to 2002), and later postponed until the two subsequent legislative terms. At the same time, regulations on the protection of the environment by way criminal law were adopted at the European Union level as well. The first of these was Council Framework Decision 2003/80/JHA, which came into force on 5 February 2003; the deadline for implementation by the Member States was 27 January 2005. In large part, the Framework Decision was geared towards the Convention of the European Council and was to be transposed into German law as a matter of priority given that the implementation deadline was already running. The project was deferred, however, after the Commission brought an action for annulment against the Framework Decision. In a judgment dated 13 September 2005, the European Court of Justice ultimately declared the Framework Decision null and void due to competency considerations. Starting in 2007, negotiations were initiated for a Directive that was to replace the Framework Decision. These were successfully completed in 2008. On 26 December 2008, Directive 2008/99/EC came into force. Germany fulfilled its implementation obligation by adopting the 45th Act Amending the Criminal Code of 6 December 2011. Since the Directive corresponds to the Convention of the European Council in many of its aspects, no need for ratification of the Convention is seen any longer.

2. Please identify the specific elements (and / or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Germany takes the following position regarding the substantive provisions of the Convention (Articles 1 to 12):

a. <u>Article 1 ("Definitions")</u>

Regarding letter a):

The concept of 'unlawfulness' ought to be defined again as part of any new Convention. This said, Germany wishes to point out first of all that the Convention ties into the non- harmonised administrative environmental law of the States Parties, and that this could lead to highly divergent legal situations in the individual States Parties in view of the criminal, respectively administrative, legal sanctions stipulated in the Articles discussed below. All the Convention requires is that the States Parties adopt measures under criminal or administrative law to deal with certain actions that infringe a law, a regulation under administrative law or the decision of a competent authority; by contrast, the exact definition of the substance of these regulations is left up to the domestic law of the States Parties.

It also bears noting that the definition of the term 'unlawfulness' that has been valid until now is unclear on at least one point: Are only infringements of a State's internal domestic laws, regulations and decisions meant here, or does this term also include infringements of another State's administrative environmental laws in cross-border cases, in keeping with the principle

that a criminal offence may be founded in infringements of administrative law? If the principle were to be applied worldwide, this would place Member States under obligation to codify criminal offences entailing significant legal uncertainties for the legal subject: Compliance with the national laws of the state in which the legal subject is acting would no longer necessarily suffice. In cross-border cases, the legal subject's conduct could also be deemed unlawful if it infringes another state's environmental laws, etc.

As regards the scope of the definition, the following bears noting: If a person holds a permit from a public authority authorising them to engage in a certain activity, then their activity is not unlawful under Article 1 a) and thus cannot be criminally punishable. This fundamentally is justified for reasons of protecting legitimate expectations and ensuring legal certainty (see letter b. below). As a rule, an exception is to be made, however, for those cases in which a permit has been obtained in abuse of the law (see also the response to Question 3). On page 3 of the Explanatory Report on the Convention, the States Parties are expressly permitted to exclude this type of scenario from the legitimating effect of the permit. Germany is in favour of codifying this in any new Convention, namely in the introductory provision containing the definition of terms.

b. Article 2 ("Intentional Offences")

Regarding paragraph 1 letter a):

The provision is structured such that it is 'autonomous;' in other words, criminal liability under Article 2 paragraph 1 a) is not premised on a violation of administrative environmental law. Germany takes a critical view of such a far-reaching 'autonomous approach,' however. For one thing, there is no practical necessity for it. The intentional causation of death or serious injury to any person, which is covered by subclause (i), surely already is sanctionable under the general provisions of the national laws of the States Parties, regardless of whether or not the environment and/or a public permit is involved. This also applies when the end result is not death or serious injury to any person, but only a significant risk of death or serious injury to any person, this being already covered by subclause (ii). In such cases, an attempt to cause death or serious injury most likely already will give rise to criminal liability under the national legal provisions of the States Parties.

Furthermore, Article 2 paragraph 1 a), read in conjunction with Article 3 no. 1, stipulates that the actions specified therein are to be penalised even if the offender has acted lawfully within the meaning of Article 1 a) and, in the process, death or serious injury to any person is caused by negligence. From the perspective of Germany, such conduct neither merits nor requires criminal sanction when it is not unlawful. Criminal law must always be the instrument of last resort (ultima ratio) of a State when dealing with certain types of conduct. This principle is not respected by Article 2 paragraph 1 a), read in conjunction with Article 3 paragraph 1. Accordingly, and notwithstanding the right of reservation granted under Article 3 paragraph 3 (which is limited to Article 2 paragraph 1 a no. ii), the provision therefore should not be retained.

The 'autonomous approach' also imperils legal certainty and the uniformity of the legal system. Only in cases involving legally abusive conduct would it be proper to deny the legitimating effect of a public permit (see above). For as long as this test has not been met, the individual's reliance on the continued validity of a permit merits protection and therefore must lead to a preclusion of criminal liability.

Regarding Article 2 paragraph 1 b) to e):

All these provisions are premised on unlawfulness within the meaning of Article 1 a) being given, as well as on the conduct of the offender exceeding a certain threshold of materiality: The action at issue must cause, or be likely to cause, 'serious injury,' 'substantial damage' or 'lasting deterioration'. This is in keeping with the ultima ratio function of criminal law and ought to be retained in any new Convention. The use of legal terms that have not been given a final definition (e.g. 'substantial damage') also will remain necessary. Indeed, the use of such terms is indispensable if the law enforcement authorities and the courts are to enjoy the discretionary range they require in order to apply the law justly in individual cases. After all, it is impossible for the legislative branch to foresee all the possible scenarios in which criminal liability could potentially be given, particularly since environmental regulations and the definition of what constitutes an infringement thereof are in continual flux. Where criminal regulations are laid out in excessive detail, the risk of also having created means of circumventing them increases accordingly. Thus, the language used to draft a provision must strike a balance between the principle of precision in criminal law and the practical need for flexibility. Germany therefore proposes that, instead of focusing on the wording of the Convention, it would be better to further point out the meaning of individual terms in the Explanatory Report.

Regarding Article 2 paragraph 2:

This provision deals with the criminal liability of aiding and abetting the commission of offences. The provision is purposeful in terms of closing loopholes in criminal liability and should therefore be retained in its present form in any new Convention.

c. Article 3 ("Negligent offences")

In principle, Germany believes it is proper to place the negligent commission of an offence under criminal sanction as well. In the interests of ensuring effective environmental protection, it would seem appropriate to make even simple negligence subject to criminal charges. This said, situations are conceivable in which the extent of wrongfulness associated with simply negligent conduct is so minor that the actions in question do not rise to the level of a criminal offence when weighed from the standpoint of proportionality. In these cases, criminal law ought to be limited to sanctioning gross negligence only. In its present form, the Convention provides for a corresponding right

of reservation on the part of the States Parties (cf. Article 3 paragraph 2). Any new Convention should offer the same flexibility to the States Parties.

Moreover, Germany wishes to voice its express objection to apply the requirements made in Article 3 paragraph 1 also to the Article 2 paragraph 1 a) no. ii) ('autonomous approach') (see above).

d. Article 4 ("Other criminal offences or administrative offences")

The provisions of Article 4 a) to d) address actions that are already partially covered by Article 2 paragraph 1. The key difference here is that the provisions of Article 4 a) to d) do not additionally require any damage to actually arise, or the suitability to cause substantial damage. Inasmuch, the extent of wrongfulness involved is lower, and the norm reflects this by giving the States Parties the option to define such actions either as criminal offences or as administrative offences. It seems doubtful to Germany, however, that the forms of conduct described therein indeed are so grave as to merit inclusion in a convention. This is the case all the more so in light of the fact that all the provisions are premised on unlawful conduct and

that the competency to define the underlying administrative environmental regulations continues to be reserved to the States Parties.

e. Article 5 ("Jurisdiction")

These provisions stipulate that the States Parties must establish their jurisdiction for the relevant criminal offences on the basis of the flag-and-territoriality principle (paragraphs 1 a and b), as well as in cases in which the criminal offence was committed by one of their nationals, insofar as the criminal offence is also punishable under criminal law where it was committed, or if the place where it was committed does not fall under any national jurisdiction (paragraph 1 c). According to paragraph 2, a Contracting State must establish jurisdiction for the relevant criminal offences also in cases in which an alleged offender is present in its territory and it does not extradite her or him to another Party after a request for extradition. As regards paragraph 1 c and paragraph 2, declarations may be made to the effect that the corresponding provisions are not to apply as a whole or in part (paragraph 4). Paragraph 3 provides that the Convention is not to exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

These provisions continue to appear purposeful and also could be retained in a new Convention. The option granted to the States Parties to forgo the application of paragraph 2, either as a whole or in part, should be kept in place. On the other hand, such a derogation option does not seem absolutely necessary when it comes to paragraph 1 c.

f. Article 6 ("Sanctions for environmental offences")

Regarding Article 6 sentence 1 and sentence 2, first half-sentence:

The provisions governing sanctions in the present Convention are formulated rather abstractly but do encompass imprisonment as well as pecuniary sanctions. The views on which sanctions are appropriate for which specific offences tend to be heavily influenced by national traditions; this should remain so in any new Convention, meaning that no further-reaching provisions should be adopted in this regard.

Regarding Article 6 sentence 2, second half-sentence:

According to Article 6 sentence 2, second half-sentence, the sanctions imposed may also include a 'reinstatement of the environment.' Germany has no objections against the use of an optional formulation here. However, reinstatement of the environment should not be stipulated as a mandatory sanction in a new Convention. Measures such as ordering the remediation of environmental damage do not traditionally belong to the core tasks of the criminal justice system. At least one reason for this is that the technical agencies competent in this field generally are more familiar with the matter in question and enjoy broader authority to issue directives. The Convention includes a corresponding provision for this in its Article 8. Thus, the imposition of measures as consequences under criminal law is to be rejected. This is particularly the case since one of the main reasons for the criticised shortcomings in the prosecution and punishment of environmental offences is the observed fact that the criminal enforcement authorities and justice systems already are burdened by a heavy workload; this should not be made heavier by imposing additional tasks extraneous to the sphere of criminal justice.

g. Article 7 ("Confiscation measures")

Environmental crimes often are committed with the aim of making illegal profits or saving expenses. Thus, Germany attaches great importance to putting confiscation mechanisms in place, particularly when it comes to recovering the proceeds obtained by offenders. Such regulations also will help promote fair competition in commerce. Evading applicable law and committing an environmental crime should not pay for the offender. In its present form, however, the Convention still provides for far-reaching rights of reservation in this context, namely in Article 7 paragraph 2. This ought to be changed. Germany is in favour of restricting any rights of reservation in a new Convention to those instrumentalities of an offence the confiscation of which could pose an unreasonable hardship, particularly when the offence in question was committed negligently.

h. Article 8 ("Reinstatement of the environment")

Please refer to the explanations provided in connection with Article 6 above in Item e.

i. Article 9 ("Corporate liability")

This provision governs the liability of legal persons, but once again grants the Contracting States far-reaching rights of reservation, namely in its paragraph 3. This should be changed in any new Convention. Germany would suggest the adoption of a binding provision in line with Article 18 of the Criminal Law Convention on Corruption of the European Council of 27 January 1999. According to Article 18 paragraph 1 of said Convention, each Party to the Convention must adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for an enumerated list of criminal offences, insofar as these are committed for their benefit by a natural person [...], as well as for the involvement of such a natural person as accessory or instigator in such offences. Paragraph 2 of said provision expands the regulatory obligation of the Contracting States to also include cases in which a lack of supervision or control by a natural person has made possible the commission of the criminal offences mentioned in paragraph 1. Notwithstanding the foregoing, Germany considers it important that the Contracting States' freedom to choose between criminal and administrative sanctions be preserved in any new Convention.

Drafting the new provision based on the model of the Criminal Law Convention on Corruption also is preferable in view of the fact that Article 9 paragraph 1 of the Convention on the Protection of the Environment through Criminal Law is less precise when it comes to specifying which types of natural persons potentially could trigger liability on the part of the legal person by committing a criminal offence. According to the aforementioned Article 9 paragraph 1, such persons include all organs, members thereof or 'another representative,' without term 'another representative' being defined or delimited in any greater detail. By contrast, Article 18 paragraph 1 of the Criminal Law Convention on Corruption stipulates that this must be a natural person who is 'acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

– a power of representation of the legal person; or
– an authority to take decisions on behalf of the legal person; or
– an authority to exercise control within the legal person.'

j. Article 10 ("Co-operation between authorities")

Article 10 paragraph 1 emphasises the importance of co-operation between the authorities responsible for environmental protection with the authorities responsible for investigating and prosecuting criminal offences. This provision should be retained also in a new Convention. Moreover, it would be sensible to put in place optional requirements, by way of supplementation, on the co-operation with neighbouring States. It is a frequent occurrence for violations of environmental law to cause cross- border damages, which it is possible to resolve only by functioning co-operation across borders. Additionally, this provision could be extended to cover co-operation among European practitioner networks (specifically IMPEL, EuFJE, ENPE, EnvCrimeNet).

By contrast, Article 10 paragraph 2, which provides for an opt-out clause for each Party, should be struck out since it is no longer in keeping with the times. If there is no co- operation among the authorities responsible for environmental protection and the authorities responsible for investigating and prosecuting criminal offences, then criminal environmental law will not be able to achieve the objective it is intended to serve: to enhance the protection of the environment.

k. Article 11 ("Rights for groups to participate in proceedings")

The goal of criminal proceedings is to identify the truth regarding the existence of a criminal offence that has been alleged or that is considered possible, and to impose legal consequences upon the accused in accordance with the law. Thus, criminal proceedings are bound to the definitions of criminal offences as they have been codified under substantive criminal law, as well as to the rules governing the application of said body of law. As things stand today, it already should be possible in the Member States to take testimony from representatives of environmental associations as eyewitnesses, expert witnesses or experts, insofar as required for fact-finding purposes. On the other hand, involving such associations in an independent procedural role for purposes extraneous to criminal law could well over-encumber the proceedings with these extraneous objectives, possibly to the detriment of the fact-finding process and the accused who are affected. Thus, this point should continue to be regulated in an optional fashion in any new Convention.

l. Article 12 ("International co-operation")

A provision governing international co-operation would be purposeful, in the view taken by Germany, and therefore ought to be included in any new Convention. It is intended to prevent the arisal of 'safe harbours' within the Convention's scope of application and thus help to warrant effective environmental protection. This said, the future deliberations also should take into consideration the model provisions on international co-operation which the European Council has already elaborated for its Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

Germany's criminal environmental law is structured so as to function as an accessory to administrative environmental law; this means that under most provisions contained in criminal environmental law criminal liability depends on the provisions of administrative environmental

law. This substantive interdependency manifests itself in that the respective criminal provisions only impose criminal sanction on persons who act either 'in breach of duties under administrative laws' (e.g. section 324a (1) and section 325 (1) to (3) of the German Criminal Code (Strafgesetzbuch – StGB[16])), or 'contrary to a prohibition or without the required permit' (section 326 (2) of the Criminal Code), or 'without the required permit or contrary to an enforceable prohibition (section 327 (1) and section 328 (1) of the Criminal Code), or 'contrary to a statutory instrument' (section 329 (1) of the Criminal Code), or 'contrary to a statutory instrument or an enforceable prohibition...' (section 329 (2) of the Criminal Code) or – worded more generally – 'without being authorised to do so' (e.g.section 324 (1) and section 326 (1) of the Criminal Code). Thus, criminal liability in some cases already may arise simply from a breach of a regulation under administrative law; in other cases, criminal liability will presuppose an individual decision by a public authority issued on the basis of a regulation under administrative law. According to section 330d (1) no. 4 of the Criminal Code, 'duties under administrative law' also may arise, moreover, from a court decision or from a contractual agreement under public law. When it comes to applying the provisions enumerated under section 330d (2) of the Criminal Code, the legal acts instituted by Member States of the European Union will be deemed equivalent to those instituted under German law, provided they serve to implement or apply a legal act of the European Union or of the European Atomic Energy Community (EAEC).

The fundamental, substantive dependency of German criminal environmental law on administrative environmental law is based on the underlying idea that criminal law must not be allowed to punish citizens for something they are permitted to do under administrative law. One the one hand, the principle of laws being accessory to each other serves to realise a uniform legal system. On the other hand, it creates legal certainty for the citizen: If they hold a permit authorising their actions, then they must be able to rely on their ability to use it without exposing themselves to the risk of criminal liability.

The individual's trust in the continued validity of a public permit does not merit protection, however, in those cases where the permit was obtained in abuse of the law. This has been duly allowed for under section 330d paragraph 1 no. 5 of the Criminal Code. This norm makes acting without a permit equivalent to acting on the basis of a permit that was obtained by threats, taking and giving of bribes or collusion, or that was obtained by deception by supplying incorrect or incomplete information. This means that an individual conceivably may be criminally liable in spite of his or her holding a permit.

Only in very isolated cases does German criminal law also make provision for standalone environmental offences that do not constitute a breach of administrative law. This holds true, for example, for section 328 paragraph 2 no. 3 of the Criminal Code. This provision imposes criminal sanctions on whoever causes a (non-controlled) nuclear explosion. Such an action is considered so dangerous that legitimating it through a permit from a public authority is deemed impossible as a matter of principle. Thus, the German legislative branch has classified this action as being criminally sanctionable by its very nature. The other German criminal provisions that are autonomous from German administrative law are based on similar considerations. These may be found in section 328 paragraph 2 no. 4 and section 330a of the Criminal Code.

16 Please see: https://www.gesetze-im-internet.de/stgb/ (German version) and https://www.gesetze-im- internet.de/englisch_stgb/index.html (English version).

9. Greece

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

There is no specific reason why the 1998 Convention has not been ratified by the Greek Parliament. The Greek criminal environmental legislation was harmonized to the Environmental Crime Directive 2008/99/EC on the protection of the environment through criminal law. Some difficulties may arise in trying to harmonize the same domestic law provisions to more than one international legal documents (Conventions, EU Directives etc).

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Most of the articles of the Convention are still important and necessary today. Especially art. 12 on international cooperation among all member states involved is very important, because not all member states of European Council are members of the European Union. International cooperation on environmental crime should be broadened, since serious environmental crime is considered an international crime as well in most cases. Criminal liability of legal persons is not accepted by the Greek Criminal Code.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment.

(In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

Any environmental pollution and degradation are considered criminal offences in Greece, according to art 28 par. 2 of the law 1650/1986 (as amended). However, in many special provisions criminal sanctions are the result of the breach of administrative environmental law. There is close relation between the breach of administrative environmental law (among which many laws derived from EU Directives) and environmental criminal law. As a result, environmental criminal law should be considered as accessory to administrative environmental law in most cases.

10. Netherlands

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

I could not find any colleagues or documents that can clarify the reason for not signing or ratifying the 1998 Convention on the Protection of the Environment through Criminal Law by the Netherlands.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Article 2, article 3, article 4, article 5, article 6, article 7, article 8, article 9, article 10, article 12.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment.

(In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

There is a strong interdependency between criminal law and administrative law. Most environmental crimes are prosecuted on violation of administrative law that is criminalised by Economic Offences Act.

The Netherlands does have stand-alone offences in its penal code, but in practice those 2 articles are seldom used because of a 'heavy burden of proof'. The criminal cases concerning illegal disposal or removal of asbestos are the only kind of cases where this proof is relatively easy found and where prosecution is successful.

11. North Macedonia

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

International legal acts for suppression of environmental crimes and their transposition in the Republic of North Macedonia.

To regulate the matter of environmental protection, the international community has long since begun adopting international documents. From the Declaration on the Environment at the Stockholm Conference in 1972, through the Convention on the Control of Transboundary Movements and Storage of Dangerous Substances (1989) and the Convention on Biological Diversity from the Rio Summit (1992) to the latest international treaties and conventions governing this matter.

All states in Southeastern Europe have introduced crimes against the environment into their criminal codes. However, harmonization of national penal codes with the crimes included in the Environmental Crime Directive varies significantly by state, with some states achieving essentially full compliance and others including only basic pollution crimes. Many crimes are "partially harmonized", criminalizing only certain aspects of the offenses listed in the Directive. Sanctions imposed for environmental crimes, particularly about the size of fines imposed, also vary significantly from state to state. All states provide for both accomplice liability and liability of legal persons, as required by the Directive.

With the amendments to the Criminal Code in 2012, and according to the Themis report in FYROM, the following offenses comply with or refer to this directive:

Article of Criminal Code	Article 3 Offense
218: Pollution of air, soil, water, water surface, or water flow	3(a)
230: Waste pollution (by storage, disposal, or handling)	3(b)
218(2): Illegal construction or operation of a facility that pollutes the environment	3(d)
231: Illegal procurement, use, transport, or gift of nuclear materials 232: Illegal import of radioactive materials and hazardous waste	3(e)
228(4): Illegal hunting of protected wild animals	3(f)

Analyzing the Directive for the protection of the environment through criminal law, we can conclude that some of the legal provisions have been transposed into the Macedonian national legislation, but the main problem, as for other legal solutions, is the implementation of the laws. Namely, it can be concluded that the Criminal Code also provides for criminal acts following Article 3 of the Directive, but the question is how much the competent law enforcement authorities act in criminal investigations aimed at suppressing environmental crimes in the country. It is also necessary to amend the Criminal Code with the acts provided in the Directive, which are not an integral part of it.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

For North Macedonia it will be important to complete all articles from the Directive in national legislation.

All good solutions and best practices are good to implement in new Directive.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment.

(In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

In the Republic of North Macedonia in the *Criminal Code*, Chapter XXII, *criminal offenses* against the environment are provided (from Article 218 to Article 234). The object of protection of these crimes is the environment, air, soil, water, etc., from generally dangerous actions that endanger the life and health of humans and other living organisms on earth, leading to the destruction of humans and nature. Criteria based on which the criminal acts in this chapter are systematized are the generally dangerous nature of these acts; the danger and endangerment of the object of protection on a larger scale, in a wider area; the intent and careless form of guilt, etc.

In North Macedonia there are separate criminalistics investigations between crimes and misdemeanors.

Misdemeanors are provided in Law on Misdemeanors and Law on Environment. Misdemeanors are independent criminal offenses regardless of the crimes in the Criminal Code.

Misdemeanors in this area are more common, and unfortunately, the number of prosecuted crimes against the environment is significantly lower.

12. Portugal

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

The Convention was opened for signature on November 4, 1998. At this distance, more than two decades later, it has not been possible to ascertain internally why Portugal has not ratified or signed this CoE legal instrument.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Regarding a possible new convention, apart from others, elements such as incrimination of specific conducts, criminal liability for natural and legal persons, sanctions of criminal nature, confiscation, reinstatement of the environment and rights for groups to participate in proceedings are to be considered as particularly relevant.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?).

In November 2011, with the transposition of Directive 2008/99/EC, of 19 November 2008, on the protection of the environment through criminal law and Directive 2009/123/EC, of 21 October 2009, on ship-source pollution and on the introduction of penalties for infringements, the portuguese legal system was updated.

A set of provisions already set forth in the Criminal Code have been updated (Article 274 – forest fire; Article 278 – damage to nature; Article 279 – pollution; Article 280 - pollution with common danger) and a new Article 279-A has been added (activities endangering the environment). Conducts described in Articles 2 to 4 of the Convention on the Protection of the Environment through Criminal Law are envisaged in these articles.

Thus, in order to prosecute an environmental crime, the breach of an administrative environmental law is not necessary. The domestic legal system provides for autonomous offences that criminalize violations against of and damaging the environment.

However, it should also be pointed out that the portuguese legislation on environmental liability includes the possibility of applying administrative sanctions (contraordenações).

13. Romania

CDPC-EC Working Group on the Environment and Criminal Law: **Contribution Points (Romania)**

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

Romania is one of the signatory states of the Convention. Even if from the perspective of the substantive and procedural criminal law, the national legislation contains to a large extent provisions in the sense of those to which the convention obliges to legislate (measures to be taken at the national level), until this moment the reasons for which the signing was not followed by ratification could not be identified.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

It is well known that although it never entered into force at the level of the Council of Europe, the main elements of the Convention were the source of the legal instruments which were subsequently adopted at the level of the European Union. The Convention is recognized as the first treaty that established the obligation on states to adopt legislative provisions, primarily in the sense of incriminate within the national criminal law the facts provided in Articles 2 and 3, and secondly in order to establish the bases for exercising the criminal jurisdiction – Article 5.

A comparative analysis of the Convention and Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law highlights a number of convergent points. As the Directive is transposed within the national law, all elements from the perspective of which the Convention and Directive converge are still of relevance being already part of the national legal order.

When prospecting on a new possible convention consideration should be firstly given to the fact that Council of Europe is addressing to an extensive already diverse number of states and thus the application of its instruments is generally wider than those adopted at the EU level. Secondly, the process itself must be realistic and must not be overlooked that at this time that the number of multilateral treaties dedicated either in whole or in part for the environment exceeds 500. Apart from this, it should be added an even greater number of bilateral treaties, as well as resolutions, recommendations, declarations and action programs adopted at the level of certain international or regional bodies or organizations.

Therefore, in light of the above, the approach in considering a possible new convention must be a pragmatic one. Thus, a possible new convention should focus on the needs already generally acknowledged requiring an immediate response such as the indisputable relationship between organized crime, economic crime (e.g. money laundering) and environmental crime, coordination between administrative and judicial authorities both nationally and internationally and a possible swift in approach (as to the ultima ratio of the

criminal law) and trans-border cooperation (for instance wildlife trafficking and waste trafficking and even some of the illegal fishing elements do have by their nature an extensive trans-border component).

Subsequently, at the European level, ECHR has unquestionably mapped the environment as a major social value that needs increased legal protection including trough criminal law and therefore the respective developments should be also considered.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

The Romanian environmental law consists of approximately 300 normative texts, the Constitution, the framework regulation on the environment, laws, ordinances, government decisions and ministerial orders.

Like in other states, the environment repressive law has a multidimensional nature and presupposes a distinction between contraventions or administrative offences and crimes or criminal offences (which, moreover, the Convention does as well in Article 4). The administrative sanctions are of different nature and severity, starting with fines until the closure of the activity. However, the administrative sanctions are on a weaker position than the criminal sanctions. Generally, the finding of the contraventions and the imposition of sanctions is carried out by commissioners and persons empowered by the National Environmental Guard, the National Commission for the Control of Nuclear Activities, police officers, gendarmes and staff of the Ministry of National Defence, empowered in its fields of activity, in accordance with the powers laid down by the Romanian law.

The analysis of the incriminations at national level reveals the fact that the environmental crimes are included in several normative acts. The main one is the Emergency Government Ordinance no. 195/2005 on environmental protection regulating the protection of the environment on the basis of the principles and strategic elements leading to the sustainable development of society. Other normative acts are the Emergency Government Ordinance no. 57 of June 20, 2007 regarding the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, Law no. 360/2003 on the regime of hazardous substances, Law no. 211/2011 on the waste regime, Law no. 407 of November 9, 2006 on hunting and protection of the hunting fund, Emergency Government Ordinance no. 23 of 5 March 2008 on fisheries and aquaculture and Law no. 101/2011 for the prevention and sanctioning of certain facts regarding environmental degradation transposing the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

Environmental criminal law as a specialized criminal law does not seem to be conceived as an autonomous one but in an extensive dependency with the administrative one, both from the point of view of substantial criminal law (while some offences are stand-alone ones other incriminations are made by referral to some administrative acts) and procedural law. As to the procedural law, the detection of environmental crimes is the responsibility of the

Commissioners and Inspectors of the National Environmental Guard[17], the National Commission for the Control of Nuclear Activities, the gendarmes and the authorized personnel of the Ministry of National Defence as well as of the police (the General Romanian Police Inspectorate through the Public Order Directorate, the Directorate of Transport and the Directorate of Arms, Explosives and Dangerous Substances, and the General Inspectorate of the Border Police, through the coast guard and the Territorial Structures).

Environmental crime is handled by prosecution offices (the prosecutor however does not lead the investigation like for instance the organized crime offences but it only supervises it the investigation being conducted mainly by the police) and the courts. The structure and organisation of the Romanian judicial system are provided by the Romanian Constitution and Law 304/2004 on judicial organisation. There are no specialised courts or judges for the adjudication of environmental crime, thus the specialization lies at the administrative level only. In August 2018, a network of Romanian prosecutors was launched with a view to sharing statements and relevant case-law relating to environmental crime, and specifically waste crime.

17 The National Environmental Guard is a public institution and functions as a specialised body, subordinated to the central public authority for environmental protection. The NEG consists of a central apparatus called the General Commissariat, which has 41 county commissariats, the Bucharest Commissariat and the Danube Delta Biosphere Reserve Commissariat. The 41 county commissariats, the Bucharest Commissariat and the Danube Delta Biosphere Reserve Commissariat cover the entire national territory.

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14. Slovenia

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

Based on the archived documents at the Ministry of Justice, which was designated as a lead ministry responsible for this file in Slovenia and institutional memory of its employees, it is not possible to conclude with certainty, what was the prevailing reason Slovenia did not ratify the 1998 Convention. While Slovenia was in principle in favour of adopting a convention focusing on criminal aspects of the protection of the environment, it was somewhat disappointed with certain elements of the adopted 1998 Convention.

More specifically, Slovenia was of the view that Article 2(1)(a) of the 1998 Convention, which does not require that the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water is unlawful (as defined by the 1998 Convention is Article 1(a)), is not compatible with the prescription of such criminal offenses in Slovenia. In this respect Slovenia was more inclined towards an amendment proposed by the French delegation during the drafting of the 1998 Convention, which would have required that conduct under Article 2(1)(a) is unlawful.

Additionally, Slovenia was concerned that the wording of Article 2 of the 1998 Convention could be understood so that the persons affected by a discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water would be legally protected, but not the environment *as such*. Slovenia was of the view that it must be clearly stated that the intent in Article 2 of the 1998 Convention pertains to the actions or omissions affecting the environment and not the consequence of such a negative effect on the environment, *i.e*. death or serious injury to a person or creating a significant risk of causing death or serious injury to a person.

Moreover, Slovenia was not in favour of including the term “gross negligence”, as proposed by the British delegation, in the Convention, as Slovenian Criminal Law does not utilise the concept of gross negligence but rather differentiates between reckless negligence (when the perpetrator did not act with due care, although he or she was aware that he or she was able to perform such act, but recklessly believed that it would not happen or that he or she would be able to prevent it) and unconscious negligence (when the perpetrator was not aware that he or she was capable of performing such an act but should and could have been aware of this under the given circumstances and with regard to his or her personal attributes).

During the discussions that led to the adoption of the 1998 Convention, Slovenia also noted the insufficiently precise wording of the ninth preambular paragraph (that now reads: “Convinced that imposing criminal or administrative sanctions on legal persons can play an effective role in the prevention of environmental violations and noting the growing international trend in this regard;”), as it was of the opinion that legal persons should first be recognized as liable before prescribing criminal or administrative sanctions on them, so the text would read better, had it provided: “Convinced that establishing criminal responsibility (liability) for legal persons and imposing criminal or administrative sanctions...”.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

Slovenia considers the following elements to be relevant and should remain in a possible new Convention:

- Article 2(1)(a), insofar as it is amended so that Article 2(1)(a) would prohibit an *unlawful* discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water and whereby it would be clear that the environment as such is the legally protected good. This is already regulated in Article 332 (Burdening and destruction of the environment) of the Slovenian Criminal Code (*hereinafter* **CC**).
- Article 2(1)(b), insofar it is understood that damage to protected monuments, objects and property can be regulated as a separate criminal offence causing their lasting deterioration or death or serious injury to any person. This is regulated in Article 219 (goods of special cultural significance, natural curiosities, other protected natural resources or a public resource) and Article 332 (Burdening and destruction of the environment) of the CC.
- Article 2(1)(c). This is partially regulated in Articles 314 (Causing of general emergency), 332 (Burdening and destruction of the environment) and 334 (Unlawful management of nuclear and other hazardous radioactive substances) of the CC.
- Article 2(1)(d) and (e). This is regulated in Article 332 (Burdening and destruction of the environment) and 334 (Unlawful management of nuclear and other hazardous radioactive substances) of the CC.
- Article 2(2), whereby aiding and abetting is regulated by Articles 36.a – 40 of the CC.
- Article 3, whereby the term gross negligence should not be included in the Convention. This is regulated in Articles 332(4) and 334(7) of the CC.
- Article 4, whereby Articles 4(b) is regulated in Article 317 (pollution of the Environment by noise or light) of the CC, Article 4(g) is regulated in Article 344 (unlawful handling of protected animals and plants) of the CC. Other elements of Article 4 can be considered as administrative offences.
- Article 5 (1). This is regulated in Articles 10 and 12 of the CC.
- Article 5(2). This is regulated in Article 13 of the CC.
- Article 6. Articles 332 and 334 of the CC provide for the possibility of a prison sentence and Article 45 of the CC provides for the possibility of pecuniary sanctions more generally, including with respect to criminal offences regulated in Articles 332 and 334 of the CC.
- Article 7. This is regulated in Articles 73 – 77.c of the CC.
- Article 8, whereby the Convention would allow for the reinstatement of the environment to be a matter resolved in an administrative procedure.
- Article 9. The Criminal Responsibility of Legal Persons Act of Slovenia already provides for the possibility of legal persons being responsible for criminal offenses regulated in Articles 332 and 334 of the CC.
- Article 11. Slovenia's Criminal Procedure Code does not provide for a possibility of formal participation of environmental organisations in the criminal procedure as envisaged by this article of the 1998 Convention.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

Most provisions of the CC which are aimed at protecting human life and property (and therefore not the environment as such) but are still relevant in the context of the 1998 Convention do not require a breach of administrative environmental laws in order for the conduct to constitute a criminal offense. For example, Article 314 (1) of the CC (Causing of general emergency) provides that "Whoever endangers human lives or property of substantial value by causing fire, flood, explosion, by means of poison or poisonous gas, ionising radiation, mechanical force, electricity or other forms of energy, or by other act or means causing general emergency, or by omitting an act required to be performed in order to ensure the general security of people and property, shall be sentenced to imprisonment for not more than five years."

On the other hand, Article 317(1) of the CC (Pollution of the Environment by noise or light), as a contrary example, provides that "Whoever **violates regulations** by causing excessive noise or lightning which could result in severe damage to human health, shall be punished with a fine or sentenced to imprisonment for not more than two years." While Article 317 of the CC is not included in Chapter 32 (Crimes against the Environment, Space and Natural Resources) and its object of protection is not the environment as such, but rather human health, it nevertheless requires a violation of relevant regulations in order for a criminal conduct to occur.

Articles 332 (Burdening and the destruction of the environment) and 334 (Unlawful management of nuclear and other hazardous radioactive substances), which are included in Chapter 32 of the CC and where the object of protection is the environment as such, require that the conduct is in breach of relevant regulations in order for it to constitute a criminal offence.

Therefore, pure environmental offences, where the object of protection is the environment as such, are generally not stand-alone provisions in that they require a breach of relevant environmental laws in order for the conduct to constitute a criminal offence.

15. Spain

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

There is no explicit reason why Spain did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law.

Although Spain did not sign or ratify the 1998 Convention, the structure of the text was included on the Criminal Code by the reform in 1995, through the introduction of Title, which contains these criminal offenses.

Later, the Spanish legislator has resorted to using criminal law to protect the environment, following the path settled by European Union through its Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law.

Most of the conducts listed in the Directive 2008/99/CE were already punished in the Spanish Criminal Code, following the guidelines settled by the Council of Europe in its resolutions and its 1998 Convention on the Protection of the Environment through Criminal Law, although not all of them were included among crimes against the environment. However, the implementation of the Directive has required the introduction of some new conducts or modifications in the already existing crimes.

By Organic Law 5/2010 (LO 5/2010) on the reform of the Criminal Code, Spain has fulfilled its obligation to transpose the Directive.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

The Convention is structured in four sections: the first Section is dedicated to the “use of terms”; Section II makes reference to “Measures taken at national level”; Section III to “Measures to be taken at international level”; and, finally, Section IV to “Final clauses”.

The elements that should remain in a possible new Convention are the need of each State to establish certain offences as criminal under its domestic law.

In addition, each Party is to establish jurisdiction over such criminal offences when it is committed in its territory, on board a ship or an aircraft registered in it or by one its nationals under certain conditions (art.5.1).

Furthermore, State parties are to make the above mentioned offences punishable by criminal sanctions, including imprisonment, pecuniary sanctions and possibly reinstatement of the environment (art. 6- 8).

Finally, article 9 specifies the conditions under which corporate liability may be invoked.

It is also important the need to implement cooperation in investigations and judicial proceeding (art. 12).

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment.

(In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

In the Spanish legal system, administrative law and criminal environmental law coexist.

The criterion according to which the legislator differentiates between administrative and criminal sanctions is the seriousness or gravity of the attack and the degree of damage or endangerment.

Criminal law has jurisdiction where the conduct is administratively unlawful and also exceeds the limits of such offence because of its seriousness.

This necessary relation with the administrative regulations requires control of the activity of the administration. Lack of action or inappropriate behaviour may constitute an administrative or criminal offence, depending on the seriousness of the legal infraction or the environmental damage.

Administrative sanctions are fragmented and laid down in different environmental laws. Meanwhile, criminal infractions only appear in the Criminal Code.

Therefore, it is not easy to specify the normative elements of environmental crime. Either because there is no regulation about it or because it is very difficult to locate, especially in view of the significant existing regulations dispersion.

European Directives 2008/99/EC and 2009/123/EC15 have greatly influenced the legal drafting of Spanish environmental crimes, especially in the inclusion of illegal administrative behaviour as an element of environmental crime.

Article 325 of the Criminal Code requires the breaching of European, state, autonomous or local law and regulations that protect the environment, on the basis that these regulations and laws arise from legislative and executive powers.

16. Switzerland

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

At the request of Parliament, the Swiss government examined in 2005 in detail whether Switzerland should sign and ratify the 1998 Convention. In its analysis, the government concluded that national law largely meets the substantive requirements of the Convention. Nevertheless, some legislative amendments and/or reservations would have been necessary in order to fully comply with the text of the convention.

The main problem identified was art. 2 para. 1 let. a/ii of the Convention, particularly as it also relates to endangering the health of persons.

Other difficulties were identified regarding the following articles:

- Art. 2 para. 1 let. b (certain aspects regarding protected monuments, a topic which in Switzerland is largely dealt with at cantonal and not federal level);
- Art. 5 para. 1 let. c (with regard to offences committed abroad that are punishable with custodial sentences of less than 1 year);
- Art. 9 (doubts existed as to whether Swiss law would fully comply with this provision on corporate liability);
- Art. 10 para. 1 let. a (as there is no general obligation in this sense in Swiss law).

It seems that most of these aspects could still pose problems nowadays and/or would require us to make reservations to such provisions.

However, we would also like to point out that the Swiss government considered that the above-mentioned difficulties were not necessarily due to gaps in Swiss environmental law, but due to the different systematic approaches between the 1998 Convention and Swiss environmental law. While the Swiss legal order protects the environment in substance in numerous specific laws (see our answer to question 3), the convention relies a priori and almost exclusively on criminal law. The Swiss government was therefore of the opinion that the legislative changes required for accession to the 1998 Convention would not necessarily improve the protection of the environment, but would have to be made primarily to formally meet the requirements of the convention. The Swiss government was of the opinion that, domestically, there would be hardly any clear benefit resulting from the changes in criminal law required for ratification. In addition, the government could not identify any prospects of sending a lasting signal in terms of foreign policy with an accession, since the Convention has only been ratified by one state and has therefore not entered into force.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

To answer this question in detail, we would need to have a clear idea on why a new or amended Convention would be necessary, i.e. what the added value of such a Convention

would be today. For this, we need to discuss whether and where possible gaps/challenges/difficulties lie in practice. If we arrive at the conclusion that a new or amended Convention is necessary, it would make sense to not only focus on aspects of criminalisation and jurisdiction etc., but to also consider, among others, provisions on confiscation for instance (as did the 1998 Convention), given that confiscation measures can prove helpful in the area of environmental crime.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

The Swiss Criminal Code does not contain a specific chapter about the environment. Nevertheless, the Swiss Criminal Code contains, albeit to a limited and unsystematic extent, criminal offenses that relate to the environment or can be used for this purpose. The Title Eight of the Swiss Criminal Code contains Felonies and Misdemeanours against Public Health. For example:

- Art. 232 Propagation of harmful parasites
- Art. 234 Contamination of drinking water
- Art. 230bis Causing danger by means of genetically modified or pathogenic organisms

In essence, Swiss environmental criminal law is governed by special legislation. The criminal provisions are grouped in the central Environmental Protection Act EPA and in other specific environmental laws such as for example the Waters Protection Act WPA and the Federal Act on the Protection of Nature and Cultural Heritage. All of these laws contain criminal law provisions, which refer to administrative special laws.

Example: According to Art. 61 para. 1 let. k of the EPA any person who wilfully infringes **the regulations** on the movement of other forms of waste is liable to a fine. This article refers to a special administrative regulation.

The preventive effect of the criminal provisions is certainly in the foreground. At the same time, criminal law sets important framework conditions for the enforcement of environmental law in Switzerland. It supports the work of the environmental authorities. Administrative law sets the rules. Anyone who disregards these can be prosecuted under criminal law.

Switzerland is a federal state. It consists of 26 cantons. The state powers are divided between the Confederation, the cantons and the communes. The cantonal criminal justice authorities prosecute and adjudicate on most offences under federal (environmental) law. The cantonal administrative authority is mainly responsible for the enforcement of environmental law.

17. Turkey

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic).

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention.

In a possible new Convention should be encapsulate crucial definitions such as measures to be taken not only at national level but also regional or international level.

In this regard, The Convention may create a high standard for protection of environment, and also recommend to the member states to enacting some regulations to their own legislative framework.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

According to the Turkish legislation, it is plausible to say that it is prescribed separate or 'stand-alone' penal provisions in the Turkish Criminal Code which includes significant penalties in case of pollution of the environment.

Since 2005 it has been implemented as "Offences Against the Environment" in the text of Turkish Criminal Code. Penalty of imprisonment or judicial fine is stipulated in case of pollution of the environment not only intentionally but also recklessness.

Besides, an administrative fine is stipulated by the Turkish Environment Code in case of infringement of the said Law.

Lastly, according to Turkish Misdemeanor Law, (Art. 41) administrative fine has been prescribed that some types of environmental pollution.

18. Ukraine

1. Please specify the reasons why your State did not sign or ratify the 1998 Convention on the Protection of the Environment through Criminal Law (for example, political or circumstantial reasons or specific elements of the Convention that were considered problematic)

The Convention on the Protection of the Environment through Criminal Law was opened for signature on November 4, 1998. The Convention was signed on behalf of Ukraine on January 24, 2006.

According to the seventh part of Article 9 of the Law of Ukraine "On International Treaties of Ukraine" if an international treaty is submitted for ratification, the implementation of which requires the adoption of new or amendments to existing laws of Ukraine, draft such laws are submitted to the Verkhovna Rada of Ukraine. are accepted simultaneously. Pursuant to Article 13, paragraph 3, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States have agreed to be bound by it by ratifying, accepting or acceding.

Due to the lack of positive experience in the implementation and application of the Convention by foreign states, further work on the draft Law of Ukraine "On Ratification of the Convention for the Protection of the Environment by Criminal Law" was postponed until its entry into force.

According to the depositary's information on the ratification of the Convention for the Protection of the Environment by means of criminal law (ETS No. 172), the international treaty has not yet entered into force, as only one of the three required ratifications has been ratified. At the same time, the Ministry of Foreign Affairs of Ukraine did not receive any proposals for ratification of the Convention from national sectoral CEBs. In the case of a positive decision on the ratification of the Convention, it would be appropriate to consider amending the resolution of the Cabinet of Ministers of Ukraine of September 13, 2002.

2. Please identify the specific elements (and/or possible articles) of the 1998 Convention that your State considers to be relevant today and should remain in a possible new Convention

Articles 6, 7, 8, 9, 10, 11 and 12 appear relevant, but this does not mean that they should not be amended in the current version.

3. Please specify the connection or interdependency (if any) between criminal law and administrative law within your domestic law in the context of the environment. (In order

to prosecute an environmental offence, does it require the breach of administrative environmental law or are there 'stand-alone' offences that criminalise damaging the environment within your domestic law system?)

Criminal sanctions in Ukraine are the result of violations of administrative environmental legislation. Therefore, there is a link between administrative and criminal environmental law.

In terms of administrative and criminal law, fines for environmental offenses are not sufficient in relation to the penalties applied in the European Union, so there is a problem of environmental crime on a large scale (including cross-border environmental crime). Administrative environmental legislation in Ukraine is currently considered to be integral to criminal law.

3.2. Appendix 2: European Committee on Crime Problems (CDPC) Model Provisions for Council of Europe Criminal Law Conventions

Available via: https://rm.coe.int/european-committee-on-crime-problems-cdpc-model-provisions-for-council/1680713e9b

3.3. Appendix 3: Parliamentary Assembly of the Council of Europe, Report by the Committee on Legal Affairs and Human Rights: Addressing issues of criminal and civil liability in the context of climate change (Doc. 15362)

Available via: Addressing issues of criminal and civil liability in the context of climate change (coe.int)