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# COMMITTEE OF EXPERTS ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW (PC-ENV)

## Draft Explanatory Report to the Council of Europe Convention on the Protection of the Environment through Criminal Law

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**Draft Explanatory Report**
**to the Council of Europe Convention on the Protection of the Environment through Criminal Law**

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I. The Committee of Ministers of the Council of Europe took note of this Explanatory Report on __ ___ 20__ on the occasion of __ meeting of the Ministers' Deputies.

II. The text of the Explanatory Report does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

## I. Introduction

### *a. Environmental crime*

1. Environmental crime can have devastating impacts on environmental quality, biodiversity and natural resources but also on human health. It can also undermine the rule of law, peace, and security. Environmental crime is increasingly becoming a high priority on the international policy agenda.

2. International organisations, law enforcement, and governments around the globe largely agree that environmental crime is one of the largest criminal activities worldwide. Criminal networks that engage in environmental crime additionally engage in other types of crimes, such as corruption, money laundering or trafficking, including in people, weapons, and drugs. Furthermore, environmental crime is perceived by criminals as a low-risk, high-profit criminal activity. Large profit margins and low level of convictions motivate criminal organisations to engage in such form of crime.1

3. The Council of Europe has recognised that environmental crime and its impact knows no boundaries. No State is immune to environmental crime, even when it does not occur on their territory. The transnational nature of environmental crime reinforces more than ever the need for a pan-European response in which criminal law should play an important role.

4. Environmental crime may take many forms. Criminal law needs to define criminal offences in a clear, effective and proportionate manner, fully respecting the principle of legality. However, any strategy to combat crime must involve many actors and various policy areas. The use of criminal measures and mechanisms alone cannot guarantee the success

[1] INTERPOL and United Nations Environment (2016) *Strategic Report: Environment, Peace and Security – A Convergence of Threats.*

of such a strategy. Criminal law is only one instrument among others, but it is also a particularly important one for its deterrent and preventive functions.

5. The Council of Europe Convention on the protection of the environment through criminal law aims to protect the environment in a wide sense, encompassing all natural resources, such as air, soil, and water, ecosystems, including the services and functions of those ecosystems, as well as wild fauna and flora and habitats.

6. Combatting environmental crime requires a global, collaborative effort; it cannot be countered effectively in isolation. The Council of Europe Convention, being one of the first legally binding instruments with global impact to address environmental crime, complements and expands the standards already set in this field. The Convention is a vital tool for States in the prevention, prosecution and sanctioning of the most serious criminal offences, including but not limited to unlawful pollution, unlawful management of hazardous waste as well as unlawful logging and unlawful trade in timber, unlawful trading in wild fauna or flora and the unlawful deterioration of protected habitats. Hence, the Convention contains a broad range of forms of unlawful conduct which need to be established as criminal offences in domestic criminal law where this is not already the case. The concept of unlawfulness is defined within the Convention.[2] Simultaneously, the Convention significantly strengthens national strategies and promotes international co-operation in this field.

*b. Action by the Council of Europe*

7. 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, groundbreaking, legally binding international 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.

8. In November 2020, the Steering Committee of the Council of Europe for overseeing and coordinating activities in the field of crime prevention and crime control, the European Committee on Crime Problems (hereafter the CDPC), set up an ad hoc Working Group on the Environment and Criminal Law. 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, was feasible and appropriate.

9. In June 2022, the CDPC decided that the drafting of a new Convention was indeed feasible and appropriate. Following the Committee of Ministers of the Council of Europe's adoption of the terms of reference of the Committee of Experts on the Protection of the Environment through Criminal Law (hereafter the PC-ENV) on 23 November 2022, the PC-ENV was established in accordance with Article 17 of the Statute of the Council of Europe and Resolution CM/Res(2021)3. Under the authority of the Committee of Ministers of the Council of Europe and the CDPC, the PC-ENV was entrusted with the drafting of a new Council of Europe Convention on the Protection of the Environment through Criminal Law, replacing and superseding the 1998 Convention.

10. The PC-ENV was composed of experts on environmental crime, including representatives appointed by member States, by observer States and by other bodies of the Council of Europe, as well as by relevant international, supranational and non-governmental organisations.

11. The PC-ENV held a total of five meetings in Strasbourg, on 3-4 April 2023, on 16-18 October 2023, on 27-29 February 2024, on 4-7 June 2024, and on 7-9 October 2024, and elaborated a draft Convention on the Protection of the Environment through Criminal Law. Mr

[2] See paragraphs 29 to 31.

Šimon Pepřík from Czechia was Chair, Ms Cristina Mauro from France was Vice-Chair, and Mr Carlo Chiaromonte was Secretary to this Committee.

12. The draft text of the Convention was finalised by the European Committee on Crime Problems (CDPC), which approved it at its plenary meeting on […].

## II. Commentary on the Preamble and the provisions of the Convention

### Preamble

13. The Preamble sets out that the main objective of the Convention is to protect the environment and to efficiently prevent and combat environmental crime. It expresses concern that environmental crimes have a negative impact on economies, human health, human safety, food security, livelihoods, biodiversity, ecosystems, and the climate. The drafters wished to emphasise the importance of concerted international action as key to addressing the recurrent problems posed by the violation of the national and international norms on the protection of the environment.

14. The Preamble recalls the Reykjavik Declaration, adopted at the 4th Summit of Heads of State and Government of the Council of Europe (Reykjavik, 16-17 May 2023), in which the Heads of State and Government of the Council of Europe declared their commitment to strengthen their work at the Council of Europe on the human rights aspects of the protection of the environment, to identify the challenges raised by the triple planetary crisis of pollution, climate change and loss of biodiversity for human rights, and to contribute to the development of common responses thereto.

15. The Preamble recalls the most important Council of Europe treaties which are relevant for the Convention: the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and its Protocols, the Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979) and the Council of Europe Landscape Convention (ETS No. 176, 2000).

16. The Preamble recalls other relevant Council of Europe treaties in criminal law, notably on international co-operation in criminal matters: the European Convention on Extradition (ETS No. 24, 1957) and its Protocols; the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959) and its Protocols; the European Convention on the International Validity of Criminal Judgments (ETS No. 70,1970); the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73, 1978); the Criminal Law Convention on Corruption (ETS No. 173, 1999); the Council of Europe Convention on Cybercrime (ETS No. 185, 2001) and its Protocols; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198, 2005).

17. It also recalls Council of Europe instruments on the protection of personal data: the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, 1981) and the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223, 2018).

18. The Preamble recalls a list of relevant Recommendations of the Committee of Ministers to member States of the Council of Europe, as well as Resolution (77) 28 on the contribution of criminal law to the protection of the environment of the Committee of Ministers of the Council of Europe.

19. Moreover, the Preamble recalls a number of Council of Europe Parliamentary Assembly Resolutions and Recommendations which call for the recognition of ecocide, while also noting that ecocide is already covered by the law of certain member States of the Council of Europe.

In this vein, the Preamble also recognises that some intentional conduct covered by this Convention can cause particularly severe damage to the environment and should be recognised as a particularly serious crime.

20. Furthermore, the drafters also took into account the European Union Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, which was negotiated at European Union level simultaneously as the Convention. Like the Convention, the Directive establishes rules with regards to the definition of criminal offences in order to effectively prevent and combat environmental crime and protect the environment as well as provisions aimed at strengthening enforcement.

21. The Preamble indicates that the drafters recalled relevant United Nations Resolutions and international legal instruments.

22. The drafters also acknowledged the important role of relevant stakeholders, such as law enforcement authorities, the private sector, civil society, non-governmental organisations, international organisations, the media, academia and the scientific community, in preventing, reporting and combatting environmental crime.

## Chapter I – Purposes, scope, definitions and non-discrimination

### Article 1 – Purpose of the Convention

23. Paragraph 1 sets out the purpose of the Convention, namely to effectively prevent and combat environmental crime, to promote and enhance national and international co-operation against environmental crime, to establish minimum rules to guide States in their national legislation, and thereby promote and enhance the protection of the environment.

24. Paragraph 2 underlines that, in order to ensure the effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism. This is a means of ensuring Parties' compliance with the Convention and is a guarantee of the Convention's long-term effectiveness (see comments on Chapter VIII).

### Article 2 – Scope of the Convention

25. Paragraph 1 states that the focus of this Convention is the prevention, detection, investigation, prosecution and sanctioning of the offences established in accordance with the Convention. The Convention does not require Parties to create a new offence where an offence required by the Convention already exists in their domestic criminal law. In this Explanatory Report, all references to "offences established" include such offences.

26. Paragraph 2 determines that the Convention shall apply in times of peace and in situations of armed conflict, wartime or occupation. Therefore, it provides for the continued applicability of the Convention during armed conflict as complementary to the principles of international humanitarian law and international criminal law as well as human rights law.

27. In this regard, as stated in Resolution 2477 (2023) of the Parliamentary Assembly of the Council of Europe, armed conflicts, wars and military aggression leave deep scars on human living space, causing severe environmental damage well beyond the conflict area and long after the conflict is over and undermining the human rights to life and to a healthy environment.

### Article 3 – Definitions

28. Article 3 provides several definitions which are applicable throughout the Convention.

*Definition of "unlawful"*

29. Domestic law contains provisions concerning the protection of the environment, for example permitted pollution levels and acceptable risks and enabling administrative authorities to issue authorisations for relevant activities where appropriate. In the area of environmental protection, where criminal law and administrative law are generally linked, administrative regulations may clarify the permitted boundaries for activities that could negatively affect the environment. This can be done by statutory provisions, provisions in subsidiary legislation, such as ordinances or regulations or by administrative decisions aimed at protecting the environment.

30. The term "unlawful" has a broad scope of application and is defined in Article 3 (a) as "infringing a domestic law, a regulation, an administrative provision, or a decision taken by a competent authority aimed at protecting the environment. The conduct shall be unlawful even if it is carried out under an authorisation by a competent authority of a Party when the authorisation was obtained fraudulently or by corruption, extortion or coercion." It relates to behaviour prohibited by laws and statutes, as well as subsidiary legislation introduced by governmental bodies with a view to implementing laws and statutes and by decisions taken by relevant authorities for the protection of the environment in its many aspects - air, soil, water as well as of the fauna and flora. Internal rules inside organisations are not included in this definition. The term 'unlawful' includes also breaches of conditions stated in authorisations, permits or licenses issued by the competent authorities.

31. The reference to "domestic law" in the definition of "unlawful" includes international agreements to which the respective Parties are bound and, where necessary, have been implemented in accordance with their domestic law. It should be noted that Article 49 on the relationship between this Convention and other sources of international law serves as a further reference for States in this regard by clarifying that this Convention does not affect the rights and obligations of Parties under other international instruments, which are binding on them (see comments on Article 49). For the European Union and its Member States, the notion of "domestic law" also refers to European Union environmental law, particularly EU law covered under the European Union Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, and domestic law giving effect to it.

*Definition of "water"*

32. The definition adopted in Article 3 (b) determines that the term "water" shall mean "all surface water categories, including rivers, lakes, transitional waters, coastal waters, all groundwater bodies, and all marine waters including oceans and seas". The list is not exhaustive.

33. It was adapted from the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law (ETS 172) and corresponds to the definition used by most international treaties regarding the protection of the environment. It does not include, for example, water in swimming pools, and water in sewage systems. The definition of water in the Convention is designed more with a view to the water abstraction offence rather than considering all the other offences, where water is referred to as an element for which damage could be done. In the latter case, the widest meaning of water should be given.

*Definition of "ecosystem"*

34. Article 3 (c) provides a definition of ecosystem, meaning "a dynamic complex of plant, fungi, animal and micro-organism communities and their non-living environment interacting as a functional unit and includes habitat types, habitats of species and species populations". It was inspired by Article 2 of the United Nations Convention on Biological Diversity and European Union Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law.

35. An ecosystem also includes ecosystem services, through which an ecosystem contributes directly or indirectly to human wellbeing, and ecosystem functions, which refer to natural processes in an ecosystem. Smaller units such as a beehive, an anthill or a stump can be a part of an ecosystem but should not be considered to be an ecosystem in their own right for the purposes of this Convention.

36. The importance of protecting and preserving ecosystems can be demonstrated by the vital contributions they provide to human health. Marine and terrestrial ecosystems are the only environments that can absorb anthropogenic carbon emissions, sequestering 5.6 gigatons of carbon annually, corresponding to approximately 60 per cent of global anthropogenic emissions.[3] Furthermore, while some human-made replacements have been innovated, such infrastructure can be costly, incur high future expenses and fail to deliver the full range of benefits provided by nature.[4]

*Definition of "waste"*

37. The definition provided in Article 3 (d) refers to "waste" and was inspired by the one adopted in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and in Directive 2008/98/EC ("Waste Framework Directive"). It encompasses a broad scope of substances or objects that the holder discards or intends or is required to discard.

**Article 4 – Principle of non-discrimination**

38. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its jurisprudence concerning Article 14 ECHR.[5] In particular, this case law has made clear that not every distinction or difference of treatment amount to discrimination. Only those that lack "objective and reasonable justification" are considered as such.[6]

39. The list of grounds of discrimination in Article 4 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. The list of grounds of discrimination is not exhaustive, but indicative, and should not give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision.

40. A few delegations wished to emphasise the importance of recognising discrimination against people whose sense of personal identity and gender does not correspond with the sex assigned at birth, and hence, they were in favour of the inclusion of the terms "gender" and "gender identity" in Article 4.
However, agreement was not reached about including these grounds in the list provided in Article 4.

## Chapter II – Integrated policies and data collection

**Article 5 – Comprehensive and co-ordinated policies**

[3] IPBES (2019): Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. S. Díaz et al., (eds.). IPBES Secretariat, Bonn, Germany.

[4] Ibid.

[5] Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention.

[6] *Molla Sali v. Greece* [GC], no. 20452/14, § 135, 19 December 2018; *Fabris v. France* [GC], no. 16574/08, § 56, 7 February 2013; *D.H. and others v. the Czech Republic* [GC], no. 57325/00, § 175, 13 November 2007; *Hoogendijk v. the Netherlands* (decision), no. 58641/00, 6 January 2005.

41. Paragraph 1 requires Parties to adopt and implement policies which would comprise a multitude of measures to be taken by different actors and agencies and which, taken as a whole, should ensure an effective response to offences established in accordance with this Convention. This obligation requires Parties to ensure that the adopted policies are implemented by way of effective multi-agency co-operation.

42. Administrative and criminal law enforcement are complementary and interdependent, relying on information exchange between authorities and government administrators. Moreover, depending on institutional set-up in a Party, multiple authorities may have responsibilities in the area of environmental protection, for example water authorities, industry supervision or forestry authorities. Efficiently preventing and combatting offences established in accordance with this Convention requires Parties to establish mechanisms for co-ordination and co-operation at strategic and operational levels. In this regard, Paragraph 2 sets the obligation for Parties to establish appropriate mechanisms, among all their competent authorities involved in enforcement against environmental offences, including all authorities exercising preventive, penal and remedial functions. For the purpose of this Convention, such mechanisms shall be aimed at: (a) ensuring a common understanding of the relationship between criminal and administrative enforcement, as well as the adoption of common priorities and practices; (b) exchange of information for strategic and operational purposes within the limits of national law including data protection rules; (c) exchange of best practices among enforcers.

43. A common and general understanding of what might be the criminal and administrative measures in response to environmental crime and promoting co-operation between all criminal and administrative law enforcement authorities is necessary to ensure a reinforced and impactful response to this form of criminality.

44. Better collection and transmission of information, as established throughout this Convention, will also demand a better integration between administrative and criminal law enforcement. The efforts undertaken by Parties to set up and enhance procedures of data collection, sharing of information and training of professionals can be made more effective and less burdensome by adopting a concerted approach to all levels of law enforcement under the scope of this Convention.

45. Preventing bottlenecks and adopting common priorities are powerful tools to combat the most common gaps hindering the effectiveness of the law enforcement chain when it comes to environmental crime.

46. Finally, the co-operation and coordination mechanisms to be established by each Party shall aim at the exchange of best practices among all their competent authorities involved in preventing and combatting offences established in accordance with this Convention. The drafters felt it best to leave it in the Parties' discretion how to implement this.

47. All competent authorities are, at all times, expected to act within their respective competences under domestic law. The autonomy of these authorities, as well as independence of the judiciary and prosecutors, should be respected as granted under domestic law.

48. Paragraph 3 requires Parties to consider designating or establishing one or more official government bodies with four specific tasks: co-ordinating, implementing, monitoring and evaluating the policies and measures which the respective Party to the Convention has devised to prevent and combat the commission of offences established in accordance with this Convention. This can be done by setting up new official bodies or mandating official bodies already in existence with these tasks. The term "official body" is to be understood as any entity or institution within government. It may be a body set up or already in existence either at national or regional level. Size, staffing and funding are to be decided by the Parties, as well as to which entity it shall be answerable to and any reporting obligations it shall have.

Regarding the tasks of implementation, monitoring and evaluation, this body should be in existence on the respective level of a Party's structure which is responsible for the carrying out of the measures. This means that in a federal government structure it may be necessary to have more than one body.

49. The four tasks which this body or bodies are mandated to undertake aim at ensuring that the various measures taken by the Party in implementation of this Convention are well co-ordinated and lead to a concerted effort of all agencies and all sectors of government. Moreover, they aim at ensuring the actual implementation of any new policies and measures. The monitoring task bestowed upon these bodies is limited to the monitoring of how and how effectively policies and measures to prevent and combat the commission of offences established in accordance with this Convention are being implemented at the national, regional and local level. It does not extend to monitoring compliance with the Convention as a whole which is a task performed through the independent, international monitoring mechanism set up in Chapter VIII of the Convention (see comments on Chapter VIII).

50. To ensure that the expertise and perspective of relevant stakeholders, agencies and institutions contribute to any policy-making in this field, Paragraph 4 calls for the involvement of "all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, including the judiciary, public prosecutors, law enforcement agencies, and, where appropriate, non-governmental organisations and other relevant organisations and entities".

51. This is a non-exhaustive list of actors, which the drafters intended to cover, in particular, environmental and human rights non-governmental organisations. By including national, regional and local parliaments in this provision, the drafters wished to reflect the different levels of law-making powers in Parties with a federal system.

52. Assigning specialised investigation units, prosecutors and judges to work on the prevention, investigation, prosecution and adjudication of offences established in accordance with this Convention is an effective measure that seeks to maximise the professionalism and effectiveness of the enforcement chain and remedy the difficulties caused by the inherent complexity of tackling environmental crime. It has therefore been included in Paragraph 5. However, as is the case also for paragraph 3, there is no obligation as to the result imposed on Parties but to consider such measures, as demonstrated by the use of the expression "Parties shall consider". Such considerations should take into account their constitutional traditions and legal systems and national circumstances, and with due respect to the rules governing the status and functions of legal professionals. For instance, general criminal courts could provide for specialised chambers of judges. The independence of the judiciary and prosecutors should in any case be respected as granted under domestic law.

**Article 6 – National strategy**

53. Article 6 complements the provisions of Article 5, determining that Parties establish and publish a national strategy to prevent and combat the offences established in accordance with this Convention. This provision aims at ensuring a coherent approach to tackling environmental crime with a national strategy establishing objectives, priorities and the corresponding measures and resources needed, including how specialisation of enforcers will be supported. Article 6 includes a non-exhaustive list of aspects to be addressed by the national strategy set up by each Party. These aspects include the objectives and priorities of national policy on combatting environmental crime, roles and responsibilities of competent authorities, resources needed, and mechanisms of regular evaluation of results, and the assistance of international networks working on matters directly relevant to preventing and combatting offences established in accordance with this Convention.

54. The goal is not only to establish a clearer set of roles and responsibilities between law enforcement, investigation and criminal prosecution, but also to provide more effective working relationships and feedback loops between the overarching policy, the common

objectives and the means to implement these objectives, as well as monitoring the subsequent results.

55. Parties are free to determine the appropriate form for that strategy which could take into account their constitutional traditions in terms of separation of powers and competences and be either sectoral or a part of a broader strategic document. Irrespective of whether Parties provide for the adoption of one or more strategies, their overall content should encompass the entire territory of the individual Party.

**Article 7 – Resources**

56. Lack of resources and enforcement powers for Parties' authorities which detect, investigate, prosecute or adjudicate environmental criminal offences create obstacles for the effective prevention and sentencing of those offences. In particular, the shortage of resources risks preventing authorities from taking any action or limiting their enforcement actions, allowing offenders to escape liability or to receive a sentence that does not correspond to the gravity of the criminal offence. Therefore, Article 7 aims at ensuring the allocation of appropriate financial and human resources for the prevention and combatting the offences established in accordance with this Convention. In view of the different circumstances of States, the drafters chose to limit the scope of this obligation to the allocation of appropriate resources. This means that the resources allocated need to be suitable for the target set or measure to be implemented and leaves a margin of appreciation to Parties in this regard.

**Article 8 – Training of professionals**

57. The training of professionals in the many causes, manifestations and consequences of offences established in accordance with this Convention provides an efficient means of preventing such offences.

58. The effective functioning of the enforcement chain preventing and combatting environmental criminal offences depends on a range of specialist skills. As the complexity of the challenges posed by environmental criminal offences and the technical nature of such offences require a multidisciplinary approach, a high level of legal knowledge and technical expertise, financial support, as well as a high level of training and specialisation within all relevant competent authorities, are necessary. Therefore, paragraph 1 of this article requires that Parties shall provide appropriate regular multidisciplinary, technical, and legal training, for the relevant professionals dealing with the prevention, detection, investigation, prosecution and adjudication of offences established in accordance with this Convention, with due respect to the rules governing the status and functions of legal professionals.

59. Drafters felt it best to leave to the Parties how to organise the training of relevant professionals. However, when providing training for professionals involved in judicial proceedings (in particular judges and prosecutors), Parties must take account of requirements stemming from the independence of the judicial professions and the autonomy they enjoy in respect of the organisation of training for their members. The drafters wished to stress that this provision does not contravene the rules governing the autonomy and independence of legal professions but that it requires Parties to ensure that training is made available to professionals wishing to receive it. Technical expertise should be made available to all relevant enforcement authorities.

60. The content of paragraph 2 is linked to the greater aim of the Convention to establish a comprehensive approach to preventing and combatting all offences covered by its scope. This provision requires Parties to encourage that the training referred to in paragraph 1 also includes training on coordinated multi-agency co-operation, complementing in this way the obligations laid down in Article 5 of this Convention. Consequently, professionals should also be taught skills in multi-agency working, equipping them to work in co-operation with other professionals from a wide range of fields.

**Article 9 – Data collection and research**

61. Systematic and adequate data collection has long been recognised as an essential component of effective policy-making in the field of preventing and combatting offences established in accordance with this Convention. Available data are seldom comparable across countries nor over time, resulting in a limited understanding of the extent and the evolution ofthe problem. Furthermore, among the challenges in successfully preventing and combatting environmental crime is the lack of data on these crimes, particularly information on trends, patterns and related criminal justice statistics, to guide resource allocation and prioritisation.

62. Preventing and combatting environmental crime requires evidence-based policy-making. This implies effectively documenting the magnitude of environmental crime by producing relevant data in order to guide policy and to monitor the implementation of measures to address the problem. This article contains the obligation to collect regularly relevant data on cases concerning offences established in accordance with this Convention. Additionally, it highlights the need to promote research in the field of environmental crime.

63. The nature of the obligation contained in paragraph 1 is twofold. First, in order to design and implement evidence-based policies and assess whether they efficiently contribute to preventing and combatting environmental crime, (a) requires Parties to collect relevant statistical data at regular intervals on cases of offences established in accordance with this Convention. Relevant statistical data may include administrative data collected from statistics compiled by law enforcement agencies and NGOs, as well as judicial data recorded by judicial authorities, including public prosecutors and courts. Appropriately collected statistical, administrative and judicial data can contribute to Parties' national response to offences established in accordance with this Convention by seeking information about the performance of government institutions as well as information on crimes that authorities are dealing with within the criminal procedure. Furthermore, judicial data can provide information on the sentences and characteristics of convicted persons, as well as on conviction rates.

64. Secondly, (b) creates the obligation for Parties to promote research in the field of environmental crime. "Research" refers to descriptive or experimental work, undertaken under regulated conditions to obtain scientific findings. It is essential that Parties base their policies and measures to prevent and combat such form of crime on state-of-the-art research and knowledge in this field. Research is a key element of evidence-based policy-making and can thus contribute greatly to improving day-to-day, real-world responses to environmental crime by the judiciary, law enforcement agencies and other relevant authorities.

65. The second paragraph of this article entails the obligation of Parties to provide the Committee of the Parties referred to in Chapter VIII with the information collected. This not only allows the identification of existing good practice but also contributes to harmonisation across the Parties to the Convention.

66. Finally, paragraph 3 contains the obligation to ensure that the information collected pursuant to Article 9 is available to the public. It is however left to the Parties to determine the form and means, as well as the type of information that is to be made available. In making information collected pursuant to Article 9 available to the public, Parties shall pay special attention to the privacy rights of persons affected and the respective applicable legislation and international agreements governing the protection of personal data.

## Chapter III – Prevention

67. This chapter contains provisions that come under the heading of prevention in the wide sense of the term. Preventing environmental crime requires broad-scope changes in attitude of the public at large and raising awareness. Local and regional authorities can be essential actors in implementing these measures by adapting them to specific needs. The critical role that prevention plays in environmental matters is demonstrated by the fact that reactive

measures are too late for the tree that has been felled or the ecosystem that has been damaged.

### Article 10 – General obligations

68. This article requires Parties to the Convention to take the necessary legislative or other measures for the prevention of the commission of any offence established in accordance with this Convention by any natural or legal person. Depending on the national legal system, some of these measures may require the passing of a law while others may not.

69. The last part of the article refers to co-operation with civil society and non-governmental organisations, where appropriate. Since non-governmental organisations are often active in engaging with different relevant stakeholders, such as academia and the private sector, their involvement contributes to help address issues of environmental crime, complementing actions of governments. Parties should therefore encourage all members of society to actively contribute to the prevention of the commission of any offence established in accordance with this Convention.

### Article 11 – Awareness-raising

70. The purpose of this article is to ensure that the general public is informed of the importance of protecting the environment as well as of the different manifestations of environmental crime. The obligation entails the promotion or organisation of information and awareness-raising campaigns that address the prevention and combatting of environmental crime. Awareness-raising activities may include the dissemination of information on the different manifestations of environmental crime, its consequences on the environment, ecosystems and habitats, the economy, human health and safety, food and water security and the need to prevent it.

71. Many non-governmental organisations have a long tradition of carrying out successful awareness-raising activities – at local, regional or national level. This provision therefore encourages the co-operation with civil society and non-governmental organisations, in particular those aimed at the protection of the environment, in order to reach out to the general public.

72. Paragraph 2 extends the obligation to the dissemination of concrete information on available government or non-government preventive measures. This may include the wide dissemination of information leaflets or posters or on-line information material on services which the police or the local community offers, contact information of local, regional or national services.

## Chapter IV – Substantive criminal law

73. Chapter IV contains the substantive criminal law provisions of the Convention and establishes a number of environmental crimes. This type of alignment of domestic law facilitates action against crime at the national and international level. Often, national measures to combat environmental crime are not carried out in a systematic manner or remain incomplete due to gaps in legislation.

74. The Convention lays down the description of the conduct to be established as criminal offences in the domestic legal system of the Parties. The terms used in the Convention for the conduct description are to be used and interpreted in accordance with domestic law, except in cases where the terms are defined in Article 3 of the Convention. This Explanatory Report provides some examples for illustrative purposes.

75. The Convention gives clear definitions of what forms of unlawful conduct fall within the scope of each offence and ensures that the offences established in accordance with this Convention are punishable by effective, proportional and dissuasive penalties. This will simplify and facilitate practical implementation by the Parties and thus ensure that the Convention will better reach its objectives.

76. As is the case in other Council of Europe Conventions seeking to combat specific forms of transnational crime, Chapter IV contains the essential substantive criminal law provisions of the Convention. The European Committee on Crime Problems (CDPC) conducted a comprehensive review of European and national legislation in force concerning environmental crime. It considered it necessary to draft substantive criminal law provisions to strengthen national and international efforts to protect the environment. The drafters therefore concentrated on the most common and serious offences that may bring about the destruction or deterioration of the environment. As such, Chapter IV represents the core of the Convention and should be read in light of the purpose of the Convention as set out in the Preamble and Articles 1 and 2.

77. The drafters took due account of other existing international instruments dealing with the protection of the environment through criminal law, including the relevant United Nations Conventions and the Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, when drafting this Chapter.

78. This Chapter is organised thematically into sections, under which the offences are clearly separated into articles. The drafters opted for this structure to provide for optimal clarity and readability.

79. It is clear, from the wording of the provisions, that Parties are only obliged to criminalise the unlawful conducts described in the respective provisions if they are committed intentionally. The interpretation of the word “intentionally” is left to domestic law, while it is understood that for the purposes of this Convention the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

80. The formulation “which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants” is used for several offences listed in the Convention, and seeks to clarify the damage which should be taken into consideration when establishing an offence in accordance with this Convention, thus providing clarity and legal certainty to Parties and those under their jurisdiction. The qualifier is intended to protect the environment in a wide sense and may include substantial damage to animals and plants, habitats, ecosystem functions and services provided by ecosystems and natural resources.

81. In assessing whether conduct defined as an offence in accordance with this Convention is “likely” to cause damage to the quality of air or soil, or the quality of water, or to animals or plants, when this is a constituent element of the offence, one or more of the following elements may be taken into account, where relevant: (a) the conduct relates to an activity which is considered to be risky or dangerous for the environment or human health, and requires an authorisation which was not obtained or complied with; (b) the extent to which a regulatory threshold, value or another mandatory parameter set out in domestic law is exceeded; (c) whether the material or substance is classified as dangerous, hazardous or otherwise listed as harmful to the environment or human health.

82. In assessing whether the damage or likely damage to the environment is “substantial”, when this is a constituent element of the offence, one or more of the following elements may be taken into account, where relevant: (a) the baseline condition of the affected environment; (b) whether the damage is long-lasting, medium-term or short-term; (c) the extent of the damage; (d) the reversibility of the damage. Such assessment should be done on a case-by-case basis.

83. By way of illustration, “air” refers to outdoor air in the troposphere, meaning the lowest layer of the atmosphere that interacts with the surface of the Earth. “Soil” refers to the top layer of the Earth’s crust situated between the bedrock and the surface and comprises, inter alia, mineral particles and living organisms. “Water” is defined in Article 3 (b) of the Convention, meaning all surface water categories, including rivers, lakes, transitional waters, coastal waters, all groundwater bodies, and all marine waters, including oceans and seas. “Animals or plants” do not include domesticated animals and cultivated plants.

84. Where, under this Chapter, conduct constitutes a criminal offence if it concerns a “non-negligible quantity”, assessment of whether such quantity is non-negligible should be done on a case-by-case basis. This assessment should not render enforcement against environmental offences excessively burdensome. In such assessment, one or more of the following elements may be taken into account, where relevant: (a) concerning, in particular, wildlife offences, the conservation status of the fauna or flora species concerned should be taken into account; (b) the number of items concerned by the offence; (c) the cost of restoration of the environment, where it is feasible to assess that cost; (d) the extent to which a regulatory threshold, value or another mandatory parameter set out in domestic law was exceeded. In assessing the latter, the hazardousness and toxicity, inter alia, of the material or substance should be taken into account because the more hazardous or toxic the material or substance is, the sooner that threshold, value or other parameter is reached and, in the case of particularly hazardous and toxic substances or materials, even a very small quantity can cause substantial damage to the environment or human health.

85. Parties are obliged to ensure that unlawful conduct covered by this Convention constitutes a criminal offence in their respective domestic law. However, Parties may not need to adopt new provisions if their domestic legislation is already in full compliance with the obligations under this Chapter. The Convention sets a minimum standard according to which the domestic legislation must ensure that at least the conducts described in this Chapter constitute a criminal offence. However, Parties may go beyond the definition of the offences provided for in this Chapter and may also criminalise other forms of conduct.

**Section 1 – Pollution, products and substances**

86. Section 1 obliges Parties to establish as an offence under domestic law several forms of conduct related to serious pollution, except for certain offences covered under other sections, such as ship-source pollution covered in Section 4. This obligation is limited to those situations where the perpetrator acts intentionally and unlawfully. Parties should provide greater precision on the definitions of the terms adopted when establishing these offences under domestic law.

**Article 12 – Offences related to unlawful pollution**

87. Article 12 obliges Parties to establish the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water as a criminal offence when these conducts meet a relevant threshold.

88. By way of illustration, “emission” could mean the direct or indirect release of a quantity of materials or substances, energy or ionising radiation from individual or diffuse sources into air, soil or water. “Substance” could mean any chemical element and its compounds.

89. The offence in Article 12 covers also the introduction of different forms of energy, such as heat, sources of thermal energy, noise, including underwater noise, and other sources of acoustic energy, vibrations, electromagnetic fields, electricity or light, into the environment which causes or is likely to cause substantial damage to the quality of air, soil or water or substantial damage to animals or plants, or the death of, or serious injury to, persons. In order to protect the environment, Parties may regulate the introduction of energy into the environment, for example in the areas of protection of water, the marine environment, noise control, waste management and industrial emissions, in accordance with their domestic laws. In light of those laws, the unlawful introduction of energy into the environment is defined as a criminal offence under this Convention if it causes or is likely to cause substantial damage to the environment or human health.

**Article 13 – Offences related to the placing on the market of products in breach of environmental requirements**

90. Article 13 introduces as a criminal offence the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product, the use of which results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to animals or plants as a result of the product’s use on a larger scale.

91. By way of illustration, “placing on the market” could cover supplying or making available, whether in return for payment or free of charge, to a third party, including import. “Use” could include, inter alia, any processing, formulation, consumption, storage and keeping. “Emission” could include the direct or indirect release of a quantity of materials or substances, energy or ionising radiation from individual or diffuse sources into air, soil or water. The terms “substance” and “energy” have the same meaning as set out in the comments on Article 12 (see comments on Article 12).

92. “A prohibition or another requirement aimed at protecting the environment” refers to prohibitions and requirements laid down in domestic law which has among its stated objectives, or has as an aim the protection of the environment, which include protecting human health; preserving, protecting and improving the quality of the environment; combatting climate change; prudent and rational utilisation of natural resources; or promoting measures at international level concerning environmental problems, whether regional or worldwide. Where such a prohibition or requirement is laid down in other areas of domestic law which have other objectives, for example protection of workers’ health and safety, the conduct should not be covered under that criminal offence.

93. Those who place products on the market must do so in accordance with applicable environmental standards and requirements. Hence, this offence covers criminal liability of those who place the products on the market in breach of environmental requirements, and not of those who acquired the products and thereafter use them as a consumer or a commercial user.

94. The words “use on a larger scale” refer to the combined effect of the use of a product by several users, regardless of their number, provided that the conduct causes or be likely to cause damage to the environment or human health.

**Article 14 – Offences related to chemical substances**

95. Article 14 covers unlawful manufacture, placing or making available on the market, import, export or use of regulated chemical substances, whether on their own, in mixtures or in articles, including their incorporation into articles, when such a conduct is prohibited according to the domestic law aimed at protecting the environment and causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. Paragraph 2 states that Parties may identify the domestic provision that they decide to make subject to paragraph 1 and notify them to the Secretariat.

96. By way of illustration, "manufacture" could cover production or extraction of substances in the natural state; "placing on the market" could mean supplying or making available, whether in return for payment or free of charge, to a third party, including import; "import" could mean the physical introduction into the territory of a Party; "export" could include permanent or temporary export; "use" could cover any processing, formulation, consumption, storage, keeping, treatment, filling into containers, transfer from one container to another, mixing, production of an article or any other utilisation.

97. By way of further illustration, chemical substances "on their own" could refer to a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability; "mixtures" could mean a mixture or solution composed of two or more substances; "article" could refer to an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition.

98. Paragraph 2 is essential considering the broad concept of chemicals and of provisions that may regulate them in domestic law. Therefore, the drafters felt it necessary to include an additional paragraph that seeks to limit the scope of this offence and allow alignment with Parties' domestic law. Accordingly, this paragraph provides that Parties may identify the domestic provisions that they decide to make subject to paragraph 1 and notify them to the Secretariat. The purpose of this provision is two-fold: (i) to allow the Parties to decide which domestic law provisions are covered under this offence. This helps to ensure that the criminal law remains *ultima ratio*, as appropriate, while the most severe breaches of domestic environmental law concerning chemical substances are covered by this offence; (ii) to ensure transparency and legal certainty concerning the scope of this offence, which also helps to promote better understanding among Parties and cooperation in this area.

99. For the purposes of this provision, the 2001 Stockholm Convention on Persistent Organic Pollutants is considered relevant to the participating Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

**Article 15 – Offences related to radioactive material or substances**

100. Article 15 concerns radioactive material or substances, of which the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal causes or is likely to cause damage to the environment or human health.

101. By way of illustration, "processing" could refer to chemical or physical operations on radioactive material including the mining, conversion, enrichment of fissile or fertile nuclear material and the reprocessing of spent fuel, "storage" to the holding of radioactive material, including spent fuel, a radioactive source or radioactive waste, in a facility with the intention of retrieval.

102. "Radioactive material" could mean material incorporating radioactive substances. "Radioactive substance" could refer to any substance that contains one or more radionuclides the activity or activity concentration of which cannot be disregarded from a radiation protection perspective.

**Article 16 – Offences related to mercury**

103. This provision concerns the unlawful and intentional manufacture, use, storage, import or export of mercury, including mercury compounds and mixtures of mercury and mercury-added products, provided that such conduct causes or is likely to cause damage to the environment or human health.

104. By way of illustration, "import" could refer to the physical introduction into the territory of a Party of mercury, mercury compounds, mixtures of mercury and mercury-added products; "export" could refer to the permanent or temporary exit of mercury, mercury compounds, mixtures of mercury and mercury-added products and the re-export of mercury, mercury compounds, mixtures of mercury and mercury-added products.

105. "Mercury" means elemental mercury (Hg(0), CAS No. 7439-97-6). "Mercury compound" could refer to any substance consisting of atoms of mercury and one or more atoms of other chemical elements that can be separated into different components only by chemical reactions. "Mixture" could refer to a mixture or solution composed of two or more substances. "Mercury-added product" could refer to a product or product component that contains mercury or a mercury compound that was intentionally added.

106. For the purposes of this provision, the 2013 Minamata Convention on Mercury is considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

**Article 17 – Offences related to ozone depleting substances**

107. Article 17 concerns atmospheric pollution, specifically the production, placing on the market, import, export, use or release of ozone depleting substances or production, placing on the market, import or export of products and equipment containing or relying on such substances. Ozone depleting substances, which contain sulphuric acid, chlorine, and bromine, have a long-lasting existence – up to 120 years – and are regarded as highly dangerous for the environment and human health due to their toxicity. These substances were the object of the 1989 Montreal Protocol on Substances that Deplete the Ozone Layer, that established a phasing out of their production and consumption.

108. "Production" could refer to the amount of controlled substances produced, minus the amount destroyed by approved technologies and minus the amount entirely used as feedstock in the manufacture of other chemicals. The amount recycled and reused is not to be considered as "production". By way of illustration, "placing on the market" could refer to the circulation in a Party or the supplying or making available to another person within the Party, for the first time, for payment or free of charge, or the use of substances produced, or of products or equipment manufactured, for own use. "Import" could refer to the entry of substances, products and equipment into the territory of a Party and may also include temporary storage. "Export" could refer to the exit of substances, products and equipment from the territory of a Party. "Use" could be understood as the utilisation of ozone-depleting substances in the production, maintenance or servicing, including refilling, of products and equipment.

109. For the purposes of this provision, the 1988 Vienna Convention for the Protection of the Ozone Layer and its 1989 Montreal Protocol on Substances that Deplete the Ozone Layer are considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

**Article 18 – Offences related to fluorinated greenhouse gases**

110. The object of Article 18 is, similarly to Article 17, atmospheric pollution. This provision concerns the production, placing on the market, import, export, use, or release of fluorinated greenhouse gases (also called F-gases), or placing on the market or import of products and equipment containing or relying on such gases.

111. The term “greenhouse gases” could be understood as referring to those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation, according to the definition provided by the United Nations Framework Convention on Climate Change. F-gases are human-made and include hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and other fluorinated compounds. F-gases trap heat in the atmosphere of the Earth, leading to warming of the Earth’s surface, which results in the greenhouse effect, which is the main driver of climate change.

112. By way of illustration, “placing on the market” could refer to the circulation in a Party or the supplying or making available to another person within the Party, for the first time, for payment or free of charge, or the use of substances produced, or of products or equipment manufactured, for own use. “Import” could refer to the entry of substances, products and equipment into the territory of a Party and may also include temporary storage. “Export” could refer to the exit of substances, products and equipment from the territory of a Party. “Use” could refer to the utilisation of fluorinated greenhouse gases in the production, maintenance or servicing, including refilling, of products and equipment.

113. For the purposes of this provision, the 1988 Vienna Convention for the Protection of the Ozone Layer and its 1989 Montreal Protocol on Substances that Deplete the Ozone Layer are considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

**Section 2 – Waste**

**Article 19 – Offences related to the unlawful collection, treatment, transport, recovery, disposal or shipment of waste**

114. Article 19 obliges Parties to establish as an offence under their domestic law certain conducts related to unlawful waste management and shipment. Unlawful collection, treatment, transport, recovery and disposal of waste and the lack of supervision of such operations and of the after-care of disposal sites, including action taken as a dealer or a broker, can cause devastating effects on the environment and human health. Such effects can be caused by unlawful conduct which concerns harmful waste such as waste from pharmaceutical products, narcotic drugs including their precursors, chemicals, waste containing acids or bases or waste containing toxins, asbestos, heavy metals, oil, grease, electrical and electronic waste, end-of-life vehicles or plastic waste.

115. Article 19 (1) distinguishes between conduct concerning hazardous and non-hazardous waste and introduces different thresholds for the two categories of conduct. The provision provides that unlawful waste management constitutes a criminal offence where it concerns hazardous waste in a non-negligible quantity, or it concerns other waste and the relevant conduct causes or is likely to cause substantial damage to the environment or human health.

116. As defined in Article 3 (d), the term “waste” is understood as any substance or object which the holder discards or intends or is required to discard. The drafters left the term “hazardous waste” open to be defined in accordance with domestic law.

117. By way of illustration, “dealer” could cover any undertaking which acts in the role of principal to purchase and subsequently sell waste and also dealers who do not take physical possession of the waste; “broker” could refer to any undertaking arranging the recovery or disposal of waste on behalf of others and includes such brokers who do not take physical possession of the waste. “Collection” could cover as the gathering of waste, including the preliminary sorting and preliminary storage of waste for the purposes of transport to a waste treatment facility. “Treatment” could refer to recovery or disposal operations, including preparation prior to recovery or disposal. “Recovery” could include any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. ‘Disposal’ could be understood as any operation

which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy.

118. Paragraph 2 of this provision also defines as a criminal offence the unlawful and intentional transboundary shipment of waste, when it is undertaken in a non-negligible quantity. “Transboundary shipment” is understood as a movement across borders of waste destined for recovery or disposal from the location from which the movement starts until the receipt of the waste by the facility that carries out the disposal or recovery in the country of destination.

119. For the purposes of paragraph 2, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

120. The objective of Article 19 is to cover all unlawful activities along the waste management chain.

**Section 3 – Installations**

**Article 20 – Offences related to the unlawful operation or closure of an installation concerning a dangerous activity**

121. Article 20 relates to dangerous activities which can lead to major accidents and thus to significant negative consequences for the environment and human health. There is also a risk of the impact of such accidents extending beyond national borders, thus emphasising the need to take the necessary precautionary action in order to ensure a high degree of protection and risk mitigation.

122. Article 20 obliges Parties to establish as an offence under domestic law the unlawful operation or closure of an installation in which a dangerous activity is carried out, when such conduct causes or is likely to cause death or certain damages to the environment and to human health.

123. By way of illustration, the term “installation” could be understood in this context as a technical unit within an establishment and whether at or below ground level, in which dangerous substances are produced, used, handled or stored; it could include all the equipment, structures, pipework, machinery, tools, private railway sidings, docks, unloading quays serving the installation, jetties, warehouses or similar structures, floating or otherwise, necessary for the operation of that installation.

124. Since the notion “an installation in which a dangerous activity is carried out” is very broad and without further specification could cover practically any establishment in which an activity is carried out which could potentially lead to dangerous consequences, the drafters felt it necessary to include an additional paragraph that seeks both to clarify the scope of this offence and to allow alignment with domestic law. Therefore, paragraph 2 of this provision provides that Parties may identify the domestic provisions that they decide to make subject to paragraph 1 and notify them to the Secretariat. The purpose of this provision is two-fold: (i) to allow the Parties to decide which domestic law provisions are covered under this offence. This helps to ensure that the criminal law remains *ultima ratio*, as appropriate, while the most severe breaches of domestic environmental law concerning dangerous installation activities are covered by this offence; (ii) to ensure transparency and legal certainty concerning the scope of this offence, which also helps to promote better understanding among Parties and cooperation in this area.

**Article 21 – Offences related to the unlawful operation or closure of an installation involving dangerous substances**

125. Article 21 complements Article 20 and obliges Parties to establish as an offence under domestic law the unlawful operation or closure of an installation in which dangerous substances or mixtures are stored or used, when such a conduct causes or is likely to cause death or substantial damage to the environment and to human health.

126. By way of illustration, the term “installation” could be understood in this context as a technical unit within an establishment and whether at or below ground level, in which dangerous substances are produced, used, handled or stored; it could include all the equipment, structures, pipework, machinery, tools, private railway sidings, docks, unloading quays serving the installation, jetties, warehouses or similar structures, floating or otherwise, necessary for the operation of that installation. “Dangerous substance” could refer to substances or mixtures defined as dangerous in accordance with domestic law, including in the form of a raw material, product, by-product, residue or intermediate. “Mixture” could be understood as a mixture or solution composed of two or more substances. “Stored" could be understood as the presence of a quantity of dangerous substances for the purposes of warehousing, depositing in safe custody or keeping in stock. “Use” could cover any processing, formulation, consumption, storage, keeping, treatment, filling into containers, transfer from one container to another, mixing, production of an article or any other utilisation.

127. Considering that dangerous substances can be found in many different installations, the drafters felt it necessary to include an additional paragraph that seeks to limit the scope of this offence and allow alignment with Parties’ domestic law. Accordingly, paragraph 2 provides that Parties may identify the domestic provisions that they decide to make subject to paragraph 1 and notify them to the Secretariat. The purpose of this provision is two-fold: (i) to allow the Parties to decide which domestic law provisions are covered under this offence. This helps to ensure that the criminal law remains *ultima ratio*, as appropriate, while the most severe breaches of domestic environmental law concerning the operation or closure of an installation involving dangerous substances are covered by this offence; (ii) to ensure transparency and legal certainty concerning the scope of this offence, which also helps to promote better understanding among Parties and cooperation in this area.

**Section 4 – Ships**

**Article 22 – Offences related to the unlawful recycling of ships**

128. Article 22 concerns unlawful ship recycling. This provision obliges Parties to establish as an offence under their domestic law, the failure of the owner of a ship to comply with the applicable requirements which impose recycling of a ship at ship recycling facilities which meet required environmental standards provided in domestic law.

129. Ships, when being recycled after reaching the end of their operational lives, may pose risk to human health and safety and to the environment. Ships sold for scrapping may contain environmentally hazardous substances such as asbestos, heavy metals, hydrocarbons, and ozone depleting substances. Article 22 aims at enhancing the prevention and tackling of unsafe and unsound ship recycling practices.

130. For the purposes of this article, the 2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (hereafter the Hong Kong Convention) is considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

131. The terms used for the offence definition are to be interpreted in accordance with domestic law, including that the domestic law may define to which categories of ships this offence applies. Where applicable, the Hong Kong Convention is relevant for the definition of ships falling within the scope of this offence.

132. By way of illustration, “ship recycling” is understood as the activity of complete or partial dismantling of a ship at a ship recycling facility in order to recover components and materials for reprocessing and re-use, whilst taking care of hazardous and other materials, and includes

associated operations such as storage and treatment of components and materials on site, but not their further processing or disposal in separate facilities. “Ship recycling facility” is understood as a defined area that is a yard or facility used for the recycling of ships.

**Article 23 – Offences related to the ship-source discharges of polluting substances**

133. Article 23 obliges Parties to establish as an offence under their domestic law, the ship-source discharges of polluting substances, when such a conduct causes or is likely to cause deterioration in the quality of water or damage to the marine environment.

134. By way of illustration, “discharge” is understood as any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying. Concerning “polluting substances”, Parties may refer to Annexes to the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (Marpol).

135. Parties may, in accordance with their domestic law, choose to define to which categories of ships, maritime zones and categories of polluting substances this offence applies.

136. For the purposes of this provision, international conventions concerning ship-source pollution, in particular the 1994 United Nations Convention on the Law of the Sea and the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (Marpol), are considered relevant to the Parties, in the light of Article 49 of the Convention on the relationship with other sources of international law.

**Section 5 – Natural resources**

**Article 24 – Offences related to the unlawful abstraction of surface water or groundwater**

137. Unlawful water abstraction is an issue set to worsen as a result of climate change, requiring an effective criminal law response. Under Article 24, Parties should criminalise under their domestic law the unlawful abstraction of surface water or groundwater which causes or is likely to cause substantial damage to the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies.

138. By way of illustration, “abstraction” refers to the removal of water. The term “surface water” covers all surface water categories, including rivers, lakes, transitional waters, and coastal waters. The term “groundwater” covers all groundwater bodies and refers to all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil. “Ecological status” could refer to the quality of the structure and functioning of aquatic ecosystems associated with surface waters. “Quantitative status” could be understood as the degree to which a body of groundwater is affected by direct and indirect abstractions.

**Article 25 – Offences related to trade in unlawfully harvested timber**

139. Trading in unlawfully harvested timber has become a matter of ever greater concern due to its contribution to deforestation, habitat loss, species extinction, and climate change. This practice is often performed in a transnational setting, making it important to define such offence in the Convention.

140. Article 25 obliges Parties to establish as a criminal offence under their domestic law, when committed unlawfully and intentionally, the placing on the market of unlawfully harvested timber, or of timber products derived from such timber, except for cases where the conduct concerns a negligible quantity.

141. By way of illustration, “placing on the market” could be understood as the first making available of a relevant commodity or relevant product on the market. “Unlawfully harvested”

could be understood as harvested in contravention of the applicable legislation in the country of harvest.

142. The timber and timber products applicable to this offence are to be defined in domestic law, however, they could generally be understood as excluding timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste.

143. This offence concerns cases in which harvesting of timber and timber products is unlawful under the domestic legal system. Hence, by way of illustration, "unlawfully harvested timber" could refer to timber that has been harvested from the forest inducing forest degradation. The term "unlawful" in this context should be seen as referring to a breach of domestic law aimed at protecting the environment, and not to other laws, e.g., law protecting property rights. Furthermore, "unlawful" could also cover the requirement to ensure that a timber product has been produced in accordance with the relevant environmental legislation of the country of production when the relevant domestic law so requires.

144. With regard to the assessment of whether the quantity of unlawfully harvested timber is "negligible", Parties could take into account, e.g., the quantity of the affected timber expressed in net mass, or, where applicable, in volume or as a number of items, or whether the scale of the activity in question is negligible in terms of quantity. For such assessment, Parties could also take into account, where relevant, the conservation status of the species concerned or the cost of restoration of the environment. This assessment should not render enforcement against the environmental offence as defined in this provision excessively burdensome.

**Article 26 – Offences related to unlawful mining**

145. Unlawful mining of minerals and metals can have severe environmental impacts, including the depletion of the planet's essential resources, and is increasingly associated with other transnational criminal offences, and also significant damage to human health.

146. This offence covers, when committed unlawfully and intentionally, mining activities which require an environmental impact assessment or an equivalent environmental procedure under domestic law, where such conduct is undertaken without a legally required development consent concerning environmental aspects established under domestic law and when such conduct causes or is likely to cause substantial damage to the environment or human health. Activities without legally required development consent concerning environmental aspects cover the execution of a mining activity which requires such development consent from the start of the implementation of such a project, for example works to prepare the ground for mining or other intervention with effects on the environment.

147. The offence of unlawful mining under this provision covers unlawful conducts undertaken without a development consent legally required under provisions of domestic law aimed at protecting the environment. It is for domestic law to define the legal requirements as well as categories of projects for which such development consent is required.

148. By way of illustration, "environmental impact assessment" could be understood as an assessment identifying, describing and assessing, in an appropriate manner and in the light of each individual case, the direct and indirect effects of a project within the scope of this offence on human beings, fauna or flora, air, soil, and water.

149. "Development consent" could be understood as a decision of the competent authority or authorities which entitles the developer of a project to proceed with the project.

150. For the purposes of this offence, international conventions concerning environmental impact assessments, in particular the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), are considered relevant to the Parties, as well as customary international law, in the light of Article 49 of the Convention.

151. Paragraph 2 of this provision provides that Parties may identify the domestic provisions that they decide to make subject to paragraph 1 and notify them to the Secretariat. The purpose of this provision is two-fold: (i) to identify environmental procedures under their respective domestic law which are covered under this offence. This helps to ensure that the criminal law remains *ultima ratio*, as appropriate, while the most severe breaches of domestic environmental law concerning unlawful mining are covered by this offence; (ii) to ensure transparency and legal certainty concerning the scope of this offence, which also helps to promote better understanding among Parties and cooperation in this area.

**Section 6 – Biodiversity**

**Article 27 – Offences related to the unlawful killing, destruction, taking and possession of protected wild fauna or flora**

152. Article 27 refers to most forms of conduct associated with wildlife crime, including the killing, destruction, taking and possession of a specimen or specimens of protected wild fauna or flora species, including the taking or possession of parts or derivatives of such specimens.

153. By way of illustration, for the purposes of Article 27, "specimen" could be understood as any animal or plant, whether alive or dead, and any readily recognisible part or derivative thereof. The notion of "wild fauna or flora" could cover all forms of naturally occurring species in wild state and does not include domesticated cattle and poultry, other domesticated animals, and cultivated plants for the purpose of this offence. Species occurring in "wild state" shall include fauna or flora which are bred, raised, or cultivated in a domesticated environment and then released or introduced into the wild. Fungi are not covered under this notion as they are a separate kingdom but are understood as part of ecosystems in a wider sense.

154. This provision covers "protected" wild fauna or flora which refers to the conservation status of the species, namely species that have been declared in need of special protection under domestic law. The term "protected wild fauna or flora" is to be interpreted as provided in domestic law.

155. The provision does not cover the conduct of killing, destruction, taking and possession when it concerns a negligible quantity of wild fauna or flora specimens. Conducts which concern negligible quantities may be addressed by means of administrative or civil law. For the offence defined in Article 27, the notion of "negligible quantity" is to be assessed taking into account the number of specimens concerned, and also, where relevant, the conservation status of animal and plant species. This is due to the fact that the more endangered the species is, the sooner the threshold of negligible quantity is crossed. In instances where the species is critically endangered, the killing of only one specimen can be greatly detrimental to that species. Hence, the assessment of "negligible quantity" should reflect the conservation status of the species, where relevant.

156. It is important to note that this offence, which can be committed in the course of any economic and private activities, covers all protected fauna species including, inter alia, mammals, reptiles, fish, amphibians and birds and all protected flora species including, inter alia, trees, terrestrial and aquatic plants.

**Article 28 – Offences related to the unlawful trading in protected wild fauna or flora**

157. Article 28 complements Article 27 and concerns the sale or offering for sale of a specimen or specimens of protected wild fauna or flora species (paragraph 1), and the trans-boundary trading in specimens of protected wild fauna or flora species (paragraph 2). These paragraphs also apply to parts or derivatives of specimens.

158. By way of illustration, and without prejudice to the CITES Convention, "specimen" could be understood as any animal or plant, whether alive or dead, and any readily recognisible part or derivative thereof. The notion of "wild fauna or flora" covers all forms of naturally occurring species in wild state and does not include domesticated cattle and poultry,

domesticated animals, and cultivated plants for the purpose of this offence. Species occurring in “wild state” could include fauna or flora which are bred, raised, or cultivated in a domesticated environment and then released or introduced into the wild.

159. The CITES Convention is considered relevant to the Parties, in the light of Article 49 of this Convention on the relationship with other sources of international law.

160. Paragraph 1 concerns domestic trade, i.e., the sale or offering for sale of a specimen or specimens of protected wild fauna or flora species within an individual country or territory. By way of illustration, “sale” could generally be understood as any form of sale including conduct carried out by way of information and communication technologies; “offering for sale” could be understood as any action that may reasonably be construed as such, including advertising or causing to be advertised for sale.

161. Paragraph 2 concerns transboundary trading, i.e., trade in specimens of protected wild fauna or flora species across borders. By way of illustration, “trade” could mean export, re-export, import and introduction from the sea, as well as the use, movement and transfer of possession of specimens. For the purposes of paragraph 2 of Article 28, the CITES Convention may also be considered relevant to the Parties when interpreting the terms in the offence definition, and in the light of Article 49 of the Convention on the relationship with other sources of international law.

162. In both cases, the obligation to criminalise the conduct is not applicable if the conduct concerns a negligible quantity of such wildlife specimens. Conducts which concern negligeable quantities may be addressed by means of administrative or civil law. For the offence defined in Article 28, the notion of “negligible quantity” is to be understood as already explained in paragraph 155.

163. It is important to note that this offence, which can be committed in the course of any economic and private activities, covers all protected fauna or flora species as referred to in paragraph 156.

**Article 29 – Offences related to the unlawful deterioration of habitats within a protected site**

164. Article 29 concerns conducts that negatively affect habitats within a protected site and covers the unlawful and intentional causing of deterioration of such habitat within a protected site, or the disturbance of protected animal species within a protected site.

165. By way of illustration, the term “habitat within a protected site” could generally be understood as any habitat of species for which an area is classified as a special protection area or any natural habitat or habitat of species for which a site is designated as a special area of conservation under domestic law. Additionally, this term could include marine habitats classified as protected. The term "protected site" could be understood as a geographically defined area whose extent is clearly delineated and which is designated or regulated and managed to achieve specific conservation objectives.

166. This offence concerns the deterioration of a habitat or the disturbance of protected animal species within a protected site when the deterioration or disturbance is significant. The drafters included the reference to “significant” deterioration or disturbance to respect the principle that criminal law is *ultima ratio*. The term “significant” for the purposes of this offence can be further clarified by domestic law.

167. Paragraph 2 of this provision provides that Parties may identify habitats (i.e. natural habitat types or habitats of species) within a protected site and protected animal species that they decide to make subject to paragraph 1 and notify them to the Secretariat. To avoid unnecessary administrative burden, Parties may choose to identify groups or categories of such protected animal species, instead of specific individual species. The purpose of this provision is two-fold: (i) to allow the Parties to decide which domestic law provisions are

covered under this offence. This helps to ensure that the criminal law remains *ultima ratio*, as appropriate, while the most severe breaches of domestic environmental law concerning unlawful deterioration of habitats within a protected site are covered by this offence; (ii) to ensure transparency and legal certainty concerning the scope of this offence, which also helps to promote better understanding among Parties and co-operation in this area. If a Party does not identify any specific categories of habitats or protected animal species under paragraph 2, it should mean that all habitats within a protected site and protected animal species are covered by this offence with respect to that Party.

**Article 30 – Offences related to invasive alien species**

168. Invasive alien species can have a significant impact on biodiversity and are a major driver of extinctions.

169. This provision criminalises a series of conducts concerning the entire range of actions related to the introduction of invasive alien species of concern, when committed intentionally and unlawfully and when such conduct causes or is likely to cause damage to the environment and human health.

170. By way of illustration, the term "alien species" could be understood as any live specimen of a species, subspecies or lower taxon of animals, plants, fungi or micro-organisms introduced outside its natural range; it could include any part, gametes, seeds, eggs or propagules of such species, as well as any hybrids, varieties or breeds that might survive and subsequently reproduce. "Invasive alien species" could be understood as an alien species whose introduction or spread has been found to threaten or adversely impact upon biodiversity and related ecosystem services. The list of invasive alien species of concern for the environment is left open for definition by domestic law.

171. For the purposes of this provision, the 1992 Convention on Biological Diversity and the 1982 Convention on the Conservation of European Wildlife and Natural Habitats are considered relevant to Parties, in the light of Article 49 of this Convention on the relationship with other sources of international law.

**Section 7 – Particularly serious offence**

**Article 31 – Particularly serious offence**

172. The entirety of the conducts criminalised throughout the provisions of this Convention could, depending on the circumstances, constitute a serious offence. However, the drafters recognised that the criminal offences relating to intentional unlawful conduct listed in this Convention can lead to particularly severe results, such as widespread pollution or, industrial accidents with severe effects on the environment or large-scale forest fires. Where such offences cause the destruction of, or widespread and substantial damage, which is either irreversible or long-lasting to an ecosystem of considerable size or environmental value or a habitat within a protected site or cause widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil, or water, such offences, leading to such devastating results, should constitute particularly serious criminal offences. Such particularly serious offences can encompass conduct comparable to "ecocide", which is already covered by the law of certain States, including some member States to the Council of Europe, and which is being discussed in international fora.

173. Article 31 obliges Parties to establish such particularly serious offences, however, it does not require the Parties to provide for a particular level of penalties deriving from this Convention.

174. According to the text of this provision, Parties are obliged to establish as a particularly serious offence any of the conducts listed in other offences established in accordance with this Convention, when it surpasses the constituent elements of the original offence according to well defined criteria:

a. when committed intentionally,

b. when such an offence causes destruction; or irreversible, widespread and substantial damage; or long-lasting, widespread and substantial damage to an ecosystem of considerable size or environmental value, or to a habitat within a protected site, or to the quality of air, soil or water.

175. As defined in Article 3 (c), the term "ecosystem" is understood as a dynamic complex of plant, fungi, animal and micro-organism communities and their non-living environment interacting as a functional unit and includes habitat types, habitat of species and species populations. For the purposes of this provision, "ecosystem of considerable size or environmental value" refers to an ecosystem that is significant in size or holds significant importance for human health or the environment.

176. ""Widespread", "long-lasting" and "irreversible" damage for the purpose of this provision should be defined and interpreted in accordance with domestic law. The term "substantial" is used for the purpose of qualifiers for some offences defined in this Convention and should have the same meaning as explained above.

177. The drafters opted for the title "particularly serious offence" to clearly highlight that the conduct defined in Article 31 is to be considered particularly serious.

178. Letter (a) in Article 36 on aggravating circumstances (see comments on Article 36), citing one possible aggravating circumstance as when the offence "*caused severe and widespread, or severe and long-term, or severe and irreversible damage to human health, to an ecosystem or to the environment*" is not applicable to the offence covered by Article 31.

**Section 8 – General provisions of criminal law**

**Article 32 – Inciting, aiding and abetting and attempt**

179. The purpose of this article is to establish additional offences relating to inciting, aiding and abetting of the offences defined in the Convention and the attempted commission of some offences established in accordance with the Convention.

180. Paragraph 1 requires Parties to establish as offences inciting, aiding and abetting the commission of the offences established in accordance with this Convention. Liability for incitement arises either when a person seeks to persuade or encourage another person to commit a crime and intends to encourage its commission or, alternatively, when a person induces another person to commit a crime. For aiding and abetting, liability arises where the person who commits a crime is aided by another person who also intends the crime to be committed.

181. Paragraph 2 provides for the criminalisation of the attempt to commit the offences established in accordance with Articles 12 to 18, 19, 20, 21, 23, 24, 25, 28 paragraph 2 and 30 of the Convention.

182. Parties are invited to consider criminalising attempt for the offences defined in Articles 27 and 28 paragraph 1, as stipulated by paragraph 3 of this provision.

183. The notion of "attempt" is left to be interpreted by the Parties in accordance with their domestic criminal law. The principle of proportionality should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

184. As with all the offences established under this Convention, inciting, aiding and abetting and attempt must be intentional.

**Article 33 – Jurisdiction**

185. This article, in its paragraph 1, lays down various requirements whereby Parties must establish jurisdiction over the offences established in accordance with this Convention.

186. The obligation in this respect is only to make the necessary provisions in their domestic law, which allow exercising of jurisdiction in such cases. This article is not intended to require law enforcement authorities and/or courts to actually exercise statutory jurisdiction in a specific case.

187. Paragraph 1 (a) is based on the principle of territoriality. Parties are required to punish the offences established in accordance with this Convention when they are committed on their territory.

188. Paragraph 1 (b) and (c) are based on a variant of the principle of territoriality. These sub-paragraphs require Parties to establish jurisdiction over offences committed on ships flying their flag or aircraft registered under their laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the state in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1 (a) would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another state, there may be significant practical impediments to the latter state's exercising its jurisdiction and it is therefore useful for the registry state to also have jurisdiction.

189. Paragraph 1 (d) is based on the principle of nationality. The nationality theory is most frequently applied by countries with a civil law tradition. Under this principle, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph (d), if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute them. Article 56 paragraph 2 on reservations allows Parties to reserve the right not to apply this jurisdiction or only to do so in specific cases or conditions. (See comments on Article 56).

190. Paragraph 2 is linked to the nationality of the victim. It is based on the premise that the particular interests of victims overlap with the general interest of the State to prosecute crimes committed against its nationals. Hence, if a national is a victim of an offence committed abroad, the Party shall consider establishing jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "consider".

191. Paragraph 3 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 3 is necessary to ensure that Parties that refuse to extradite a person have the legal ability to undertake investigations and proceedings domestically instead. Paragraph 3 does not prevent Parties from establishing jurisdiction only if the offence is punishable in the territory where it was committed, or if the offence is committed outside the territorial jurisdiction of any State.

192. In certain cases, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. In order to avoid duplication of procedures and unnecessary inconvenience for suspects and witnesses or to facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective for them to choose a single venue for prosecution. In some cases, it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under paragraph 4. The obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that

consultation is not necessary (e.g., it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

193. The bases of jurisdiction set out in this provision are not exclusive. Paragraph 5 of this article confirms that this Convention does not prevent Parties from establishing in its domestic law further reaching provisions on exercising extra-territorial jurisdiction such as, for example, in respect of offences committed by persons who are not nationals but habitual residents of that State.

**Article 34 – Liability of legal persons**

194. Article 34 is consistent with the current legal trend towards recognising liability of legal persons for criminal offences committed by certain natural persons. The intention is to make commercial companies, associations and other legal entities ("legal persons") liable for criminal actions performed for their benefit by anyone in a leading position in them. Article 34 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences referred to in the Convention for the benefit of the entity.

195. "Legal person" refers to any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

196. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention (including inciting, aiding and abetting of such offences) must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence. The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of their powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

197. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context, failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

198. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any one or all of these forms of liability as long as the requirements of Article 35, paragraph 2 are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and include monetary sanctions.

199. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or other. In particular, foreseeing a liability of the legal person should generally not be considered as an alternative to imposing a criminal sanction on the offender and vice versa.

**Article 35 – Sanctions and measures**

200. This article is closely linked to Articles 12 to 31 of this Convention, which define the various offences that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, Article 35, paragraph 1, applies to natural persons and requires Parties to match their action with the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". The sanctions available shall include imprisonment and may include monetary sanctions.

201. Paragraph 2 concerns the liability of legal persons in accordance with Article 34. In this case, the sanctions shall also be "effective, proportionate and dissuasive", but may be criminal or non-criminal monetary sanctions such as administrative sanctions or civil liability.

202. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: disqualification from exercising commercial activity; exclusion from entitlement to public benefits or aid; exclusion from access to public funding, including tender procedures, grants and concessions and withdrawal of permits and authorisations; placing under judicial supervision; a judicial winding-up order; suspension, withdrawal or cancellation of permits or authorisations to pursue activities which resulted in the relevant criminal offence; where there is a public interest, the publication of all or part of a judicial decision related to an environmental offence, without prejudice to privacy or data protection rules; and the obligation of companies to install due diligence schemes for enhancing compliance with environmental standards, thus contributing to the prevention of further environmental criminal offences. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

203. Concerning the reference in sub-paragraph (g) to "data protection rules", this refers to the obligation of Parties to comply with rules on the rights and freedoms of data subjects under their domestic law when publishing all or part of a judicial decision that relates to the environmental offence committed and the penalties or measures imposed. The publication of the decision imposing the penalties or measures upon a legal person should be applied without prejudice to the rules laid down in domestic law governing the anonymisation of judicial decisions or the duration of publication.

204. Paragraph 3 requires Parties to ensure, to the greatest extent possible within their domestic legal systems, that measures concerning freezing, seizure and confiscation of instrumentalities and proceeds derived from criminal offences established in accordance with this Convention can be taken. This paragraph should be read in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. Furthermore, anti-money laundering measures are an effective tool to prevent environmental crime and Parties should therefore, in addition to the Conventions above, also refer to international instruments such as the United Nations Convention Against Transnational Organized Crime (UNTOC) and the United Nations Convention Against Corruption (UNCAC). For instance, the UNTOC sets out, in its Article 7, certain measures to combat money laundering, including the monitoring of the movement of substantial quantities of cash across the borders of States Parties, subject to safeguards to ensure proper use of information and without impeding the movement of legitimate capital. As most of the criminal offences related to the environment are undertaken for financial profit, anti-money laundering measures and measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

205. Paragraph 3 (a) provides for the freezing, seizure and confiscation of instrumentalities, meaning any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences established in accordance with this Convention.

Paragraph 3 (b) provides for the freezing, seizure and confiscation of proceeds of crime derived from the offences, or property whose value corresponds to such proceeds.

206. The Convention does not contain definitions of the terms “freezing”, “seizure”, “confiscation”, “proceeds” and “property”. However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) as well as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) provide definitions for these terms, which may be used for the purposes of this Convention. "Freezing" or "seizure" means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. “Confiscation” refers to a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. "Proceeds" means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences, and may include property and assets that may have been transferred to third parties. The wording of paragraph 3 takes into account that there may be differences of domestic law as regards the type of property which can be subject to freezing, seizure or confiscation after an offence. It can be possible, e.g., to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds. “Property” is generally understood as property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

207. Article 35, paragraph 4 requires Parties to consider taking the necessary legislative and other measures to include among the sanctions and measures applicable to natural and legal persons the reinstatement of the environment, according to certain provisions. Certain States’ legal systems admit the reinstatement of the environment solely as a measure pertaining to administrative or civil liability procedures, not admitting it as a criminal law tool.

208. Therefore, the drafters considered that the reinstatement of the environment, already present in the 1998 Convention on the Protection of the Environment through Criminal Law, should be included among the sanctions and measures in this Convention as an optional solution, with the possibility for competent authorities to impose restoration and compensation measures.

209. There are legal systems in which the liability for environmental damage is a sufficient condition for a judicial or administrative decision to order the offender to take the necessary steps to repair the damage caused to environmental interests or to restore a situation which approaches the environmental conditions prior to the offence.

210. Paragraph 4 (a) determines that the competent authority may order the reinstatement of the environment in relation to an offence established in accordance with this Convention, subject to certain conditions. This means that the competent authority, according to the existing national legal systems of the Parties that choose to implement this paragraph, may choose to order the reinstatement of the environment, observing the conditions laid out in domestic law. The drafters considered it necessary to make a reference to the domestic law of Parties, since differences exist with regard to the exact measures to be applied and procedures to be followed when ordering the reinstatement of the environment.

211. It may be that the perpetrator, in a first moment, welcomes the order of reinstatement of the environment as an alternative to more severe sanctions and measures, or it may be that the competent authority orders it independently of the perpetrator’s will, only to have it ulteriorly not be complied with because of its costs, which can be considerably high. Keeping in mind the hypothesis of non-compliance with the order of reinstatement of the environment, Paragraph 4 (b) gives the possibility for the competent authority to make the person subject to the order executable for the costs of the reinstatement of the environment in case of non-compliance, or that person may be liable to other criminal or non-criminal sanctions instead

of or in addition to it. It therefore provides additional preventive and deterrent effects to the measure.

212. In view of the interest of protection of the environment, the imposition of sanctions should, where appropriate, encourage measures leading to the reinstatement of the environment. The reinstatement of the environment is a valuable measure because it is not merely a retributive reflection of disapproval of the offence but helps improve the environmental conditions that were damaged by it.

213. The reference to "other measures" in paragraphs 3 and 4 of this provision allows Parties to include other measures in addition to legislative measures. Parties could consider, e.g., to establish a fund from the proceeds of fines levied in application of the Convention to support prevention measures and restoration operations in respect of environmental criminal offences and their devastating consequences.

**Article 36 – Aggravating circumstances**

214. Article 36 requires Parties to ensure that one or several of the circumstances mentioned in sub-paragraphs (a) to (f) may be taken into consideration as aggravating circumstances in the determination of the penalty for offences established in accordance with the Convention. These circumstances must not already form part of the constituent elements of the offence.

215. By the use of the phrase "may be taken into consideration", the drafters wished to highlight that the Convention places an obligation on Parties to ensure that one or several of these aggravating circumstances are available for judges to consider when sentencing perpetrators although there is no obligation on judges to apply them. In addition, the reference to "in conformity with the relevant provisions of domestic law" is intended to reflect the fact that the various legal systems in Europe have different approaches to aggravating circumstances and therefore permits Parties to retain their fundamental legal concepts. This gives flexibility to Parties in implementing this provision without notably obliging them to modify their principles related to the application of sanctions in the criminal law systems.

216. The first aggravating circumstance (a) is where the offence caused severe and widespread, or severe and long-term, or severe and irreversible damage to an ecosystem. It should be up to the national courts of the Parties to assess the causal link between the conducts established in accordance with the Convention and any severe and widespread, or severe and long-term, or severe and irreversible damage to an ecosystem sustained as a result thereof.

217. The second aggravating circumstance (b) is where the offence was committed in the framework of a criminal organisation. The Convention does not define "criminal organisation", however, in applying this provision, Parties may take inspiration from other international instruments, which define the concept. For example, Article 2(a) of the 2000 United Nations Convention against Transnational Organized Crime (UNTOC) defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences referred to in this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised crime group" and "criminal organisation".

218. The third aggravating circumstance (c) is where the offence involved the use of false or forged documents by the offender. By including this, the drafters recognised the added seriousness related to the use of false or forged documents by the offender, when it does not already form part of the constituent elements of the offence, considering the modus operandi often employed to avoid detection. The use of false or forged documents is especially relevant when considering transnational environmental crime and the importing and exporting of goods.

219. The fourth aggravating circumstance (d) is where the offence was committed by a public official when performing their duties. Where such conduct is not already covered under separate offences such as corruption, this aggravating circumstance may be triggered when a public official, or other person entrusted with official duties, abuses their position and refrains from performing their duties with a view to obtaining an undue advantage or a prospect thereof.

220. The fifth aggravating circumstance (e) indicates that recidivism – that is, the fact that the perpetrator has previously been definitely convicted of offences established in accordance with the Convention – should be considered as an aggravating circumstance by the Parties under their domestic law.

221. The last aggravating circumstance (f) is where the offence generated or was expected to generate substantial financial benefits or avoid substantial expenses directly or indirectly to the extent to which they can be determined. This circumstance may refer to business activities where the offender committed the offence to increase profits or save expenses.

222. Paragraph 2 clarifies the relationship between paragraph 1 (a) of this article and Article 31 of the Convention, by providing that the aggravating circumstance referred to in paragraph 1 (a) is not applicable to the offence referred to in Article 31.

**Article 37 – Previous sentences passed by another Party**

223. Some of the offences established in accordance with this Convention can have a transnational dimension or may be carried out by perpetrators who have been tried and convicted in another country or in more than one country. At the domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only convictions by a national court count as a previous conviction. Traditionally, convictions by foreign courts are not necessarily taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

224. Such arguments have less force today in that internationalisation of criminal law standards – as a result of the internationalisation of crime – is tending to harmonise the laws of different countries. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

225. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law.

226. The fact remains that at international level there is no standard concept of recidivism and the laws of some countries do not include the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. In the EU, Article 3 of the Council Framework Decision 2008/675/JHA on taking account of convictions in the member states of the European Union in the course of new criminal proceedings, firstly establishes in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (member) State. This could serve as an inspiration at international level.

227. Article 37 provides that Parties shall consider taking the necessary legislative measures to provide in their domestic law that previous convictions by foreign courts are to result in a harsher penalty when they are known to the competent authority. They may also provide that,

under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the perpetrator should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

228. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

## Chapter V – Investigation, prosecution and procedural law

### Article 38 – Initiation and continuation of proceedings

229. Article 38 is designed to enable the public authorities to prosecute offences established in accordance with the Convention *ex officio*, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims. When initiating investigation and prosecution of offences established in accordance with this Convention, Parties may also take into account the seriousness of the offence. Hence, there is no obligation on Parties to initiate an investigation when the case concerns minor acts.

### Article 39 - Rights to participate in proceedings

230. Article 39 requires Parties to consider taking the necessary legislative and other measures to grant persons having sufficient interest or maintaining the impairment of a right and non-governmental organisations promoting the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention, in accordance with domestic law, to the extent that such procedural rights for such persons and organisations exist in the Party for other criminal offences

231. Resolution (77) 28 of the Council of Europe on the contribution of criminal law to the protection of the environment already recommended member States to re-examine criminal procedure in matters of environmental protection, in particular by giving persons or groups the right to become associated with criminal proceedings for the defence of the interests of the community.

232. The relevant stakeholders covered by this provision include natural persons, persons that are directly affected by the offence, but also non-governmental organisations aiming to protect the environment.

233. The main reason for allowing non-governmental organisations access to environmental proceedings is that criminal law in the environmental field protects interests of a highly collective nature, given the fact that the various forms of environmental crime potentially affect the interest not only of single individuals, but also of groups of persons. This Convention does not require Parties to introduce new procedural rights for such persons. However, when such procedural rights for members of the public concerned exist in a State in equivalent situations concerning criminal offences other than those provided for pursuant to this Convention, that Party should consider to grant such procedural rights also to such persons in proceedings concerning the environmental criminal offences defined in this Convention.

234. Indeed, in some States, legislative measures have been taken to enable groups, foundations and associations aiming at environmental protection to participate in criminal

proceedings concerning environmental matters. The content of this right, if present, varies from one State to another.

235. The drafters took into consideration the fact that this right is not recognised in all States and not always in the same way and thus article 39 does not impose an obligation of establishing the right of participation to the persons or groups mentioned in it. Parties are therefore invited to consider establishing such a right and in such cases they are entitled to stipulate the conditions for such groups to have the access to proceedings or the right to participate in them, and the exact content of this right is a question left for the national procedural law. Furthermore, as the text of this provision makes clear, the right to participate in criminal proceedings concerning offences established in accordance with this Convention, is only to be granted to persons or groups having corresponding procedural rights in equivalent situations concerning criminal offences other than those provided for pursuant to this Convention. Thus, this provision does not require Parties to introduce new procedural rights.

236. Parties may, as appropriate, also refer to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

## Chapter VI – International Co-operation

237. Chapter VI sets out the provisions on international co-operation between Parties to the Convention. The provisions are not confined to judicial co-operation in criminal matters but are also concerned with co-operation in preventing offences established in accordance with this Convention.

238. As regards judicial co-operation in general and more specifically in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the European Convention on Extradition (ETS No.24), the European Convention on Mutual Assistance in Criminal Matters (ETS No.30), their Additional Protocols (ETS No. 86, 98, 99 and 182), European Convention on the International Validity of Criminal Judgments (ETS No. 70), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198). These treaties are cross-sector instruments applying to a large number of offences and can be implemented to permit judicial co-operation in criminal matters in the framework of procedures aiming at the offences established in the Convention. As all member states of the Council of Europe are parties to the European Convention on Extradition and the European Convention on Mutual Legal Assistance, drafters are generally advised not to reproduce provisions on mutual legal assistance and extradition in specialised instruments, but to include the aforementioned general provision and otherwise refer to the horizontal instruments in the explanatory report accompanying the convention being drafted.

239. For this reason, the drafters opted not to reproduce, in this Convention, provisions similar to those included in cross-sectoral instruments such as those mentioned above. For instance, they did not want to introduce separate mutual assistance arrangements that would replace the other instruments and arrangements applicable, on the grounds that it would be more effective to rely, as a general rule, on the arrangements introduced by the mutual assistance and extradition treaties in force, with which practitioners were fully familiar. This chapter therefore includes only provisions that add something over and above the existing conventions.

### Article 40 – International co-operation in criminal matters

240. The drafters considered the fact that environmental crime is often transnational in nature, as well as the financial flows it implicates. Therefore, perpetrators exploit the absence or ineffectiveness of co-operation between jurisdictions. In this context, Article 40 sets out the general principles that should govern international co-operation in criminal matters to provide an effective response to environmental crime.

241. Article 40 obliges the Parties to co-operate with each other to the widest extent possible.

242. Article 40 then makes it clear that the obligation to co-operate is general in scope: it covers preventing, combatting and prosecuting offences established in accordance with this Convention, including freezing, seizure and confiscation (a), protecting and providing assistance to witnesses and persons who report the offences established in accordance with the Convention and co-operate with justice (b), investigations or proceedings concerning offences established in accordance with the Convention (c), and enforcement of relevant criminal judgments issued by Parties (d).

243. In this context, particular reference is made to the European Convention on Extradition (ETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on the Transfer of Sentenced Persons (ETS No. 112), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198) but also to the United Nations Convention of 15 November 2000 against Transnational Organized Crime (UNTOC, Palermo Convention).

244. Paragraph 2 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it does not have a treaty relationship referred to in paragraph 1. This provision is of interest because of the possibility provided to third States to sign the Convention. The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. The additional reference here to Articles 16 and 18 of the UNTOC Convention are intended to refer Parties to the possibility to apply in this context also these provisions even where the UNTOC Convention as such cannot be applied as the particular type of crime falls outside of its scope of application. Any action taken under this paragraph shall be in full compliance with the Party obligations under international law, including obligations under international human rights instruments.

**Article 41 – Information**

245. Article 41 substantiates a principle already present in the international co-operation field, and in particular in the criminal field, which provides for an efficient and timely exchange of information between states in order to either prevent a possible offence established in accordance with this Convention, to initiate investigation on such an offence or to prosecute a perpetrator.

246. Paragraph 1 leaves to each Party the choice whether to forward to another Party information related to its own investigations. This may be done “without prior request” by the other Party.

247. Similarly, paragraph 2 establishes the principle according to which when a Party receives information (which concerns in general a central administrative authority dealing with international co-operation in criminal matters), this Party shall submit that information to the relevant authorities which, according to its internal law, are competent to deal with this information. In general, the relevant authorities are for instance the police, prosecution service or judge. The relevant authorities will then consider whether that information is appropriate for their investigations or judicial proceedings. It is important to note that the exchange of information required under this provision is not limited to criminal investigations or proceedings but extends to civil law action, including protection orders.

248. In accordance with paragraph 3, conditions may be attached to the use of information provided under this article, and further provides that, if that should be the case, the receiving Party is bound by those conditions. This means that the sending Party only binds the receiving Party to the extent that the receiving Party accepts the unsolicited information. By accepting the information, it also accepts to be bound by the conditions attached to the transmission of that information. In this sense, the provision creates a "take it or leave it" situation. The conditions attached to the use of the information may for example be a condition that the information transmitted will not be used or re-transmitted by the authorities of the receiving State for investigations or proceedings as specified by the sending State.

**Article 42 – Data protection**

249. This provision aims to safeguard the protection of personal data. While the transfer of such data may be necessary for the investigation and prosecution of environmental criminal offences, Article 42 sets out that any transfer of personal data in accordance with Articles 40 and 41 shall only take place if the conditions laid down in applicable legislation and international agreements governing the protection of personal data are complied with.

250. “Personal data” is generally understood as any information relating to an identified or identifiable natural person. An essential principle, inter alia, concerning the protection of personal data, is that the processing of such data must be adequate, relevant limited to what is necessary and stored for no longer than is necessary in relation to the purposes for which they are processed. To ensure a continuity of protection of personal data, applicable legislation might also require that the personal data are subject to other appropriate safeguards, including that procedures are in place for adequate security measures, processing of sensitive data, individual rights of access and rectification, independent oversight and effective redress.

## Chapter VII – Measures for protection

251. The protection of, and assistance to, victims of crime, witnesses and persons who report offences and co-operate with justice has long been a priority in the work of the Council of Europe.

252. It is recalled that, the term “victim” is not defined in the Convention, as the drafters felt that the determination of who could qualify as victims of the offences established in accordance with this Convention was better left to the Parties to decide in accordance with their domestic law.

**Article 43 – The standing of victims in criminal investigations and proceedings**

253. Paragraph 1 contains a non-exhaustive list of measures designed to protect victims of offences established in accordance with this Convention during proceedings. These measures of protection are to be taken in accordance with domestic law and apply at all stages of the proceedings, both during the investigations, whether they are carried out by law enforcement agencies or judicial authorities, and during trial proceedings. Although there is no legal necessity to do so, Parties can adopt measures more favourable than those provided for in any part of the Convention. Parties are thus free to grant additional measures of protection.

254. First of all, (a) sets out the right of victims to be informed of developments in the investigations and proceedings in which they are involved as victims. In this respect, the provision provides that victims should be informed of their rights and of the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigations or proceedings, and their role as well as the outcome of their cases.

255. With regard to (b), this provision aims at enabling victims to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented and considered. Parties shall take the necessary measures to ensure that the presentation and consideration of the victims' views, needs and concerns is assured directly or through an intermediary.

256. Thirdly, (c) deals more specifically with general assistance to victims to ensure that their rights and interests are duly presented and taken into account at all stages of investigations and judicial proceedings.

257. Furthermore, (d) contains the obligation for Parties to take the necessary legislative and other measures in order to provide for the protection of victims, as well as that of their families. Parties must ensure that measures are available to protect victims and their family members from secondary and repeat victimization, intimidation and retaliation.

258. In addition to information on relevant judicial proceedings, Paragraph 2 also covers administrative proceedings since for example procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

259. Paragraph 3 provides for access to legal aid for victims of offences established in accordance with this Convention, when the victim is entitled to be a party to the criminal proceedings. Judicial and administrative procedures are often highly complex, and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention, in accordance with their domestic law.

260. The purpose of Article 43, paragraph 4 is to make it easier for a victim to complain by allowing him or her to lodge the complaint with the competent authorities of his or her State of residence. However, this possibility is only available if the victim is unable to lodge a complaint in the State where the criminal offence was committed, or in the case of serious offences as defined in the domestic law of the State where the crime was committed, the victim does not wish to lodge a complaint in that State. This provision does not place any obligation on the State of residence to institute an investigation or proceedings.

261. Paragraph 5 provides for the possibility for members of various organisations to support victims during criminal proceedings concerning the offences established in accordance with this Convention. The last part of the paragraph stating that "unless a reasoned decision has been made to the contrary", means that in instances in which a victim cannot supported in that way, that conclusion must have been based on a reasoned decision. The authority that can make such decision should be decided by each Party to this Convention in accordance with their domestic law.

**Article 44 – Protection of witnesses**

262. Article 44 is inspired by Article 24, paragraph 1, of the United Nations Convention against Transnational Organized Crime (Palermo Convention) from 2000 and by Article 20 of the Council of Europe Convention against Trafficking in Human Organs (CETS No. 216) from 2018.

263. Paragraph 1 obliges Parties to provide effective and appropriate protection from potential retaliation or intimidation for witnesses in criminal proceedings concerning offences established in accordance with this Convention. As appropriate, the protection should be extended to relatives and other persons close to the witnesses. Paragraph 2 of Article 44 provides for the protection of victims in so far as they are witnesses, in the same manner as set out in paragraph 1.

### Article 45 – Protection of persons who report offences or co-operate with justice

264. Under Article 45, Parties must take the necessary legislative and other measures to provide effective and appropriate protection for those who report the offences established in accordance with this Convention or otherwise co-operate with the investigating or prosecuting authorities.

265. Environmental crime causes damage to society, human health and the environment. Therefore, persons who report an offence or offences established in accordance with this Convention not only expose and prevent the commission of further offences, but these persons also contribute to the public good and the protection of the environment.

266. Such persons could be members of the community affected or members of society as a whole taking an active part in protecting the environment. Such persons who report environmental criminal offences as well as persons who co-operate with justice, i.e., with regard to the enforcement of such offences, should be provided with the necessary support and assistance in the context of criminal proceedings, so that they are not disadvantaged as a result of their co-operation but supported and assisted. The necessary support and assistance measures should be available to such persons in accordance with their procedural rights laid down in domestic law and could include support and assistance measures available to persons having corresponding procedural rights in criminal proceedings concerning other criminal offences. The content of the necessary support and assistance measures is not established by this Convention and should be determined by each Party to this Convention in accordance with their domestic law.

267. Parties should further assess the need to enable persons to report the offences established in accordance with this Convention anonymously, where such possibility does not already exist.

268. The term “those who report the offences established in accordance with this Convention or otherwise co-operate with the investigating or prosecuting authorities” could refer to persons who inform competent authorities of possible environmental crimes, provide evidence or otherwise co-operate with the competent enforcement and judicial authorities.

269. The expression “effective and appropriate protection”, as used in Article 45 refers to the need to adapt the level of protection to the threats to persons who report offences and co-operate with justice. The measures required depend on the assessment of the risks such persons run.

270. Regarding the period during which the protection measures have to be provided, the Convention aims in a non-exhaustive manner at the period of investigation and of the proceedings or the period following them. The period in which protection measures have to be provided depends on the threats upon the persons. Protection measures should be granted only when the beneficiary persons have consented.

271. The present article does not indicate the specific form of protection that should be offered to the persons who report the offences established in accordance with this Convention and co-operate with justice. This is left for the Parties to determine in accordance with the general legal principles of their legal systems.

## Chapter VIII – Monitoring mechanism

272. Chapter VIII of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties through a monitoring mechanism. This is the mechanism announced in Article 1 paragraph 2. The monitoring system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

**Article 46 – Committee of the Parties**

273. Article 46 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based monitoring tasks.

274. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

275. The setting-up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

276. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

277. Paragraph 4 concerns the contribution of Parties which are not members of the Council of Europe to the financing of the activities of the Committee of the Parties. The contributions of member States to these activities are covered collectively by the ordinary budget of the Council of Europe, whereas non-members contribute individually, in a fair manner. The Convention does not stipulate the form in which the contributions, including the amounts and modalities, of Parties which are not members of the Council of Europe shall be established. The legal basis for the contribution of such Parties will be the Convention itself and the act(s) establishing that contribution. The contribution of a non-member of the Council of Europe shall be established jointly by the Committee of Ministers and that non-member. The Convention does not affect domestic laws and regulations of Parties governing budgetary competencies and procedures for budgetary appropriations.

**Article 47 – Other representatives**

278. Article 47 concerns the participation of bodies other than the Parties themselves in the Convention monitoring mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights, and the European Committee on Crime Problems (CDPC), and, secondly, more unspecified, to other relevant intergovernmental committees of the Council of Europe which, by virtue of their responsibilities, would definitely make a worthwhile contribution by taking part in the monitoring of the work on the Convention.

279. The possibility of admitting representatives of civil society, inter-governmental and non-governmental organisations and other bodies actively involved in preventing and combatting environmental crime as observers was considered to be an important issue, if the monitoring of the application of the Convention was to be truly effective.

280. Paragraph 4 specifies that the representatives referred to in this provision are allowed to participate in meetings of the Committee of the Parties, however, they do not have the right to vote.

**Article 48 – Functions of the Committee of the Parties**

281. When drafting this provision, the *ad hoc* committee wanted to base itself on the similar provision of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. No. 201), and on Counterfeiting of medical products and similar crimes (CETS. No. 211) creating as simple and flexible a mechanism as possible,

centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on the protection of the environment through criminal law. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between Parties to improve their policies in this field.

282. With respect to the Convention, the Committee of the Parties has the traditional monitoring competencies and:

- plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations made under the Convention;
- plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention;
- serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of other relevant Council of Europe committees and bodies.

283. Paragraph 4 states that the Committee of the Parties is to be assisted by the Secretariat of the Council of Europe in carrying out its functions pursuant to Article 48.

284. Paragraph 5 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 48.

## Chapter IX – Relationship with other sources of international law

### Article 49 – Relationship with other sources of international law

285. Article 49 deals with the relationship between the Convention and other sources of international law. It reflects the notion of *pacta sunt servanda*, namely that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

286. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 49 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – dealing with matters which the Convention also covers and with relevant customary international law, for example in the area of maritime law. This Convention is designed to strengthen the prevention and the fight against environmental crime. For this reason, Article 49, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from customary international law and other international conventions to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention. Hence, this paragraph sets out the interplay between different instruments.

287. The reference to customary international law was considered important since the offences established in accordance with this Convention and their consequences extend beyond national boundaries and may fall within the scope governed by international customary law, e.g., situations concerning maritime offences. A situation may arise in which a ship discharges polluting substances in marine waters under the jurisdiction of a State which is Party to the Convention, while the flag State may not be a Party to the Convention. Paragraph 1 confirms that the present Convention does not affect the rights and obligations of Parties arising from customary international law, which may be applicable in such a situation.

288. Article 49, paragraph 2, states positively that Parties may conclude bilateral or multilateral agreements relating to the matters which the Convention governs. However, the

wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

289. Paragraph 3 provides that the provisions of the Convention shall not affect the rights, obligations and responsibilities of States and individuals under international law. While the Convention provides a high level of harmonisation, it does not purport to address all outstanding issues relating to the protection of the environment through criminal law. Therefore, paragraph 3 was inserted to make plain that the Convention only affects what it addresses. Other rights, obligations and responsibilities that may exist are left unaffected.

## Chapter X – Amendments to the Convention

### Article 50 – Amendments to the Convention

290. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to the Secretary General of the Council of Europe and to all Council of Europe member states, to any signatory, to any Party, to the European Union and to any state invited to sign or accede to the Convention.

291. As a next step, the Committee of Ministers examines and adopts the amendment. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties to the Convention. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

## Chapter XI – Final clauses

292. With a few exceptions, the provisions in this chapter are essentially based on the Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 1291st meeting on 5 July 2017. Articles 51 to 58 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe.

### Article 51 – Effects of this Convention

293. Article 51 safeguards those provisions of internal law and binding international instruments which provide additional protection to persons in preventing and combatting environmental crime; this Convention shall not be interpreted so as to restrict such protection. The phrase "more favourable rights" refers to the possibility of putting a person in a more favourable position than provided for under the Convention.

294. Paragraph 2 of this article acknowledges the increased integration of the European Union, particularly as regards the protection of the environment through criminal law. This paragraph, therefore, permits European Union member States to apply European Union law that governs matters dealt with in Convention between themselves. Paragraph 2 is intended, therefore, to cover the internal relations between European Union member States and between European Union member States and institutions, bodies, offices and agencies of the European Union.

295. This provision does not affect the full application of the Convention between the European Union or Parties that are members of the European Union, and other Parties. This provision similarly does not affect the full application of this Convention between Parties that are not members of the European Union to the extent that they are also bound by the same rules and other Parties to the Convention.

**Article 52 – Dispute settlement**

296. The drafters considered it important to include in the text of the Convention an article on dispute settlement, which imposes an obligation on the Parties to seek first of all a peaceful settlement of any dispute concerning the application or the interpretation of the Convention.

297. The various types of peaceful settlement mentioned in the first paragraph of this article (negotiation, conciliation and arbitration) are commonly recognised under international law. These methods of settlement are not cumulative, so that Parties are not obliged to exhaust all of them before having recourse to other methods of peaceful settlement. Any procedure for solving disputes shall be agreed upon by the Parties concerned.

298. Paragraph 2 provides that the Committee of Ministers of the Council of Europe may establish a non-judicial procedure which Parties could use if a dispute arises in relation to the application or the interpretation of the Convention.

**Article 53 – Signature and entry into force**

299. Paragraph 1 states that the Convention is open for signature not only by Council of Europe member states but also the European Union and States not member of the Council of Europe which took part in drawing it up. Once the Convention enters into force, in accordance with paragraph 3, other non-member states not covered by this provision may be invited to accede to the Convention in accordance with Article 54, paragraph 1.

300. Paragraph 2 states that the Secretary General of the Council of Europe is the depositary of the instruments of ratification, acceptance or approval of this Convention.

301. Paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 10. This figure reflects the belief that a significant group of States is needed to successfully set about addressing the challenge of preventing and combatting environmental crime. The number is not so high, however, as to unnecessarily delay the Convention's entry into force. In accordance with the treaty-making practice of the Organisation, of the ten initial states, at least eight must be Council of Europe members.

**Article 54 – Accession to the Convention**

302. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.*d* of the Statute of the Council of Europe and the unanimous vote of the Parties to the Convention having the right to sit on the Committee of Ministers.

**Article 55 – Territorial application**

303. Paragraph 1 specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

304. Paragraph 2 is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

**Article 56 – Reservations**

305. Article 56 specifies that no reservation may be made in relation to any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3 of this article. The

declarations of reservation made pursuant to paragraphs 2 and 3 should explain the reasons why a reservation was sought by a Party.

306. The article listed in paragraph 2 of this article is a provision for which unanimous agreement was not reached among the drafters despite the efforts achieved in favour of compromise. These reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts. The provision concerned is the following: Article 33, paragraph 1.*d*.

307. Paragraph 3 provides for the possibility of regional integration organisations and member States of those organisations, based on their harmonised law, to specify the scope of certain notions in the Convention. These notions are the following: the scope of the term "unlawful" in Article 3 (a) of this Convention; and (ii) the scope of the notions "domestic law", "domestic provisions", "protected" and "requirement" used for the purpose of defining offences under Article 13, Article 14, Article 19, Article 20, Article 21, Article 22, Article 26, Article 27, Article 28, Article 29, Article 30 of this Convention.

308. Paragraph 3 imposes two conditions: (i) the existence of a regional integration organisation; (ii) and that that regional integration organisation has harmonised legislation. The term "regional integration organisation" means an international organisation that has international legal personality and has been constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. "Harmonised law" refers to laws, regulations and standards adopted by the regional integration organisation in the exercise of its competence. Thus, the existence of legislation is a prerequisite for the regional integration organisation to make a declaration under this provision, with a view to aligning the notions referred to in this provision to the law adopted by that organisation.

309. As an example, under European Union law, the notion of 'unlawful' for the purpose of defining offences under the new EU Environmental Crime Directive covers breaches of: (i) European Union law which contributes to pursuit of one of the objectives of the Union's policy on the environment as set out in Article 191(1) TFEU; and (ii) a law, regulation or administrative provision of a Member State, or a decision taken by a competent authority of a Member State, which gives effect to that European Union law. Moreover, under European Union law, conduct constituting such breaches is unlawful even where it is carried out under an authorisation issued by a competent authority of a Member State if such authorisation was obtained fraudulently or by corruption, extortion or coercion, or if such authorisation is in manifest breach of relevant substantive legal requirements.

310. Paragraph 4, by making it possible to withdraw reservations at any time, aims at reducing in the future divergences between legislations which have incorporated the provisions of this Convention.

**Article 57 – Denunciation**

311. In accordance with the United Nations Vienna Convention on the Law of Treaties, Article 57 allows any Party to denounce the Convention.

**Article 58 – Notification**

312. Article 58 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and it also designates the recipients of these notifications (States and the European Union).