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COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS (CDPC)

ETUDE DE FAISABILITÉ SUR LA PROTECTION DE L'ENVIRONNEMENT PAR LE DROIT PÉNAL

Document préparé par le
Groupe de travail sur l'environnement et le droit pénal (CDPC-EC)

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Introduction

1. Avec l'accélération des phénomènes de dégradation (dérèglement climatique, érosion de la biodiversité, épuisement des ressources naturelles, destruction des habitats, etc.), la problématique et les enjeux environnementaux ont évolué, soulignant l'importance de cette situation. Cette question est reconnue comme d'actualité de nombreuses parts, y compris par l'IPBES[1] de la biodiversité et la COP 26 sur le changement climatique.

2. La délinquance écologique est susceptible de revêtir différents visages que le droit se doit d'identifier, de circonscrire et de criminaliser de manière claire, efficace et proportionnée, en respectant pleinement le principe de légalité. Or toute stratégie de lutte contre la criminalité fait intervenir de nombreux acteurs et divers domaines politiques. Parmi ces derniers, l'utilisation de mesures et mécanismes pénaux ne peut à elle seule garantir la réussite d'une telle stratégie. Le droit pénal n'est qu'un instrument parmi d'autres et il s'agit en plus d'un instrument de dernier recours, mais il est également particulièrement important pour ses fonctions répressives et préventives.

3. Le Conseil de l'Europe a fait figure de pionnier en la matière, en adoptant le 4 novembre 1998 une Convention sur la protection de l'environnement par le droit pénal (STE n° 172) (ci-après « Convention de 1998 ») qui était le premier instrument international contraignant rendant obligatoire la criminalisation des comportements attentatoires à l'environnement. Cependant, il convient de garder à l'esprit que cet instrument n'est pas entré en vigueur, le seuil des trois ratifications requises pour son entrée en vigueur n'ayant jamais été atteint[2].

4. Néanmoins, le texte a inspiré les travaux de l'Union européenne ayant abouti à l'adoption de la Directive n° 2008/99/CE du 19 novembre 2008 relative à la protection de l'environnement par le droit pénal.

5. Suite aux décisions prises lors de la réunion plénière qui s'est tenue les 3 et 4 novembre 2020, le Comité européen pour les problèmes criminels (ci-après le CDPC) a créé un groupe de travail ad hoc sur l'environnement et le droit pénal (ci-après le CDPC-EC). Le groupe de travail s'est vu confier la tâche de réaliser une étude de faisabilité visant à évaluer si l'élaboration d'un nouvel instrument du Conseil de l'Europe sur la protection de l'environnement par le droit pénal, destinée à remplacer la Convention de 1998, est réalisable et appropriée.

6. Le groupe de travail CDPC-EC, composé de 32 experts représentant 23 États[3] et l'Union européenne, ainsi que d'un expert scientifique, a tenu quatre réunions, en ligne.

7. Cette étude de faisabilité, préparé par le groupe de travail, a ainsi pour objet de lister les principaux éléments pouvant servir de base à une réflexion, une discussion et finalement à une décision sur la question de savoir si l'élaboration d'une nouvelle Convention sur la protection de l'environnement par le droit pénal, préparée au sein du Conseil de l'Europe, notamment sous les auspices du CDPC, est faisable et appropriée. Dans une première partie,

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

2 Seule l'Estonie a ratifié ladite Convention en 2002.

3 Allemagne, Autriche, Belgique, Bosnie-Herzégovine, Bulgarie, Chypre, Croatie, Espagne, Estonie, Fédération de Russie, Finlande, France, Géorgie, Grèce, Macédoine du Nord, Pays-Bas, Portugal, République tchèque, Roumanie, Slovénie, Suisse, Turquie, Ukraine.

il sera étudié l'opportunité d'adopter un nouvel instrument : l'analyse de l'échec de la Convention de 1998, la position prise par l'Assemblée parlementaire du Conseil de l'Europe et le travail législatif de l'Union européenne, le rôle du Conseil de l'Europe et les raisons d'un possible nouvel instrument ainsi que la question de sa valeur ajoutée (1). Dans une seconde partie seront présentés les points juridiques à discuter et à insérer dans l'éventuelle rédaction d'une nouvelle convention ainsi que les différentes options pour les traiter (2).

1. Une nouvelle convention du Conseil de l'Europe sur la protection de l'environnement par le droit pénal ?

8. Le droit pénal est une matière régalienne relevant de la souveraineté de chaque État, Le cas échéant, l'élaboration de normes minimales générales devrait s'inscrive dans un cadre international commun et collaboratif. La mise en place d'un cadre international commun devrait être fondé sur les leçons tirées du passé et sur la faisabilité et la pertinence d'un tel instrument dans le contexte actuel.

1.1. L'analyse de l'échec de la Convention de 1998 sur la protection de l'environnement par le droit pénal

9. Lors de leur première réunion, les experts du groupe de travail ont souligné l'importance de comprendre pourquoi la Convention de 1998 n'a pas été couronnée de succès et n'est jamais entrée en vigueur, afin d'identifier les difficultés rencontrées et d'éviter la rédaction d'un instrument risquant une nouvelle fois d'échouer. Afin d'aborder cette question, chaque délégation a été invitée à soumettre des réponses aux points de contribution suivants :

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

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

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

10. La deuxième réunion du groupe de travail a donc été consacrée à la présentation et à l'examen des réponses reçues dans le document intitulé « Compilation des points de contribution » (voir annexe 1) préparé par le Secrétariat du CDPC.

11. Quant à la première question concernant l'échec de la Convention de 1998, en général, de nombreux États ont noté qu'ils rencontraient des difficultés lorsqu'ils essayaient de déterminer les raisons spécifiques pour lesquelles la Convention n'a pas été signée et/ou ratifiée dans chaque État respectif. Plus spécifiquement, de nombreuses délégations ont

exprimé que le travail de l'Union européenne sur la Directive sur la protection de l'environnement par le droit pénal (2008/99EC) aurait pu éclipser la Convention du Conseil de l'Europe à ce moment précis. L'importance d'une étroite collaboration et coordination avec l'Union européenne dans les travaux actuels du CDPC-EC a donc été soulignée. En outre, le groupe de travail a noté que l'existence, dans la Convention de 1998, de dispositions établissant des infractions "autonomes" complètement distinctes du droit administratif était souvent considérée comme problématique dans chaque système national.

12. L'analyse des réponses au deuxième point de contribution (*éléments spécifiques et/ou articles possibles de la Convention de 1998 qui devraient être maintenus dans une éventuelle nouvelle convention*) est disponible au *chapitre 1.3, paragraphe 24.*

13. Les réponses au troisième point de contribution (*le lien ou l'interdépendance entre le droit pénal et le droit administratif*) soulignent que les systèmes juridiques des États prévoient principalement une interdépendance de fond entre le droit administratif et le droit pénal. Par conséquent, l'absence de lien entre les deux dans la Convention de 1998 peut avoir entravé son succès (voir également le *chapitre 1.3, paragraphe 26).*

14. Sur la base des réponses reçues par les délégations, il est clair que ce n'est pas la nature de l'instrument qui a entravé le succès de la Convention, mais plutôt les éléments contextuels et structurels, y compris la relation susmentionnée entre le droit administratif environnemental et le droit pénal, ainsi que certaines dispositions d'une grande portée qui étaient un défi.

1.2. Le besoin d'une nouvelle convention sur la protection de l'environnement par le droit pénal

15. Une nouvelle convention du Conseil de l'Europe sur la protection de l'environnement, fondée sur les enseignements de la Convention de 1998, posant un cadre commun pour les législations nationales pourrait apporter une base générale paneuropéenne de droit pénal, dans le plein respect des cadres juridiques nationaux, permettant d'harmoniser l'approche générale des États pour combattre et prévenir les activités environnementales illégales.

16. Une nouvelle convention pourrait représenter une valeur ajoutée à ce qui est déjà réalisé au seul niveau national. Des règles communes élémentaires semblent cruciales afin d'efficacement combattre et prévenir le crime environnemental et de contribuer à décourager le phénomène du « dumping environnemental » : la pratique par laquelle les criminels accomplissent leurs actes dans des États où la législation environnementale est moins stricte, moins contrôlée ou non appliquée.

17. Une nouvelle convention constituerait, en outre, une opportunité de répondre aux revendications sociétales actuelles, en gardant à l'esprit, toutefois, que le débat public sur les phénomènes et les questions d'actualité est, bien entendu, important, mais en soulignant dans le même temps que les politiques en matière de droit pénal ne devraient pas être décidées sur la base de revendications populaires.

18. Les pollutions et infractions environnementales présentent souvent un caractère transfrontalier. La criminalité écologique a fréquemment des effets extraterritoriaux et prend

de plus en plus la forme de trafics internationaux[4]. On évalue que la criminalité environnementale est la quatrième plus grande entreprise criminelle du monde[5], les criminels exploitant les différences d'approche entre les pays. Ce qui peut constituer un crime dans un pays peut ne pas l'être dans un autre, ce qui permet aux criminels de faire du « forum shopping »[6]. Le constat d'un impact global des atteintes et dégradations qui en résultent, de même que le développement d'une criminalité organisée à l'échelle transnationale, amènent à développer une vue plus large et à adopter une démarche systémique dans le traitement de ces problèmes. L'existence d'une compréhension commune et générale des potentielles mesures pénales et administratives en réponse au crime environnemental semble approprié pour assurer une réponse renforcée et impactante à l'encontre de cette forme de criminalité.

19. L'établissement de normes minimales entre les États sur ces questions environnementales existantes et en développement faciliterait davantage la capacité à engager des poursuites plus efficaces et efficientes en matière d'application de la loi. Sur cette base, l'échange d'informations, l'exposition aux meilleures pratiques et la formation de spécialisation pour l'application de la loi amélioreraient simultanément la coopération internationale.

20. L'efficacité de la lutte contre la criminalité environnementale, dans toutes ses dimensions et notamment transfrontière, est également subordonnée, entre autres, à une coopération internationale efficace des États. Une telle coopération est essentielle pour garantir que les autorités nationales compétentes impliquées dans la prévention et la lutte contre les crimes environnementaux « parlent le même langage ». Un nouvel instrument juridique serait l'occasion de poser les règles communes d'une coopération internationale renforcée, en s'inspirant des instruments internationaux existants du Conseil de l'Europe.

21. Il est important d'avoir à l'esprit qu'historiquement, le Conseil de l'Europe s'intéresse à de nombreuses grandes questions auxquels les pays européens font face. Il relève de sa mission d'élaborer des réponses communes aux défis politiques, sociaux et juridiques de ses États membres[7]. Cependant, si l'on tient compte des préoccupations croissantes liées à la protection de l'environnement (également par le biais du droit pénal), de l'évolution de la problématique environnementale qui prend une dimension systémique et planétaire, du lien entre l'environnement et la santé, on se trouve face à des défis et des risques qui dépassent la simple crise écologique, qui sont multidirectionnels, transfrontières et intergénérationnels.

22. Le Conseil de l'Europe, dont les conventions de droit pénal sont reconnues comme efficaces en général, et dont les travaux dans le domaine de la protection de l'environnement par le droit pénal sont de longue date, est particulièrement bien placé pour proposer un cadre commun rénové, adapté aux enjeux actuels et futurs. En raison du grand nombre de ses États membres (47 pays), son influence est telle que les instruments qu'il élabore peuvent avoir un

4 a) EUROPOL European Union Serious and Organised Crime Threat Assessment (SOCTA) (2021), p.54, disponible à : *https://www.europol.europa.eu/publication-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-socta-2021*
b) UNEP Global Environmental Alert Services (GEAS), (2012), Transnational Environmental Crime- a common crime in need of better enforcement, p.3, disponible à : *https://wedocs.unep.org/rest/bitstreams/14319/retrieve*
5 UNEP – INTERPOL Report: Value of Environmental Crime up 26%, (2016), Disponible sur: *https://www.unep.org/es/node/8026*
6 UNEP-INTERPOL, Rapid Response Assessment, The Rise of Environmental Crime: A growing threat to natural resources, peace, development and security, (2016), p.20-22, p. 25, p., p.39, Disponible à : *https://wedocs.unep.org/bitstream/handle/20.500.11822/7662/The_rise_of_environmental_crime_A_growing_threat_to_natural_resources_peace%2C_development_and_security 2016environmental_crimes.pdf.pdf?sequence=3&isAllowed=y*
7 Voir, par exemple, la Convention de Budapest et la Convention d'Istanbul du Conseil de l'Europe.

poids considérable, à la mesure du défi environnemental qu'il convient de relever. L'adoption d'une nouvelle convention en ce domaine, outre sa dimension hautement symbolique sur la scène internationale, en parallèle d'autres initiatives régionales, pourrait avoir un effet d'entraînement au niveau national et inspirer d'autres instruments internationaux. Par conséquent, la question d'une nouvelle convention par le Conseil de l'Europe mérite d'être considérée comme très appropriée dans le cadre d'une dynamique générale de discussions et de négociations pour répondre à cette situation urgente.

23. Le Conseil de l'Europe a été créé afin de garantir la démocratie fondée sur la liberté des personnes et de prévenir de nouvelles violations massives des droits de l'homme comparables à celles commises pendant la seconde guerre mondiale. Le Conseil aborde tous les grands problèmes auxquels les pays européens font face, hormis ceux liés à la défense militaire et vise à promouvoir la démocratie, les droits de l'homme et l'Etat de droit, ainsi qu'à élaborer des réponses communes aux défis politiques, sociaux, culturels et juridiques de ses États membres. La tâche de promouvoir l'adhésion à l'État de droit devient particulièrement importante lors de l'élaboration de la réglementation environnementale ainsi que la protection de l'environnement est une priorité pour l'Organisation.

1.3 La faisabilité et l'opportunité d'une nouvelle convention sur la protection de l'environnement par le droit pénal

24. Suite à l'examen des réponses au deuxième point de contribution soumis par le groupe de travail *(L'identification des éléments spécifiques (et/ou éventuellement les articles) de la Convention de 1998 que votre État considère comme **pertinents** aujourd'hui et qui devraient être **maintenus** dans une éventuelle nouvelle convention),* les experts du groupe de travail ont souligné que des leçons peuvent et doivent être tirées de l'échec de la Convention de 1998, servant de base aux éventuelles négociations futures d'une nouvelle convention. Le groupe de travail a convenu que les articles suivants contenus dans la Convention de 1998 pourraient être maintenus dans une éventuelle nouvelle convention du Conseil de l'Europe, avec certaines modifications éventuelles :

- Article 5 – Compétence ;
- Article 6 - Sanctions réprimant les atteintes à l'environnement ;
- Article 7 - Mesures de confiscation ;
- Article 8 - Remise en l'état de l'environnement (à condition qu'il reste facultatif) ;
- Article 9 - Responsabilité des personnes morales ;
- Article 10 - Coopération entre les autorités ;
- Article 11 - Droits pour des groupes de participer aux procédures (à condition qu'il reste facultatif) ;
- Article 12 - Coopération internationale.

25. Ces modifications peuvent inclure l'incorporation de dispositions facultatives qui garantissent que le texte est suffisamment souple pour s'adapter aux situations juridiques nationales existantes. D'autre part, certains éléments de la Convention de 1998 ont été reconnus comme potentiellement problématiques et par conséquent trop complexes pour figurer dans une éventuelle nouvelle convention.

26. Comme mentionné précédemment dans ce document, l'une des questions clés et l'un des principaux défis soulevés par le groupe de travail est l'interdépendance substantielle et le lien entre le droit et les mesures administratives et pénales dans chaque système juridique

national. Le groupe de travail a souligné que ces aspects sont, en règle générale, interdépendants en matière d'environnement, puisque le non-respect des réglementations administratives est, dans la plupart des États membres, l'un des éléments constitutifs d'une infraction pénale. Ainsi, l'existence d'une réglementation administrative est une condition préalable à la possibilité de faire de la violation des règles prévues une infraction pénale. En cas de non-respect de ces obligations et normes, des infractions proportionnées sont établies avec la possibilité d'appliquer des sanctions pénales ou administratives. Ainsi, le droit pénal est très souvent accessoire au droit administratif de l'environnement. Cependant, dans très peu d'États membres, certaines infractions sont définies non pas en fonction du non-respect d'une réglementation administrative mais en fonction des dommages causés à l'environnement. Ces infractions (fautes graves) sont traditionnellement très peu nombreuses. Le groupe de travail a donc insisté à plusieurs reprises sur le fait que, lors de la rédaction d'une éventuelle nouvelle convention, les experts du futur comité de rédaction devront maintenir l'interdépendance matérielle du droit administratif et du droit pénal et trouver la solution la plus appropriée, en gardant à l'esprit l'opinion largement partagée par les États membres sur l'interdépendance essentielle du droit administratif de l'environnement et du droit pénal.

27. Les experts ont également souligné l'importance de veiller à ce que les sanctions soient proportionnées et respectent les systèmes juridiques nationaux, pour laquelle il a été convenu par le groupe de travail que les dispositions types du CDPC devraient être utilisés pour guider de telles discussions. En particulier, en ce qui concerne l'article 8 sur les sanctions et mesures et l'article 12 sur la coopération internationale, en tant qu'éléments clés d'une éventuelle nouvelle convention, comme cité ci-dessous[8] :

> « ***Article 8 – Sanctions et mesures***
>
> *1 Chaque Partie veille à ce que les infractions pénales visées [par] [aux articles x, y de] la présente Convention, commises par des personnes physiques, soient passibles de sanctions effectives, proportionnées et dissuasives, tenant compte de la gravité de l'infraction. [Ces sanctions incluent, pour les infractions pénales visées par les articles [x] et [y], des peines privatives de liberté pouvant donner lieu à l'extradition.]*
>
> *2 [Chaque Partie veille à ce que les personnes morales déclarées responsables en application de l'article 7 (Responsabilité des personnes morales) soient passibles de sanctions effectives, proportionnées et dissuasives, y compris des sanctions pécuniaires pénales ou non pénales [, et pourrait inclure d'autres mesures, telles que :*
>
> *a) des mesures d'interdiction temporaire ou définitive d'exercer une activité commerciale ;*
>
> *b) des mesures d'exclusion du bénéfice d'un avantage ou d'une aide à caractère public*
>
> *c) un placement sous surveillance judiciaire ;*
>
> *d) une mesure judiciaire de dissolution].]*
>
> *3 [Chaque Partie prend les mesures législatives et autres nécessaires, conformément à son droit interne, pour permettre la saisie et la confiscation :*

[8] Comité européen pour les problèmes criminels (CDPC) Dispositions modèles pour des conventions de droit pénal du Conseil de l'Europe (2016), Disponible à : https://rm.coe.int/comite-europen-pour-les-problemes-criminels-cdpc-dispositions-modeles-/1680713e9e

i. des instruments utilisés pour commettre les infractions visées par [les articles x, y de] la présente Convention ;

ii. des produits de ces infractions ou de biens d'une valeur équivalente à ces produits.]

Article 12 – Coopération internationale en matière pénale

1 Les Parties coopèrent, conformément aux dispositions de la présente Convention, en application des instruments internationaux et régionaux applicables et pertinents, des arrangements reposant sur des législations uniformes ou sur la réciprocité et de leur droit interne, dans la mesure la plus large possible, aux fins des enquêtes et des procédures concernant les infractions pénales visées conformément à la présente Convention, y compris à l'aide de mesures de saisie et de confiscation.

2 Si une Partie qui subordonne l'extradition ou l'entraide judiciaire en matière pénale à l'existence d'un traité reçoit une demande d'extradition ou d'entraide judiciaire en matière pénale d'une Partie avec laquelle elle n'a pas conclu pareil traité, elle peut, agissant en pleine conformité avec ses obligations découlant du droit international et sous réserve des conditions prévues par le droit interne de la Partie requise, considérer la présente Convention comme la base légale de l'extradition ou de l'entraide judiciaire en matière pénale pour les infractions visées dans la présente Convention [et peuvent appliquer, mutatis mutandis, les articles 16 et 18 de la Convention des Nations Unies contre la criminalité transnationale organisée à cet égard[9]]. »

28. En ce qui concerne les dispositions relatives aux sanctions et à la coopération internationale contenues dans l'éventuelle future convention du Conseil de l'Europe sur l'environnement, le groupe de travail a approuvé l'approche générale du CDPC, à savoir que, « lors des futures négociations sur toute nouvelle convention de droit pénal, il conviendrait d'utiliser les dispositions types pour les Conventions de droit pénal du Conseil de l'Europe, qui contiennent un langage standard ». Le texte intégral des « dispositions types » vise à établir un « modèle de Convention » et suit, en principe, la structure de certaines conventions de droit pénal récentes du Conseil de l'Europe. Les futurs négociateurs de projets de conventions de droit pénal pourront utiliser ce texte modèle pour les guider dans leurs travaux. Un grand nombre de ces dispositions types peut être utilisé par les négociateurs sans ajustement.

1.4. L'Assemblée parlementaire du Conseil de l'Europe

29. L'Assemblée parlementaire du Conseil de l'Europe a tenu sa quatrième partie de session du 27 au 30 septembre 2021 au cours de laquelle une journée entière a été consacrée à des débats sur des questions liées à l'environnement, aux droits de l'homme, à l'Etat de droit et à la démocratie.

30. Le 29 septembre 2021, le rapporteur M. Ziya Altunyaldiz (Turquie, NI) pour la commission des questions juridiques et des droits de l'homme a présenté la Résolution 2398 et la Recommandation 2213 du rapport intitulé « Examen des questions de responsabilité

9 Convention des Nations Unies sur la criminalité transnationale organisée (UNTOC) (2004), Disponible à : https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf

civile et pénale dans le contexte du changement climatique » (doc. 15362) (voir en annexe 3), qui fait spécifiquement référence au travail du CDPC-EC et à l'échec de la Convention de 1998. Ce rapport est consacré à la responsabilité juridique de la situation environnementale et donc au rôle essentiel du droit pénal et du droit civil dans le « litige climatique ». La Recommandation (Rec. 2213) stipule spécifiquement que l'Assemblée parlementaire « recommande au Comité des Ministres d'élaborer sans attendre un nouvel instrument juridique pour remplacer la Convention sur la protection de l'environnement par le droit pénal (STE n° 172) », appelant les États membres à réfléchir à la nécessité de remplacer ce traité pour s'assurer qu'ils sont équipés pour répondre aux défis actuels posés par le changement climatique.

31. Suite à cette présentation, l'Assemblée parlementaire a proposé de renforcer la responsabilité civile et pénale pour les « actes susceptibles d'avoir un impact sur le changement climatique ou de causer des dommages environnementaux graves » et a souligné la nécessité de « mettre en œuvre une politique pénale unifiée visant à protéger l'environnement et d'adopter des définitions communes des infractions environnementales et des sanctions correspondantes ».

32. La Résolution 2398 et la Recommandation 2213 ont été adoptées à l'unanimité par l'Assemblée parlementaire, qui a en outre décidé de créer un réseau parlementaire sous ses auspices, dont la tâche serait de suivre l'action des autorités nationales pour respecter les engagements pris en réponse à la crise climatique.

33. Ces discussions et décisions de l'Assemblée parlementaire du Conseil de l'Europe soulignent l'importance du travail du CDPC-EC et soutiennent l'élaboration éventuelle d'une nouvelle convention sur la protection de l'environnement par le droit pénal, en priorité.

1.5. L'Union européenne

34. Au sein de l'Union européenne, plus de 250 textes, essentiellement des directives, fixent des normes et des limites dans le domaine de l'environnement. La Convention de 1998 du Conseil de l'Europe a eu une influence importante sur certains de ces instruments, à savoir la Directive 2008/99CE du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal.

35. Cette Directive fixe les règles minimales que doivent suivre les États membres de l'Union européenne dans le domaine du droit pénal de l'environnement. Son objectif : pour « garantir une protection efficace de l'environnement, il est absolument nécessaire d'instaurer des sanctions plus dissuasives à l'égard des activités préjudiciables à l'environnement, qui entraînent généralement ou sont susceptibles d'entraîner une dégradation substantielle de la qualité de l'air, y compris la stratosphère, du sol et de l'eau ainsi que de la faune et de la flore, notamment en termes de conservation des espèces »[10].

36. Cette Directive a fait l'objet d'une évaluation et d'une consultation publique en 2019/20, dont les résultats ont été publiés en octobre 2020. Sur la base des résultats de l'évaluation, la Commission a proposé de réviser la directive. Le résumé de l'évaluation met en évidence

10 Directive 2008/99/CE du Parlement européen et du Conseil du 19 novembre 2008 relative à la protection de l'environnement par le droit pénal (Texte présentant de l'intérêt pour l'EEE), Disponible à : EUR-Lex - 32008L0099 - FR - EUR-Lex (europa.eu)

certains objectifs qui peuvent être, mais ne sont pas limités à, des domaines possibles d'amélioration[11] :

1. *Des mesures pourraient être envisagées afin de collecter des statistiques et des données sur les infractions environnementales de manière cohérente dans toute l'Union et de les communiquer à la Commission ;*
2. *L'interprétation de certains termes juridiques nécessitant des précisions concrètes pourrait être facilitée ;*
3. *Davantage d'efforts pourraient être consentis afin de standardiser le niveau de sanctions dans tous les États membres, dans le respect des traditions juridiques nationales et des systèmes pénaux des États membres ;*
4. *Des sanctions supplémentaires, ainsi que des sanctions liées à la situation financière des personnes morales, pourraient être envisagées ;*
5. *Le champ d'application de la directive pourrait être élargi afin de couvrir davantage de domaines de la criminalité environnementale, ou des domaines émergents ;*
6. *La directive pourrait inclure davantage de mesures relatives à la coopération transfrontière et à la criminalité organisée ;*
7. *Davantage de mesures visant à sensibiliser davantage le public aux infractions environnementales pourraient être envisagées.*

37. Le 15 décembre 2021, la Commission européenne a adopté une proposition de nouvelle Directive européenne sur la criminalité environnementale[12]. La proposition définit de nouvelles infractions pénales environnementales de l'UE, notamment le commerce illégal de bois, le recyclage illégal de navires ou le captage illégal d'eau. En outre, la proposition clarifie les définitions existantes des infractions pénales environnementales, offrant ainsi une sécurité juridique accrue.

38. La Commission propose de fixer un dénominateur minimum commun pour les sanctions applicables aux infractions environnementales. La proposition prévoit également des sanctions supplémentaires, notamment la remise en état de la nature, l'exclusion de l'accès aux financements et aux procédures de passation de marchés publics ou le retrait des autorisations administratives. Elle vise à rendre les enquêtes et les procédures pénales pertinentes plus efficaces et prévoit de soutenir les inspecteurs, la police, les procureurs et les juges par la formation, les outils d'enquête, la coordination et la coopération, ainsi que par de meilleures collectes de données et statistiques. La Commission propose que chaque État membre élabore des stratégies nationales qui garantissent une approche cohérente à tous les niveaux de l'application de la législation et la disponibilité des ressources nécessaires. Cette proposition facilitera les enquêtes et les poursuites transfrontalières. Les crimes contre l'environnement touchent souvent plusieurs pays (par exemple, le trafic illicite d'espèces sauvages) ou ont des effets transfrontaliers (par exemple, dans le cas de la pollution transfrontalière de l'air, de l'eau et du sol). Les autorités répressives et judiciaires ne peuvent s'attaquer à ces crimes que si elles travaillent ensemble par-delà les frontières.

39. Compte tenu des activités menées par l'Union européenne dans le domaine de la criminalité environnementale, et notamment des travaux susmentionnés sur la proposition de

11 Document de travail des services de la Commission, Évaluation de la directive 2008/99/CE du Parlement européen et du Conseil du 19 novembre 2008 relative à la protection de l'environnement par le droit pénal (directive sur les infractions environnementales), SWD (2020) 259 final du 28 octobre 2020 (partie I, partie II, résumé).

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

nouvelle Directive européenne, il sera essentiel de maintenir des contacts réguliers entre les deux Organisations et de coordonner leurs efforts, dans la mesure du possible, afin d'éviter les contradictions entre les travaux de l'Union européenne d'une part et, à l'échelle paneuropéenne, ceux du Conseil de l'Europe d'autre part. Ceci devrait être facilité par des échanges réguliers entre les différents groupes d'experts, comités et secrétariats des deux Organisations.

2. Principaux éléments d'une nouvelle convention du Conseil de l'Europe sur la protection de l'environnement par le droit pénal

40. L'objectif étant de ne pas répéter les erreurs du passé (la non-ratification de la Convention de 1998), il s'agit de trouver des éléments capables d'accroitre l'attractivité d'une nouvelle convention qui serait le socle commun aux États membres fixant des normes minimales pour une protection de l'environnement plus efficace et surtout effective. Dans cette perspective, certains besoins peuvent être identifiés et formalisés. Reprenant la structure traditionnelle des instruments du Conseil de l'Europe, y compris les « dispositions types » du CDPC pour les conventions de droit pénal du Conseil de l'Europe, les points suivants proposés, fondés sur la Convention de 1998 et les discussions du CDPC-EC, pourraient ainsi servir de base aux discussions et négociations futures sur le contenu d'une nouvelle convention relative à la protection de l'environnement par le droit pénal.

2. 1. But, champ d'application et terminologie

2. 1. 1. But de l'instrument

41. Deux principaux objectifs peuvent être identifiés, traçant les lignes directrices d'une nouvelle Convention sur la protection de l'environnement par le droit pénal :

1° Renforcer la **lutte contre le crime environnemental**, aussi bien nationale que transfrontière.

2° Instituer **des règles minimales** guidant les États dans leurs législations nationales.

42. Ces objectifs généraux pourront être discutés, modifiés et complétés par les États.

2. 1. 2. Champ d'application de l'instrument

43. En déterminant la portée et la définition spécifiques des comportements que les Parties à une nouvelle convention seraient tenues d'incriminer, dans le respect du principe de légalité, il convient de considérer que l'incrimination de ces comportements doit toujours être considérée comme le « dernier recours ».

44. Il importe de définir la portée exacte d'une éventuelle nouvelle convention du Conseil de l'Europe sur la protection de l'environnement par le droit pénal pour garantir que le principe de souveraineté nationale, qui régit la matière pénale, est pleinement respecté.

45. Partant des différentes fonctions du droit pénal, une nouvelle convention en la matière devrait prévoir des dispositions et des mesures portant à la fois sur la prévention et la répression des atteintes les plus graves à l'environnement.

46. La prévention peut résulter des mesures de prévention, tant d'un point de vue individuel (dissuader le délinquant de commettre/de répéter le crime) que collectif (décourager le groupe social).

47. Les mesures de réparation relèvent traditionnellement de la branche de droit civil ou administratif. Cependant, l'on observe dans certaines législations des dispositions sur la réparation au niveau du cadre législatif pénal. Les « mesures de remise en état » ou « mesures de compensation environnementale » pourraient ainsi être considérées comme des sujets de discussion lors de la rédaction d'une potentielle Convention, en tant que solution optionnelle.

48. Comme le soulignent les points de contribution susmentionnés soumis par plusieurs experts du groupe de travail, une coordination et une collaboration étroites avec la révision normative en cours en parallèle au niveau de l'Union européenne sont essentielles pour les travaux futurs du Conseil de l'Europe. De ce point de vue, il peut, par exemple, être noté que parmi les améliorations possibles suggérées par le document de travail de la Commission européenne figure l'élargissement du champ d'application du futur texte à proposer *« afin de couvrir davantage de domaines de criminalité environnementale, ou des domaines émergents »*[13]. Aussi, il pourrait être pertinent de s'interroger sur cette perspective d'élargissement également dans le cadre d'une nouvelle Convention du Conseil de l'Europe, en tenant compte notamment de la criminalité organisée ou à grande échelle, telle que les crimes globaux aux impacts écologiques substantiels et étendus.

2. 1. 3. Terminologie de l'instrument

2. 1. 3. 1. Définitions

49. La mise en place de définitions communes de certains termes, comprises et utilisées par tous, semble essentielle dans la rédaction éventuelle d'une nouvelle convention. Ceci devrait inclure une traduction des enjeux environnementaux auxquels les États doivent faire face actuellement, qui justifie une protection renforcée par le biais de normes pénales et administratives unifiées. Les définitions de ces notions et termes clés dans les éventuelles négociations futures d'une nouvelle convention permettrait ainsi de centrer la réponse pénale en identifiant les formes les plus graves de crimes environnementaux.

50. En conséquence, une nouvelle convention devrait commencer par énoncer les termes

13 Document de travail des services de la Commission – Résumé de l'évaluation de la directive 2008/99/CE du Parlement européen et du Conseil du 19 novembre 2008 relative à la protection de l'environnement par le droit pénal, 28 octobre, SWD (2020) 260 final.

environnementaux de base auxquels elle se réfère pour sa mise en œuvre, qui seront discutés et définis à un stade ultérieur. Il est à relever que, compte tenu de l'évolution constante de la législation environnementale, certains termes importants ne figurent pas dans le texte de la Convention adoptée il y a plus de vingt ans, en 1998. Les termes suivants pourraient, ainsi, être discutés lors d'éventuelles négociations futures pour une nouvelle convention, par exemple :

- **Environnement ;**
- **Déchet ;**
- **Biodiversité ;**
- **Habitat ;**
- **Ecosystèmes ;**
- **Personne morale ;**
- **Illicite ;**
- **Victime.**

2. 2. Droit pénal matériel : incriminations, responsables, peines

2. 2. 1. Droit pénal matériel

51. Le dispositif d'incriminations contenu dans la Convention de 1998 a d'ores et déjà fait l'objet de discussions au sein du groupe de travail et soulève nombre de questions fondamentales tant dans sa conception théorique que dans sa mise en œuvre au sein de chaque Etat.

52. Le texte actuel (articles 2 à 4) comporte des incriminations spéciales, par secteurs environnementaux (eau, air, faune, flore, déchets, pollution, etc.) qu'il serait semble-t-il pertinent d'examiner, de discuter et, si nécessaire, de redéfinir plus précisément.

53. En principe, le caractère illicite des actes incriminés nécessite, en plus des autres éléments de l'infraction, une atteinte aux normes administratives. Une criminalisation efficace des infractions environnementales dépend, à ce titre, du maintien ou de de la mise en place par les États d'un cadre administratif adéquat pour régir les différentes activités humaines qui sont de nature à impacter l'environnement.

54. Dans ces hypothèses où le droit pénal se réfère au droit administratif, il paraît alors nécessaire de clarifier le rapport entre les sanctions pénales et les sanctions administratives et de préciser l'articulation entre le droit administratif et le droit pénal. L'on pourrait notamment se demander, dans le cadre des éventuelles futures négociations d'une nouvelle convention, si une coordination des réseaux de sanctions, avec un partage de compétences entre les autorités administratives et judiciaires pourrait être souhaitable et réalisable.

55. Au sein du groupe de travail, des délégations ont fait part de réticences concernant la question d'infractions autonomes ou plus générales. L'objectif étant de trouver un dénominateur commun aux différents États, en assurant le respect des systèmes juridiques nationaux, il convient de discuter de cette question.

56. De manière générale, la question est de savoir comment traiter de manière appropriée les atteintes à l'environnement les plus graves et à grande échelle.

2. 2. 2. Responsables

57. Les éventuelles négociations futures d'une nouvelle convention pourraient inclure des discussions sur la responsabilité pénale des personnes morales, conformément à l'article 7 (Responsabilité des personnes morales) des dispositions types du CDPC pour les conventions de droit pénal du Conseil de l'Europe.

2. 2. 3. Sanctions pénales

58**.** En référence aux exigences générales posées par le Conseil de l'Europe dans les dispositions types susmentionnées, les sanctions doivent être « effectives, proportionnées et dissuasives ».

59. Des mesures, à la place, ou en complément des peines pécuniaires, telles que des interdictions, suspensions etc., conformément à l'article 8 (Sanctions et mesures) des dispositions modèles du CDPC, pourraient également être prises en considération.

60. En outre, une aggravation généralisée de la répression dans les cas de réitération des infractions pourrait être justifiée en ce qu'elle viendrait renforcer la fonction de dissuasion de la réponse pénale face à une délinquance qui s'enracine et qui persiste. De même, lorsque « l'infraction a été commise dans le cadre d'une organisation criminelle »[14], cela pourrait être considère comme une circonstance aggravante

61. Enfin, les mesures de confiscation et de remise en état de l'environnement, que l'on trouve dans la Convention actuelle parce qu'elles présentent un caractère utilitaire, mériteraient d'être discutées. Si elles sont maintenues dans une nouvelle convention, elles devraient rester facultatives.

2. 3. Droit procédural et coopération internationale

62. Parce que les atteintes à l'environnement concernent souvent plus d'un pays, que les pollutions et nuisances ne connaissent pas les frontières et que les trafics illicites sont généralement internationaux, il importe d'utiliser les règles communes existantes de coopération internationale, y compris la Convention européenne d'entraide judiciaire en matière pénale (STE n° 30)[15] et ses protocoles additionnels, et , le cas échéant, de faciliter le cheminement processuel qui permet d'aboutir à la saisine du juge pénal et à la condamnation des responsables d'infractions visées dans une nouvelle convention. L'objectif final est que la justice pénale soit effective quel que soit le lieu où elle est rendue.

14 Comité européen pour les problèmes criminels - Dispositions types (CDPC) (2016), Article 9, « Circonstances aggravantes », p.24, disponible à : https://rm.coe.int/comite-europen-pour-les-problemes-criminels-cdpc-dispositions-modeles-/1680713e9e

15 Convention Européenne d'entraide judiciaire en matière pénale (ETS No.30), disponible à : https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=030

2. 3. 1. Coopération judiciaire internationale

63. Il importe de préciser et utiliser les règles communes d'une coopération judiciaire entre tous les Etats parties en ce qui concerne l'échange d'informations, les investigations (enquête, instruction), les poursuites pénales et les procédures judiciaires relatives aux infractions visées par la Convention. Cette coopération doit être la plus large possible, autant que les instruments internationaux et le droit interne des Etats parties le permettent.

64. Toujours dans ce même objectif d'effectivité, une spécialisation, ou du moins une formation à la matière environnementale, des différents acteurs intervenant dans le processus de répression (enquêteurs, magistrats, divers agents habilités) apparaît indispensable face à un droit pénal de l'environnement hautement spécialisé et technique.

2. 3. 2. Participation de la société civile

65. Enfin, en vue de favoriser les actions en justice contre la délinquance environnementale, la Convention de 1998 prévoyait dans son article 11, l'*actio popularis* (action populaire), sur une base optionnelle, qui permet de faire participer les associations, fondations et ONG aux procès environnementaux et, le cas échéant, de saisir directement le juge pénal.

66. La question se pose ainsi de savoir s'il est approprié de maintenir une telle disposition dans un nouvel instrument. Toutefois, la création de cette disposition dans une nouvelle convention devrait tenir compte des particularités des différents systèmes nationaux de droit pénal, prévoir une flexibilité suffisante et rester une solution facultative.

67. De manière générale, l'*actio popularis* est préconisée en droit de l'environnement comme particulièrement adaptée puisqu'elle est le droit d'agir en justice en défense d'un intérêt commun, à savoir la sauvegarde de l'environnement. Un tel recours ouvert aux associations et ONG spécialisées dans la protection de l'environnement faciliterait l'accès au juge, le déclenchement de poursuites pénales à l'encontre des délinquants écologiques, au moins dans les systèmes qui donnent au ministère public le droit de choisir de ne pas saisir lui-même le juge pénal.

68. Les éventuelles négociations futures d'une nouvelle convention pourraient, par conséquent, inclure une discussion sur l'opportunité de réglementer juridiquement ce point afin d'assurer son application effective d'une part et la faisabilité de maintenir un tel instrument à la vue des différences entre les systèmes juridiques domestiques, d'une autre part. Lorsque cela est approprié pour la mise en œuvre efficace de l'éventuelle nouvelle Convention, les États parties pourraient être invités à prévoir dans leur droit interne une telle action, en désignant précisément les titulaires de cette action (associations, fondations, ONG, etc.) et en précisant les conditions strictes à remplir pour justifier d'un intérêt légitime à agir (objet statutaire renvoyant à la protection de l'environnement, durée d'existence de l'organisme, etc.).

2. 4. Mesures de prévention

69. Conformément à la plupart des conventions élaborées par le CDPC, il semblerait approprié, également dans le cas d'une nouvelle convention, d'inclure certaines dispositions sur les mesures préventives. Le chapitre V des dispositions types du CDPC pour les Conventions du Conseil de l'Europe en matière de droit pénal prévoit la rédaction de provisions sur la prévention, à la fois aux niveau domestique et international, cependant, en raison de la nature très différente des mesures de prévention possibles qui peuvent être appropriées compte tenu de l'objet et du champ d'application de la Convention, ce texte type ne fournit aucune suggestion de formulation spécifique. Le groupe de travail a estimé qu'il ne lui appartient pas à ce stade d'identifier ces mesures et qu'il est plus sage de laisser les experts nationaux désignés dans le cadre des négociations de la nouvelle convention examiner la nature et la substance des mesures préventives.

2. 5. Mécanisme de suivi de l'instrument juridique

70. Il convient enfin de prendre en considération la question du suivi de la mise en œuvre de l'éventuelle nouvelle convention du Conseil de l'Europe. Ce dernier tirerait clairement profit d'un mécanisme de suivi, s'assurant de sa mise en œuvre.

71. En dépit du fait que la plupart des comités de suivi ne peuvent produire que des avis non contraignants, ils jouent néanmoins un rôle crucial dans la production d'un recueil des meilleures pratiques qui pourraient ultérieurement servir de modèle à d'autres. Ces avis pourraient également être utilisés par d'autres organes du Conseil de l'Europe, tels que la Cour européenne des droits de l'homme, dans leur jurisprudence à venir. Les coûts et le poids administratif pour les États entrainés par un mécanisme devraient également être pris en compte.

3. Annexe

3.1. Annexe 1 : Compilation des points de contribution (en anglais seulement)

Strasbourg, 2 September 2021 CDPC(2021)7

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

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

Compilation of Contribution Points

Document prepared by the CDPC Secretariat

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Contents

I. Background

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

II. The Contribution Points

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

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

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

***

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

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

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

1. Austria

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

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

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

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

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

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

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

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

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

2. Belgique/Belgium

English translation below

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

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

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

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

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

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

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

English translation

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

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

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

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

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

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

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

3. Croatia

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

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

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

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

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

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

4. Czech Republic

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

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

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

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

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

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

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

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

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

5. Finland

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

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

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

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

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

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

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

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

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

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

6. France

English translation below

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

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

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

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

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

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

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

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

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

English translation

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

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

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

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

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

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

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

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

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

7. Georgia

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

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

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

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

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

Administrative and Criminal Liabilities

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

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

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

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

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

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

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

  2. The same act committed repeatedly,

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

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

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

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

Environmental Liability

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

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

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

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

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

8. Germany

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

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

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

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

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

Regarding letter a):

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

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

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

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

b. Article 2 ("Intentional Offences")

Regarding paragraph 1 letter a):

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

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

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

Regarding Article 2 paragraph 1 b) to e):

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

Regarding Article 2 paragraph 2:

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

c. Article 3 ("Negligent offences")

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

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

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

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

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

all the more so in light of the fact that all the provisions are premised on unlawful conduct and that the competency to define the underlying administrative environmental regulations continues to be reserved to the States Parties.

e. Article 5 ("Jurisdiction")

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

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

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

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

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

Regarding Article 6 sentence 2, second half-sentence:

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

g. Article 7 ("Confiscation measures")

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

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

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

i. Article 9 ("Corporate liability")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Greece

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

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

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

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

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

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

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

10. Netherlands

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

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

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

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

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

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

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

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

11. North Macedonia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Portugal

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

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

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

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

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

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

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

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

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

13. Romania

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

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

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

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

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

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

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

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

nationally and internationally and a possible swift in approach (as to the ultima ratio of the criminal law) and trans-border cooperation (for instance wildlife trafficking and waste trafficking and even some of the illegal fishing elements do have by their nature an extensive trans-border component).

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

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

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

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

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

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

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

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

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

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14. Slovenia

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

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

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

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

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

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

establishing criminal responsibility (liability) for legal persons and imposing criminal or administrative sanctions...”.

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

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

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

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

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

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

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

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

15. Spain

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. Switzerland

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

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

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

Other difficulties were identified regarding the following articles:

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

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

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

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

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

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

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

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

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

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

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

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

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

17. Turkey

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

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

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

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

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

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

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

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

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

18. Ukraine

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

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

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

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

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

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

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

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

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

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

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

3.2. Annexe 2 : Comité européen pour les problèmes criminels (CDPC) Dispositions modèles pour des conventions de droit pénal du Conseil de l'Europe

Disponible via : https://rm.coe.int/comite-europen-pour-les-problemes-criminels-cdpc-dispositions-modeles-/1680713e9e

3.3. Annexe 3 : Assemblée parlementaire du Conseil de l'Europe, Rapport de la Commission des questions juridiques et des droits de l'homme : Examen des questions de responsabilité pénale et civile dans le contexte du changement climatique (Doc. 15362)

Disponible via : Examen des questions de responsabilité civile et pénale dans le contexte du changement climatique (coe.int)