If you have issues viewing or accessing this file contact us at NCJRS.gov.

HELSINKI INSTITUTE FOR
CRIME PREVENTION AND CONTROL,
AFFILIATED WITH THE UNITED NATIONS

HEUNI

140561

CRIMINAL LAW AND THE ENVIRONMENT

Edited by
Hans-Jörg Albrecht
and
Seppo Leppä

140561

Helsinki Institute for
Crime Prevention and Control,
affiliated with the United Nations
PO Box 34, SF 00931
Helsinki, Finland

Publication Series No. 22

CRIMINAL LAW AND THE ENVIRONMENT

Proceedings of the European Seminar held in Lauchhammer, Land Brandenburg, Germany, 26 - 29 April 1992

Edited
by
Hans-Jörg Albrect and Seppo Leppä

Forssa 1992

NCJRS

JAN 26 1993

ACQUISITIONS

140561

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
HEUNI

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

Copyright © 1992 by HEUNI

Copies can be purchased from:

Academic Bookstore
P.O.Box 128
00100 HELSINKI
Finland

Criminal Justice Press
P.O.Box 249
Monsey, New York 10952
U.S.A.

Printed by Forssan Kirjapaino OY, 1992,
Forssa, Finland

ISBN 951-47-6439-0
ISSN 0780-3656

FOREWORD

The resolution "The Role of Criminal Law in the Protection of Nature and Environment", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, in 1990, requests that the Secretary-General, *inter alia,* examine the possibilities of further harmonization of the provisions of existing international instruments entailing penal sanctions under national criminal law.

In response to this request, HEUNI, in cooperation with the Max Planck Institute for Foreign and International Criminal Law, convened an international seminar on criminal law in the protection of nature and the environment in a European perspective. The seminar was organized under the auspices of the United Nations, the Council of Europe and the German Federal Ministry of Justice.

Also in association with the Max Planck Institute, HEUNI carried out a survey of cooperation and coordination between national authorities of various European countries in the control of harm to the environment. Materials from the survey were utilized in the preparation of the background document for the seminar.

The present volume contains the papers presented to the seminar together with the general report. A summary report of the survey is presented in an annex. Both texts reflect the growing tendency in Europe of devising integrated approaches that employ a variety of instruments designed to influence conduct and reduce burdens on the environment, ranging from public participation to the use of sanctions. We hope that publication of this volume will introduce some of the ideas currently under development among European environmental authorities to a wider international audience.

Helsinki, 30 October 1992

Matti Joutsen
Director, HEUNI

Contents

FOREWORD		III
REPORT ON THE SEMINAR		6
CONCLUSIONS		25
CONCLUSIONS		30
SCHLUßFOLGERUNG		36
ВЫВОДЫ		43
ANNEX I		
List of participants		47
ANNEX II		
Agenda of the Seminar		54
DOCUMENTATION PRESENTED BY EXPERTS		
Background paper		57
Günther Kaiser	Welcome address	75
Matti Joutsen	Welcome address	77
Reinhard Göhner	Opening speech	80
Christian Häntzka	Opening words	85
Bertram Wieczorek	Impacts of environmental law on criminal law; introductory statement	86
Seppo Leppä	Control of harm to the environment and the United Nations crime prevention and criminal justice programme	89
	Résumé	93
	Zusammenfassung	95
	Резуме	97
Hans G. Nilsson	European aspects of control of harm to the environment	98
	Résumé	104
	Zusammenfassung	107
	Резуме	110
Hans Lefèvre and Henk Wattel	Enforcement of environmental law in the Netherlands	112
	Résumé	127
	Zusammenfassung	132

	Резуме	138
Franco Giampietro	Models and types of environmental offences; preliminary considerations	142
	Résumé	152
	Zusammenfassung	152
	Резуме	156
Staffan Westerlund	The effect of administrative law on the shape and the application of environmental offences	157
	Résumé	176
	Zusammenfassung	180
	Резуме	184
Anatolij Naumov	Administrative and penal sanctions in the field of the environmental crime	186
	Résumé	191
	Zusammenfassung	193
	Резуме	195
Hans-Jörg Albrecht	The role of administrative agencies and of the judiciary in the prevention and suppression of environmental crime	196
	Résumé	206
	Zusammenfassung	208
	Резуме	210
Peter Polt	The development of national environmental criminal law concerning cross-border offences and offences committed abroad	212
	Résumé	222
	Zusammenfassung	225
	Резуме	227
ANNEX III: Report of an European survey		
Hans-Jörg Albrecht	Survey on cooperation and communication between authorities in the field of controlling harm to the environment	228
Annex:	Survey questionnaire	250

Mr. Staffan Westerlund
Rapporteur

THE POLICY OF CRIMINAL LAW IN THE PROTECTION OF NATURE AND THE ENVIRONMENT IN A EUROPEAN PERSPECTIVE

General points

The title of the seminar focuses on criminal law, and in particular on the policy of criminal law, in the protection of nature and the environment in a European perspective. The programme, however, was much broader in scope and focused to a high extent on the interrelationship between issues of administrative law and issues of criminal law. This broad layout seemed, at first, to result in somewhat confused or confusing discussions. But eventually it proved to serve the most important function of all when it comes to scientific discussions with relation to practical issues, namely a broadening of the understanding through contributions from different disciplines, many countries and many practically experienced educated persons.

One fundamental issue addressed in this seminar was under what circumstances and in what kinds of situations *criminal law as such* has a role to play. This issue must be distinguished from another, perhaps similar issue, that of when *"criminal"* sanctions have a role to play in the control of the environment.

Criminal law can add to the substantive contents of national law, and perhaps in the future even to the substantive contents of international law. One way to express this is that some actions and effects may be so dire, so drastic, that the legislator does not even consider them when drafting administrative environmental law or making administrative decisions. The utmost safety net for society, humanity and the Earth must therefore be designed by criminal law. This corresponds to the notion of the hard core of criminal environmental law, as expressed by one of the participants in the seminar.

Furthermore, techniques of criminal law can be used to back up, to reinforce the implementation systems of states. By designing offences with a consideration to techniques that rest and are developed within criminal law, other requirements (such as administrative law standards or other similar requirements) can be given teeth - perhaps even strong teeth.

This view seems to be shared by most, and perhaps all participants in the seminar, regardless of the different terminology and, perhaps, somewhat different intradisciplinary dogmas.

The seminar proceedings clearly demonstrated that the differences between administrative law and criminal law pose problems, not the least from comparative points of view as well as with respect to compatibility. One reason that is relevant for this seminar may be that comparative law was not an explicit foundation for the structure and methodology of the seminar. The title focuses on *criminal law policy* with respect to the protection of the environment, but it also claims that the seminar has a *European* perspective.

This last objective calls for a subsidiary comparative approach. However, thanks to the intellectual openness and spontaneity of the participants, the proceedings gradually led to the recognition that, although fundamental criminal law principles and approaches are rather similar all over the continent, the same does not apply to administrative law principles and approaches. Once this has been noted, many conclusions can be drawn in respect to the policy of criminal law in the protection of the environment. The detailed proceedings of the seminar will probably demonstrate, even for those not attending the discussions, to what extent we should be cautious when balancing or otherwise comparing principles of criminal law and administrative law.

As a matter of fact, the combined efforts of the participants resulted in the presentations of not only two, but three, approaches to the protection of the environment within the legal field, the third being the environmental law approach. How-

ever, it was not argued that environmental law can stand on its own, without the integration of, among others, criminal law, international law, civil law, procedural law and international law.

The core of environmental law is related to the complexity of biospherical mechanisms and interrelationships. Quite possibly such complexity has never before been the object for legislation and other kinds of strategic and analytic decisions.

Much, perhaps most, of the environmental degradation (such as everything that we have seen around Lauchhammer) is the result of many and prolonged acts, each of which may have seemed to be of marginal significance from the point of view of liability, whether civil or criminal. The efforts to ease the burden on the environment, to improve environmental quality, to adjust all nations to sustainable development, require *inter alia* making acts that today are legal, illegal.

However, this is not necessarily the same thing as making all those acts criminal offences, as was clearly demonstrated in the discussions. The greatest share will probably be handled by legal instruments originating from administrative law, although the discussions also referred to economic incentives, information and, in particular, public participation in different respects.

Also other perspectives were discussed in the efforts to cover all issues of significance for environment control. *Cooperation* and *coordination* were two key words frequently used in the presentations and discussions.

Cooperation between legal and other disciplines was one issue considered, for example in the ample discussions on how to define a crime against the environment as such, and when touching upon the issues of implementing environmental goals requiring a great number of measures and decisions.

Cooperation between different bodies - administrative, judicial and others, sometimes also non-governmental organizations - was also addressed with some intensity during the seminar.

This last issue is very close to that of coordination, the other key word. Coordination within and between agencies and other public organizations, among others between prosecuting and administrative agencies, was one example; coordination between different pieces of legislation was another; coordination between nations by means of common minimum standards and efforts to construct and define offences suitable for the introduction in the law of all states was a third example.

A fourth example, one that was scarcely discussed explicitly but nonetheless clearly implicit, was coordination between different legal disciplines such as administrative law, criminal law and environmental law. The quality of the discussions as well as of the conclusions are mostly due to the efforts to synthesize different approaches in order to reach an understanding of the place and need for criminal law techniques and criminal law policy in the present and, even more, future development of what is hopefully becoming successful protection of the environment.

Did the seminar achieve its objectives? In the beginning it was said that one important purpose of the seminar was to hear the opinions of the participants regarding the policy of criminal law in the protection of the environment. The participants responded enthusiastically to this and offered much information, analyses and ideas from different angles. Thanks to this broad approach, the final conclusions are based upon a criminal law perspective and may contribute to legal thinking in the protection of the environment. At the same time, the conclusions together with the proceedings may encourage further discussions, analyses and the development of legal instruments designed to improve the implementation of environmental policies and standards aiming at sustainable development together with a good life for present and future generations, with sufficient food and with the opportunity to experience and enjoy the beauty of nature.

Presentations and discussions

Following this general, comprehensive and compressed introductory report, we now turn to a rather detailed, although not exhaustive, summary of the seminar. The contents of the presentations of the different speakers are summarized, since the full text is found in their papers. The discussions and comments are often more fully recorded in the report, generally without reference to who made the different comments.

Session 1

1-1 The seminar began with two presentations, as in the written papers, that gave the background to the topic of the seminar and outlined UN and European aspects of control of environmental harm (the papers delivered by Mr. Seppo **Leppä**, HEUNI and Mr. Hans **Nilsson**, Council of Europe). During the seminar Mr. Nilsson added to the information by referring to the fact that within the Council of Europe similar issues have been discussed for 15 years (see also 2-10).

1-2 One issue which surfaced already during the first session was whether or not criminal law has a key role within the protection of the environment, and also whether criminalization should be avoided or favoured. Mr. Nilsson proposed that the old concept of ultima ratio was not completely adequate in this connection (see also 3-8 and 3-18). He advocated being innovative without being adventurous.

A hard core of offences should be penalized under criminal law. Others, referring to previous considerations, argued that criminal law could and should be used when appropriate. However, did Nilsson's approach actually mean that criminal law approaches were to be replaced by administrative law approaches? Nilsson

thought that this was not necessarily a consequence of his ideas, but he agreed that there are twilight zones between these law areas. Whether criminalization of misuse of discretion by public officials should be included in the innovations remained a question to discuss in the future (see also 2-4 and 3-13).

1-3 Corporate liability versus individual liability was discussed, and corporate liability as a complementary measure to individual liability was proposed (see also 3-13).

1-4 There was no discussion on how the results of the seminar should be used, other than a statement from one of the vice presidents that it would be difficult to draft conclusions in a few days. However, the seminar was expected to provide interesting ideas regarding reactions to innovations. According to Mr. Leppä, the main function should be to collect the general points of view of the participants.

Session 2

2-1 In session 2 Mr. Hans **Lefévre** used examples from the Netherlands to discuss, among other things, laws on media (one for water, one for air etc.) versus "integral laws" (such as the previous Dutch Nuisance Act). He stressed the need for integration of enforcement, and he advocated the sanctioning of violations of norms and standards both administratively and criminally. One particular drawback of regulations as instruments is that they are time consuming, not the least in the political process. Rules should be made enforceable, or else not be passed. After this, he reported on the Dutch experience and drew conclusions. Among others, the most effective and efficient way ought always to be chosen. He advocated a non-dogmatic approach and claimed that criminal law is not particularly moralizing; it is just a tool.

He also outlined methods of enforcement, and distinguished between serious, somewhat serious, and very serious violations. He emphasized that the structuring of enforcement was the most important; this included such measures as allocating sufficient money to all enforcement levels and prosecutors, programming on three levels of seriousness, and doing the job together or, at least, in a coordinated manner. There is also a need for coherence between administrative bodies (horizontally and vertically) and between administrative bodies and police and prosecutor.

His over-all conclusion was: Do not make a big difference between criminal and administrative measures - they can work in the same direction.

2-2 In the subsequent discussion different topics and issues connected with the report were touched upon. One issue was what to do when the structure does not function. The simple answer given by the speaker was that nobody is the boss over others.

2-3 The moralizing function of criminal law was disputed. One argument was that criminal law is a special tool, not just any tool. However, are civil law, administrative law and criminal law based upon the same kinds of seriousness? The speaker answered yes to this question.

2-4 Cooperation was discussed, especially in situations where civil servants bend the law, neglect to intervene, or do not inform law enforcement agencies of violations (see also 1-2 and 4-6). The only clear cases mentioned by the speaker regarding the Netherlands were some corruption cases, but such cases were somewhat different from pure law-bending cases.

2-5 The choice between criminal and administrative enforcement in the Netherlands is not regulated. The speaker advocated efficiency as the guide for that choice and mentioned that guidelines exist on giving priority for criminal actions. Similar efforts were reported from Norway (see also 3-6), where between 10 and 20

prosecutions for environmental offences are brought to court every year. In Germany, or at least some German regions, there are regulations requiring administrative agencies to inform prosecutors about offences.

2-6 Mr. Franco **Giampietro's** presentation, as found in his paper, was based upon the idea of making environment as such the object of protection, and not property, health, etc.

The subsequent discussion clearly indicated that there was no consensus as regards the approach to how to define such a crime. The alternative seemed to be to protect different environmental components such as air, soil, etc. Furthermore, it was argued that criminal law has to step into the area of risks, otherwise it will come too late.

2-7 Another basic comment was that there is no universal definition of a "criminal offence". Many countries do not recognize or observe the separation between administrative criminal law and "real" criminal law (see also 2-9, 3-8, 3-10, 3-13, 4-3, 4-4, 4-5 and 4-9).

The speaker proposed that the definition of environment should be narrow, and the list of environmental components should not be exhaustive. What is new, he said, is the protection of environment as such; the protection of man and property is already part of traditional law.

2-8 In the discussions a line was drawn between professional actions and non-professional actions without, however, anyone reaching a conclusion as to how to use this distinction when defining crimes against the environment.

2-9 In some of the comments, a line was presupposed also between criminal and administrative fines, the former being considered to be used for more severe actions.

2-10 The seminar was informed that the Council of Europe will probably propose that pollution of water, air and soil should be constructed as a common offence. One participant argued that this might cause some problems in the light of the legality principle. Another participant advocated a practical approach, considering that there are but a few court cases, since the prosecutors have problems in handling such offences. Such observations were offered from Hungary, where the integrated approach is used. It has not worked in practice. Because of this, the participant advocated the component approach.

The speaker pointed out that there are different approaches and sanctions in different countries. There is a need for common legislation covering every element of the environment. We have to observe the interaction between those elements.

2-11 A specific criminal law question was raised: If one action causes the pollution of three components at the same time, will this be considered as one or three crimes? To this, other participants suggested that there are simple methods within criminal law to handle such a problem, leading to the result where it will be punished as if it were one, due to the principle of concurring crimes.

2-12 The speaker's argument for making environment as such the object of protection was that scientific results must be observed, including for example knowledge about the interaction between elements. The environment is an entity; it is more than the sum part of its components. It also has to be protected as an entity.

2-13 The discussion went further concerning the entity and the component approaches. Most participants regarded the integration of air, water and soil as fitting into this component approach. One question was whether something vital was overlooked if the component approach was chosen. No real answer was offered to this question. Instead, the discussion focused upon the possible degree of precision. Some participants expressed their fear that the entity approach would make the rules much too abstract, even if the notion of pollution can be used. In practice it is very

difficult to define endangerment when related to the environment as such. The speaker, on the other hand, said that a narrow definition made the proposed rule precise. This had not been done in Hungary, but it is possible.

Session 3

3-1 In his paper, Mr. Staffan **Westerlund** presented the environmental law perspective to the need for more and improved administrative methods to achieve sustainable development, to achieve and maintain environmental quality standards and to protect species, habitats, etc. By demonstrating that a low implementation ratio is normal for legal and administrative systems, but incompatible with some basic environmental goals, he emphasized the importance of efficient sanctions, criminal sanctions included.

3-2 In the subsequent discussion it was mentioned that some serious attempts have been made in the world to diminish the gap between the old legal culture and the need for the protection of the environment. Examples cited were the US Clean Air Act and some EC directives, all of which strive to give legal reference to environmental quality as such, at the same time observing the need for implementation rules that would be applicable when the quality standards are not achieved.

3-3 Another question concerned the interaction between laws and implementation. Negative examples were given from Sweden, illustrating how different laws concerning water may conflict, mainly because some kinds of impact are to be considered under one statute, other kinds under other statutes. This is probably a general problem in many countries.

3-4 During the discussion a brief report from Iceland was presented. Even in Iceland, pollution and other environmental problems (such as erosion) occur but

the intensity may be rather low in many cases. The general public is not very conscious about this and there is a lack of political and public will to follow up when environmental problems occur. This contribution resulted in comments on the need for public opinion and information.

3-5 The pressure from many interests to compromise between the protection of the environment and other objectives was discussed from more than one perspective. One such perspective was that international legislation or recommendations may show the way for national legislation, especially in countries with much environmental damage and bad economy, as was the case with some of the Eastern European states. On the other hand, generally applicable precise norms suitable for all nations will normally not be possible as regards substantive environmental law standards. However, some basic procedural principles or norms may more easily be generally applicable. The speaker mentioned that the progress of international cooperation is too slow, and unilateral radical legislation will often be appropriate or even necessary.

3-6 The public's interest in environmental offences is high in Norway (see also 2-5). The prosecuting agency keeps the mass media informed about prospective prosecutions. In contrast to this, another participant suggested that public opinion is not very reliable.

3-7 The problems with transboundary pollution (see also 4-12) was raised in this context, with special reference to Environmental Impact Assessments and the recent Espoo-convention. Not only should the public be informed, but it should have the opportunity to participate in planning and many other types of administrative and political decisions that might affect the environment.

3-8 Another topic in the discussion proved to be a recurrent issue during the seminar, namely the relationship between administrative and criminal law within the field of the environment (see also 2-9, 3-10, 3-13, 4-3, 4-4, 4-5 and 4-9). According to some participants, criminal law is to a high degree supplementary to

administrative law, and criminal law cannot impose more stringent sanctions that can administrative law (cf. 1-2 and 3-18).

The visibility that is characteristic of the criminal system (those found guilty) but not of the administrative system was pointed out as something to bear in mind when evaluating them. On the other hand it is not possible to draw conclusions in this respect for all countries; insufficient information was available on the different administrative systems, and they vary considerably.

3-9 The more specific environmental law perspective was reintroduced in the discussion with reference to the British Environment Protection Act of 1990. The difference between the substantive law and its implementation was stressed.

3-10 It was mentioned that no difference is made in international conventions between criminal law, administrative criminal law and administrative law (see also inter alia 2-9, 3-8, 3-13, 4-3, 4-4, 4-5, and 4-9) and the speaker proposed that the common denominator now being discussed in the seminary was *sanctions*.

3-11 The police agency perspective on legal instruments and the clarity of norms, etc., was introduced in the discussion. Road traffic regulations in Switzerland were cited as an example. This led to comments about mass criminality when regulations were too far from common acceptance. It also led to the observation that everything in the end was a question of inducements for proper behaviour.

3-12 Finally in this discussion, constitutional guarantees for the public's right to the environment were mentioned with reference to the Turkish constitution, which contains a section concerning public health and environment.

3-13 In his paper, Mr. Anatolij **Naumov** discussed the choice between administrative and criminal measures and sanctions (see also *inter alia* 2-9, 3-8, 3-10, 4-3, 4-4, 4-5, and 4-9), drawing as the criteria the causing of actual harm or damage. He considered the definition of criminal and administrative law sanctions to cause great difficulty and gave examples from Russia.

In Russia, there are two types of administrative law sanctions for ecological offences. One is a penalty imposed on officials, other citizens and corporations. So far, these have been imposed only on officials and citizens, and the fines until recently have been very low. A new law was enacted in 1991 for imposing penalties even on corporations, etc.

The second type of administrative law sanctions comprises administrative prevention such as limiting or stopping the operation of an activity. So far, this type of sanction has been used very rarely, at least in part due to legal technical reasons.

The adoption of the legislation on the imposition of penalties even on corporations is, in Russia, more or less connected with the orientation towards the market economy (see also 1-3). According to the speaker, imprisonment as one sanction ought to be the extreme measure and reserved for very serious crimes such as gravely endangering health and life, above all for the sake of general prevention and for the moral satisfaction of victims and the society.

3-14 The discussion and questions at first concerned the Russian experience and development. To the question of why agencies do not close down plants violating the law, the speaker offered two reasons. One is economic, the other that the environmental agencies traditionally had no real power. There is now slow progress, and environmental interests have become absolute interests.

3-15 As regards sanctions other than fines and imprisonment, the speaker said that new legislation must include more non-traditional sanctions such as stopping an enterprise. Such a proposal is likely to be adopted. He expressed his hopes of a compromise, or a combination, between criminal and administrative law sanctions.

3-16 Closing down a factory, according to one participant, was a very important power with political implications. Also, intervention with orders to change production methods was discussed. An Italian example was given, concerning a power plant (cooling water discharge) that lost its permit.

3-17 In this context, some information on the Council of Europe approaches was offered. The council tries, as much as possible, to avoid fines and imprisonment and this, the participant said, is especially relevant for environmental protection. If the new measures are considered criminal law measures, the moralizing effect is likely to occur. The procedural guarantees will be provided. The disadvantage will be the same as with criminal law in general.

3-18 So far, the British experience with the 1990 Environment Protection Act, as an example of combination of sanctions, is too brief. The intention is to use an integrated approach. Imprisonment for up to 5 years is possible. Other measures include cleaning up at the cost of the polluter (this measure was considered by another participant to be very close in principle to civil law remedies, as is compensation). Also, information on all potential offences is available to the public.

The relationship in the United Kingdom between different remedies was also discussed in the *ultima ratio* perspective (see also 1-2 and 3-8). Criminal sanctions in the UK are not the last resort, although priority is given to preventing damage. This caused another participant to refer to the European Council report of 1977.

Session 4

4-1 Mr. Hans-Jörg **Albrecht** based his presentation upon three approaches:

- The back-stop function (see also 3-1 and 4-3);
- A mixed approach (beyond mere contempt protecting environmental values but with reference to administrative decisions etc.);
- Completely independent criminal law offences.

Administrative bodies and courts are independent organizations. They will operationalize over all goals more or less differently. There are one-way functional dependencies (with the judicial system as the dependant). Criminal justice agencies are more restricted than administrative agencies. Agencies are often specialized, the judiciary is not.

4-2 Objections were raised against the claim that wide criminalization would diminish the moralizing effect (see also 4-11). The speaker pointed out that the moral of criminal law can be transformed into meaningful hypotheses: there must always be a message to the citizen and to others.

The question whether the function of criminal law is primarily to moralize was once again raised. Is it different in the environ- mental law context? No general answer was offered. In addition to this issue, general prevention and the importance of the public were mentioned with examples from Norway. The ultimate preventative sanction or action is to terminate the polluting activity. This, in Norway as in many other countries, is normally referred to as an administrative action or sanction.

4-3 Another participant agreed that criminal law may also have back-stop functions, but this is primarily limited to deterrence, not prevention. This last comment was disputed. It was argued that there may be different definitions of seriousness in administrative and criminal law (see also 2-9, 3-8, 3-10, 3-13, 4-4, 4-5 and 4-9). As a result of the functional dependence, the judiciary become an annex, and criminal law should not accept this.

4-4 Clear norms were also discussed. The general opinion seemed to be that simple and clear norms are clearly needed in order to avoid the *ignorantia legis* objection. One comment offered was that administrative systems in Europe are so different that it is not possible to compare criminal law principles or functions and administrative law solutions and functions without referring to specific countries or groups of countries (see also 2-9, 3-8, 3-10, 3-13, 4-3, 4-5 and 4-9).

4-5 One participant said that there may be one over-all goal for criminal law and administrative law, but the techniques are quite different. Political goals, even within the protection of the environment, must be transferred into different techniques. The speaker agreed with this: we cannot take away the differences between criminal and administrative law (see also 2-9, 3-8, 3-10, 3-13, 4-3, 4-4 and 4-9). Earlier during the seminar one participant pointed out that within the Council of Europe, already in 1977 it was clear to the authors of the report that there are different approaches in different countries.

4-6 The duty of administrative agencies to inform the prosecuting agency of violations was discussed, as was the question of whether the prosecutor may exercise discretion when deciding on whether or not to prosecute. Alternatively, there should be guidelines or a clear duty to prosecute. No general conclusion was drawn.

4-7 One participant recommended that the analyses should not be restricted to substantive criminal law and environmental law, and instead expanded to include implementation and the limits of law-making. There are perhaps more than two organizations in the states. The judiciary itself has several, some of which are even conflicting. Also the administrative side is complex, perhaps even more so, with possible conflicts. Even in the political sector there are conflicts, but the legislators shall not avoid them. It is important to note that the legislator does not tell others to decide, but what to decide.

4-8 Separate goals for the judiciary and the administration were discussed and it was argued that we must accept the difference of goals and methods. This cannot be overcome by bringing the two organizations closer together.

4-9 Once again the relationship between criminal and administrative law was addressed (see also 2-9, 3-8, 3-10, 3-13, 4-3, 4-4 and 4-5). It was said that the mixed type of environmental criminal law cannot be defined universally. The following problem was identified: Who is in charge of controlling the balance between

the administrative and the criminal mode of control? According to the speaker, clear rules are needed even for the balance between the judiciary and administration.

4-10 The issue of judicial review of an administrative decision and appeals to administrative courts was raised. In Spain, a decision by an administrative body can be maintained, but also a suspension is possible.

4-11 Another participant raised the "chicken-and-the-egg issue" of what came first - morals or criminal law? Morals are changing as regards environmental pollution. Earlier, pollution was not only legal but also accepted or at least tolerated. Criminal law can be used in order to influence attitudes (see also 4-2). But prevention and repression as well as reparation for the victim are important, and the same goes for back-stopping functions. In one way or another, the provisions on all kinds of offences are back-stop norms for other types of law. Therefore, the intermingling of criminal law and administrative law could result in beneficial results, while maintaining the advantages of criminal law.

4-12 In his presentation, Mr. Peter **Polt** discussed the development of national environmental criminal law in the case of transboundary pollution (see also 3-7) and environmental crimes committed abroad. He chose to base this upon the issue of international obligation serving as a basis for the development of national rules. One thesis is that environmental impact has intensified so much that it now has a new quality of international significance. Ecocide as a new type of crime has been discussed. The speaker provided a complete overview of what is being discussed and done on the level of international law, before he turned to the principles of jurisdiction, territoriality and extra-territoriality and discussed the problem of how to define the place of crime when the basic elements of the offence are completed in more than one country at the same time.

4-13 In the subsequent discussion, the issue of the criminal liability of states was raised. The speaker, however, expressed the opinion that for several reasons, (among them sovereignty) one can not speak of the criminal liability of states.

Such sovereignty problems do not occur within a state, and within the scope of national law there is no problem concerning criminal liability for a state.

4-14 Another question concerned accidents and criminal liability, and the relationship between them. The answer offered was that when the accident is caused by negligence, there is a connection.

4-15 Extradition of nationals, which was mentioned in the speaker's paper, was considered an important issue. The speaker said that more cooperation between states should be requested in this area. The European Extradition Convention allows one state to request information from another state. The problem arises in the case of extradition.

4-16 The speaker was of the opinion that a number of the existing conventions should be supplemented with criminal provisions, although he noted his doubts over whether this really is the very best solution.

4-17 The interesting situation which may arise when an act is committed in one country on the basis of a permit, and a harmful effect occurs in another state, was discussed. This once again raises the issue of state liability.

4-18 The so called "Victim Declaration" (the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power) also deals with actions harmful for the environment, although in this respect it does not deal with the criminal liability of the state. The question of restitution for environmental harm was emphasized. Who is the victim when we must decide on compensation for environmental harm? In this connection, we must note that the Victim Declaration states that also a group of people can be victims.

4-19 Finally, the universality principle was discussed. It should be applied only when the act was such that it would not be tolerated in any country.

5 This ends the general report of the seminar.

SEMINAR ON THE POLICY OF CRIMINAL LAW IN THE PROTECTION OF NATURE AND THE ENVIRONMENT IN A EUROPEAN PERSPECTIVE - LAUCHHAMMER, GERMANY, 25 - 29 APRIL 1992

Conclusions

A.1. The existing state of the environment is serious and calls for efficient counter-measures all over Europe on the national, supranational and international level. The environment as a whole and its component elements must be protected in such a way that

- existing damage will be eliminated or at least reduced (including restoration),
- harm will be prevented, and
- risks will be minimized.

2. There should be enhanced recognition of environmental interests as special or particular legal interests. The necessity of using water, air, the soil and other natural elements to a certain extent, however, precludes a prohibition on every action affecting those environmental interests.

3. The objective of environmental protection requires an integrated approach employing a variety of instruments appropriate to influence conduct and to reduce burdens on the environment, ranging from public participation to the use of sanctions. Regulatory environmental administrative law still remains at the heart of state instruments for the protection of the environment. Other methods of environmental protection, e.g., economic incentives or the use of civil sanctions, will be important for many aspects of environmental protection. In addition to that, the criminal law should play a flanking and supporting and, where appropriate, independent role.

B.4. The goal in using the threat of sanctions is not only to back up the enforcement of administrative rules, but also to protect environmental interests as such (qualifying them as penally protected interests). Here, too, the criminal law can

have a general and special preventive effect and may, by its moral stigma, heighten environmental awareness.

5. Substantive criminal law can play an autonomous and independent role in cases of serious attacks on the environment, including the endangerment of public health or of life or of serious bodily harm. Above and beyond this the legislator cannot develop behavioural criteria under the criminal law which are more stringent than those under administrative law. In that respect environmental criminal law is closely linked to and dependent upon administrative law which limits the effect of the former; nevertheless, this does not provide any reason for it not to be used in this context. That limitation is also dependent upon what differences exist in the approach and the means of the administration and the judiciary in the role which they play in protecting the environment. To reduce the risk of non-uniform application, emphasis should be placed on links with administrative regulations by comparison with links with administrative decisions.

6. Environmental criminal law should encompass all areas of the environment. It is up to the national legislators whether in this respect offences are developed which refer to the environment as a whole or to the specific components thereof. The legislator should develop at least a common or similar offence in relation to water, air and soil pollution.

7. Offences should be differentiated according to their seriousness (with, as a consequence, a different range of sanctions).

One factor is the division according to the state of *mens rea* between intentional and reckless or negligent acts.

Another emerging possibility is the use of the concept of endangerment in addition to the traditional use of so-called result crimes in continental legislation.

8. It is not sufficient to use the criminal law only to combat damage to other violations of environmental entities. Serious infringements of safety regulations, other operator duties or of the administrator's preventive control interests can vastly increase the risk that hazards or damage will occur. Therefore it is justifiable to invoke the criminal law to deal with the inappropriate handling of hazardous substances, goods and plants or the possible impairment of control interests.

A distinction may be drawn between offences which require that the act:

- creates a concrete or actual danger to environmental objects (so-called concrete endangerment offence),

- occurs in a situation with a likelihood of danger (cf. the penal provision in the Vienna Convention on the Protection of Nuclear Materials; so-called potential endangerment offence),

- covers a mode of behaviour which is typically dangerous for the environment (e.g., operation without the necessary permit of a plant classified in a list as typically dangerous; violation of an order prohibiting the running of a plant; illegal disposal or export of dangerous waste; so-called abstract endangerment offence).

9. Minor offences (especially non-severe violations of administrative rules) could, without a loss of efficiency, be sanctioned only by fines or, in countries where a distinction exists between criminal and administrative punitive sanctions, be classified as administrative violations (punishable by a non-criminal fine). In that respect the scope of criminal law could even be restricted.

10. In the context of moves towards the introduction of alternative or additional measures under the criminal law in general, in comparison with the traditional use of fines and imprisonment, consideration should also be given to the possibility of using other measures (such as restoration of the *status quo;* imposition of

obligations to improve the state of the environment; confiscation of proceeds from crime). The decision on such a variety of measures may be dependent on the use on those instruments by the administration and on their effect.

11. Support should be given to the extension of the idea of imposing (criminal or non-criminal) fines on corporations (or possibly even other measures) in Europe.

12. When using the criminal law and creating new offences in the area of environmental protection, consideration should be given to the need for enforcement resources. In countries where prosecution is not undertaken by the administrative agencies themselves, the application (and effect) of environmental criminal law by the prosecuting authority and judiciary is to a great extent dependent on the use of the knowledge and experience of those agencies and upon their cooperation. In order to reduce conflicts of interests and to enhance the possibility of clearing up cases, legal rules or administrative guidelines for reporting offences by administrative agencies should be developed. Cooperation and coordination between the administrative and criminal agencies is essential. Special training and sufficient staffing should be provided. Further studies on improved measures for enforcement of existing environmental protection legislation should be undertaken.

C.13. The environment must be protected not only on the national but also on the international level. In this respect criminal law for the protection of the environment should also be developed at an international level.

14. Improvements should be made in the options available for prosecuting extraterritorial or transboundary criminal offences. In that respect:

(a) it should be possible to take jurisdiction in all countries over offences of a transboundary nature. Positive conflicts of jurisdiction should be solved. The problem of dealing under the criminal law with acts permitted in one state, and which produce harmful effects in another state where such acts are prohibited, should be examined in the light of the development of international and/or supranational law, including the use of bilateral and

multilateral conventions or EC-regulations to develop common environmental standards;

(b) the extension of extraterritorial jurisdiction or the possible use or expansion of extradition should be considered.

15. European standards of environmental substantive criminal law should be developed.

Following the encouragement given by the United Nations resolution ("The role of criminal law in the protection of nature and environment", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, and welcomed by the 45th session of the United Nations General Assembly, 1990) for the harmonization of regional legislation, the efforts of the Council of Europe in elaborating a convention and a recommendation on environmental offences should be supported. Such instruments should reflect the basic ideas as expressed in section B, particularly paras. 6, 8 and 10. This will improve international cooperation and reduce the danger of dislocation through the evasion of stricter enforcement in one country by moving to another country.

16. European conventions applicable to international cooperation in the prosecution of offences (e.g., by extradition, mutual assistance, transfer of proceedings, etc.) should be adhered to, if not done already, and utilized.

COLLOQUE SUR LA POLITIQUE DE DROIT PENAL EN MATIERE DE PROTECTION DE LA NATURE ET DE L'ENVIRONNEMENT DANS UNE PERSPECTIVE EUROPEENNE - LAUCHHAMMER, ALLEMAGNE, 25 au 29 avril 1992

Conclusions

A.1. L'état actuel de l'environnement est grave et il appelle des contre-mesures efficaces dans toute l'Europe, aux niveaux national, supranational et international. L'environnement doit être protégé comme un ensemble formant un tout et dans les éléments qui le composent, de manière à

- éliminer le dommage existant ou, du moins, réduire celui-ci (y compris la réparation),
- prévenir le préjudice,
- minimiser les risques.

2. Les intérêts relatifs à l'environnement devraient être davantage reconnus comme intérêts légaux spéciaux ou particuliers. La nécessité d'utiliser une certaine quantité d'eau, d'air, le sol et d'autres éléments naturels s'écarte toutefois l'interdiction de toute action affectant ces intérêts environnementaux.

3. L'objectif de la protection de l'environnement nécessite une approche intégrée mettant en oeuvre une variété d'instruments appropriés; ils visent à influencer la conduite et à réduire les charges qui pèsent sur l'environnement, depuis la participation publique jusqu'au recours à des sanctions. Le droit administratif réglementaire en matière d'environnement reste toujours au coeur des instruments dont dispose l'Etat pour protéger l'environnement. D'autres méthodes (de protection de l'environnement), par ex. des incitations économiques ou l'usage de sanctions civiles, seront importantes pour maints aspects de la protection de

l'environnement. En outre, le droit pénal devrait jouer un rôle de défense et de soutien et, le cas échéant, indépendant.

B.4. L'objet du recours à la menace de sanctions n'est pas simplement de conforter l'application des règles administratives mais également de protéger les intérêts environnementaux en tant que tels (en les qualifiant d'intérêts pénalement protégés). Là encore, le droit pénal peut avoir un effet préventif général et spécial et il peut, par ses stigmates moraux, favoriser une prise de conscience accrue de l'environnement.

5. Le droit pénal substantiel peut jouer un rôle autonome et indépendant dans les cas d'attaques sérieuses contre l'environnement (au nombre desquelles la mise en péril de la santé publique ou de la vie ou d'un préjudice corporel grave). Au-dessus et au-delà de cela, le législateur ne peut élaborer de critères comportementaux ressortissant au droit pénal qui soient plus rigoureux que ceux qui ressortissent au droit administratif. A ce titre, le droit pénal en matière d'environnement est étroitement lié au et dépend du droit administratif qui limite l'effet du précédent; il n'y a là, néanmoins, aucune raison de ne pas y avoir recours dans ce contexte. Cette limitation dépend également des différences qui existent dans l'approche et les moyens qui sont ceux de l'administration et de l'appareil judiciaire dans leur rôle de protecteurs de l'environnement. Afin de réduire le risque de non-uniformité au niveau de l'application, l'accent devrait être mis sur les liens avec les règlement administratifs par comparaison avec les liens avec les décisions administratives.

6. Le droit pénal en matière d'environnement devrait englober tous les domaines de l'environnement. Il dépend des législateurs nationaux de savoir si, à cet égard, des délits sont commis contre l'environnement pris dans son ensemble ou à ses composants spécifiques. Le législateur devrait définir au moins un délit courant ou similaire en rapport avec la pollution de l'eau, de l'air et du sol.

7. Les délits devraient être différenciés selon leur gravité (avec, donc, un éventail différent de sanctions).

La distinction constitue un facteur selon l'état de *mens rea* entre les actes intentionnels et les actes imprudents ou de négligence.

L'utilisation du concept de mise en péril, dans la législation continentale, en plus de l'usage traditionnel des crimes dits conséquents, constitue une autre possibilité qui émerge.

8. Il n'est pas suffisant d'utiliser le droit pénal uniquement pour combattre le dommage pour d'autres violations des entités de l'environnement. De sérieuses atteintes aux règlements en matière de sécurité, d'autres obligations incombant à l'exploitant ou les intérêts de l'administrateur en matière de contrôle préventif augmentent le risque de voir surgir des périls ou des dommages. C'est pourquoi il est justifié d'invoquer le droit pénal pour traiter de la manutention impropre des substances, denrées et plantes dangereuses ou l'éventuelle altération des intérêts du contrôle.

Une distinction doit être faite entre les délits qui impliquent que l'acte:

- crée un danger concret ou réel pour les objets de l'environnement (délit dit de mise en péril concret),

- survient dans des conditions présentant une vraisemblance de danger (voir la disposition pénale contenue dans la Convention de Vienne sur la Protection des Matériaux nucléaires; délit de mise en péril potentielle),

- couvre un mode de comportement qui est typiquement dangereux pour l'environnement (par ex. exploitation sans l'autorisation du permis nécessaire dans le cas d'une usine classée typiquement dangereuse et listée comme telle; violation d'un ordre interdisant l'exploitation d'une usine; décharge ou exportation illégale de déchets dangereux; délit dit de mise en péril abstraite).

9. Des délits mineurs (en particulier, violations non-graves de règlements administratifs) pourraient, sans perdre en efficacité, n'être sanctionnées que par des amendes ou, dans les pays où une distinction existe entre sanctions pénales et sanctions punitives administratives, être classés comme violations administratives (passibles d'une amende autre que pénale). A cet égard, le code pénal pourrait même être amputé.

10. Dans le contexte d'une transition destinée à favoriser l'introduction de mesures alternatives ou additionnelles en vertu du droit pénal, comparé au recours traditionnel aux amendes et à l'emprisonnement, la possibilité de faire appel à d'autres mesures (comme la restauration du statu quo); l'imposition d'une obligation d'améliorer l'état de l'environnement; la confiscation des bénéfices du délit) devrait également être retenue. La décision d'une telle variété de mesures peut dépendre du recours à tels instruments par l'administration et de leurs effets.

11. L'extension de l'idée d'imposer des amendes (pénales ou non pénales) aux personnes morales (ou même d'autres mesures) en Europe devrait être soutenue.

12. Lors du recours au droit pénal et de la création de nouveaux délits dans le domaine de la protection de l'environnement, il conviendrait d'attirer l'attention sur la nécessité de ressources destinées à la mise en application. Dans les pays où la poursuite n'est pas engagée par les agences administratives elles-mêmes, l'application (et l'effet) du droit pénal en matière d'environnement par l'autorité de poursuite et par le judiciaire dépend, dans une large mesure, de l'utilisation des connaissances et de l'expérience de ces agences et de leur coopération. Afin de réduire les conflits d'intérêts et de favoriser la possibilité d'élucider les cas, des règles pénales ou des lignes de conduite administratives devraient être développées. La coopération et la coordination entre les agences administratives et les agences pénales sont essentielles. Formation spéciale et dotation suffisante en personnel doivent être assurées. Des études ultérieures, relatives aux mesures améliorées en vue de l'application des dispositions de la législation actuelle pour la protection de l'environnement, devraient être entreprises.

C.13. L'environnement doit être protégé non seulement au niveau national mais également international. A cet égard, le droit pénal de protéger l'environnement devrait également être développé et porté à un niveau international.

14. Des améliorations devraient être apportées au niveau des options disponibles pour la poursuite pour délits extraterritoriaux ou transfrontières. A cet égard:

(a) il devrait être possible de faire juridiction dans tous les pays en matière de délits de caractère transfrontière. Le problème de traiter, en vertu du droit pénal, des actes autorisés dans un Etat et qui produisent des effets préjuciables dans un autre Etat où de tels actes sont prohibés, devrait être examiné à la lumière du développement du droit pénal international et/ou supranational, y compris le recours aux conventions bilatérales et multilatérales ou aux réglementations communautaires afin d'élaborer des normes communes en matière d'environnement;

(b) l'extension d'une juridiction extraterritoriale ou la possibilité d'avoir recours ou d'étendre la possibilité d'extradition devraient être considérées.

15. Des normes européennes de droit pénal substantiel en matière d'environnement devraient être élaborées.

Suivant l'encouragement donné par la résolution des Nations Unies ("Le rôle du droit pénal dans la protection de la nature et de l'environnement", adoptée par le Huitième Congrès des Nations Unies sur la Prévention du crime et le traitement des Délinquants, Cuba, 1990, et saluée par la 45ème Assemblée générale des Nations Unies, 1990) en vue d'harmoniser la législation régionale, les efforts du Conseil de l'Europe en vue d'élaborer une convention et une recommandation sur les délits en matière d'environnement devraient être soutenus. De tels instruments devraient refléter les idées maîtresses exprimées sous la section B, en particulier aux paragraphes 6, 8 et 10. Ceci aura pour effet d'améliorer la coopération

internationale et de réduire la menace de dislocation par la voie du contournement de l'exécution plus stricte dans un pays en passant dans un autre pays.

16. Les conventions européennes applicables à la coopération internationale pour la poursuite des délits (par ex. par extradiction, assistance mutuelle, transfert de poursuites etc.) devraient être souscrites, si ce n'est déjà fait, et utilisées.

SEMINAR ÜBER DIE ROLLE DER STRAFRECHTSPOLITIK BEIM NATUR- UND UMWELTSCHUTZ IN EUROPÄISCHER PERSPEKTIVE - LAUCHHAMMER, DEUTSCHLAND, 26.-29. APRIL 1992

Schlußfolgerungen

A.1. Der gegenwärtige Zustand der Umwelt ist besorgniserregend und erfordert überall in Europa auf nationaler, supranationaler und auf internationaler Ebene effiziente Gegenmaßnahmen. Die Umwelt muß insgesamt und in allen ihren Bestandteilen in einer Weise geschützt werden, daß

- bestehende Schäden eliminiert oder zumindest vermindert (einschließlich Wiederherstellung) werden,
- Schäden verhütet werden,
- Risiken minimiert werden.

2. Die Umweltinteressen sollten in vermehrtem Maße als spezielle Interessen oder als Interessen mit besonderer Rechtmäßigkeit anerkannt werden. Die Notwendigkeit, zu einem bestimmten Maße Wasser, Luft, Boden oder andere natürliche Elemente verwenden zu müssen, schließt ein Verbot sämtlicher Maßnahmen, die jene Umweltinteressen beeinflussen, jedoch aus.

3. Das Ziel des Umweltschutzes erfordert eine integrierte Annäherungsweise, die auf verschiedene Instrumente zurückgreift, die geeignet sind, das Verhalten zu beeinflussen und die Belastungen der Umwelt zu vermindern, von der öffentlichen Beteiligung bis hin zur Anwendung von Sanktionen. Regulative Gesetze administrativen Charakters mit umweltbezogenen Vorschriften zur Verwaltung der Umwelt bilden das Kernstück der staatlichen Instrumente für den Umweltschutz. Andere Mittel des Umweltschutzes, z.B. wirtschaftliche Anreize und der Rückgriff auf die sog. zivilrechtliche

Verantwortung u.dgl., wird für viele Aspekte des Umweltschutzes wichtig sein. Die Gesetze des Strafrechts sollten jedoch eine flankierende und unterstützende Rolle und eine - in geeigneten Fällen - unabhängige Rolle spielen.

B.4. Das Ziel bei der Anwendung von Sanktionsandrohungen ist nicht nur die Unterstützung der Durchsetzung von Verwaltungsvorschriften, sondern auch der Schutz von Umweltinteressen als solchen (was sie als unter Strafandrohung geschützte Interessen kennzeichnet). Hier kann das Strafrecht ebenfalls eine allgemeine und eine spezielle verhütende Wirkung haben und kann durch sein moralisches Stigma das Umweltbewußtsein schärfen.

5. Ein materielles Strafrecht zum Schutz der Umwelt kann in Fällen mit schwerwiegenden Umweltverstößen eine autonome und unabhängige Rolle spielen (dies beinhaltet ebenfalls die Gefährdung der öffentlichen Gesundheit oder des Lebens oder schweren körperlichen Schäden), obwohl es sich um einen begrenzten Beitrag handelt. Darüber hinausgehende und weiterreichende Verhaltenskriterien kann der Gesetzgeber unter dem Strafrecht, das einen mehr zwingenden Charakter hat als die Verwaltungsvorschriften, nicht entwickeln. In dieser Hinsicht ist das Umwelt-Strafrecht eng mit dem Verwaltungsrecht verknüpft und von ihm abhängig. Das Verwaltungsrecht beschränkt die Wirkung des Strafrechts; dies ist jedoch kein Grund, warum das Strafrecht nicht auch in diesem Sinne verwendet werden könnte. Diese Limitierung ist auch abhängig von den Unterschieden, die zwischen den Annäherungsweisen und den Mitteln der Verwaltung und der Justiz bei ihren umweltschützenden Funktionen existieren. Um das Risiko einer nicht einheitlichen Anwendung zu verringern, sollten die Verbindungen mit den Verwaltungsvorschriften durch Vergleiche mit Verwaltungsentscheidungen hervorgehoben werden.

6. Die für die Umwelt geltenden Teile des Strafrechts sollten alle Bereiche der Umwelt erfassen. Es ist von den nationalen Gesetzgebern abhängig, ob in dieser Hinsicht Straftatbestände erarbeitet werden, die für die Umwelt als Ganzes gelten oder für spezifische Teile davon. Der Gesetzgeber sollte eine gemeinsame oder

zumindest eine ähnliche Vorlage für die Wasser-, Luft- und Bodenverschmutzung erarbeiten.

7. Die in den Gesetzen erfaßten Straftatbestände sollten nach ihrem Schweregrad differenziert werden (was, als Folge, eine unterschiedliche Spanne der resultierenden Strafen nach sich zieht).

Ein Kriterium ist die Unterscheidung nach dem Status des *Mens rea,* zwischen einer beabsichtigten, einer fahrlässigen oder vernachlässigenden Tat.

Eine andere sich anbietende Möglichkeit ist die Verwendung des Konzeptes der Gefährdung, zusätzlich zu dem traditionellen Gebrauch der sog. Ergebniskriminalität der Gesetzgebung auf dem europäischen Festland.

8. Es ist nicht ausreichend, das Strafrecht ausschließlich für die Bekämpfung von Umweltschäden oder bei Verletzungen der Umwelt anzuwenden. Ernsthafte Verstöße gegen Sicherheitsvorschriften, gegen andere Betreiberverpflichtungen oder das Interesse der Verwaltungsorgane an der präventiven Kontrolle können das Risiko für Gefährdungen oder Schädigungen beträchtlich erhöhen. Deswegen ist es gerechtfertigt, sich auf das Strafrecht zu berufen, das sich mit der unangemessenen Handhabung von gefährlichen Substanzen, Gütern und Anlagen oder der möglichen Schädigung von Kontrollinteressen befaßt.

Eine Unterscheidung kann getroffen werden zwischen Delikten, die voraussetzen, daß die Handlung:

- eine konkrete oder tatsächliche Gefährdung von Umweltobjekten hervorruft (sog. konkretes Gefährdungsdelikt),

- in einer Situation vorkommet, die mit einer bestimmten Wahrscheinlichkeit mit einer Gefährdung verbunden ist (vergleiche den sog. Bestrafungsvorbehalt in der Wiener Konvention über den Schutz von nuklearem Material; das sog. potentielle Gefährdungsdelikt),

- eine Verhaltensweise, die typischerweise umweltgefährdend ist (z.B. der genehmigungslose Betrieb einer Anlage, die in einer Liste als typisch gefährlich eingestuft wurde; der Verstoß gegen eine Vorschrift, die den Betrieb einer derartigen Anlage verbietet, die ungesetzliche Beseitigung oder der Export von gefährlichem Abfall; das sog. abstrakte Gefährdungsdelikt).

9. Geringere Verstöße (insbesondere nichtschwerwiegende Verstöße gegen Verwaltungsvorschriften) könnten ohne Wirkungsverluste lediglich durch Geldstrafe geahndet werden oder, in Ländern, in denen eine Unterscheidung zwischen Bestrafungen nach dem Strafrecht und dem Verwaltungsrecht besteht, als Verletzung von Verwaltungsvorschriften eingestuft werden (zu ahnden mit einer nichtkriminalisierenden Geldstrafe). In dieser Hinsicht könnte man den Geltungsbereich des Strafrechts sogar noch einschränken.

10. Im Rahmen von Initiativen in Richtung auf die Einführung von alternativen oder zusätzlichen Maßnahmen nach dem allgemeinen Strafrecht, sollte im Vergleich mit dem Traditionellen Gebrauch von Geld- und Gefängnisstrafen auch die Möglichkeit der Anwendung anderer Maßnahmen berücksichtigt werden (so wie die Herstellung des *vorherigen Zustandes,* die Beschlagnahme von Gütern, die der Delinquent aufgrund von umweltkriminellen Delikten erhalten hatte, die Auferlegung von Verpflichtungen, um den Zustand der Umwelt zu verbessern). Die Entscheidung über ein derartiges Sortiment verschiedener Maßnahmen kann von dem Gebrauch derartiger Instrumente durch die Verwaltung und ihren Wirkungen abhängig sein.

11. Die Idee der Verhängung von (kriminellen oder nichtkriminellen) Geldstrafen für Unternehmen (oder möglicherweise sogar anderen Maßnahmen) in Europa sollte unterstützt werden.

12. Bei der Anwendung des Strafrechts und der Erarbeitung neuer Strafbestände, sollte man der Notwendigkeit von Durchsetzungsressourcen

Beachtung schenken. In Ländern, wo die Strafverfolgung nicht von den administrativen Institutionen selbst durchgeführt wird, ist die Anwendung (und die Wirkung) des Umwelt-Kriminalitätsgesetzes bei den Verfolgungsbehörden und der Justiz zu einem großen Teil von der Verwendung der Kenntnisse und den Erfahrungen derartiger Vertretungen und ihrer Kooperation abhängig. Um Interessenskonflikte zu vermindern und die Möglichkeiten zur Klärung derartiger Fälle zu verbessern, sollten gesetzliche Vorschriften oder Verwaltungsrichtlinien über die Berichterstattung entwickelt werden. Die Zusammenarbeit und die Koordination zwischen den administrativen und strafrechtlichen Institutionen ist von entscheidender Bedeutung. Spezielle Ausbildung und eine ausreichende Personalausstattung sollten gewährleistet sein. Weitere Untersuchungen über Verbesserungsmaßnahmen zur Durchsetzung bestehender Umweltschutzgesetze sollten durchgeführt werden.

C.13. Die Umwelt muß nicht nur auf nationaler, sondern auch auf internationaler Ebene geschützt werden. In dieser Hinsicht sollte das Strafrecht zum Schutz der Umwelt auch im internationalen Rahmen weiterentwickelt werden.

14. Die zur Verfügung stehenden Möglichkeiten zur Verfolgung extraterritorialer oder grenzüberschreitender Delikte sollten verbessert werden. In dieser Hinsicht:

(a) sollte es möglich sein, bei grenzüberschreitenden Vergehen in sämtlichen betroffenen Ländern juristische Maßnahmen zu ergreifen. Tatsächliche Konflikte der Rechtssprechung sollten gelöst werden. Das Problem der Behandlung eines Vergehens nach dem Strafrecht, bei Handlungen, die in einem Land erlaubt sind, die aber in anderen Ländern, wo solche Handlungen verboten sind, schädliche Auswirkungen verursachen, sollten im Hinblick auf die Entwicklung internationaler und/oder supranationaler Gesetze untersucht werden, einschließlich der Anwendung bilateraler und multilateraler Konventionen oder EG-Vorschriften zur Entwicklung einheitlicher Umwelt-Standards;

(b) es sollte überlegt werden, ob die extraterritoriale Rechtssprechung ausgeweitet werden sollte oder ob die Möglichkeiten zur Auslieferung von Delinquenten genutzt oder erweitert werden sollten.

15. Europäische Standards des materiellen Umweltstrafrechts sollten weiterentwickelt werden.

Der Unterstützung durch die Resolution der Vereinten Nationen ("Die Rolle des Strafrechts beim Schutz der Natur und der Umwelt", die vom 8. Kongreß der Vereinten Nationen zur Verhütung der Kriminalität und der Behandlung der Delinquenten, Kuba, 1990, angenommen und von der 45. Vollversammlung der Vereinten Nationen, 1990, begrüßt wurde) für die Harmonisierung der regionalen Gesetzgebung folgend, sollten die Bemühungen des Europäischen Rates zur Erarbeitung einer Konvention oder einer Empfehlung für Umweltdelikte gefördert werden. Solche Instrumente sollten die Grundideen widerspiegeln, wie sie in Sektion B, insbesondere in den Paragraphen 6,8, und 10 dieser Schlußfolgerungen ausgedrückt werden. Dies wird die internationale Zusammenarbeit verbessern und die Gefahr einer Dislokation mittels Vermeidung einer strikteren Gesetzesdurchsetzung in einem Land durch das Überwechseln in ein anderes Land verringern.

16. An den europäischen Konventionen, die für die internationale Zusammenarbeit bei der strafrechtlichen Verfolgung von Delikten (z.B. durch Auslieferung, gegenseitige Unterstützung, Transfer der Gerichtsverfahren usw.) anwendbar sind, sollte man - sofern dies nicht bereits geschieht - festhalten und man sollte sie nutzen.

СЕМИНАР ПО ПОЛИТИКЕ УГОЛОВНОГО ПРАВА В ДЕЛЕ ЗАЩИТЫ ПРИРОДЫ И ОКРУЖАЮЩЕЙ СРЕДЫ В ЕВРОПЕЙСКОЙ ПЕРСПЕКТИВЕ - ЛАУГАММЕР, ГЕРМАНИЯ, 25-29 АПРЕЛЯ 1992 г.

Выводы

A.1. Существующее состояние окружающей среды серьезно и требует эффективных контрмер на национальных, сверхнациональных и международном уровнях. Окружающая среда должна быть защищена как целое, так и её составные части таким образом, что
- существующий ущерб будет уменьшен или ликвидирован/включая реставрацию
- вред будет предотвращен
- риски будут сведены к минимуму

2. Требуется повышенное признание интереса к окружающей среде как специальный юридический интерес. Необходимость использования в какой-то степени воды, воздуха, земли и других элементов природы обзначает, однако, запрет каждого действия, затрагивающего интересы окружающей среды.

B.3. Цель защиты окружающей среды требует интегрированного подхода, используя целый ряд средств, подходящих для влияния на поведение и на уменьшения давления на окружающую среду, начиная с публичного участия до применения санкций. Регулирующий административный закон об окружающей среде остается все еще ядром государственных средств для защиты окружающей среды. Другие методы по защите окружающей среды, включая, например, экономические рычаги и использование гражданской ответственности, будут важными для многих аспектов окружающей среды. Уголовное право должно играть фланговую и поддерживающую, а где это нужно - независимую роль.

4. Применение угроз и санкций не является только поддержанием применения административных правил, но также используется для защиты окружающей среды как таковой /квалифицируя их как интересы в карательном смысле защищенные/. Здесь также уголовное право может иметь общий и специальный предохранительный эффект и может по своей моральной стигме повысить сознательность по вопросам окружающей среды.

5. Существующее уголовное право может сыграть автономную и независимую роль в случаях серьезных нападений на окружающую среду /включая подрыв общественного здоровья или жизни, или серьезный телесный ущерб/, хотя это вклад ограниченный. Над и вне этого законодатель не сможет развивать критерий поведения, подсудный уголовному праву, который более строгий, чем подсудный праву административному.

В этом отношении уголовное право тесно связано и зависит от административного права, которое ограничивает эффект предыдущего; все же это не дает повода к тому, чтобы быть использованным в этом контесте; это ограничение также

зависит от того, какие различия существуют в подходе и в средствах администрации и в правосудии в той роли, которую они играют, предоставляя защиту окружающей среде. Для уменьшения риска не одинакового применения ударение должно ставиться на связь с административной регулировкой посредством связи с административным решением.

6. Уголовное право по окружающей среде должно охватывать все отрасли окружающей среды. Это зависит от национальных законодателей, если в этом отношении они будут выявлять нарушения, относящиеся к окружающей среде в целом или к ее специфическим компонентам. Законодатель должен во всяком случае определить общие или частые случаи правонарушений по отношению к воде, воздуху и земле.

7. Правонарушения должны быть дифференцированы согласно их серьезности /с, как следствие, различной градацией санкций/. Одним фактором является разделение согласно положению **mens rea** между актами, совершенными с намерением, и безрассудным или халатными. Другая возникающая возможность - это использование концепции подвода под угрозу дополнительно к традиционному использованию так называемых результативных преступлений по континентальному законодательству.

8. Недостаточно использовать угловное право только для борьбы с ущербом или нарушением едлиниц окружающей среды. Серьезные нарушения правил безопасности, других обязанностей опраторов или предохранительных контрольных интересов администратора могут сильно повысить опасность того, что ущерб может иметь место. Вследствие этого оправдывается обращение к уголовному праву для того, чтобы оно вмешалось в обращение с опасными веществами, фабриками и в возможные ущербы контрольным интересам. Различие может быть проведено между правонарушениями, создающими:
   - конкретную и актуальную опасность для объектов окружающей среды /так называемое конкретное правонарушение подвода под угрозу/
   - появление ситуации с вероятностью возникновения опасности /см. карательное постановление Венской Конвенции по защите ядерных материалов, так наз. потенциальное правонарушение в виде подвода под угрозу/.
   - возникновение поведения, типично опасного для окружающей среды /например, операции без нужного разрешения на заводе, квалифицированном как типично опасный по списку, нарушение порядка, запрещающего эсплуатацию завода, нелегальное владение или экспорт опасных отбросов, так наз. абстрактное правонарушение как подвод под угрозу/.

9. Менее серьезное правонарушение /специальные нарушения административных правил могут без потери эффективности санкционироваться штрафами или в странах, где существует различие между уголовными и административными карательными санкциями, могут классифицироваться как административные нарушения /которые можно карать не уголовными штрафами/. В этом отношении уголовное право могло бы быть урезанным.

10. В контесте сдвигов по направлению к введению альтернативных или добавочных мероприятий в уголовные законы вообще, по сравнению с традиционным использованием штрафов, нужно бы принять во внимание использование других мер /таких, как реставрация предыдущего состояния, конфискация вырученных доходов, полученных благодаря преступлению против окружающей среды, принятие обязательства по улучшению состояния окружающей среды/. Действенность такого варианта мероприятий может зависеть от того, как администрация использует эти инструкции, и от их эффективности.

11. Следует оказать поддержку распространению этой идеи наложения /уголовных или неуголовных/ штрафов на корпорации /возможны также другие меры/ в Европе.

12. При использовании уголовного права и учреждении мер по предотвращению в области защиты окружающей среды, следует принимать во внимание потребность ресурсов для применения правосудия. В странах, где не приступают к обвинению сами административные органы, применение /и эффективность/ уголовного права по окружающей среде обвинительными властями и правосудием в значительной мере зависят от использования знания и опыта этих органов и от их сотрудничества. Для уменьшения конфликтов интересов и улучшения действенности судебных дел административными органами должны быть развиты юридические правила или административные руководящие акты для рапортов о правонарушениях. Существенное значение имеет сотрудничество и координация между административными органами. Следует иметь в распоряжении специализированное обучение и достаточное количество кадров. Следует ввести дальнейшее изучение улучшенных мероприятий по применению существующего законодательства по защите окружающей среды.

C13. Окружающая среда должна быть защищена не только на национальном, но и на международном уровнях; в этом отношении также должно быть развито уголовное право для защиты окружающей среды на международном уровне.

14. Улучшения могут быть сделаны по имеющимся в распоряжении обвинения выборам по экстратерриториальным или распространяющимся через границу правонарушениям:

/а/ Должна иметься возможность приступить к юрисдикции во всех подчиняющих ей странах касательно распространяющихся через ганицу правонарушений. Должны быть решены положительные конфликты по юрисдикции. Проблема действия по уголовному праву с актами, дозволенными в одном государстве и производящими вредными последствия в другом государстве, где такие акты запрещены, должна рассматриваться в свете развития международного и/или сверхнационального права, включая двусторонние и многосторонние конвенции или постановления общего рынка для развития общих стандартов по окружающей среде.

/б/ Следовало бы принять во внимание потребность в растяжении экстерриториального правосудия или в использовании и расширении экстрадиции.

15. Европейские стандарты в уголовном праве по окружающей среде должны быть существенно развиты.

Следуя за поощрением, данным резолюцией ООН /"Роль уголовного права в защите природы и окружающей среды", принятой 8 конгрессом ООН о предотвращении преступлений и обращении с правонарушителями, Куба 1990 г. и принятой на 45-й Генеральной Ассамблее Объединенных наций в 1990 г./, для гормонизации регионального законодательства должны быть поддержаны усилия в выработке при Совете Европы конвенции или рекомендации, касающейся правонарушений в отношении окружающей среды. Такие средства должны отражать основные идеи так, как они выражены в секции В, особенно в параграфах 6, 8 и 10 заключений. Это улучшит международное сотрудничество и уменьшит опасность дислокации через уход от более строгого применения правосудия в одной стране путем перемещения в другую страну.

16. Европейские конвенции, применяемые к международному сотрудничеству по обвинению за правонарушения /например, передачу юридических переводов судебных дел и т.д./ должны быть учтены, если это еще не сделано, и использованы.

ANNEX I
LIST OF PARTICIPANTS

Name	*Address*
Mr. Erling Agder Head of Division	Legal Division The State Pollution Control Authority POB 8100 Dep N-0032 Oslo, Norway
Mr. Michael Alkalay Chief of Criminal Administrative Branch	Security Police Division Cantonal Police of Zurich Postfach 370 CH-8021 Zürich, Switzerland
Mr. Teodor Anastasiu Counsellor	Ministry of Justice Department for International Relations Kogalniceanu Blvd, Nr. 55, s.5 Bucarest, Romania
Mr. Shablyko Oleg Antonovich Assistant to the Procurator- General (apologized)	Office of the Procurator- General Minsk, Belarus
Mr. Petros Artemis Judge	Supreme Court of Cyprus Nicosia, Cyprus
Mr. Justice G. Björne Chairman, PC-EN, Council of Europe	Supreme Administrative Court POB 2293 S-103 17 Stockholm, Sweden

Mr. Simeon Bozhanov Environmental Adviser	Presidency of the Republic 2, Dondoukov Blvd. 1000 Sofia, Bulgaria
Mr. Joaquin Martin Canivell Magistrate	Calle Agastia no. 74 28043 Madrid, Spain
Mr. Cenk Alp Durak Magistrate	Hakim, Ceza Isleri Genel Müdürlügü Adalet Bakanligi Ek Bina Kat:4 Oda:405 Milli Müdafaa Caddesi No:22 06659 Ankara, Turkey
Mr. Manuel Marques Ferreira (apologized)	Ministry of Justice Praca do Comércio 1194 Lisboa Codex, Portugal
Ms. Dalia Foigt Senior Research Associate	Institute of Philosophy, Sociology and Law Saltoniskiu, 58 2600 Vilnius, Lithuania
Mr. Franco Giampietro Magistrate	Legislative Service Ministry of Justice Via Arenula, 70 I-00100 Rome, Italy
Ms. Alison Golding	Solicitor's Office Department of the Environment 2 Marsham Street London SW1P 3EB, United Kingdom

Mr. Konrad Hobe Ministerialrat	Federal Ministry of Justice Aussenstelle Berlin Clara-Zetkin-Strasse 93 D-1086 Berlin, Germany
Mr. Matti Joutsen Director	HEUNI POB 34 SF 00931 Helsinki, Finland
Mr. Günther Kaiser Prof.-Dr., Director	Max-Planck-Institut für ausländisches und internationales Strafrecht Günterstalstrasse 73 D-7800 Freiburg i.Br., Germany
Mr. Ioannis Karakostas Associate Professor (apologized)	Law School University of Athens Athens, Greece
Mr. John Kelleher	Environmental Policy Section Office for the Protection of the Environment Department of the Environment Custom House Dublin 1, Ireland
Ms. Irena Kleniewska	Institute of Justice Ministry of Justice Krakowskie Przedmiescie 25 00-950 Warsaw, Poland

Mr. Philippe Labregère
Chef du Bureau du Droit Criminel
International et Européen

Ministry of Justice
13, Place Vendome
F-75001 Paris, France

Ms. Laureta Laçka
Expert

Ministry of Justice
Tirana, Albania

Mr. H.E.C. Lefèvre
Chief of Enforcement
Policy Division

Directorate-General for
the Environment
Ministry for Housing,
Physical Planning and
the Environment
POB 450
2260 MB Leidschendam,
The Netherlands

Mr. Manfred Möhrenschlager
Ministerialrat

Federal Ministry of Justice
Postfach 20 03 65
Heinemannstr. 6
D-5300 Bonn 2, Germany

Mr. Anatolij Naumov
Professor

Institute of State and Law
Russian Academy of Sciences
119841, Znamenka str., 10
Moscow, Russia

Mr. Hans G. Nilsson

Division of Crime Problems
Directorate of Legal Affairs
Council of Europe
B.P. 431 R6
F-67006 Strasbourg Cedex, France

Ms. Jaroslava Novotna Public Prosecutor (apologized)	General Prosecutor's Office of Czech and Slovak Federal Republic nam. Hrdinu 1300 140 00 Prague 4, Czechoslovakia
Mr. Peter Polt Associate Professor of Law	Ministry of Justice Szalay u. 16. H-1055 Budapest, Hungary
Mr. Märt Rask First Deputy Minister of Justice (apologized)	Ministry of Justice Pärnu mnt. 7 Tallinn, Estonia
Mr. W. Schrage	Environment and Human Settlements Division Economic Commission for Europe Palais des Nations CH-1211 Geneve 10, Switzerland
Mr. Hans Valentin Schroll Public Prosecutor	Ministry of Justice Postfach 63 A-1016 Vienna, Austria
Mr. Jonatan Thormundsson Professor	Faculty of Law University of Iceland Lögberg 101 Reykjavik, Iceland
Ms. Vibeke Uldal Deputy District Public Prosecutor	Jens Kofoeds gade 1 DK-1268 Copenhagen K., Denmark

Mr. Staffan Westerlund Professor	Institute for Environmental Law (IMIR) Åmyra S-740 30 Björklinge, Sweden
Mr. Peteris Zilgalvis Chief Counsel (apologized)	Environmental Protection Committee 25 Peldu Street 226282, Riga, Latvia

Observers

Ms. Anna Alvazzi del Frate Associate Research Officer	UNICRI Via Giulia, 52 I-00186 Rome, Italy
Mr. Heinz Sutter Scientific Assistant	Federal Office of Justice (Criminal Law Section) Justice and Police Department CH-3005 Berne, Switzerland
Mr. H.L. Wattel	Constitutional and criminal law department Ministry of Justice POB 20301 2500 EH The Hague, The Netherlands

Secretariat

Mr. Hans-Jörg Albrecht Senior Researcher	Max-Planck-Institut für ausländisches und internationales Strafrecht

Günterstalstrasse 73
D-7800 Freiburg i.Br., Germany

Mr. Heinz Fiedler
Oberamtsrat

Federal Ministry of Justice
Postfach 20 03 65
Heinemannstr. 6
D-5300 Bonn 2, Germany

Mr. Seppo Leppä
Senior Researcher

HEUNI
POB 34
SF 00931 Helsinki, Finland

Mr. Christopher Pavis
Interpreter

Federal Ministry of Justice
Postfach 20 03 65
Heinemannstr. 6
D-5300 Bonn 2, Germany

Ms. Dorothea Perera
Meeting Secretary

Federal Ministry of Justice
Postfach 20 03 65
Heinemannstr. 6
D-5300 Bonn 2, Germany

ANNEX II
AGENDA OF THE SEMINAR

SEMINAR ON THE POLICY OF CRIMINAL LAW IN THE PROTECTION OF NATURE AND THE ENVIRONMENT IN A EUROPEAN PERSPECTIVE
LAUCHHAMMER, GERMANY, 26 - 29 APRIL 1992

Sunday, 26 April

10.00	Opening session Professor Dr. Günther Kaiser, Max-Planck-Institute für ausländisches und internationales Strafrecht Dr. Matti Joutsen, HEUNI The German Federal Minister of Justice, represented by Parliamentary State Secretary Dr. Reinhard Göhner Dipl.-Ing. Christian Häntzka, Mayor, Town of Lauchhammer Election of officers
10.30	Control of Harm to the Environment and the United Nations Crime Prevention and Criminal Justice Programme, by Mr. Seppo Leppä, HEUNI European Aspects of Control of Harm to the Environment, by Mr. Hans G. Nilsson, Council of Europe Discussion
14.00	Fnforcement of Environmental Law in the Netherlands, by Mr. Hans Lefévre, Ministry for Housing, Physical Planning and the Environment, Physical Planning and the Environment, and Mr. Henk Wattel, Ministry of Justice, the Netherlands

	Discussion
16.00	Models and Types of Environmental Offences: Preliminary Considerations, by Mr. Franco Giampietro, Ministry of Justice, Italy
	Discussion

Monday, 27 April

09.00	Introductory Statement, by Dr. Bertram Wieczorek, Parliamentary State Secretary of the German Federal Minister of Environment, Protection of Nature Conservation and Nuclear Safety
09.15	The Effect of Administrative Law on the Shape and the Application of Environmental Offences, by Mr. Staffan Westerlund, Institute for Environmental Law, Sweden
	Discussion
11.15	Administrative and Penal Sanctions in the field of Environmental Crime, by Mr. Anatolij Naumov, Russian Academy of Sciences
	Discussion
15.00	Visit to different environmentally interesting industrial sites as well as the Hollow Casting Plant of Lauchhammer

Tuesday, 28 April

09.00	The Role of Administrative Agencies and of the Judiciary in the Prevention and Suppression of Environmental Crime, by Mr. Hans-Jörg Albrecht, Max-Planck-Institut für ausländisches und internationales Strafrecht, Germany
	Discussion

11.00	The Development of National Environmental Criminal Law Concerning Cross-border Offences and Offences Committed Abroad, by Mr. Peter Polt, Ministry of Justice, Hungary
	Discussion
14.00	Social programme

Wednesday, 29 April

09.00	Summary report of the seminar, by general rapporteur
	Discussion on conclusions of the seminar
10.30	Concluding remarks
	Closing of the seminar

BACKGROUND PAPER FOR THE SEMINAR ON THE POLICY OF CRIMINAL LAW IN THE PROTECTION OF NATURE AND THE ENVIRONMENT IN A EUROPEAN PERSPECTIVE

Background

(1) In pursuance of the resolution "The Role of Criminal Law in the Protection of Nature and the Environment" of the United Nations Eighth Congress on the Prevention of Crime and the Treatment of Offenders (A/CONF.144/ L.4), a study on the control of environmental harm through criminal law in various European countries1 has been conducted. In it, cooperation and communication between authorities charged with control in this field were surveyed2.

(2) The reasons for the focus on this particular aspect of environmental control policies are readily apparent when studying recent and ongoing research on the problems of environmental protection by means of administrative, criminal and civil law.

Criminal statutes devised to respond to events and behaviour endangering or harming the environment first of all have to deal with the problem of drawing a clear and practically feasible line between environmental crimes on the one hand and legitimate or necessary use of natural resources or legitimate and indispensable industrial or commercial activities on the other. Thus, the *definition of environmental offences* must in one way or another take into consideration both ecological and industrial, commercial, etc., interests. Research throughout the 1970s and the 1980s

1) The survey was conducted by Dr. Hans-Jörg Albrecht, Senior Researcher, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany. The countries in question were Federal Republic of Germany, France, Hungary, Italy, the Netherlands, Poland, the Scandinavian countries (Denmark, Finland, Norway, Sweden), Spain, Switzerland, United Kingdom.

2) Responses were received from all the target societies. The mail questionnaires were responded by competent authorities (predominantly by Ministries of Justice, with information added through Ministries of the Interior and Ministries of the Environment).

has demonstrated that the bulk of environmental offenders is linked to small-scale pollution, while on the other hand legal pollution seems to account for most of the harm done to the environment.

(3) The outcome of environmental criminal law therefore has been considered to display serious deficits in implementing and enforcing criminal law, but also deficits in implementing administrative environmental law, particularly in those fields which are regarded by the public as posing the most serious threats to the natural environment, human health and safety. The problem could be discussed in terms of conflicting perspectives provided by the criminal law approach to environmental control, on the one hand, and administrative models of control, on the other. Although the overall goal, the protection of the natural environment, underlies both environmental criminal law and environmental administrative law, the means which have been elaborated to achieve the goal are basically different. From the perspective of environmental administrative agencies, invoking criminal law is rather assessed to destroy an indispensable positive relationship between administration and industrial clients. Short-term benefits in terms of successful criminal prosecution of environmental offences would, from this perspective, be exchanged for long-term benefits in terms of achieving the goal of future compliance with administrative law objectives. The use of criminal law evidently results in a zero-sum game likely to increase the problem of non-compliance as well as to increase the problem of other legal conflicts between companies and administrative authorities.

(4) A second point of concern refers to the problems of keeping criminal environmental statutes in line with the basic principles of traditional criminal law while on the other hand demands for efficient law enforcement argue for alleviation of restrictions placed upon enforcement by the need to provide clear evidence on the existence of causal links between an individual offender and pollution, the need to provide full proof on negligence, intent, etc. (e.g., in terms of reversal of the burden of proof or strict liability). The operation of traditional criminal law is based on solid knowledge on causal links between human behaviour and harm or damages,

as well as on solid knowledge on values and interests protected by criminal law and on the dangerousness of certain types of behaviour. Environmental criminal law cannot be backed up by such knowledge as behavioural standards with respect to the environment are not as yet developed in a way that would allow transformation into clearly defined penal prohibitions.

(5) Two characteristics of environmental criminal law may be identified which basically determine the kind of crime definitions used in environmental law as well as their implementation, and finally help in explaining the importance of centering problems of environmental criminal law around the issue of cooperation and communication between administrative and criminal justice agencies, moreover around the issue of integration and coordination of differing legal approaches to environmental control and differing theoretical propositions on how to achieve compliance with the goal of preserving or ameliorating the natural environment.

Need for a Survey

(6) First, we have to acknowledge that environmental criminal law interferes in a complex and well organized (and we may add powerful) system (i.e., the industrial, commercial, etc., system) which in turn is deeply interrelated with other important sectors of society, particularly the political system and the state administration system. Invoking criminal law in such a context has to consider from the very beginning that important functions of the economic and commercial systems may be affected and that side-effects may occur with respect to other sectors of society.

(7) Secondly, intertwining criminal law and criminal justice on the one hand, administrative law and administrative decision-making on the other, creates dependencies which determine the degree to which environmental criminal law

may be enforced, as well as the outcomes in terms of the types of offences and offenders prosecuted, convicted and sentenced. Environmental administration and the industrial system are represented by organizations that are specialized and differentiated along different types of polluting behaviour, dangerous technologies and substances, etc. With these conditions two options emerge for criminal justice agencies to organize the response to environmental offences. The criminal justice system may adopt the structure of specialization and differentiation of the system which is to be controlled, or it may make use of the resources available in the environmental administration. As the first proposition seems to be less plausible and attractive because of the enormous costs, it is reasonable to rely on the second option when attempting to enhance efficiency in criminal law enforcement. As a consequence the major questions which must be answered are centered around the issue of coordination concerning

(a) The central concepts inherent to criminal law on the one hand, and administrative law, on the other, and

(b) The decision-making of the criminal justice agencies and departments on the one side, and of environmental administration, on the other.

Problems of International Comparative Analysis of Environmental Legislation and Law Enforcement Policies

(8) The information provided by the survey sheds light on the diversity of regulations, norms and general policies. Moreover, considerations of this kind draw attention to the problem of comparative approaches in the field of environmental criminal law. Problems go far beyond those we face in traditional fields of international comparative legal research, because in assessing and evaluating environmental criminal law and its enforcement we are forced to include administrative law and administrative law enforcement as well as general aspects of state organization.

The Organizational Framework of Environmental Control: Fragmentation of Responsibility and Competence or Uniformity and Centralization?

(9) The first issue addressed refers to general and specific aspects of the organizational structure of environmental control. Here, questions concerning centralization or decentralization of the control structure, division of competence, and power related to administrative and criminal justice tasks, among others, have been put forward, highlighting the special rights of administrative control agencies to have access to industrial plants as well as the special duties of factories, etc., to provide the environmental administration with relevant information.

(10) One of the major similarities in the structure of organization of control seems to be that in environmental law enforcement and control of pollution the investigation and prosecution of environmental criminal offences fall in the competence of the regular police while various environmental administrative bodies are responsible for the enforcement of administrative laws or the administrative parts of environmental laws. Exceptions from this general trait include the English system of control where enforcement authorities under the regime of Integrated Pollution Control, brought into force in 1991, are concerned with both administrative and criminal law. As to the French system, it was stated that administrative bodies responsible for enforcement of administrative law may also investigate criminal offences, but in doing so they are subject to the guidelines provided by criminal procedural law. In Italy, finally, within the Ministry of the Environment, a special police force (N.O.E.) has been established, but obviously regular police forces do most of the criminal investigation. In Switzerland variation may be observed insofar as for practical reasons smaller cantons have vested administrative and criminal law enforcement powers in a single agency, while in larger cantons the respective powers are split.

(11) Another similarity concerns the horizontal division of competence in (administrative) control with regularly three, sometimes four levels in terms of cen-

tral governments (federal government), districts, provinces, departments, cantons, etc., and finally municipalities or local communities. While law-making in the field of environmental protection usually is centralized, with Spain having special arrangements for the autonomous provinces and Italy obviously depending heavily on decentralized regional law-making, lower levels are competent for administration and enforcement. However, the point has been made for Denmark that, when local communities or municipalities are included, environmental administration may finally turn out to become political in nature on the lowest level, if elected officials and with them local political interests influence and shape decision-making.

(12) On the other hand rather large differences may be observed as far as the degree of vertical segmentation of powers and administration is concerned. In the Nordic countries, Poland and in England and Wales competence is rather concentrated in administrative bodies headed by the Ministry of the Environment (an exception to this is Finland for the protection of water). Uniform administration and control in a vertical or a sectoral perspective surely is dependent on the type of environmental laws which were adopted in European countries with central laws on environmental protection covering most or at least the most important environmental media and polluting activities - in the Nordic countries, England and Wales, Poland and Switzerland - on the one hand and specific sectoral environmental laws on the other. In countries with many specific sectoral environmental laws - e.g. Germany, France and the Netherlands - competence is spread over various ministries. But in countries with strong federal elements - Switzerland and Spain - it was found that despite little sectoral differentiation on the central governmental level, administration and law enforcement is split up again at the cantonal level or at the level of autonomous regions.

To what Extent does Specialization of Police, of Prosecutorial Services and of Criminal Courts Occur?

(13) Specialization of law enforcement in criminal law control in this field is not a phenomenon which may be observed throughout the countries surveyed. The Nordic, Polish, French, English and Welsh, Hungarian and Spanish reports for example simply responded with a "no" to the questions whether specialization occurs within police forces, public prosecutor's offices and the courts. Specialization, if actually taking place, obviously is primarily related to police forces. Some specialization is reported also for prosecutorial services, with the Dutch concept of "liaison-prosecutors", who connect prosecution with the environmental administration, thus adopting a device already successfully used in international police co-operation in the drug field. The least specialization seems to occur in the court system. However, in the Netherlands serious environmental offences are handled by "economic chambers" at the level of the district courts. In some large Italian cities at the level of first instance courts special sections have been assigned exclusive competence in handling environmental offences. Furthermore, in Germany, internal case assignment procedures are sometimes, but obviously not systematically, used to concentrate environmental offences into certain courts.

(14) As far as police forces are concerned there seem to exist two trends in specialization. One of these trends may be seen in the development of specialized police units at the central level (e.g. in Germany at the State Police Investigation Bureaus, the Landeskriminalämter), where control technology and experts can be made available at a lower cost-benefit ratio than would be possible in a decentralized system. In the Netherlands, however, since the second half of the 1980s local police forces are increasingly participating in environmental law enforcement, a policy which recently was backed up by providing considerable state funding for an extension of this strategy. On the other hand, no voices seem to have been raised in favour of truly separate environmental police forces, except in Poland where plans for the development of an "ecological police" have been made.

Basic Models of Defining Environmental Offences

(15) Another section of the survey focusses on the basic problem of definition of environmental criminal offences, and on the values and interests underlying those statutes. As was outlined in the introductory remarks, environmental offences deviate from traditional offences in one important aspect. The point is that environmental offences may not be defined without making some kind of reference to or at least taking into account administrative laws or standards, norms and decisions established and made within the system of environmental administration.

(16) Although variation in European countries can be observed as far as the location of environmental offences are concerned, with some jurisdictions placing offences in the basic criminal code, others in a central environmental protection act, and still others annexing criminal provisions to special administrative environmental laws, more importance should be attached to the differences in the extent and the nature of links between criminal environmental provisions and administrative laws.

(17) Developments in designing environmental offences have led, basically, to the emergence of three different models:

(a) The first *model* deals with criminal environmental offences which are *absolutely dependent* on or *accessory* to *administrative law* or even *administrative decision-making.* Here, criminal sanctions are used ultimately to push the offender towards compliance with administrative orders, etc., or towards better cooperation with administrative agencies. The objective of criminal law in such cases is reduced solely to back up administrative law enforcement. In order to reduce flexibility inherent in such crime definitions and to comply with the basic penal law principles of predictability and legality, some jurisdictions have resorted, at least in part, to the introduction of fixed limits to emissions or immissions laid

down by higher administrative bodies (Denmark, Switzerland and Italy). Although such techniques in defining environmental offences help in overcoming certain shortcomings of the dependence on individual administrative decision-making, reducing discretion, binding administrative authorities, ensuring predictability and avoiding some of the problems of evidence, a major problem arises with the question of *where* the limits should be set. Obviously, concern for economic interests results in setting limits rather high, which in turn allow only peaks in pollution to be covered by environmental criminal law;

(b) A *second model* of defining environmental offences is led by the idea of going beyond mere punishment for contempt of administrative orders or obligations provided by administrative law and to protect certain environmental media (water, air, soil, etc.) directly through incriminating behaviour endangering or harming these media. But nevertheless, these types of environmental offences have to take into account also administrative concerns and interests. Environmental authorities may for example grant permits, thus allowing the polluting behaviour. Problems that arise from this type of environmental offences ("relatively dependent" on administrative law and decision-making) are found for example in the consequences that faulty or unjustified administrative permits should have on the punishability of polluting behaviour or in the question of whether and to what extent judicial authorities should have the competence to review and control administrative decision-making. The basic problem then concerns which authority should be given priority in defining ultimately environmental offences;

(c) *A third model* is based upon complete independence of environmental criminal law from administrative environmental law with incriminating behaviour creating serious threats to human life or health (public danger or concrete dangers to life and limb) and therefore not eligible for administrative permits. With respect to these "independent" criminal offences, the

problem should be noted that in criminal trials clear evidence of causal links between individual behaviour and harm to the environment must be established. Experiences with these types of offences, for example in Sweden, Federal Republic of Germany, and Poland, have demonstrated that convictions are rather rare events. In general, there has been a tendency to extend environmental criminal law and to alleviate problems of establishing sufficient evidence through criminalizing merely abstract dangers, while setting no requirements on the establishment of links between behaviour and any impacts on environmental media. But as a consequence, obviously the need for again restricting criminal law is felt and techniques are sought to parcel out certain types of behaviour by way of either trivializing the event or by allowing defenses (such as the plea that the pollution is in accord with good agricultural practice) against criminal indictments.

Penalties Provided by Environmental Criminal Law

(18) A further field of concern is the criminal sanctions provided for environmental offences. Considering the penalties provided by environmental criminal provisions, it can be stated that in all systems surveyed imprisonment and fines (both summary and day fines) may be applied. However, rather great differences can be observed in the maximum penalties, whether imprisonment or fines. Besides these traditional penalties, various new sanctions have been introduced in some jurisdictions. These new sanctions include monetary penalties or forfeiture aiming at illegal profits, reparation and compensation, but also incapacitative and coercive measures such as interdiction of professional activities, closing down factories, etc. Furthermore, the use of (civil) injunctions backed up by imprisonment or fines in the case of environmental offences has been reported. But despite these various alternatives which are made available in many jurisdictions, the penalties most commonly used are simply fines.

Administrative Sanctions

(19) An area in legal and criminological research that appears to be neglected, although of particular relevance for the control of pollution, seems to be the administrative (non-criminal) sanctions as well as other coercive administrative measures designed to promote compliance with environmental norms.

(20) In addition to criminal penalties, most countries provide for administrative sanctions in the case of breaches of administrative orders or administrative law. The most common sanction provided here is administrative fines, which partially may be used also to forfeit profits or savings derived from these illegal acts. Besides administrative sanctions, compensative and restitutive coercive and preventive measures are made available.

Criminal Liability of Corporations

(21) Although consensus has been reached with respect to the proposition that negative impacts on the environment are rooted to a great extent in decisions made in corporations, the conclusions drawn from this proposition have split European countries, roughly speaking, into two groups. Some countries, following a rather pragmatic line in the approach to criminal law, accept the idea of the criminal liability of corporations. Another group of countries sticks to the principle that criminal penalties must be based on individual and personal guilt. But nonetheless, even in the second group of countries the liability of corporations is discussed, and some suggestions have even been made regarding administrative sanctions.

Relationships between Administrative Authorities and Criminal Justice Agencies

(22) Also the relationships between administrative and criminal law authorities were covered in the survey. In this respect information on general principles of cooperation as well as on models of cooperation and communication between public authorities was sought. Furthermore, information was gathered on the duties of administrative agencies to report criminal offences to the police or public prosecutor and the consequences of non-compliance with those duties.

(23) In describing the relationships between administrative authorities and criminal law enforcement agencies, several issues seem to be of particular importance. First of all, the general issue of the principle of cooperation must be reviewed. Here, virtually all reports note that as a general principle government authorities should cooperate and give each other mutual support in fulfilling their respective tasks. The general assessments of how this functions in practice differ, with some reports stating that no problems and conflicts could be observed, while others said that patterns of proper cooperation do not exist. In the enforcement of environmental criminal law, cooperation first of all refers to the duties of officials to report if there is some evidence that an environmental offence has occurred. Most countries where administrative and criminal law enforcement tasks diverge have stated that their system recognizes legal duties to report suspicion of environmental crimes either to police or the office of public prosecutor. However, with the exception of the Italian system, violation of these duties does not lead to criminal penalties.

(24) The Netherlands reports cooperation and coordination which go beyond the rather traditional principles of mutual support and dependable inter-ministry cooperation. Here, regular round-table meetings that bring together the judiciary, public prosecutors and the police in addition to environmental authorities are used to exchange views and promote coordination of policies. Similar efforts are

reported from the canton of Zurich where recently two coordination agencies were established. Furthermore, in the Dutch report the need for vertical coordination has been mentioned.

(25) Another issue which belongs to the topic of the relationship between administrative and criminal justice agencies concerns the phenomenon of condoning: an authority which has the power of enforcement decides not to enforce administrative environmental laws or, as another facet of the problem, an authority makes a decision that is not compatible with the obligations or goals laid down in environmental laws. Here, the issue arises of whether officials who behave in this way should themselves be made liable on the basis of the environmental offence which was tolerated or triggered by the administrative authority. It goes without saying that all jurisdictions know such traditional offences as corruption or other offences committed by public servants. Furthermore, criminal laws may be invoked if some kind of complicity in the environmental offence can be ascertained. But special criminal statutes covering the types of behaviour of officials mentioned above have so far not been enacted anywhere. However, in the Federal Republic of Germany a hot debate did go on throughout the 1980s on whether such behaviour should be penalized on the grounds that the neglect to undertake action which would prevent an environmental offence may be punished if the official was statutorily obliged to make the appropriate preventive decisions. But although in principle such an extension of criminal law is accepted, so far there has been only one known conviction.

(26) A last point on cooperation should be made with respect to sentencing procedures. In some jurisdictions conditions of suspension of prison sentences may partially be set by administrative agencies, for example in terms of reparation and clean-ups.

Monitoring Systems and Statistics on the Enforcement of Environmental Criminal Law

(27) Since all efforts to prevent harm to the natural environment and to reduce pollution by means of criminal and/or administrative law should be subjected to thorough evaluation, valid and reliable longitudinal data describing the actual state of different sectors of the environment, the quantity of specific emissions and immissions as well as the outcome of control in terms of administrative decisions taken, criminal offences reported, prosecutions, convictions and sentences are of paramount importance.

(28) However, monitoring systems with respect to environmental protection and especially implementation of environmental criminal law in European countries are very poorly developed. The monitoring systems which have been implemented are not as yet integrated but provide sectoral information on the state of various environmental media. But the need for integrated information systems is recognized. While some countries could provide data on environmental crimes recorded by the police, convictions and sentences, others (Hungary and Spain) had no capacity for that. However, it should be noted that complete statistical data on environmental offences, prosecution and convictions could not be made available anywhere.

(29) With respect to statistical accounts on administrative control measures, administrative sanctions, etc., there are even greater deficiencies. Obviously, in the Netherlands, as part of the "National Environmental Policy Plan", statistics are currently developed on control measures, offences and administrative and criminal procedures. But in general, and on the base of criminological and legal research, we may note that nothing has changed in recent years. When looking at crime, prosecution and court statistics available from Denmark, England and Wales, France, Germany, the Netherlands, Poland, Sweden and Switzerland we observe that:

(a) Only a small share of environmental cases are brought to the criminal court - ranging from 18 % to 5 %;

(b) The sanctions meted out are almost exclusively fines - 86 % to 100 %;

(c) The size of fines, as a rule, is rather modest. Sentencing therefore may be regarded to be rather lenient, although the structure of sentences may also reflect the more trivial and petty nature of cases coming to the attention of criminal courts.

(30) However, it should be noted that even if sophisticated monitoring systems would produce valid and reliable data on the state of various environmental media as well as on the course and outcomes of criminal proceedings in environmental cases, attempts to assess the relative causal impact criminal law may have on the prevention of pollution and harm done to the environment would still pose enormous problems. These difficulties are underlined by the magnitude of problems which have to be faced in research on deterrence and general (positive) prevention even in the case of traditional crimes where well-elaborated instruments are available.

Revisions and Amendments of Criminal Environmental Statutes

(31) Information was requested on the development of environmental criminal law currently and in the near future. In Poland the draft criminal code now contains a section on environmental offences. The Swiss draft criminal code will bring about a total revision of environmental criminal offences, extending the reach of criminal law and introducing new penalties. The same is true of the Spanish draft criminal code, where the introduction has been suggested of a rather differentiated structure of criminal environmental offences compared to the existing law. Revi-

sion of environmental law is also being discussed in Italy. In Germany amendments of environmental criminal law are proposed in a Government bill. This bill contains, *inter alia,* provisions covering the protection of soil and air, the illegal export of dangerous waste and the illegal handling of dangerous substances; higher punishments shall be introduced especially for very serious offences. Hungary reports plans for criminal code revisions that would bring about more severe penalties for environmental criminal offences. New provisions regarding water pollution (an extension of criminal law) are being prepared in France. In the Dutch report notice is given of an ongoing discussion of increasing penalties for environmental offences.

Suggestions Concerning Improvement of Environmental Criminal Law Enforcement

(32) An attempt was also made to gather suggestions and views on the enhancement of the efficiency of environmental control. It seems quite clear that *intensification of environmental law enforcement* has high priority. But it was also argued (in the report from Switzerland) that criminal law sentences should be tougher. Relief from deficits in implementation of environmental criminal law is sought through better training of law enforcement staff, improvement of control technology as well as closer cooperation between criminal law and administrative authorities. Legal training, it is suggested, should also be provided to the staff in administrative agencies, who usually have a technical educational background. Moreover, it is argued that core problems of administration and criminal law enforcement are embedded in the complexity of the legal system. Therefore, voices were raised in favour of simplifying and clarifying the legal framework. In some reports it was noted that administrative sanctions and administrative procedures should be assessed to represent a superior device compared to criminal sanctions and traditional criminal procedure.

Conclusions

(33) The results of the survey might be summarized as follows:

- We observe throughout Europe that environmental protection is sought also through the enforcement of criminal law, although a debate is going on whether criminal law can in fact fulfil its very functions in this field;

- Attempts to intensify the enforcement of criminal law have relied heavily on the extension of the reach of environmental offences through penalization of mere abstract dangers created for environmental media. These changes have led to a strong reliance on decision-making in administrative bodies and on technological knowledge, and thus in general a dependence on interests and values external to criminal law;

- At least legislative bodies obviously prefer sometimes to resort to amendments of criminal law and especially to increasing maximum penalties, because this may have a symbolic effect and does not produce much costs, at least if enforcement is not considered;

- The outcome of the enforcement of criminal law appears to be rather poor when compared with the promises given when environmental offences were introduced into the system;

- Basically, two modes of control can be found in the field of environmental protection, the criminal law model and the administrative model. The latter is based upon cooperation and bargaining, long-term planning and technological considerations. These two models are not compatible as they are based upon different goals and methods;

- Problems of enforcement also stem from the fact that environmental criminal law should be deployed in a complex and powerful system (which creates the very same problems also for the enforcement of administrative law);

- Mere organizational devices do not seem to provide better solutions. Although the ways powers and competence are divided or concentrated vary quite sharply in Europe, there is no evidence that any specific system would produce better results. Essentially, the enforcement problems are rather dislocated;

- In coordinating the two models of control it seems better not to mix them, because ultimately the administrative model will prevail and criminal law will take up many administrative and even civil features, thus losing its most important, that is, moralizing functions;

- Coordination through separation could therefore represent an adequate strategy. This would mean a restriction of criminal law to simple and clear norms, while administrative sanctions and procedures could be used in those fields of behaviour which represent mere disobedience to administrative orders or rules;

- On the other hand, in coordinating both models, criteria derived from criminal law must be incorporated into administrative decision-making. Here, it seems absolutely necessary to establish consistent guidelines for reporting and prosecuting environmental criminal offences. These guidelines must reflect the seriousness of the events in question (expressed rather by objective measures) and not, as is the case today, by the seriousness of conflicts between administration and its industrial clients;

- Such basic coordination of different perspectives of control may provide the base for the use of other methods of inter-agency coordination and communication in attaining better results in enforcement.

Prof. Dr. Günther Kaiser
Director, Max Planck Institute for Foreign and International Criminal Law

WELCOME ADDRESS

Ladies and Gentlemen, Colleagues and Friends,

Dr. Matti Joutsen and myself feel happy that you followed our invitation to contribute to the seminar on the policy of criminal law and the protection of nature and the environment in a European perspective. We know very well what it means for each of you to leave the family and work in order to make the long journey to Lauchhammer. Therefore, we are grateful for your kind willingness to participate and for the opportunity to profit from your rich experience as experts in the field. Furthermore, we would like to thank the Federal Ministry of Justice in Bonn as well as the Ministry of Justice of the Land Brandenburg and the Mayor of the Town of Lauchhammer for giving the financial resources or supporting generally this international meeting.

We all know that our environment is in danger. This danger is not limited to national borders, but is spread over nations. It is a European, even a universal fate. In other words, today no country can disregard the serious effects of pollution, also to other countries, although the dangers and harms to soil, air and water differ in the European states and regions. But, however, there exists everywhere an urgent need for us to take serious consideration of dealing with the natural environment and to effect the necessary measures to its protection. These facts, needless to say, require us to adopt ways of international cooperation among the nations. With regard to these efforts to protect nature and environment, law (in particular criminal law) and crime policy are required or even challenged to participate, in order to point out the endangered natural resources to everyone and to reinforce the strict rules of the environmental administrative law with an efficient sanction system.

Manifold practical experiences, empirical studies and criminal political debates have, however, disclosed serious deficiencies in the current practice, mainly with regard to legal implementation, to the cooperation between administration, police and the judiciary as well as to the qualification and the organization of criminal prosecution authorities. Thus, it is important to identify measures, to develop guidelines and set priorities which enable legislation and administration to intensify environmental protection and render it more efficient. Surely, it is undeniable that criminal law also has an important function. The seminar at Lauchhammer may teach us exactly what role criminal law has to play and can fulfill within its boundaries. I am convinced that the contributions of the expert meeting here will not only be interesting but will, furthermore, stimulate later political and scientific discussion. Major issues and appropriate solutions could be set out within the perspective of European harmonization.

In this spirit, I would like to wish us profitable deliberations and a meaningful contribution with regard to the role of criminal law in environmental protection.

Dr. Matti Joutsen
Director, HEUNI

WELCOME ADDRESS

Mr. State Secretary, Herr Bürgermeister, Ladies and Gentlemen,

Pollution is generally not a dramatic event. There is seldom a clear moment in time when we can look around us and say that our land, water and air is polluted, and we should do something about this. Such a moment came six years ago to the day when the name "Chernobyl" became known throughout Europe and throughout the world. Such incidents cause us to take a look at our own immediate environment.

When we do so, we begin to grasp the seriousness of the problem. It is an economic problem: polluted water, air and land can stunt the growth of crops or make commercial fishing impossible. It is a health problem: pollution has long-term effects on health and, as in the Chernobyl incident, can be immediately fatal. It is also a problem of simple enjoyment; pollution diminishes our possibilities of taking pleasure from our environment.

We are now agreed that "something should be done", but as so often, we are not agreed on what that something is. The major difficulty is the conflicting pressures between demands for sustainable development and demands for economic growth. This is, in particular, a problem for the developing countries, which may view pressure for environmental controls as a plot by the developed countries to stunt their economic growth, at a time when they are grappling with the bottom line of simple economic survival.

Despite these conflicting pressures, much action has been taken on the local, national and international levels. Civic groups have worked together with (and, in some cases, in opposition to) private companies to clean up the local

environment. Key legislation has been adopted in many countries even within the past four or five years. And on the international level, many bilateral and multilateral agreements have been drafted and signed. In only a few weeks' time, the United Nations Congress on the Environment and Development - known as the "Earth Summit"- will be convened in Rio de Janeiro to discuss, among other issues, a draft "Earth Charter".

Almost all of the discussion at the United Nations Congress will be on the technical, social and economic aspects of pollution. The legal control of pollution - and in particular the control of pollution through criminal law and the criminal justice system - does not figure prominently on the agenda.

To some, this may seem unfortunate. Criminal law has an important role - real and potential - in controlling pollution. However, the benefits of administrative vs. criminal law, the draftsmanship required when criminalizing pollution, and the approach to be used by the various criminal justice agencies, are not subjects that could be discussed in any meaningful fashion at large Congresses such as the Earth Summit.

Instead, it is at specialized expert meetings such as this Seminar that the issues can be dealt with more thoroughly, the advantages and disadvantages explored, and experience with the different approaches exchanged. On behalf of the Helsinki Institute, and of the United Nations Crime Prevention and Criminal Justice Programme, we hope that the Lauchhammer Seminar will produce conclusions that will be of value to the different European countries in the development of their own criminal justice policies.

We do not expect agreement on all points. Disagreements can in fact be more productive, if the reasons for the disagreement can be explored, and the different approaches compared. Criminal justice systems vary so widely across Europe that there can be no one approach that is suitable for all. However, we would hope that the conclusions can be backed up by references to your experience in each of

your countries, so that other interested persons, also from countries beyond Europe, can compare your experience with their own, and seek some suggestions as to where they should go.

We are most grateful to the city of Lauchhammer and the Ministry of Justice of the Land Brandenburg for their generosity and hospitality in making the local arrangements for this Seminar. The setting serves as a reminder both of the difficulties of pollution, and of what constructive action can be taken on the local and national level to respond to a serious problem of pollution.

We would also like to thank the Bundesministerium der Justiz and in particular Mr. Konrad Hobe and Mr. Manfred Möhrenschlager for their strong support and commitment throughout the preparations for this Seminar.

Above all, we would like to thank you, the participants, for having provided us with a wealth of advance material for the discussion guide, and for having taken the time to come here to Lauchhammer to meet your colleagues from other countries.

Dr. Reinhard Göhner
Parliamentary State Secretary, German Federal Ministry of Justice

OPENING SPEECH

Dr. Kinkel, the Federal Minister of Justice of the Federal Republic of Germany and patron of this Conference, deeply regrets his inability to attend the opening session today. On his behalf, and for myself, I should like to bid you a warm welcome to this European Seminar and also to the town of Lauchhammer.

It is a joy for me that experts in the fields of criminal and environmental law from no less than twenty-three European states are attending this Conference alongside representatives from international organizations. I should like to express my particular thanks to the organizers, the Helsinki Institute for Crime Prevention and Control and to Freiburg's Max Planck Institute for Foreign and International Criminal Law, for having taken up our proposal to hold a Europe-wide conference of this type here in Germany. The Conference is being held, with the commendable support of Mayor Häntzka, in a town which, ladies and gentlemen, you had previously probably not heard much about. It is a town which lies in a region whose problems provide us with great challenges, and which should remind us of the great political task of our times, that of saving our environment, which serves as the background to our Seminar topic.

The increasing burdens on the environment over the past decades have elevated environmental protection to a position of urgency. Responsible environmental policy is called for on the national level and with supranational and international collaboration to reduce and eliminate existing environmental damage as well as to prevent such damage and to minimize risks.

That aim requires a coherent programme employing a variety of means to steer us towards a mode of conduct which is more in tune with, and geared towards a reduction of the burdens on the environment. Despite advances in economic

incentives, in Germany - as in many other countries - regulatory environmental administrative law still remains at the heart of the instruments available to the state. The effectiveness of preventive prohibitions and requirements is in this respect also dependent upon non-observance of incumbent duties not remaining inconsequential. Illegal conduct which damages and poses a threat to the environment must therefore also be met with sanctions and, not least, also with ancillary measures taken from criminal law. This is something which really ought to meet with fundamental agreement amongst all of us here today.

The role of the criminal law in the entire system of environmental protection is something which has for some time now been the subject of intensive debate both on the national and international level. In a large number of states, changes have occurred - in some cases on a number of occasions - over the last twenty years; in many states, further reforms are being pursued. The Federal Republic of Germany is one such state.

In 1980, the most important parts of environmental criminal law were inserted into the German Criminal Code. In so doing, the legislator wished to emphasize in the public mind the socially damaging character of conduct which is harmful to the environment as well as the shift in stance which had taken place in assessing environmental offences. Associated with this was a definite extension of the domain of criminal law and an increase in the range of statutory punishments. In ten years, the number of convictions for environmental offences under the Criminal Code increased from about nine hundred to over two thousand six hundred. That the effectiveness of environmental criminal law is nevertheless restricted is - irrespective of enforcement deficits - in the nature of things. Due to the fact that to a certain extent they need to be able to be used, environmental interests can be protected only in relative terms. As a result, protection under the criminal law is to a very large extent dependent upon the framework of administrative law, though that does correspond to its fundamentally subsidiary and ancillary role.

Practical experience, empirical investigations and scientific discussions

have shown that the revised environmental criminal law still requires further improvements in some areas. A Draft Second Bill to Combat Environmental Crime produced by the Federal Minister of Justice and which has been laid before Parliament aims at eliminating the deficits which have been identified.

One area of concern in the reform work is to achieve a better balance in structuring the protection of legal interests in the environmental sphere. To date, the criminal law has offered the greatest protection to bodies of water, with protection of the air and - even more so - of the soil, taking a back seat.

Extensions in criminal law provisions on pollution of the air and a new statutory offence on contamination of the soil are designed to close existing loopholes. A criminal law provision protecting the soil against contamination, which has to date been applicable to the territory of the former GDR only, can then be rescinded thus once again creating a common legal climate across the whole of Germany, a situation already created elsewhere in the sphere of environmental criminal law at the time of German reunification on 3 October 1990.

The Federal Government's draft bill also aims at combatting existing serious hazards by extending prevailing criminal law. These days it has been widely recognized that it is not sufficient to use the resources of the criminal law to combat only damage to, or violations of, environmental interests. Infringement of the administration's preventive control interests, of safety regulations and other operator duties can vastly increase the risk that hazards or damage will occur and, as so many accidents have shown, can even be the straw that breaks the camel's back.

As a result, there is justification in invoking criminal law resources to deal even with instances where risk-reducing control interests may possibly be impaired or to deal with the careless handling of hazardous substances, goods and plants.

As regards the first of these areas, I would mention the government's proposal in future to qualify the unlicensed import and export of hazardous waste as a

criminal offence. The aim of this is to combat more resolutely "illegal waste tourism" in Europe, as well as to the Third World. To date, criminal law protection against potential environmental risks has largely been restricted to the sphere of waste, and has otherwise largely been limited to specific substances only, such as nuclear fuels or explosives, or to certain situations in which specific risks occur. The extension to the criminal law in this area proposed in the draft bill emphatically stresses the duty to observe safety regulations.

In addition, I should also like to mention certain important amendments to the general law on regulatory offences, according to which the options for imposing regulatory fines against juridical persons and upon senior management for breaches of their duty of supervision are to be broadened.

As already described, what we need is not just a national approach, but action on the international level, be it worldwide or - as is the objective of this Conference - restricted to the regional level. Here, too, the German Federal Government has become active. Upon the initiative of, amongst others, the Federal Minister of Justice, greater attention has also been focussed within international organizations upon the role of the criminal law in environmental protection. For example, one resolution of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders was essentially based upon a German draft. In response to a German proposal, in 1990 the Conference of Ministers of Justice of the Council of Europe's member States held in Istanbul discussed the subject of "the protection of the environment through criminal law". Based upon the resolution concluded at the time, a committee in Strasbourg is currently attempting to develop European criminal law standards. It would be very pleasing if they could manage to draw up a convention.

The Seminar which has opened here today has a direct relation to those discussions, which it moreover sets forth. Ladies and gentlemen, it is with much attention that we await your contributions centering upon criminal policy in the protection of nature and of the environment in a European perspective. I wish the Semi-

nar every success as well as a result which will have a beneficial effect both on thoughts being given to this subject in your own states, as well as for the further development of European and international criminal law.

Mr. Christian Häntzka,
Dipl.-Ing., Mayor, Town of Lauchhammer

OPENING WORDS

The fact that your seminar on criminal law and the environment is here in Lauchhammer is a pleasurable recognition of our town.

I am very glad to see you here, to bid you a hearty welcome and to thank you very much.

Lauchhammer is not a famous town. It does not have many inhabitants or important industries. However, you can find here all the special things that are interesting for the practicable contents of the seminar.

Our town is 725 years old. For over 250 years, it has been the site of manufacturing plants and major industries.

At first iron was mined here. For over one hundred years, also lignite has been mined. This explains why you can see some little lakes in this town. To the north of our town you can find open casts which cover an area over 25 square kilometers. You might think that you are on the moon. But you can also see open casts as lakes where you can enjoy a holiday.

The lignite is used to produce briquettes, energy, fuel and gas in our town. The output of the lignite mines in the last year was small. As a result, all the factories have been closed. We now need new industries. You will be able to see all the problems during our visit on Monday and at our little exhibition today.

I wish you every success in your seminar.

Dr. Bertram Wieczorek
Parliamentary State Secretary, German Federal Ministry of Environment, Protection of Nature Conservation and Nuclear Safety

IMPACTS OF ENVIRONMENTAL LAW ON CRIMINAL LAW
Introductory Statement

Ladies and gentlemen,

I am pleased to attend your meeting and should like to convey to you best wishes from the Federal Minister Klaus Töpfer.

Here, in one of the new Federal Länder you will see that the completion of Germany's unity also means that a new era in environmental policy has begun. In his government declaration of 30 January 1991 the Federal Chancellor Helmut Kohl defined it as a policy goal of absolute priority "to achieve equal living conditions for people in Germany". In this context the environmental situation plays an important role. Without coping with the pollution legacy handed down by forty years of SED regime this aim cannot be achieved. However, this will have to be done at the highest possible level corresponding to that in the old Federal Länder which set international standards. Environmental law will provide a basis here for effective and comprehensive ecological rehabilitation.

The topic "Impacts of environmental law on penal law" which I am going to talk about might create the impression that environmental law and penal law are two separate legal areas independent of each other. However, environmental law as an overall and cross-sectional law also comprises environmental penal law. This means that environmental law is an aggregate of various partial areas which may be quite heterogenous. Hence, it is the sum of several legal areas.

One argument is uncontested:

Environmental penal law is an instrument of environmental protection. It is a subsidiary instrument - but it is an indispensable one.

You will understand that as a representative of the Federal Environment Minister responsible for the central legislation of environmental administrative law, I lay particular emphasis on the necessary instruments of for example administrative control of ecologically relevant activities.

Incorporation of environmental penal law into the superordinate system of environmental protection, however, does not only make a close relation between environmental administrative law on the one hand and environmental penal law on the other hand unavoidable but also indispensable. This topic will be the subject of the first lecture of this seminar.

Let me make just a few brief comments here. Environmental law as a complex branch of law with a wide range of sub-branches has reached a first concluding step; the necessary legal foundation has been laid. As a dynamic branch of law, however, this does not represent a standstill but the basis for further development. The tasks environmental law is faced with include the following three:

Firstly, still existing gaps in environmental law have to be closed;

Secondly, precautionary environmental protection, that is prevention from a potential threat has to be further developed;

Thirdly, enforcement of environmental protection has to be improved.

Environmental penal law makes a considerable contribution towards all these goals. One of the gaps still to be filled is soil protection legislation which at present is governed by a plethora of individual regulations. By the current amendment of environmental penal law, soil pollution is included as a new offence into the penal law. Thus, a further signal showing the importance of soil protection is given.

Further development of *precautionary environmental protection* which is of major significance in environmental administrative law is also reflected in environmental penal law. It has been recognized that prosecution of damage or harm done to environmental goods is not sufficient. Already violations of preventative control interests of environment administration, of safety regulations and other obligations of the operator may lead to a considerable increase in the occurrence of risks and damage. In these cases too, infringement of important control interests can now be combatted by penal law instruments.

Finally, enforcement of environmental law has to be improved. The "classical" role of environmental penal law has always come under the aspect of enforcement of environmental law. Environmental penal law is of central importance in enforcing the necessary compliance with environmentally relevant obligations and prohibitions. Even though also its effectiveness is limited due to the fact that environmental penal law refers to culpable individual behaviour, it may nevertheless send important signals - not only by penalizing infringements but also by threatening with sanctions for infringements.

Ladies and gentlemen,

Development of independent criteria for illegal action would put too great a strain on environmental penal law. On the other hand not every violation of environmental standards should necessarily lead to penal law sanctions.

In this context we are faced with the challenge to create an environmental penal law which can cope with the dynamic development of environmental law. I am convinced that this meeting will produce valuable results and should like to wish you every success.

Mr. Seppo Leppä
Senior Researcher, HEUNI

CONTROL OF HARM TO THE ENVIRONMENT AND THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAMME

(1) I would like to outline briefly a few items in the United Nations Crime Prevention and Criminal Justice Programme, with a view to the control of harm to the environment1.

(2) At the outset I would like to stress that, in a European perspective, the role of the United Nations has been a rather prominent one in developing international control systems in the field of environmental protection. During the 1950s and the 1960s, the Economic Commission for Europe (ECE) was already involved in attempts to regulate the problem of transboundary water pollution. The United Nations involvement in environmental problems in a wider scale stems from 1972, when the Conference on the Human Environment was convened in Stockholm. The UN Environmental Programme (UNEP) was also established that year.

(3) It is, on the other hand, safe to state that before the mid-1980s no serious regard was given to environmental questions within the United Nations bodies which formulate and develop the crime prevention and criminal justice programme of that organization. Apparently, environmental matters were considered to belong to the territory of the UNEP and to that of other competent UN organs, for example the regional economic commissions and the World Health Organization.

(4) In August 1988, the United Nations Committee on Crime Prevention and Control, which up to the present has been the initiating power in designing and developing the UN crime prevention and criminal justice programme, drafted a

---

1) The opinions presented in this intervention are mine and they do not in any way reflect the position of the competent United Nations bodies in these issues.

resolution at its tenth session for the attention of the Economic and Social Council, asking for concerted international action against certain forms of serious crime, among them the harmful and illicit practices that cause devastating damage to the environment. The Economic and Social Council subsequently adopted the resolution in May 1989 (1989/62). Apparently, this did not lead to any further action.

(5) At its eleventh session, in February 1990, the Committee on Crime Prevention and Control decided (decision 11/114) to recommend that the Economic and Social Council transmit to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders a draft resolution on the role of criminal law in the protection of nature and the environment. This request was subsequently carried out by ECOSOC.

(6) The resolution that was adopted (A/CONF.144/L.4), which emphasizes the need for national criminal laws designed to protect the environment, calls upon Member States, *inter alia,* to become party to the relevant international conventions, to cooperate in the prevention, investigation and prosecution of criminal acts against the environment and, *inter alia,* to ensure the restoration of the environment, whenever harmed, to its original state as far as possible. The resolution further requests the Secretary-General of the UN to encourage the incorporation, where appropriate, in future international conventions for the protection of the environment, of provisions under which States would be expected to enact sanctions under national criminal law, and also to examine the possibilities of future harmonization of the provisions of existing international instruments entailing penal sanctions under national criminal law.

(7) Within the sphere of the United Nations crime prevention and criminal justice activities, further elaboration of the norms and guidelines to control harm to the environment has been envisaged. In conformity with proposals made by Governments and by members of the now dissolved United Nations Committee on Crime Prevention and Control at its three most recent sessions, criminal law as a

means of enforcing environmental protection has been identified as one of the areas for the possible elaboration of new standards. At the moment it is up to the newly established United Nations Commission on Crime Prevention and Criminal Justice, currently gathered at its first session in Vienna, to give its opinion on whether the issue of criminal law and environmental protection is deemed as ranking high enough on its programme of activities to qualify for standard setting in the near future.

(8) Personally, I feel that the competent United Nations organs will meet great problems when drafting the text of that particular standard. When the new Commission was established, special weight was attached to the importance of the implementation of standards and norms, as a general rule. It has been suggested that each proposal for an activity should specify how success or failure is to be assessed. And, to keep the focus on implementation, the proposals for activities should also set out ideas for follow-up action.

(9) Coming back to the elaboration of the standard of criminal law in the environmental context, why will that work be so problematic? This is mainly due to the fact that the acts and processes which are harmful to the environment do not fit easily into the frame of reference of the intentions of legislation, as conceived by the criminal justice experts and ordinary people alike. In other words, there seems to exist an *implementation gap* between the intended aim of the provisions and the acceptance of it by the section of the public concerned. In view of the 'implementation gap' one might ask why we should penalize under the criminal law acts when there is a great likelihood that the penalty will not be levied due to the intrinsic difficulty of the task and also due to some distinctive characteristics of acts harmful to the environment. Just to give two examples: first, the unique causation issues found in many environmental cases often make it extremely difficult for the prosecution to prove its case, and, second, many activities which harm the environment also create significant benefits to some sectors of society, especially in the short time perspective.

(10) Another issue which calls for care in elaborating new standards in this field, is that coordination efforts are of utmost importance in order to avoid overlapping and duplication of work already invested in similar projects elsewhere within the United Nations sphere of organizations. An integrated system of standards and norms is the key here. Thus, attention should be paid for example to the work done at the Economic Commission for Europe to develop responsibility and liability principles in the form of a code of conduct on transboundary environmental effects. Another issue that should be considered is the so called procedural human rights: the right to be informed about environmental problems, the right to participate in environmental planning and decision-making processes, and the right to appeal decisions involving environmental questions.

(11) It will thus be interesting to observe how the United Nations standard concerning criminal law in the environmental context will be formulated and how the problems of its implementation will be overcome if and when it is considered worthwhile to invest resources in the drafting work. My personal opinion is that a functional system of monitoring and evaluating the success and effectiveness of the implementation process on this sector is a must. The design of good systems to monitor and evaluate the implementation of United Nations norms and guidelines in the field of crime prevention and criminal justice is a timely and pressing issue as it is. It is then all the more important that the competent bodies with emphasis stress this aspect in elaborating the new United Nations provision.

M. Seppo Leppä
Chercheur Senior, HEUNI

CONTROLE DU PREJUDICE POUR L'ENVIRONNEMENT ET PROGRAMME DES NATIONS UNIES POUR LA PREVENTION DU CRIME ET LA JUSTICE PENALE

Résumé

Dans une perspective européenne, le rôle des Nations Unies a été proéminent pour le développement de systèmes internationaux de contrôle dans le domaine de la protection de l'environnement. D'autre part, avant le milieu des années 1980, aucune attention sérieuse n'était accordée aux questions d'environnement au sein des organes des Nations Unies qui chargés de formuler et de développer le programme de cette organisation pour la Prévention du crime et la justice pénale.

Le Huitième Congrès unifié sur la Prévention du Crime et le Traitement des Délinquants a adopté une résolution sur le rôle du code pénal dans la protection de la nature et de l'environnement. Elle souligne la nécessité de dispositions pénales nationales pour protéger l'environnement et elle appelle les Etats Membres à devenir partie des conventions internationales pertinentes.

Dans la sphère des activités qui ressortissent de la prévention du crime et des activités de justice pénale des Nations Unies, une élaboration plus poussée des normes et lignes directrices visant à contrôler le préjudice pour l'environnement a été envisagée comme l'un des domaines de priorité. Personnellement, j'ai le sentiment que les organes compétents des NU se heurteront à de sérieux problèmes lorsqu'ils ébaucheront le texte de cette norme. Les raisons sont de deux sortes.

Premièrement, il semble exister, au niveau de l'exécution, un *fossé* entre le but visé par les dispositions et leur acceptation par la catégorie concerne de l'opinion. En ce qui concerne ce 'fossé', d'aucuns s'interrogeront pourquoi

pénaliser aux termes des codes de procédure pénale s'il est très vraisemblable que la peine ne sera pas infligée, en raison de la difficulté intrinsèque de la tâche et du fait également que certaines caractéristiques distinctives des décrets, sont préjudiciables pour l'environnement. Deuxièmement, les efforts de coordination sont de la plus haute importance afin d'éviter les chevauchement ou le doublement d'efforts déjà investis ailleurs dans des projets similaires, dans la sphère des organisations des Nations Unies. Leterme-clé, ici, est un système intégré de standards et de normes.

Seppo Leppä
Senior Researcher, HEUNI

KONTROLLE VON UMWELTSCHÄDEN UND DAS KRIMINALITÄTSVERHÜTUNGS- UND STRAFRECHTSPROGRAMM DER VEREINTEN NATIONEN

Zusammenfassung

Aus europäischer Sicht haben die Vereinten Nationen im Bereich der Umweltschutz bei der Entwicklung von internationalen Kontrollsystemen eine recht hervorgehobene Rolle gespielt. Auf der anderen Seite hat man in den Organen der Vereinten Nationen, die das Programm zur Kriminalitätsverhütung und das Strafrechtsprogramm ausarbeiten und weiterentwickeln, den Umweltfragen keine wesentliche Beachtung geschenkt.

Der Achte Kongreß der Vereinten Nationen über die Kriminalitätsverhütung und die Behandlung von Delinquenten nahm eine Resolution über die Rolle des Strafrechts beim Natur- und Umweltschutz an. Sie unterstreicht die Notwendigkeit von Gesetzen des nationalen Strafrechts zum Schutz der Umwelt und ruft die Mitgliedsstaaten auf, sich an den relevanten internationalen Abkommen zu beteiligen.

Einer der Bereiche höchster Priorität innerhalb der Aktivitäten der Vereinten Nationen zur Kriminalitätsverhütung und des Strafrechtsprogramms ist die beabsichtigte weitere Ausarbeitung von Normen und Richtlinien zur Kontrolle von Umweltschäden. Ich persönlich bin der Ansicht, daß die zuständigen Gremien der Vereinten Nationen bei der Ausarbeitung des Entwurftextes zu diesem Standard auf große Schwierigkeiten stoßen werden. Hierfür gibt es zweierlei Gründe. Zum ersten scheint es eine *Umsetzungslücke* zu geben zwischen dem beabsichtigten Ziel der Maßnahmen und der Annahme durch den betroffenen Teil der Öffentlichkeit zu geben. Im Hinblick auf die 'Umsetzungslücke' kann man fragen, warum wir ein Delikt nach dem Strafgesetz ahnden sollen, wenn eine große Wahrscheinlichkeit

besteht, daß die Strafe aufgrund der innewohnen Schwierigkeit einer derartigen Aufgabe und auch aufgrund einiger bestimmten Charakteristiken umweltschädlicher Handlungen nicht verhängt wird. Zweitens sind Koordinationsanstrengungen zur Vermeidung von Überschneidungen und einer doppelten Ausführung von Arbeiten, die im Rahmen ähnlicher Projekte in einer anderen Organisation der Vereinten Nationen bereits angefertigt worden sind, von allergrößter Wichtigkeit. Ein integriertes System von Standards und Normen ist in diesem Zusammenhang das entscheidende Schlüsselwort.

Сеппо Леппя
Старший научный сотрудник ХЕУНИ

КОНТРОЛЬ НАД ВРЕДОМ, ПРИЧИНЯЕМЫМ ОКРУЖАЮЩЕЙ СРЕДЕ, И ПРОГРАММА ОБЪЕДИНЕННЫХ НАЦИЙ ПО ПРЕДОТВРАЩЕНИЮ ПРЕСТУПЛЕНИЙ И УГОЛОВНОМУ ПРАВОСУДИЮ.

В европейской перспективе роль ООН в развитии системы международного контроля в области защиты окружающей среды была довольно выдающейся. С другой стороны, никакого серьезного внимания не уделялось вопросам окружающей среды до середины 80-годов среди органов ООН, которые формулируют и развивают программы этой организации по предотвращению преступлений и уголовному праву.

Восьмой объединенный конгресс по предотвращению преступлений и обращению с нарушителями принял резолюцию о роли уголовного законодательства в деле защиты природы и окружающей среды. Она подчеркивает потребность в национальных уголовных законах, изданных для защиты окружающей среды, и призывает страны-члены ООН участвовать в относящихся к делу международных соглашениях.

В сфере деятельности ООН по предотвращению преступлений и уголовному праву было предусмотрено как одно из приоритетных направлений дальнейшее развитие норм и руководящих принципов контроля на вредом, причиняемым окружающей среде. Мне лично кажется, что компетентным органам ООН придется сталкиваться с большими проблемами при составлении текста для этого стандарта. Причины двоякие: во-первых, похоже на то, что существет пробел между осуществлением запланированной цели и принятием ее той частью публики, которой этой касается. Ввиду указанного можно спросить себя, почему мы должны делать наказуемыми с точки зрения уголовного законодательства акты, когда имеется большая вероятность, что взыскание не будет приводиться в исполнение вследствие присущих заданию трудностей, а также из-за некоторых четких характеристик актов, вредных для окружающей среды. Во-вторых, скоординированные усилия имеют крайне важное значение для предотвращения дублирования и двойной работы, которую уже вложили в подобные проекты в других местах в сфере организации ООН. Интегрированная система стандартов и норм является здесь ключевым словом.

Следовательно, будет интересно заметить, какую формулировку дадут стандарту ООН по уголовному законодательству в контесте окружающей среды и как проблемы его осуществления будут преодолены, если и когда будет считаться выгодным вложить ресурсы в работу по его проектированию. Мое личное мнение таково, что обязательно требуется наличие фундаментальной системы проверки и оценки успеха и эффективности процесса осуществления мер в этом секторе.

Mr. Hans G. Nilsson
Directorate of Legal Affairs, Council of Europe

EUROPEAN ASPECTS OF CONTROL OF HARM TO THE ENVIRONMENT1

Introduction

The Council of Europe was founded in 1949 as a European organisation for intergovernmental and parliamentary co-operation. Its aim is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress. At present, the Council on Europe has 26 member States, the 23 West European democracies and now also Hungary since November 1990, Czechoslovakia since February 1991, Poland since November 1991 and Bulgaria in two weeks' time. It can be foreseen that the Baltic States might perhaps become members sometime this year or early next year as well as Slovenia.

The Council of Europe has moreover embarked upon a co-operation programme with the other States in Central and Eastern Europe such as Albania and Romania. For the time being relations with Yugoslavia are suspended. Last but not least, co-operation with the Russian Federation and other former USSR Republics are under way.

The conditions for the admission of a State to the Council of Europe are: The existence of a genuine pluralistic democracy, adherence to the principles of the rule of law and enjoyment by all persons within the jurisdiction of a state of human rights and fundamental freedoms as embodied in our Convention on Human Rights

1) The views expressed are those of the author and not necessarily those of the Council of Europe.

and Fundamental Freedoms, which sets up a unique organ to control human rights in Europe.

The Council of Europe has competence to deal with all kinds of questions except defence matters. In practice we have also, since 1949, dealt with a number of questions in particular within the legal field. We have drafted 145 Conventions and Agreements which form part of the European Treaty series. Within the criminal law field, 19 Conventions and 75 Recommendations by the Committee of Ministers have been adopted. Hundreds of reports have been drafted by the European Committee on Crime Problems which is the body within the Council of Europe that has, since 1957, discussed crime and crime policy. Perhaps most well-known among all the Conventions are the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

Criminal Law Protection of the Environment

There are two distinct lines of evolution, seemingly opposed to one another but based on the same philosophy, which we may notice during the last 20-30 years in crime policy. One trend consists in the *decriminalization* of certain types of offences which are not of major seriousness or dangerousness to society: the other trend is the emergence of *new offences,* often linked to technological developments in society and their close links to the economical and post-industrial society. We need only consider offences such as computer crime, money laundering and insider trading. *Environmental crime* forms part of this new class of offences which has emerged during recent years.

Traditionally, civil law and administrative law have been the major tools available to the legislator in the environmental field. In the civil law field, the Council of Europe is at present terminating its work on a new Convention on compensation for damage caused to the environment. The Committee which elaborated

this draft Convention will now turn its interest over to compensation funds in the environmental field.

But civil and administrative law is not enough, and the legislators have increasingly become aware that criminal law has a role to play in the field of environment. As criminal lawyers we refer often to the subsidiary role of the criminal law, but the *ultima ratio* principle does not prevent the criminal law from playing a role, in particular in respect of the most serious offences. The aim of the criminal law is to protect the most important facets of society and the priority social interests. It has become evident that without a healthy environment, the quality of life will decrease and we will not be able to enjoy the fruits of life. Thus, by protecting the air, water, soil, flora and fauna, we will not only protect the environment but also ourselves.

A general decision to elaborate criminal law norms at the European level will entail difficult changes in crime policy at national level. In view of the transfrontier character of environmental pollution, and of environmental crime, it will either be necessary to harmonize European standards in this area or at least to make them compatible. This was why the European Ministers of Justice, when they met in Istanbul in 1990, and on the basis of a report prepared by the German Minister of Justice, decided to ask the Council of Europe to study the elaboration of guidelines defining a hard core of offences committed against the environment to which most countries could subscribe and the possible use of so-called endangerment offences, a particularly efficient weapon in the fight against environmental crime.

The Council of Europe started this work last year so we are only at the beginning of a long and difficult task. We have decided to aim at the drafting of a Convention for the Protection of the Environment through Criminal Law. It is to be hoped that this convention can solve the issue of harmonization and simplify international co-operation in this field.

It is not easy to solve all questions simply by writing a convention, and I do not even pretend that it is possible to do so. Administrative and civil law must

be the most important tools in combating environmental impairment, but criminal law will become important as the ultimate tool in the hands of law enforcement agencies. In order for criminal law to become this tool, we must reconsider some of our traditional thinking in criminal law - we must become innovative without, however, becoming adventurous.

First we must reconsider the *role of criminal law* as the last resort regarding environmental offences. We must recognize certain types of environmental crime as serious crime, often committed with huge profits and to the detriment of both society at large and its individual members. Crimes against the environment are serious and there is no reason to treat serious environmental crime with leniency.

Second, we must reconsider the concepts of *individual criminal responsibility*. Environmental crime is often committed by (or within) large companies and it is often difficult to find any individual responsible. Already a Resolution from 1977 by the Committee of Ministers of the Council of Europe recommended a re-examination of this principle. The Committee on Ministers reconfirmed this policy in a general Recommendation from 1988.

Third, the victims are sometimes not individuals but society at large. This may lead to a reconsideration of crime policy aiming at the risk of the offence instead of the effect which it has caused. The *concrete* endangerment offence requires that the judge must establish in any given case whether a danger has actually arisen; the *abstract* endangerment offence requires that the judge establish whether the behaviour in itself presented a typical risk for the environment or human beings; and the so-called *potential* endangerment offence requires that the judge establish, on the basis of general principles, whether the circumstances in the case could actually be deemed to constitute a danger. All these forms of offences were in fact already mentioned by the Council of Europe as early as in the report which is attached to the 1977 Resolution.

Fourth, at the level of *sanctions and measures,* it is necessary for the legislator to prove that he or she is innovative. Here, a number of measures might be envisaged under criminal law. The closing down of the polluting company, which of course is an ultimate recourse, can take place in particularly serious cases. The relationship to administrative law is shown in the sanction which consists in the withdrawal of a licence. A so-called daily fine is practiced in certain countries, where the judge orders the company or an individual to pay a fixed lump sum or a certain sum per day of delay. It may be imposed by a court as a means of forcing a debtor or an offender to perform an obligation and enable the court to ensure that its decision is carried out. Furthermore, a court may be entitled to use the proceeds of fines to reinstate the environment or it might order the reinstatement of the environment, sometimes at the expense of the polluter. Further innovative sanctions and measures include the obligation to lodge a deposit and the publication of a sentence in an environmental crime case.

Fifth, at the level of *international co-operation,* states must reconsider some of the traditional obstacles to such co-operation. For instance, is it always necessary to invoke the condition of double punishability? Can extradition of one's own nationals be allowed in the most serious cases? Can transfer of criminal proceedings become a standard tool in international co-operation? Can foreign judgments of confiscation be recognized as proposed by the Council of Europe Convention on Laundering and Confiscation? Can the territoriality rule be replaced by the rule of universality in serious cases?

Criminal law is thus orienting itself towards new solutions in this particularly important field of law. It should be able to demonstrate that it has the possibility to adapt itself to new solutions and new technologies. It is the well-being of our society which is at stake.

In this context, the Secretary General of the Council of Europe greets every initiative which is taken to stimulate a reflection in the matter. It is particularly pleasant that this initiative comes from the Helsinki Institute and from the Max

Planck Institute with which we have long standing ties and that the seminar is held under the auspices of the German Ministry of Justice, the Council of Europe and the United Nations.

M. Hans G. Nilsson
Directorat des Affaires juridiques, Conseil de l'Europe

LES ASPECTS EUROPEENS DU CONTROLE DU PREJUDICE SUBI PAR L'ENVIRONNEMENT

Résumé

Dans le domaine du droit civil, le Conseil de l'Europe est en passe de terminer son travail sur une nouvelle Convention sur l'indemnisation pour dommage causé à l'environnement. Le Comité qui a élaboré ce projet de Convention fera désormais porter son intérêt sur les fonds d'indemnisation dans le domaine de l'environnement.

Mais le droit civil et administratif ne suffit pas et les législateurs sont, de plus en plus, devenus conscients du fait que le droit pénal a un rôle à jouer dans le domaine de l'environnement. Les avocats au criminel que nous sommes renvoient souvent au rôle subsidiaire du droit pénal mais le principe *ultima ratio* n'empêche pas le droit pénal de jouer un rôle, en particulier dans le cas des délits les plus graves. Le droit pénal a pour objet de protéger les aspects les plus importants de la société et la protection des intérêts sociaux.

Une décision générale d'élaborer des normes de droit pénal au niveau européen entraînera de difficiles changements dans la politique pénale au niveau national. Vu le caractère transfrontière de la pollution de l'environnement et du délit en matière d'environnement, il sera soit nécessaire d'harmoniser les normes européennes dans ce domaine soit, au moins, de les rendre compatibles. C'est pourquoi les Ministres européens de la Justice, lorsqu'ils se sont réunis à Istanbul en 1990, et sur la base d'un rapport élaboré par le ministre allemand de la Justice, ont décidé de demander au Conseil de l'Europe d'étudier l'élaboration de lignes directrices définissant un noyau dur de délits contre l'environnement, auquel la plupart des pays pourraient souscrire, et le possible recours à des délits dit de mise en péril, une arme particulièrement efficace de la lutte contre le délit en matière

d'environnement.

Le Conseil de l'Europe a initié son travail l'année dernière, aussi n'en sommes-nous qu'au début d'une tâche difficile et de longue haleine. Mais nous avons décidé de viser l'élaboration d'une Convention pour la Protection de l'environnement par le Droit pénal et il est à souhaiter que cette convention permettra de résoudre le problème de l'harmonisation et de simplifier la coopération internationale dans ce domaine.

Mais, pour que le droit pénal soit efficace, nous devons reconsidérer certaines de nos approches traditionnelles du droit pénal - nous devons devenir innovateurs sans pour autant devenir aventureux.

En premier lieu, nous devons reconsidérer le rôle du droit pénal comme dernier ressort en ce qui concerne les délits relatifs à l'environnement. Nous devons identifier certains types de délits en matière d'environnement comme constituant un délit grave, souvent commis avec d'énormes bénéfices et au détriment de la société dans son ensemble et de ses membres pris individuellement. Les délits contre l'environnement sont graves et il n'y a pas de raison de prendre à la légère le délit en matière d'environnement.

Deuxièmement, nous devons reconsidérer les concepts de responsabilité pénale individuelle. Le délit en matière d'environnement est souvent commis par (ou au sein de grandes entreprises et il est souvent difficile de trouver le moindre responsable individuel. Déjà une Résolution de 1977 du Comité des Ministres du Conseil de l'Europe recommandait un réexamen de ce principe et le Comité des ministres a confirmé cette politique dans une Recommandation générale de 1988.

Troisièmement, les victimes sont quelquefois non pas des individus mais la société dans son ensemble. Ceci peut amener à une reconsidération de la politique pénale visant à retenir le risque du délit plutôt que son effet, tenant en compte des délits *concrets* de mise en péril, du délit *abstrait* de mise en péril et du délit *potentiel*

de mise en péril. Toutes ces formes de délits étaient, en fait, déjà mentionnées par le Conseil de l'Europe dans le rapport joint à la Résolution de 1977.

Quatrièmement, au niveau des sanctions et des mesures, il est nécessaire pour le législateur de prouver qu'il est innovateur. Là, un certain nombre de mesures peuvent être envisagées en vertu du droit pénal. La fermeture d'une entreprise polluante qui, bien sûr, est un recours ultime, peut survenir dans des cas particulièrement graves. La relation avec le droit administratif est montrée dans la sanction qui consiste à retirer une autorisation. Une amende dite journalière est pratiquée dans certains pays, où le juge ordonne à l'entreprise ou à l'individu de verser une somme globale fixée ou une certaine somme par jour de délai. Elle peut être imposée par un tribunal comme un moyen de contraindre un débiteur ou l'auteur d'un délit à satisfaire à une obligation et permettre au tribunal de s'assurer que sa décision est exécutée. De plus, un tribunal peut être habilité à utiliser les produits des amendes pour rétablir l'état de l'environnement ou il peut ordonner son rétablissement, parfois au dépens du pollueur. D'autres sanctions et mesures innovatrices incluent l'obligation d'effectuer un dépôt et la publication d'une sentence dans un cas de délit en matière d'environnement.

Cinquièmement, au niveau de la coopération internationale, les Etats doivent reconsidérer certains des obstacles traditionnels à une telle coopération. Par exemple, est-il toujours nécessaire d'invoquer la double responsabilité pénale? L'extradition de ses propres ressortissants est-elle admissible dans les délits les plus graves? Le transfert de poursuite pénales devient-il un outil standard dans la coopération internationale? Des jugements étrangers de confiscation peuvent-ils être reconnus comme le propose la Convention du Conseil de l'Europe sur le lessivage de l'argent et la confiscation? La régle de la territorialité peut-elle être remplacée par la règle de l'universalité dans les cas graves?

Hans G. Nilsson
Direktorat für Juristische Angelegenheiten, Europäischer Rat

EUROPÄISCHE ASPEKTE ÜBER DIE KONTROLLE VON UMWELTSCHÄDEN

Zusammenfassung

Im Bereich des Zivilrechts ist der Europäische Rat zur Zeit dabei, seine Arbeit über eine neue Konvention über den Ersatz von Schäden an der Umwelt abzuschließen. Das Komitee, das diesen Entwurf für diese Konvention ausarbeitete, wird jetzt sein Interesse auf die Entschädigungsfonds im Umweltbereich richten.

Aber das Zivil- und Verwaltungsrecht ist nicht ausreichend, und die Gesetzgeber sind sich im größeren Maße der Tatsache bewußt geworden, daß das Strafrecht eine Rolle im Bereich der Umwelt zu spielen hat. Als Strafrechtler beziehen wir uns häufig auf die untergeordnete Rolle des Strafrechts, aber das Prinzip der *Ultima ratio* verhindert nicht, daß das Strafrecht eine Rolle spielt, insbesondere bei den schwersten Vergehen. Ziel des Strafrechts ist der Schutz der wichtigsten Güter der Gesellschaft und die sozialen Interessen höchster Priorität.

Eine allgemeine Entscheidung, die Normen des Strafgesetzes auf europäischem Niveau zu erarbeiten, wird auf nationaler Ebene schwerwiegende Veränderungen der Kriminalitätspolitik nach sich ziehen. Im Hinblick auf den grenzüberschreitenden Charakter der Umweltverschmutzung und der Umweltskriminalität wird es daher notwendig sein, die europäischen Standards zu harmonisieren oder sie zumindest kompatibel zu gestalten. Dies ist notwendig, weil die europäischen Justizminister, als sie sich im Jahre 1990 in Istanbul trafen und auf der Grundlage eines vom deutschen Justizminister erarbeiteten Berichts vorbereitet wurde, beschlossen, den Europäischen Rat zu bitten, Richtlinien auszuarbeiten, die den harten Kern der Vergehen gegen die Umwelt definiert und die von den meisten Ländern anerkannt werden könnten, sowie den möglichen Gebrauch der sog. Gefährdungsvergehen, eine besonders effiziente Waffe im Kampf gegen die Umweltkriminalität.

Der Europäische Rat begann im letzten Jahr mit dieser Arbeit, so daß wir erst am Beginn einer langen und schweren Aufgabe stehen. Aber wir haben beschlossen, den Entwurf einer Konvention zum Schutz der Umwelt durch das Strafgesetz anzustreben und es ist zu hoffen, daß diese Konvention die Frage der Harmonisierung und der Vereinfachung der internationalen Kooperation in diesem Bereich lösen wird.

Aber damit das Strafrecht effizient sein kann, müssen wir einen Teil unseres traditionellen Denkens im Strafgesetz überdenken - wir müssen innovativ sein, ohne jedoch den Verlockungen des Abenteuertums zu verfallen.

Zunächst einmal müssen wir die Rolle des Strafgesetzes als letzten Zufluchtsort im Hinblick auf Umweltvergehen überdenken. Wir müssen erkennen, daß bestimmte Typen von Umweltvergehen schwere kriminelle Delikte sind, die häufig den Delinquenten große Gewinne einbringen, zum Schaden der gesamten Gesellschaft als auch zum Schaden seiner einzelnen Mitglieder. Delikte gegen die Umwelt sind schwerwiegende Delikte und es gibt keinen Grund, sie mit Nachsicht zu behandeln.

Zweitens müssen wir das Konzept der individuellen kriminellen Verantwortlichkeit berücksichtigen. Umweltkriminalität wird oft von und innerhalb großer Unternehmen durchgeführt und es ist häufig schwierig, verantwortliche Individuen zu finden. Schon eine Resolution aus dem Jahre 1977 vom Ministerkomitee des Europäischen Rates empfahl eine erneute Untersuchung dieser Prinzipien und das Komitee des Ministers bestätigte diese Politik en einer allgemeinen Empfehlung des Jahres 1988.

Drittens sind die Opfer manchmal nicht Individuen sondern die Gesellschaft insgesamt. Dies kann zu einer Neubewertung der Kriminalitätspolitik führen, die auf das Risiko des Vergehens abzielt, anstelle der Auswirkungen, die sie verursacht hat und dabei die *konkreten* Gefährdungsdelikte berücksichtigt sowie die *abstrakten* Gefährdungsdelikte und die sog. *potentiellen* Gefährdungsdelikte. Alle

diese Deliktformen wurden tatsächlich schon in dem Bericht des Europäischen Rates erwähnt, der der Resolution aus dem Jahre 1977 beigefügt wurde.

Viertens ist es auf dem Niveau der Sanktionen und Maßnahmen für den Gesetzgeber notwendig, zu zeigen, daß er innovativ ist. Hier könnte man eine Reihe von Maßnahmen ins Auge fassen, die unter das Strafgesetz fallen, z.B. die Schließung einer umweltverschmutzenden Firma, was natürlich eine äußerste Maßnahme ist, die in schweren Fällen in Frage käme. Das Verhältnis zu dem Verwaltungsgesetz zeigt sich in der Bestrafung, die in dem Entzug der Lizenz besteht. Eine sog. Tagesstrafe wird in einigen Ländern verhängt, wo der Richter einem Unternehmen oder einem Individuum die Zahlung eines festen Betrages oder einer bestimmten Summe je Verzögerungstag auferlegt. Sie kann von einem Gericht als Mittel verfügt werden, mit der ein Delinquent gezwungen wird, einer Verpflichtung nachzukommen und sicherzustellen, daß die Entscheidungen des Gerichts befolgt werden. Des weiteren kann das Gericht berechtigt sein, das Mittel einer Geldstrafe anzuwenden, um den ursprünglichen Zustand der Umwelt wiederherzustellen, oder es kann die Wiederherstellung des ursprünglichen Umweltzustandes verfügen, manchmal auf Kosten des Verschmutzers. Weitere innovative Bestrafungen und Maßnahmen beinhalten die Verpflichtung der Einzahlung eines Betrages und die Veröffentlichung eines Urteils in einem die Umwelt betreffenden Delikt.

Fünftens, auf dem Niveau einer internationalen Kooperation, müssen die Staaten einige der traditionellen Hindernisse, die einer derartigen Kooperation im Wege stehen, neu überdenken. Ist es zum Beispiel immer notwendig, sich auf die doppelte strafrechtliche Verantwortlichkeit zu berufen? Kann man die Auslieferung eigener Staatsbürger in den schwersten Fällen immer zulassen? Kann der Transfer von Strafverfahren zum Standardmittel in der internationalen Kooperation werden? Kann man ausländische Urteile auf Konfiszierung anerkennen, so wie es die vom Europäischen Rat verabschiedete Konvention "Laundering and Confiscation" vorschlägt? Kann in schwerwiegenden Fällen die Territoritätsregel durch die Universalitätsregel ersetzt werden?

Резюме выступления на тему:

ЕВРОПЕЙСКИЕ АСПЕКТЫ КОНТРОЛЯ НАД ВРЕДОМ, ПРИЧИНЯЕМЫМ ОКРУЖАЮЩЕЙ СРЕДЕ

Ханс Г. Нильсон

Правление юридическими делами при Совете Европы(*

В области гражданского права Совет Европы оканчивает свою работу над новой конвенцией о компенсации за ущерб, причиненный окружающей среде. Комитет, выработавший основные положения конвенции, сейчас устремит свой взор на компенсационные фонды в области окружающей среды.

Но гражданское и административное право недостаточно, и законодатели все в большей степени стали сознавать, что уголовное право может сыграть свою роль в области защиты окружающей среды. Как юристы по уголовному праву мы часто ссылаемся на вспомогательную роль уголовного права, но принцип **Ultima Ratio** не препятствует уголовному праву играть свою роль, особенно в наиболее тяжелых правонарушениях. Цель уголовного права - защитить наиболее важные аспекты общества и первоочередные социальные интересы.

Общее решение выработать нормы по уголовному праву на Европейском уровне знаменует трудные перемены в уголовном законодательстве на национальном уровне. Ввиду харатера загрязнений окружающей среды, проникающих сквозь границы и ввиду преступлений против окружающей среды, будет необходимо или унифицировать европейские стандарты в этой области, или же во всяком случае сделать их сопоставимыми. Это стало причиной того, что министры юстиции на своей встрече в Истамбуле в 1990 г., а также на основании рапорта германского министра юстиции решили попросить Совет Европы изучить разработку руководящих принципов, определяющих грубые правонарушения, совершенные против окружающей среды, под которыми большинство стран может подписаться, и дающих возможность использовать закон о нарушениях, ставящих под угрозу, как особенно эффективное оружие в борьбе с преступлениями, касающимися окружающей среды.

Совет Европы начал свою работу в прошлом году, и поэтому мы находимся только в начале длинной и трудной задачи. Но мы решили нацелиться на планирование конвенции для защиты окружающей среды посредством уголовного права, и следует надеяться на то, что эта конвенция сможет решить вопрос о гармонизации и упростит международное сотрудничество в этой области.

Но для того, чтобы уголовное право стало эффективным, мы должны пересмотреть некоторые элементы нашего традиционного мышления в области уголовного права. Мы должны стать новаторами, но не быть авантюристами.

(* Взгляды, высказанные автором, не обязательно разделяются Советом Европы.

Во-первых, мы должны пересмотреть роль уголовного права как последнего прибежища в отношении правонарушений против окружающей среды. Мы должны признавать отдельные типы нарушений как серьезные преступления, часто совершаемые с огромными прибылями и в ущерб как обществу в целом, так и его индивидуальным членам. Преступления против окружающей среды - серьезные вопросы, и нет никакой необходимости трактовать серьезные преступления против окружающей среды снисходительно.

Во-вторых, мы должны пересмотреть концепции индивидуальной уголовной ответственности. Преступление против окружающей среды часто совершается крупными предприятиями /или внутри их/, и часто трудно найти какое-либо индивидуальное ответственное лицо. Уже в резолюции 1977 года, принятой Советом министров Совета Европы, рекомендовали пересмотреть этот принцип, и комитет министров подтвердил эту политику в рекомендации 1988 года.

В-третьих, пострадавшими иногда являются не индивидуумы, но общество в целом. Это может привести к пересмотру уголовной политики, имея в виду риск правонарушения вместо эффекта, произведенного им, принимая во внимание **конкретные** нарушения в смысле угрозы, **абстрактное** правонарушение, ставящее по угрозу, или так называемое **потенциальное** правонарушение, ставящее под угрозу. Все эти формы правонарушений были на самом деле уже упомянуты Советом Европы в то же время, что и в том рапорте, который приложен к резолюции 1977 года.

В-четвертых, на уровнях санкций и мероприятий для законодателя необходимо доказать, что он является новатором. Здесь целый ряд мероприятий может быть предусмотрен уоловным правом. Закрытие загрязняющего предприятия, к чему, конечено, прибегают только в крайних случаях, может иметь место в особо серьезных случаях. Отношение к административному праву показано санкцией, проявляющейся в отзыве лицензии. Так назывемый дневной штраф практикуется в некоторых странах, где судья приказывает предприятию или индивидууму заплатить разовую сумму или сумму за каждый день просрочки. Она может быть присуждена судом как средство для принуждения должника или нарушителя выполнить свое обязательство, и дает суду возможность утвердиться в том, что его решение будет выполнено. Далее суд может использовать процедуру штрафов для восстановления окружающей среды или он может приказать восполнить урон иногда за счет загрязнителя. Далее новаторские санкции и мероприятия заключают в себе обязательство вложить депозит и публиковать приговор по уголовному делу окружающей среды.

В-пятых, на уровне международного сотрудничества государства должны пересмотреть некоторые из традиционных препятствий к такому сотрудничеству. Например, всегда ли нужно возбуждать двойную уголовную ответственность ? Может ли экстрадиция собственных граждан быть допустима в самых серьезных случаях ? Может ли перевод уголовных актов стать стандартным орудием в международном сотрудничестве ? Могут ли иностранные судебные приговоры о конфискации быть признаны, как это предлагается конвенцией Совета Европы ? Можно ли правило территориальности заменить правилом универсальности в серьезных случаях ?

Mr. Hans Lefèvre,
Ministry for Housing, Physical Planning and Environment
and
Mr. Henk Wattel
Department of Justice, the Netherlands

ENFORCEMENT OF ENVIRONMENTAL LAW IN THE NETHERLANDS1

1 The Importance of Environmental Law Enforcement

The 1990s pose great challenges for environmental policy in the Netherlands, and in the whole world. In order to achieve the ambitious objectives of the National Environmental Policy Plan (NEPP, May 1989), environmental regulations need to be strengthened and expanded and their implementation should certainly be improved. This means that the NEPP also presents an extra challenge for enforcing those regulations.

In the mid-1980s, Environment Minister Pieter Winsemius developed the concept of a "regulatory chain" in the environmental policy area. The chain consists of five links: legislation followed by standard-setting, the granting of permits or licenses, implementation, and enforcement. All the links have a role in regulation and all are indispensable. The chain, usually illustrated as a wheel, is powered by policy planning.

The national, provincial, and municipal governments rely primarily on regulation to carry out environmental policy. The regulated community has to comply with the rules. If it does not, all of the governments' conservation efforts are in vain. Environmental policy and regulations would be paper tigers and the government's environmental policy would lose its credibility. It is therefore essential that

---

1) This paper does not necessarily reflect the Netherlands' Government's opinion in every aspect.

the government monitor compliance and, where necessary, take timely and appropriate steps to enforce environmental regulations.

Enforcement is the last link in the chain. On the other hand, the enforcement link also is the first one because enforcement practice and experience produce incentives for legislation, standard-setting, and granting permits whenever certain regulations turn out to be unrealistic or impossible to enforce.

Environmental regulations have to be as severe as possible, but must not be ambiguous or unrealistic. If they are, they will be considered symbolic legislation and will result in little or no compliance. Enforcement is one of the key links in the regulatory chain. Even so, also all the other links must function well for adequate execution of environmental policies.

2 Who Have Enforcement Jobs in the Netherlands?

This question is answered mainly in the environmental laws and in the Criminal Procedure Act and the Police Act. The police (local police forces and general police branches) generally do a competent job of detecting environmental violations. They are supposed to look for violations of environmental regulations, whether they be violation of a national law, provincial law, or a municipal bylaw, or violations of the legal requirements of an environmental permit.

Of course the police powers only apply where there is a criminal code violation, which is the case for violations of most of the environmental regulations. Only the public prosecutor has the power to bring these cases to court. On the other hand, the administrative authorities are responsible for monitoring compliance and for administrative and civil enforcement.

In the Netherlands the authority responsible for implementing a given statute or legal requirement, including the granting of permits, is entitled to enforce that law. Therefore, under the Nuisance Act (dating originally from 1875 and amended in 1981), the municipalities enforce that law and the permits of nearly all of the 400,000 businesses in the country. The provinces, which are the permit-granting authority for about 3,000 big plants, including landfills, are entitled to enforce the regulations applicable for those plants.

To make things even more complicated, however, most of the compliance monitoring officials who work for a given administrative authority also are appointed by the Minister of Justice as special detectives for environmental crimes. These officials can choose to either handle non-compliance along the administrative route or submit a report to the public prosecutors. Police officers only have the authority to turn reports of criminal violations over to a public prosecutor.

Compared to the municipal and provincial layers of government, the national government enforces only a few statutes: the Hazardous Waste Act; the Nuclear Energy Act, which deals with nuclear plants as well as radioactive fire alarms and measuring equipment; the Mining Act; the Clean Waters Act; the Toxic Substances Act; and product-related regulations, such as laws or regulations for sulfur content in fuels, chlorofluorocarbons, cadmium, automobiles, etc.

The most important environmental enforcement entities in the national government are the Ministry of Transport and Public Works (and Waters) (for the Clean Waters Act) and the Environmental Inspectorate (of the Environment Ministry).

If the authority that implements a certain statute also enforces it, it does not necessarily mean that the processes of granting permits, setting standards under the permits, and monitoring and enforcing compliance should be executed by the same governmental persons or units. Most government agencies that are responsible for both implementation and enforcement have adopted the view that those

who issue permits and those who do enforcement work should be in different parts of the administrative organization.

3 Enforcement from the 1970s to the present

In the early days of Dutch environmental policy, very little attention was given to compliance promotion, monitoring, or enforcement. Of course in some cases the national government, the provinces, or the municipalities undertook some compliance monitoring and enforcement action, but this occurred only incidentally. Furthermore, the attention to enforcement that occurred in the 1970s mostly came from civil servants, citizens, and environmental organizations, rather than from the elected authorities. Most public prosecutors were not interested in environmental cases, and neither were the police.

In the beginning of the 1980s a number of environmental scandals occurred. Most of these principally involved illegal dumping of hazardous waste. While the United State ad its Love Canal incident (1979), the Netherlands had the *Uniser* case (1980-1981).

Uniser was a company that handled hazardous waste, including waste oil. On several sites, it had polluted the soil and water of a river and an estuary. In the 1960s and 1970s the company illegally dumped large quantities of dangerous substances. Early in 1980 a criminal investigation was begun to evaluate what one authority called the "astonishing" pollution caused by Uniser. Some executives of the company subsequently were sentenced to prison. The Hellinga Commission established by the Environment Ministry, which investigated the extent of the pollution and how it could have continued for so long, made suggestions for improvement in both the enforcement and regulatory arenas.

In 1983 the Hellinga Commission report on the Uniser case marked the beginning of the second phase in the development of more uniform enforcement mechanisms. The Ministry for the Environment decided it had become obvious that something had to be done about the existing backlog in the enforcement area. A program was set up to intensify the enforcement of hazardous waste regulations. This was the Multi-Year Intensification Program for the Enforcement of the Regulations on Hazardous Waste (1984-1990). The program intensified enforcement where the Ministry *itself* was responsible, and stimulated and financially supported enforcement activities to be carried out by other authorities. Hazardous waste was given priority under the program because of its great risks to the environment.

The Multi-Year program was also used to encourage the local police and the public prosecutors to take a greater interest in the enforcement of environmental legislation. A conscious decision was made in Netherlands NOT to set up a separate environmental police force. This is because the government was convinced from the outset that the local police, being on patrol 24 hours a day and well-versed in criminal law, could play an extremely important role in the enforcement of environmental legislation.

The Minister founded the Environmental Assistance Team in 1985. It is composed of special investigating officers from the Environmental Inspectorate who investigate and prosecute environmental offences that are complicated and wide-ranging. Members of the Team take part in inquiries by a police investigations team that are conducted on the authority of the public prosecutor. The Team helps not only by making available its specialized knowledge of environment matters, but also by providing equipment and laboratory and research facilities. It may be noted that the activities of the Environmental Assistance Team as a spin-off definitively stimulated the local police and the public prosecutor to take a greater interest in environmental matters and crimes.

4 Structuring the Enforcement

As part of its implementation of the National Environmental Policy Plan, the Netherlands Government arranged substantial extra financial means for the execution of the environmental policy by the 12 provinces, the 670 municipalities, the public prosecutors, judges and the police. These means were and are structural, that is, they are provided annually and earmarked for environmental matters, such as enforcement. For the 12 provinces, this can mean some 100 extra "full-time equivalents" (FTEs); correspondingly, it can mean some 250 extra FTEs for the municipalities, some 25 for the public prosecutors and perhaps some 200 for the police.

Connected with this growing capacity in the enforcement area, the need for more coherence in enforcement activities of all the responsible authorities and agencies is also growing. At the initiative of the Environmental Inspectorate, a working group with representatives of the provinces, the municipalities and the water boards, the police, the public prosecutors and the other four responsible State departments (Interior, Justice, Transport and Waters, and Agriculture) was set up in 1990 to design a model. The main elements of this model are as follows:

- annual planning of enforcement activities by all agencies, including the police, on the three levels of government;
- use of municipal cooperatives as the core of the enforcement implementation;
- financing the cost of enforcement on the basis of performance commitments (business-like partnerships);
- establishment of structural deliberative bodies (groups concerned with enforcement matters) at the three levels of government (civil servant platforms as well as platforms for elected administrators).

The main target of the enforcement structure is to achieve the following:

- all participants marching together within a level of government (all State departments, all provinces, all municipalities) as well as vertical (the three levels of government);
- realization of an integrated, multi-media approach;
- the administrative authorities on the one hand and the police and the public prosecutors on the other marching together (not two separate circuits!);
- municipalities working together and starting doing so within a municipal cooperative (of five to fifteen municipalities).

There are "civil servants" platforms as well as platforms of elected administrators on all of those three levels. The selected administrators platform" on State level is formed by the National Coordinating Committee for Environmental Law Enforcement. The main target of the Coordinating Committee is monitoring and stimulating the implementation of the enforcement structure, as described above, at all three levels of government. The Committee also seeks to detect bottlenecks and to suggest solutions (e.g. preparing an enforcement structure manual).

The members of the Coordinating Committee are equal, everyone retaining his or her own responsibility and authority. Through this process, systematic and programmed cooperation among all the enforcement participants is promoted. Furthermore, each individual participant tends to carry out its own enforcement activities in a more systematic way.

5 The Process of Enforcement

It is difficult to give the term "enforcement" an overall definition, and so instead we will mention a number of elements of which enforcement consists.

The first element is the initial visit of a compliance monitoring official or a local policeman to a factory or company. In many cases, this first visit will be

informational: the official explains the environmental regulations that are applicable to the facility or finds that it should have a new permit or should incorporate certain procedures in its production process. The inspector announces that he or she will return at a certain time; meanwhile, the factory will have to take action in order to comply with the regulations.

The second visit to the factory is a real compliance monitoring visit. The official now really checks whether the facility is in compliance or not. If it is not, procedures necessary to ensure compliance are initiated. In the Netherlands, as in other countries, there is the option to handle the case administratively, a process that eventually can result in an administrative decree. Another option is criminal prosecution, which could result in criminal penalties, including imprisonment.

The third option, civil action, is based mostly on tort law and leads to a verdict by a civil judge. Of course an administrative decree, a criminal verdict, or a civil verdict can also be a "paper tiger" if not carried out. In our view, enforcement (compliance monitoring and enforcement) covers all these activities from the first visit up to the actual execution of decrees and verdicts.

Note that in, or rather, after compliance monitoring by civil servants in most cases a decision can be made either to go the administrative, the civil or the criminal way of enforcement. In our opinion, it is important to choose explicitly either administrative action, civil action, or criminal action, or a combination, and only choose on the basis of efficiency or effectiveness reasons. So no dogmas! Note also that police officers basically do not have a choice whether the case should be pursued by the criminal, the civil or the administrative path: for them it always has to be the criminal path.

In the Netherlands environmental measures aimed at sources of pollution are as much as possible drawn up as a set of multi-media measures. Especially since the mid-1980s the various policy makers and law makers believe that a multi-media approach to a type of industry as well as an individual company is better than an

approach targeting each environmental sector separately. This is also applicable in compliance monitoring and enforcement: they become more effective and efficient. Sometimes a multi-media approach is not possible, for instance for practical reasons. In that case it is of particular importance that monitoring officers, working at one of the enforcing agencies, confer with others that are in charge of the company's other environmental compartments and laws.

A multi-media or "integrated" approach not only applies for environmental and technical reasons, it also helps in getting the optimal coordination between the criminal and the administrative authorities. They should be on speaking terms, should inform each other and should, whenever possible and useful, work together in order to get the best result for compliance and for the environment.

6 Tools for Enforcement

As shown above, regulation is one way an environmental policy can be realized - if the regulated community complies with the regulations. The authorities have a set of "instruments" or tools at their disposal to promote compliance.

Providing adequate information for the regulated community is another way, as is subsidizing certain firms or enforcement projects or promoting an internal company environmental management system. They all are applicable to the situation in the Netherlands. However useful and necessary all those instruments are, there always exists an absolute need for compliance monitoring and enforcement of the regulations by the government.

The various authorities enforce the environmental regulations in a number of ways. First, most compliance monitoring and enforcement activities in the Netherlands do not result in lawsuits. That means that most cases are solved before they

would have been taken to court. The Netherlands, generally speaking, are not particularly fond of suing people and businesses. As shown above, in most cases there is a possibility to choose whether or not the case will be enforced by administrative, civil, or criminal law.

Administrative tools

The administrative enforcement route can result in administrative penalties to discourage illegal activities. Administrative fines of the magnitude of those in the United States are unknown to the Netherlands' administrative system. It is only since 1981 that the Nuisance Act has provided for penalty payments. A municipality may require a company to pay, for example, 1,000 guilders (USD 500) for each day it is in breach of the regulations after the date of the issuance of the administrative order. This has proved to be a rather effective weapon, particularly in the case of companies that fail, for example, to install a certain piece of technical equipment to limit emissions into the air or into the water. In the fall of 1990 this new administrative instrument was inserted in all environmental laws.

Another, and harsher, penalty that may be imposed under administrative law is the *partial or complete closure* of a plant or business. In many cases, however, this is too drastic a measure, especially when the offenses are relatively minor. The procedure is, moreover, complicated by all manner of appeal options. In practice, closure is a penalty that is hardly used.

Furthermore, the administrative authorities have the long existing instrument of *administrative coercion:* the administration has the right, at the cost of the noncomplier, to install in the plant whatever the company should have installed itself or to remove anything the plant should have removed itself. This is a course of action that can only be used in a very careful way and in complete harmony with the set criteria, such as proportionality between the infringement and the government's intervention. If not, the supreme administrative organ, the State's Council, which acts as an independent administrative judge, will order the administration to pay for all the damages.

Civil tools

In the Netherlands, civil law is increasingly used to counter violation of environmental legislation. Successful prosecutions have been brought against companies guilty of soil pollution (illegal dumping) in the past. More than 130 suits against such businesses have been brought before the courts. The fact that the authorities systematically prosecute any offender who does not proceed to clean up the results of his or her own violation has a two-fold effect. The number of cases of voluntary soil cleanups has increased enormously, and Dutch industry as a whole is now working on a plan whereby it will systematically identify and clean up all polluted industrial areas. The threat of a special levy to form the equivalent of an American "Superfund" to clean up hazardous waste sites also helped in this respect. Secondly, the knowledge that infringements of environmental laws may prove very costly has a high preventive effect: businesses are generally becoming more cautious about taking risks with the environment.

It has also proved effective in practice to resort to civil law where, for example, toxic waste has been imported illegally. This type of civil action is also used quite frequently in combination with criminal proceedings, when the object is, for example, to stop without delay the illegal storage of dangerous substances or toxic waste. With this process, there is no need to await the end of lengthy criminal proceedings to put an end to abuses. As stated previously, however, most problems of non-compliance often can be and are solved without bringing the case to court.

Criminal law tools

In respect of criminal enforcement, most of the sectoral environmental acts (such as the Nuisance Act, the Waste Act, the Hazardous Waste Act, the Clean Waters Act, the Air Pollution Act, the Pesticides Act and the Manure Act) are placed under the *Economic Offences Act (WED)*. This act defines the offences of most environmental acts. Moreover, this Economic Offences Act contains certain special coercive measures. This Act can therefore be seen as a special criminal act on economical offences (including environmental offences) with regard to the gene-

ral Criminal Code and Criminal Procedure Code. The main *sanctions* of the Economic Offences Act are imprisonment and fine (section 6 of the WED).

The maximum sanction in case of intentional offences under this law is at present two years imprisonment; a proposal to increase the existing maximum-penalties (imprisonment and fine) is now prepared at the Ministry of Justice. Also sanctions such as forfeiture of objects and claims is possible (section 7 of the WED). In addition, the Economic Offences Act contains certain special sanctions (section 8 of the WED). Mention may be made of the following:

- the obligation to pay a sum equivalent to the economic advantage the offender has derived from his or her illegal conduct;
- the obligation to restore what is illegally done (for instance clean a plant), or to do what has illegally been neglected; and
- closing of the factory or company for at most one year.

Another important possibility contained in the Economic Offences is the *provisional measure,* which can be used by the public prosecutor or the judge in serious cases where immediate intervention is necessary (sections 28 and 29 of the WED). However, until now this provision has not been applied frequently in environmental cases.

The Economic Offences Act also contains (beside the normal provisions of the Criminal Procedure Code) some special *coercive measures.* Especially important in the field of environmental crime are (sections 18 through 23 of the WED):

- the requirement to provide investigating officials, etc., access to plants if necessary;
- the requirement to submit documents and files, etc., for inspection; and
- the requirement to draw samples.

Beside the provisions in the Economic Offences Act in the field of criminal provisions on environmental crime, we may mention two articles in the *Criminal Code* which have existed in the present form since 1989 (sections 173a and b). These provisions aim at the most serious environmental offences: intentional or negligent pollution of soil, air or water that causes real danger for human life or public health. The maximum sanction in these cases is 12 or 15 years imprisonment. It will only be a surprise that up till now these articles are applied only a few times.

7 Criminal Enforcement in the Netherlands

We end with some special remarks on the position or role of criminal law in the enforcement of environmental law in the Netherlands. As the title of this seminar indicates, the study of "the policy of criminal law in the protection of nature and the environment" in the diverse European countries is the main purpose of this seminar.

First, to indicate which place criminal law has in the enforcement of environmental law in Netherlands, it is good to make clear that from the viewpoint of the police a distinction is made between:

- serious and sometimes organized environmental crime (for example illegal dumping of hazardous waste and fraud); and
- frequent but less serious environmental crime.

Needless to say, the police and public prosecutor are predominantly involved in the cases of the first type of environmental crime mentioned.

The second form of crime, however, has a different status. In cases of this type primary responsibility rests with the administrative authorities. We already

described how this operates. However, if administrative possibilities are practically non-existent, inadequate and/or exhausted, prosecution is to be considered. In these cases the penal provision functions as the "gorilla in the closet".

As pointed out before, criminal law in the Netherlands gives certain possibilities and requirements in the field of the enforcement of environmental law: diverse coercive measures can be operated, in urgent cases certain provisional measures can be taken and various common as well as special sanctions can be imposed, and the public prosecutor (not in the least because of his or her independent position with regard to the administrative authorities) and the police can play a useful role in the enforcement of environmental law, as a supporting, complementing, stimulating and sometimes correcting partner of the administrative authorities. Besides, the police and public prosecutors have their customary role in combating serious environmental crime. It is clear that in this enforcement strategy good cooperation and coordination between all parties participating in the enforcement of environmental law is indispensable.

In the light of the foregoing, the "Dutch concept" of enforcement of environmental law can be characterized in a few key words as follows:

- integral approach;
- participation in enforcement, beside administrative authorities, of the regular police and prosecution authorities;
- tendency to cooperation and cohesion of enforcement activities by the administrative authorities and police and prosecution authorities;
- tendency to approach enforcement in accordance with plans;
- criminal law is no ultimum remedium; it is one of the tools used in obtaining compliance.

One final remark. The concept and structure we pointed out in the Netherlands is practically speaking still in its infancy. Problems around unwilling administrative authorities, condoning, lack of coordination, insufficient knowledge or

interest by the police, etc., still occur. There is still a lot of work to be done! On the other hand, much work has been done already, and all of the enforcing partners are going in the same direction.

M. Hans Lefèvre
Ministère du Logement, Planification physique et Environnement,
et
M. Henk Wattel
Ministère de la Justice, Pays-Bas

MISE EN APPLICATION DU CODE DE L'ENVIRONNEMENT AUX PAYS-BAS

Résumé

Afin de mettre en oeuvre la politique de l'environnement, les autorités nationales, provinciales/régionales et municipales utilisent des instruments comme les subventions, les taxes, les services relatifs à l'environnement, la publicité etc., mais elles s'appuient principalement sur la réglementation. La communauté réglementée doit se conformer aux règles. Si elle ne le faisait pas, toute la politique du gouvernement en matière d'environnement serait vaine; les règlement seraient des tigres de papier, la politique du gouvernement perdrait sa crédibilité. C'est pourquoi il est essentiel que le gouvernement procède au suivi de la conformité et prenne, le cas échéant, des mesures opportunes dans le temps et appropriées pour faire appliquer les réglementations en matière d'environnement.

Aux Pays-Bas, l'autorité responsable de l'application d'une loi donnée ou de toute autre disposition légale, notamment la délivrance de permis, est habilitée à faire exécuter - administrativement ou civilement - cette loi. Cela signifie que les 670 municipalités sont responsables de l'application des réglementations et des permis de la quasi totalité des 400.000 entreprises d'affaires et usines opérant dans le pays. Les 12 provinces sont habilitées à faire appliquer les permis pour les quelques 3000 usines plus importantes, y compris les décharges. En comparaison, une part relativement mineure des activités de mise en application sont effectuées par l'administration nationale: La Loi sur les Pesticides, la Loi sur les Substances toxiques, la Loi sur l'Energie nucléaire et certains éléments de la Loi sur les Déchets dangereux et de la Loi sur les Eaux pures. La police et le Ministère public ainsi que de nombreux fonctionnaires chargés de la surveillance de la conformité, désignés

par le ministre de la Justice à titre d'enquêteurs spéciaux pour les délits dans le domaine de l'environnement, sont habilités à faire appliquer *toutes* les normes, tous les règlements et permis là où l'exécution pénale est appropriée.

Dans la plupart des administrations nationales et provinciales des Pays-Bas, ainsi que dans la plupart des grandes villes ou des coopératives municipales, le point de vue a été adopté que les fonctionnaires qui délivrent les permis et ceux qui ont la charge de les faire appliquer devraient être des volets différents de l'organisation administrative.

Aux premiers jours de la politique néerlandaise en matière d'environnement (vers 1970), très peu d'attention a été accordée à la promotion de la conformité, au suivi de l'exécution. Au début des années 1980, un certain nombre de scandales, relatifs à l'environnement, se sont produits. Il s'agissait principalement pour la plupart, de décharges illégales de déchets dangereux. Les autorités ont commencé à réaliser qu'elles se devaient de faire quelque chose pour faire appliquer leurs propres réglementations.

Le ministère de l'Environnement a établi un programme visant à intensifier la mise en application des réglementations relatives aux déchets dangereux par le ministère ainsi que par d'autres niveaux de l'administration.

Ce Programme pluriannuel d'intensification (1984-1990) a également été utilisé pour encourager la police locale et le Ministère public à s'intéresser davantage aux questions et aux délits relatifs à l'environnement.

A l'époque, la décision avait été prise de NE PAS instaurer une force de police distincte en matière d'environnement (ainsi que l'avait suggéré un comité); la police locale, patrouillant 24h sur 24 et très versée dans le droit pénal, pourrait certes jouer un rôle important dans les questions d'environnement. Afin d'aider la police, le ministère de l'Environnement a créé une Equipe d'assistance en matière d'environnement, composée du personnel de l'Inspection de l'environnement, qui

peut aider et aide la police et le Ministère public dans l'examen des affaires pénales.

Les années 1990 lancent un grand défi à la politique de l'environnement aux Pays-Bas et dans le monde entier. Afin d'atteindre les ambitieux objectifs inscrits dans le Plan de la politique nationale de l'environnement (mai 1989), les réglementations en matière d'environnement doivent être renforcées et élargies, et elles doivent, certainement, être mieux appliquées. Il s'ensuit un défi supplémentaire en vue du renforcement de ces réglementations. En liaison avec ce Plan, des moyens financiers substantiels ont été accordés par le gouvernement aux municipalités, aux provinces, au Ministère public et à la police. Ces moyens financiers, prévus pour une période de plusieurs années, sont accordés sur une base annuelle; ils sont exclusivement réservés aux questions relatives à l'environnement. En liaison avec cette extension de la capacité, il existe un besoin croissant de coordination des activités de tous les acteurs, notamment cinq ministères nationaux (Intérieur, Justice, Transport et Travaux publics (et Eaux), Agriculture et Environnement). A l'initiative de l'Inspection de l'environnement, un modèle a été concu en 1990 par un groupe de travail réunissant des représentants de toutes les agences et des ministères, y compris la police et le Ministère public, ce modèle comporte des éléments comme:

- la programmation annuelle par toutes les agences/autorités qui participent à la mise en application du code de l'environnement (la police et le Ministère public compris), aux trois niveaux de l'administration;
- des plates-formes délibératives structurelles (plates-formes de fonctionnaires ainsi que plates-formes pour des administrateurs élus) à tous les trois niveaux de l'administration;
- le noyau de la mise à exécution sera fournipar les syndicats intercommunaux (cinq à quinze municipalités travaillant ensemble).

Les principaux objectifs de cette structure d'exécution, qui devrait être appliquée et rendue opérationnelle avant 1990, sont:

- tous les participants travaillant ensemble à la planification et procédant au suivi de la conformité et de l'exécution;
- la réalisation d'une approche intégrale, multimédia;
- les autorités administratives, d'une part, et le Ministère public, d'auto part, faisant route commune (au lieu de deux circuits distincts).

Les instruments administratifs pour l'exécution sont:

- les paiements d'amendes administratives (pour chaque violation ou pour chaque jour pendant lequel l'entreprise ne se conforme pas après intimation d'un ordre administratif);
- la fermeture partielle ou complète d'une usine;
- la contrainte administrative;
- le retrait du permis.

Instruments civils; basés sur la loi sur les infractions. Deux types de cas se produisent aux Pays-Bas:

- des cas contre les entreprises qui se sont rendues coupables de pollution du sol (décharge illégale) dans le passé; l'administration nationale leur réclame des dommages;
- des cas contre des entreprises pour interdire ou pour exiger certaines activités, afin de leur demander de se conformer aux réglementations sur l'environnement.

Instruments pénaux: la plupart des décrets sectoriels sur l'environnement - en ce qui concerne l'exécution pénale (sanctions et mesures de contrainte spéciales) - relèvent de la Loi sur les délits économiques. Les principales sanctions sont:

- l'emprisonnement;
- l'amende;

- l'obligation de verser une somme équivalente à l'avantage économique que le fautif a tiré de sa conduite illégale;
- l'obligation de restaurer/préserver;
- la fermeture de l'usine/l'entreprise pour un an au plus.

De plus, certaines *mesures provisoires* peuvent immédiatement être prises par le procureur et par le juge. A côté des mesures de contrainte, la Loi sur les délits économiques prévoit certaines *mesures coercitives* spéciales, comme:

- l'exigence d'avoir accès aux usines;
- l'exigence d'obliger des personnes à montrer des documents et des fichiers etc. pour inspection;
- l'exigence de prélever des échantillons.

Exécution pénale: considérant la place du droit pénal dans l'application des dispositions du code de l'environnement, la distinction suivante est faite aux Pays-Bas:

- délit grave (parfois organisé) contre l'environnement;
- souvent le cas, un délit moins grave contre l'environnement.

Evidemment la police et le Ministère public sont principalement impliqués dans les cas qui relèvent du premier type. Dans les cas qui relèvent du second type, la responsabilité reste aux autorités administratives. Si les possibilités administratives sont inexistantes, inadéquates et/ou épuisées, la poursuite doit être envisagée; la disposition pénale joue le rôle du "gorille dans le placard".

Hans Lefèvre
Wohnungs-, Planungs- und Umweltministerium,
und
Henk Wattel
Departement für Rechtsangelegenheiten, Niederlande

DURCHSETZUNG VON UMWELTGESETZEN IN DEN NIEDERLANDEN

Zusammenfassung

Zur Durchführung einer Umweltpolitik benutzen nationale, provinziale und kommunale Verwaltungen Instrumente wie Unterstützungen, Steuern, Umweltdienste, Öffentlichkeitsarbeit usw., stützen sich aber in erster Linie auf Vorschriften. Die regulierte Gemeinschaft hat die Vorschriften zu befolgen. Wenn sie dies nicht tut, wäre die Umweltpolitik der Regierung nutzlos, die Vorschriften wären Papiertiger und die Politik der Regierung würde ihre Glaubwürdigkeit verlieren. Es ist deshalb von entscheidender Bedeutung, daß die Regierung die Einhaltung der Vorschriften kontrolliert und, wenn erforderlich, rechtzeitig die geeigneten Maßnahmen zur Durchsetzung der Umweltvorschriften unternimmt.

In den Niederlanden ist die Behörde, die für die Durchsetzung bestimmter Vorschriften oder eines gesetzlichen Anspruches - einschließlich der Erteilung von Genehmigungen - verantwortlich ist, berechtigt, die Durchsetzung dieses Gesetzes zu erzwingen - auf behördlichem oder zivilrechtlichem Wege. Das bedeutet, daß die 670 Gemeinden für die Durchsetzung der Vorschriften und für die Genehmigungen fast aller der 400.000 Firmen und Werke des Landes verantwortlich sind. Die 12 Provinzen sind zur Durchsetzung der Genehmigungsauflagen für die etwa 3000 größeren Werke einschließlich der Landauffüllungen verantwortlich. Nur ein relativ kleiner Teil der Durchsetzungsaktivitäten fällt in den Verantwortungsbereich der nationalen Regierung: das Pestizidengesetz, das Gesetz über toxische Substanzen, das Kernenergiegesetz und Teile des Gesetzes über gefährlichen Abfall sowie das Gesetz zur Wasserreinhaltung. Die Polizei und die Öffentlichen Staatsanwälte, und eine Reihe von Beamten zur Überwachung der Gesetzesbefolgung, die vom Justizministerium eingesetzt werden, sowie spezielle

Detektive zur Bekämpfung der Umweltskriminalität, sind bevollmächtigt, die Befolgung *sämtlicher* Standards, Vorschriften und Genehmigungen mit ihren Auflagen zu erzwingen, wo eine Durchsetzung nach dem Strafrecht angebracht ist.

In den meisten Departementen der nationalen und provinzialen Verwaltungen der Niederlande ist man, ebenso wie in den meisten großen Städten oder kommunalen Kooperativen, der Ansicht, daß die Beamten, die Genehmigungen erteilen und jene, die die Durchsetzung der Bestimmungen erzwingen, in anderen Teilen des Verwaltungsapparates arbeiten sollten.

In der Anfangsphase der niederländischen Umweltpolitik (etwa 1970), hat man der Förderung der Compliance, der Überwachung und der Durchsetzung nur wenig Beachtung geschenkt. Zu Beginn der 80er Jahre gab es eine Reihe von Umweltskandalen. Bei den meisten von ihnen handelte es sich um illegale Ablagerungen gefährlichen Mülls. Die Behörden begannen zu erkennen, daß sie etwas unternehmen mußten, um die Durchsetzung ihrer eigenen Vorschriften zu erzwingen.

Das Umweltministerium hatte ein Programm gestartet, um die Durchsetzung der vom Ministerium und von anderen Verwaltungsebenen erarbeiteten Vorschriften für gefährlichen Abfall zu erzwingen.

Dieses Intensivierungsprogramm, das sich über mehrere Jahre erstreckte (1984-1990), wurde auch dazu benutzt, die lokale Polizei und die Staatsanwälte zu ermutigen, den Umweltfragen und der Umweltkriminalität eine größere Aufmerksamkeit zu schenken.

In jenen Tagen hatte man beschlossen, KEINE separate Umweltpolizei einzurichten (wie dies von einem Komitee vorgeschlagen worden war): die örtliche Polizei, die 24 Stunden am Tag auf Streife ist und sich im Strafgesetz auskennt, könnte in Umweltfragen in der Tat eine wichtige Rolle spielen. Um der Polizei zu helfen, richtete das Umweltministerium ein Unterstützungsteam für

Umweltangelegenheiten ein, das sich aus Mitarbeitern des Inspektorates für Umweltfragen zusammensetzt, und das der Polizei und dem Staatsanwalt bei der Behandlung von kriminellen Fällen hilfreich zur Seite stehen kann.

Die 90er Jahre stellen für die Umweltpolitik in den Niederlanden, und in der ganzen Welt eine große Herausforderung dar. Um die ehrgeizigen Ziele des Nationalen Planes Umweltpolitik (Mai 1989) zu verwirklichen, müssen die Umweltvorschriften gestärkt und ausgedehnt und sicherlich auch effizienter umgesetzt werden. Dies stellt eine besondere Herausforderung hinsichtlich der Durchsetzung dieser Vorschriften dar. In Verbindung mit diesem Plan sind den Gemeinden, den Provinzen, den Staatsanwälten und der Polizei beträchtliche finanzielle Mittel gewährt worden. Diese Zahlungen sind für eine Dauer von mehreren Jahren vorgesehen und werden auf jährlicher Basis gewährt; sie dürfen ausschließlich für Umweltangelegenheiten eingesetzt werden. In Verbindung mit dieser Kapazitätsausweitung besteht ein sich vergrößernder Bedarf für eine Koordinierung der Aktivitäten aller Beteiligter, einschließlich der fünf nationalen Ministerien (das Innenministerium, das Justizministerium, das Ministerium für das Transportwesen und für Öffentliche Bauten, das Landwirtschafts- und das Umweltministerium). Auf Initiative des Umwelt-Inspektorats wurde 1990 in einer Arbeitsgruppe mit Repräsentanten sämtlicher Instanzen und Ministerien, einschließlich der Polizei und der Staatsanwaltschaften ein Modell entworfen. Dieses Modell enthält Elemente wie:

- jährlich auf den drei Verwaltungsebenen zu erarbeitende Programme sämtlicher Instanzen/Behörden, die an der Durchsetzung von Umweltgesetzen beteiligt sind (einschließlich der Polizei und der Staatsanwälte);
- beratende Plattformen auf allen drei Verwaltungsebenen (Beamten-plattformen sowie Plattformen für gewählte Vertreter der Verwaltung);
- der Kern der Maßnahmen für die administrativ erzwungene Durchsetzung wird von den kommunalen Kooperativen durchgeführt (es arbeiten fünf bis fünfzehn Gemeinden zusammen).

Dieses Arrangement zur Durchsetzung der Umweltgesetze, das vor 1995 realisiert und intakt sein sollte, hat in erster Linie folgende Ziele:

- alle Beteiligten sollten bei der Planung und der Ausführung der Compliance-Überwachung und der Erzwingung der Gesetzesbefolgung aufeinander zugehen;
- Realisierung einer integralen, multiformen Herangehensweise;
- die Verwaltungsbehörden einerseits und die Polizei und die Staatsanwaltschaften andererseits sollten gemeinsam marschieren (keine zwei getrennten Kreise!)

Administrative Mittel zur Durchsetzung der Gesetzesbefolgung:

- administrative Strafgebühren (für jede Gesetzesverletzung oder für jeden Tag, an dem das Unternehmen behördlichen Anordnungen nicht nachkommt);
- teilweise oder komplette Schließung eines Werkes;
- administrative Erzwingung;
- Widerrufung der Betriebsgenehmigung.

Zivile Mittel: basierend auf dem Schadensersatzrecht. In den Niederlanden kommen zweierlei Fälle vor:

- Verfahren gegen Unternehmen, die sich in der Vergangenheit der Bodenverschmutzung schuldig gemacht haben (illegale Müll- oder Abfallablagerung); die nationale Regierung erhebt Schadensersatz-ansprüche gegen sie;
- Verfahren gegen Unternehmen, um bestimmte Aktivitäten zu verbieten oder zu verlangen, um zu erreichen, daß sie in Übereinstimmung mit den Umweltbestimmungen arbeiten.

Mittel nach dem Strafrecht: die meisten der sektoralen Umwelt-bestimmungen sind - im Hinblick auf ihre Durchsetzung (Sanktionen und spezielle

erzwingende Maßnahmen) - unter dem sog. "Economic Offence Act" plaziert. Die wichtigsten Strafen sind:

- Gefängnisstrafe;
- Geldstrafe;
- die Verpflichtung, eine Summe zu bezahlen, die dem ökonomischen Nutzen entspricht, die der Straffällige aus seinem illegalen Verhalten gezogen hatte;
- Verpflichtung zur Wiederherstellung/Erhaltung;
- Schließung der Fabrik/des Werks für höchstens ein Jahr;

Darüber hinaus können von einem Staatsanwalt oder einem Richter sofort bestimmte *einstweilige Maßnahmen* ergriffen werden. Neben den allgemeinen *erzwingenden Maßnahmen* enthält der "Economic Offence Act" bestimmte spezielle erzwingende Maßnahmen, so z.B.

- Zutritt zu Fabriken und Anlagen;
- Verpflichtung von Personen, Dokumente und Unterlagen usw. für Inspektionszwecke vorzuzeigen;
- Entnahme von Stichproben.

Erzwingung nach dem Strafrecht: Im Hinblick auf die Rolle des Strafrechts bei der Durchsetzung des Umweltgesetzes wird in den Niederlanden folgende Unterscheidung getroffen:

- schwere (manchmal organisierte) Umweltkriminalität;
- gelegentlich vorkommende, nicht so schwerwiegende Kriminalität.

Offensichtlich sind Polizei und Staatsanwälte in erster Linie mit Fällen der ersten Kategorie beschäftigt. Fälle der zweiten Kategorie fallen vor allem in den Verantwortungsbereich der Verwaltungsbehörden. Gibt es keine administrativen Mittel, oder wenn sie nicht angemessen und/oder ausgeschöpft sind, ist eine straf-

rechtliche Verfolgung in Erwägung zu ziehen. Die strafrechtlichen Maßnahmen wirken wie der "Gorilla auf dem Klo".

Доклад Ханса Лефевра, Министерство по жилищному строительству, физической планировке и окружающей среде, и Хенка Ваттеля, департамент юстиции Голландии.
Этот доклад не обязательно отражает во всех отношениях мнение голландского правительства.

ПРИМЕНЕНИЕ ЗАКОНА ОБ ОКРУЖАЮЩЕЙ СРЕДЕ В ГОЛЛАНДИИ

0 РЕЗЮМЕ

В проведении свой политики окружающей среды, национальной, провинциальной и муниципальной, правительства используют такие средства, как субсидии, налоги, обслуживание окружающей среды, гласность и т.п., но прежде всего они опираются на **регулирование.** Регулированное общество должно подчиняться правилам. Если оно не будет этого делать, то вся политика окружающей среды, проводимая правительством, будет напрасна, постановления превратятся в бумажных тигров, политика правительства потеряет доверие. Поэтому существенно, что правительство наблюдает за согласием и принимает, где это возможно, своевременные и нужные меры для применения постановлений по окружающей среде.

В Голландии власть ответственна за применение того или иного статута или иного законного требования, включая выдачу разрешений, имеет право применять в административном порядке или по гражданскому праву этот закон. Это значит, что 670 муниципалитетов ответственны за применение постановлений и разрешений для почти всех 400.000 торговых предприятий и заводов страны. 12 провинций имеют право выдавать разрешения приблизительно 3.000 наиболее крупным заводам, включая подходы к берегу. Лишь сравнительно небольшая часть принудительных действий осуществляется национальным правительством: постановление о средствах для борьбы с вредителями, постановление о ядовитых веществах, постановление о ядерной энергии, некоторые части постановления об опасных выбросах и постановление о чистых водах. Полиция и прокуратура, и определенное число контролирующих служащих, назначенных Министерством юстиции в качестве специальных детективов по преступлениям против окружающей среды, имеют право применять **все** стандарты, постановления и разрешения, где уместно уголовное применение.

В большинстве департаментов национальных и провинциальных правительств в Голландии, как и в большинстве крупных городов или муниципальных коопераций, преобладает мнение, что служащие, выдающие разрешения, и служащие, занимающиеся работой по их применению, должны быть в разных частях административной организации.

В самое первое время существования политики окружающей среды в Голландии /около 1970 г./ очень мало внимания уделялось поощрению согласия, наставлению или принуждению.
В начале 1980-х годов обнаружился целый ряд скандалов, касающихся окружающей среды. Большинство из них приниципиально касалось нелегальной разгрузки опасных отходов.
Власти начали понимать, что они должны предпринять какие-то шаги для соблюдения собственных постановлений.

Министерство окружающей среды учредило программу для интенсификации проведения в жизнь постановлений министерства и других правительственых уровней о вредных выбросах.

Эта многолетняя программа по интенсификции /1984-1990 г.г./ была также использована, чтобы побудить местную полицию и общественных прокуроров уделять больше внимания вопросам и преступлениям в области защиты окружающей среды.

В те дни было принято решение не учреждать отдельную полицию по вопросам окружающей среды /как это предлагала одна комиссия/: местная полиция, патрулируя 24 часа в сутки, хорошо осведомленная в уголовном правосудии, могла бы, безусловно, сыграть важную роль в вопросах окружающей среды.

Для оказания помощи Министр по вопросам окружающей среды создал группу помощи по вопросам окружающей среды, состоявшую из персонала инспекции окружающей среды, которая может и будет помогать полиции и прокурорам в расмотрении уголовых дел.

1990-е годы ставят крупные задачи перед политикой окружающей среды в Голландии и во всем мире.

Для достижения амбиционных целей национального плана в политике окружающей среды /май 1989 г./ постановления по вопросам окружающей среды должны быть усилены и расширены, и на самом деле, лучше выполнены. Таким образом будет решена важная задача при осуществлении этих постановлений.

В связи с этим планом финансовые средства были выделены правительством муниципалитетам, областям, прокурорам и полиции.
Эти финансовые средства рассчитаны на многолетний период и выдаются на годовой основе; они предназначены исключительно для вопросов, связанных с окружающей средой.

В связи с этим расширением мощности возникает возрастающаяя потребность в координации деятельности всех, кого это касается, включая пять национальных министерств /внутренних дел, юстиции. транспорта и общественных работ /и вод/, земледелия и окружающей среды/.
По инициативе Инспекции окружающей среды в1990 году была выработана модель в рабочей группе, в которую входили представители всех органов и министерств, включая полицию и прокуратуру.
Эта модель включает такие элементы, как:

* годовое программирование всеми органами /властями, участвующими в осуществлении закона об окружающей среде, включая полицию и прокуратуру/ на трех правительственных уровнях;

* структурные совещательные платформы /платформы государственных служащих и платформы выборных администраторов/ на всех трех правительственных уровнях;

* ядро административного осуществления будет представлено муниципальным кооперациям /от пяти до пятнадцати работающих вместе муниципалитетов/.

Главные задания по проведению в жизнь структуры, которые должны быть осуществлены и будут действовать до 1995 года, следующие:

* все участники идут нога в ногу в планировании и выполнении согласованных постановлений и действий;

* реализация интегрированного, многорежимного подхода;

* административные власти с одной стороны и полиция и прокуратура с другой стороны идут вместе /не два различных круга/.

Административными средствами принуждения являются:

- административные штрафные платежи /за каждое нарушение или за каждый день, в течение которого предприятие не подчиняется административному предписанию после его вынесения/;
- частичное или полное закрытие завода;
- административное принуждение;
- отмена разрешения.

Гражданские средства, основанные на законе об исках. Два типа дел имеют место в Голландии:

- судебные дела против предприятий, виновных в загрязнении почвы /нелегальное сваливание в отвал/ в прошлом; национальное правительство требует от них компенсацию за причиненные убытки;
- судебные дела против предприятий с тем, чтобы запретить определенную деятельность или потребовать, чтобы они подчинялись постановлениям об окружающей среде.

Уголовные средства: большинство актов, касающихся окружающей среды, по отраслевому признаку подчиняются в отношении их криминального принуждения /санкции и специальные принудительные меры/ Акту экономических нарушений.

* Главными санкциями являются:

- тюремное заключение;
- штраф;
- обязательство уплатить сумму, эквивалентную экономической прибыли, полученной нарушителем от его нелегального действия;
- обязательство восстановления/сохранения;
- закрытие фабрики/предприятия максимум на один год.

* Далее определенные **временные меры** могут быть немедленно приняты прокурором и судьей.

* Наряду с общими принудительными мерами, Акт экономических нарушений содержит специальные **принудительные меры**, как-то:

- требование иметь доступ к заводам;
- требование предъявлять документы, досье и т.п. для инспекции:
- требование доставлять пробы.

Уголовное принуждение: по отношению к месту уголовного права в применении закона об окружающей среде, в Голландии было сделано следующее отличие:

- тяжкое /иногда организованное/ преступление против окружающей среды;
- часто повторяющееся менее тяжкое преступление против окружающей среды.

Очевидно, полиция и прокуратура преимущественно заняты делами первого типа. В судебных делах второго типа в первую очередь несут ответственность административные власти. Если же административные возможности отсутствуют, недостаточны и/или исчерпаны, надо подумать о судебном преследовании, карательное постановление тогда функционирует как "горилла в чулане".

Mr. Franco Giampietro
Magistrate, Ministry of Justice, Italy

MODELS AND TYPES OF ENVIRONMENTAL OFFENCES; PRELIMINARY CONSIDERATIONS

1. Introduction

1.1. This contribution reflects the paper that I presented to the "Working Group on the protection of the environment through criminal law" (PC-S-EN), requested by Council of Europe to prepare some proposal to the following works of Plenary Committee (PC-R-EN).

Therefore, it contains some specific reference to documents presented by my distinguished colleagues of the Working Group on the same issue or on complementary ones.

However, I think that it will be useful for our discussion to keep these references not only to get my contribution enriched with their ideas, but also to increase matter for a deeper debate.

1.2. The scope of this paper lays on discussing the main issues of a fundamental approach to a list of criminal offences to the environment. I consider the solution of these questions as preliminary to drafting the structure of criminal offences. Naturally, I will try to make deeper my first reactions drafted in my previous report, and I have to present my compliments to Mr. Möhrenschlagen for this very important contribution, before declaring that the following considerations are directed to express a *different* approach to the list of criminal offences to the environment, suggested by him.

However, I expect that two different analysis will support a deeper discussion in the Plenary Committee and, consequently, more conscious deliberations.

2. General questions preliminary to a list of criminal offences to the environment

2.1. In my opinion, it is necessary to give a clear answer to the following general questions, otherwise we face the following risks:

a) To discuss in *every* case or in *specific* ones the *same* problems;

b) To miss *uniformity* and *coherence* in drafting the structures of criminal offences;

c) To complicate the *list* of criminal offences, while it seems opportune to set up *few general* provisions.

2.2. *First question: what is (or what are) the object (or the objects) requiring protection?*

There is at the moment a significant agreement at the international level, codified in EC documents (for example, dir. 156/ 1991 CEE on waste, art. 3) on the importance of defining:

a) *Environment* as the *scope* of the protection *ex se, distinguishing* it from properties and public health or individual right to personal integrity;

b) The *components* of the environment meriting protection.

In the first case *(sub* a), we can adopt a *new* protection *adding it* to the traditional provision on criminal offences regarding the protection of public health or properties. Some *exceptions* are possible related to cases of danger or damage, assuming the characteristics of an "environmental disaster" (after, *sub* n. 2.3.2.).

In the second case *(sub* b) we can evaluate the opportunity of accepting the definition of the components of environment, already drafted by international instruments or declarations, considering the *main aims* to have:

b.1. a *common* conception of the object requiring criminal protection;
b.2. a precise *relationship* between civil - administrative sanctions and criminal sanctions.

Consequently, I *suggest* to adopt as "working text" the *definition of environment* set up by the draft Convention of Council of Europe (*Art. 2, para. 11*) on "damage resulting from activities dangerous to the environment", which is just appearing on the draft Protocol to the Convention of Vienna on civil liability for nuclear damage.

We will probably have some more opportunities to connect this draft Convention (according compensation and reinstatement of damage to the environment resulting from a list of dangerous activities) with our envisaged provisions.

b.3 Naturally, for the purposes of criminal law, we need a clear and narrow *definition* of environment and of its components as well as protected. In the subject matter, I think that it is possible to achieve this result, if we consider the possibility of two steps strategy.

The first one should establish a *common* and *precise scope* of the protected elements. We suggest to accept the *definition* of environment *as a whole and as any* of the *following components:* natural resource (air, water, soil, fauna and flora); the interaction between the same factors (natural balance, climate); property which forms part of the cultural heritage and the characteristic aspects of the landscape.

The *second part* of the definition is aimed to *integrate* the first one (which remains the *minimum standard* in the Convention), considering the opportunity to

commit to national law to stipulate *specific integrations* of the quoted components of the environment (as defined in the first part of definition).

It is a generally accepted idea to leave some "open windows" in a Convention looking forward to the future and in a field (as it is in the case), where rapid advancements are *already* envisageable - especially in some countries.

In our proposal we intend to stress the *unity* of the environment as a *whole* since there are scientific evidences of the *complementary* role and on the *interaction* between its components.

But, at the same time, it is possible to consider as relevant, in criminal law, the protection of any component *ex se,* following the same approach of administrative law. That *actually* means:

b.3.1. In the case of endangerment or damage to the environment, the criminal offence is considered "committed" when the endangerment or the damage relate to *one* of its components (as well as above defined).

b.3.2. In the case of endangerment or damage regarding *more than one* component of the environment *or* the *interaction* between the environmental components, this conduct will be evaluated only on the point of view of the *seriousness* of *offence* (and therefore of criminal liability) and, consequently, with an *appropriate* and *more* severe *punishment.*

b.3.3. In the case of "abstract endangerment" we ought to select criminal offence categories, which can cause a risk of relevant and specific impact on one of the environmental components or on the whole of the environment (see par. 3.2).

The suggested solution can easily avoid the problems coming from a structure of criminal offences, which considers the behaviour causing damage or danger "to the air, natural soil or natural water bodies".

If the same fact regards more than one of these components of the environment, I wonder whether we could admit many (or different) criminal offences.

In our proposal the answer is easily negative since we put up the definition of the environment as a whole, where air, soil, water, etc., are only components of the its global unity.

c. It seems easier, following a *common* definition of the environment, to make the choice of utilizing *criminal sanctions* only as an *extreme ratio,* avoiding the risk of over-criminalisation, since we are assessing a specific (criminal) measure inside of *different measures* (administrative, civil and criminal ones) for the protection of the *same entities.*

2.3. *Second question: What are the general profiles of the criminal offences concerned?*

2.3.1. We can identify as general elements integrating the structure of criminal offences:

A) intentional or negligent action;

B) abstract offence of exposure to danger or offence of exposure to concrete danger or offence which causes injury or result crime (to the environment);

C) the conduct, causing the danger *or* the damage, quoted in a) - b), has to be *unlawful.*

I totally agree on the points A) and B) with the conclusions about the structure of offences stated by Mr Möhrenschlager.

Two statements on point C:

C.1. The word *unlawful* means every violation: a) of *general, specific* pro-

visions and *principles* of laws or statutory rules, adopted to protect the environment; and b) of the provisions contained in administrative acts (orders, permits, etc.), implementing the provisions of laws (of statutory rules).

Obviously, every kind of legal provision has to be clear and defined in a precise rule. This requirement is necessary to stress that only a danger or a damage *caused unlawfully* dan be considered relevant.

C.2. If the conduct is unlawful, it is *not possible* to invoke a justificatory effect, coming from *erroneous* administrative *acts.*

On one hand, public officials cannot exempt (with their misleading acts not in *compliance with law,* sometimes hiding or covering their own liability) the operator from *criminal* liability relating to *serious* offences to the environment (we are dealing with: see para. 2.2 in c)).

On the other hand, the person whose activity constitutes a significant risk for the environment has to provide himself not only with *professional* and *technical* support, but also with *legal* knowledge (or with a qualified staff), if he wants to exercise a lucrative (but dangerous) activity.

Finally, the operator can assess the danger to the environment deriving from *its activity* in a favorable position (compared to public officials, charged with control), *enjoying* its daily experience on its production technology, on raw materials and wastes or emissions put off.

In *particular cases,* it is possible to envisage some *exceptions* to these conclusions, (generally speaking) and to *exclude* the criminal liability. These conclusions are opposite to the ones accepted by my distinguished colleague, Mr. Möhrenschlager, who can envisage only *very rare* cases of criminal liability when the "erroneous" act is really *null* and *void,* in any other cases assuming the *justification effect* of the same act, even if erroneous and unlawful.

C.3 When the conduct of operator causes a damage to the environment, which can be qualified as an "environmental disaster" (and therefore with considerable negative effects on public health and properties: see para. 2.2. *sub-comments* to para. a)), in this case (and in the case of exposure to concrete danger) it would be possible to declare the criminal liability, without requesting an *unlawful* action (in the meaning of action not in compliance with environmental administrative law), but *always* requiring *negligence*, according to the principle of fault liability. But we may argue that *also* in the case involved we are applying the general profiles, as defined in *sub. paras.* A, B, C, (para. 2.3.1), since we assert that the person responsible for (danger or) damage - environment disaster violated a particular *duty of care*, resulting from a *general principle of law.*

3. Outline of a general list of criminal offences.

I think that we must achieve two objectives:

a) The drafting of general and simple provisions concerning serious forms of offences;

b) The evaluation of the opportunity to establish criminal sanctions of "imprisonment" or putting it as an alternative to criminal fines.

I propose to distinguish:

3.1. *Activities performed professionally producing a direct and immediate impact on the environment in their ordinary running.*

I mean all the activities which cause emissions, discharge of waste, noise, generally submitted to a permit or an authorization to protect the environment against direct effects, coming from their carrying on. In this category, when the con-

duct of emission, discharge, noise, etc., is performed *unlawfully* and with *negligence*, it is possible to envisage:

a) Criminal offences causing *exposure to concrete danger*, punishable with *imprisonment alternative* to *criminal fines*;

b) Criminal offence causing *damage to the environment* (as *relevant* one: e.g. causing elimination of *quality standards* of natural resources, assured by law), *punishable* with *imprisonment.*

3.2. *Activities performed professionally causing a risk of relevant and specific impact on the environment.*

In this category we may lish activities causing a significant risk to the environment (and to man and properties).

When the conduct relates to management or emission or discharge of dangerous substances or *dangerous* wastes; micro-organism, dangerous radiations (ionizing or non-ionizing); or relates to activities with risk of major accidents hazards (EEC directive No. 82/501), if the conduct is acted *unlawfully* and with *negligence*, it is possible to envisage:

a. Criminal offence as *abstract offence of exposure to danger*, punishable with *imprisonment alternative* to *criminal fines*;

b. Criminal offence causing *damage* to the environment, (in the same meaning as sub-para. a)) *punishable* with *imprisonment.*

3.3. *Activities causing a concrete exposure to an environmental disaster or a damage qualified as an environmental disaster.*

In this case not only environmental entities but also public health and properties (can/or) are involved with considerable and spread effects.

We already said that, in this case, it is not necessary to prove a specific violation of law (see para. 2.3.1. lett. C 3), but only negligence. The criminal sanction will be i*n every case* the *imprisonment.*

3.4. *Non-compliance with duty of information or monitoring.*

If we agree on the conclusion about the great importance of information, coming from the operator, to set up stringent and pertinent prescriptions to him and to avoid danger or damage to the environment, I think that it is possible to envisage the form of *likelihood to produce given results or potential offences of exposure to danger*, when with *negligence* and *unlawfully*, the same operator:

a) **Running the activities causing any direct and immediate impact on the environment (para. 3.1) does not supply information required by public authority:**

a.1 Before the concession of permit or authorization;

a.2 Before the closing down of plant;

a.3 When established by law in specific cases.

b) **Running the activities causing a risk of relevant and specific impact on the environment (para. 3.2) does not supply information not only in the cases of sub-para. a) (1-3), but also when:**

b.1 Obliged to periodical reports; or

b.2 When the operator does not carry out automatic controls or direct monitoring of his dangerous activity (if prescribed).

In the *first* case, criminal sanctions may be imprisonment as alternative to criminal fines; in the *second*, imprisonment is preferable as an exclusive one.

4. Criminal offences committed by individuals.

In our approach to the criminal protection of the environment we have chosen activities professionally performed (see above para. 3.1; 3.2; 3.3; 3.4) on the basis of the following considerations.

a) The opportunity of setting up *few general provisions* for relevant cases of danger or damage to the environment;

b) The necessity of taking into account the *experience* of domestic *and transboundary pollution*, deriving from *dangerous activities*, professionally acted and therefore causing a *continuous risk* for the environment;

c) The scope of *common problems* connected to the unlawful exercise of plants or economic enterprises. For example, the relevance of *professional fault* in managing activities which poses a significant risk for the environment.

But we can envisage *some particular categories* of criminal offences, which can be acted by individuals *outside* (in a juridical meaning or in fact) of economic activities, professionally performed.

Generally, we will meet cases of *intentional* behaviour directed to cause danger or damage to the environment or public - environmental disaster (e.g. for political and or other reasons).

In these cases the person responsible of the criminal offences can be *anyone*. I think that the structure of the crime has to consider endangerment or damage to the environment, dropping the categories of abstract offences of exposure to damage (excepted when consisting in a conduct not in compliance with administrative law and causing a specific and significant risk to the environment).

M. Franco Giampietro
Ministère de la Justice, Italie

MODELES ET TYPES DE DELITS RELATIFS A L'ENVIRONNEMENT - CONSIDERATIONS PRELIMINAIRES

Résumé

1. Introduction

La présente contribution reflète le document que j'ai présenté au "Groupe de travail sur la protection de l'environnement par le droit pénal" (PC-S-EN), demandé par le Conseil de l'Europe pour élaborer une proposition pour les travaux futurs du Comité plénier (PC-R-EN).

Le présent document a pour objet de discuter les principaux thèmes d'une approche fondamentale en vue de dresser une liste des délits pénaux en matière d'environnement. Je considère la résolution de ces questions comme un préliminaire à l'élaboration de la structure des délits pénaux.

2. Questions d'intérêt général préalables à une liste des délits pénaux

2.1 *Première question*: Quel est (ou quels sont) l'objet (ou les objets) nécessitant une protection

a) Définition de l'environnement et de ses composants,

b) Relation entre les sanctions civiles, administratives, pénales,

c) Mise en péril ou dommage causé à un de ses composants.

2.2 *Seconde question*: Quels sont les profils généraux des délits pénaux concernés

a) La structure des délits pénaux,

b) La conduite illicite: le problème de l'effet de justification résultant d'actes administratifs erronés.

3. Ebauche d'une liste générale de délits pénaux concernés

3.1 Activités menées de manière professionnelle, exerçant un impact direct et immédiat sur l'environnement dans leur exécution ordinaire.

3.2 Activités menées de manière professionnelle entraînant un risque d'impact significatif ou spécifique sur l'environnement.

3.3 Activités entraînant une exposition concrète à un désastre environnemental ou dommage qualifié de désastre environnemental.

3.4 Non conformité avec le devoir d'information ou de suivi.

4. Délits pénaux commis par des personnes

Franco Giampietro
Polizeirichter, Ministerium der Justiz, Italien

MODELLE UND TYPE DER UMWELTDELIKTE - EINLEITENDE ÜBERLEGUNGEN

Zusammenfassung

1. Einführung

Dieser Beitrag gibt den Vortrag wieder, den ich der "Arbeitsgruppe über den Schutz der Umwelt durch das Strafgesetz" (PC-S-EN) auf Veranlassung des Europarates zur Ausarbeitung einiger Vorschläge für die zukünftige Arbeit des Plenumskomitees gehalten habe (PC-R-EN).

In diesen Ausführungen werden die wichtigsten Fragen erläutert, die für die Erarbeitung einer Liste krimineller Umweltdelikte von Relevanz sind. Ich betrachte die Lösung dieser Fragen als Vorbereitung einer Skizzierung der Struktur krimineller Delikte.

2. Allgemeine Fragen bei der Vorbereitung eines Verzeichnisses krimineller Delikte

2.1 *Erste Frage:* Was ist das (oder was sind die) zu schützende(n) Objekt(e)?

a) Definition der Umwelt und ihrer Bestandteile,

b) Verhältnisse zwischen zivilen, administrativen und strafrechtlichen

Sanktionen,

c) Gefährdung oder Schädigung einer ihrer Komponenten.

2.2 *Zweite Frage*: Was sind die allgemeinen Profile der betreffenden kriminellen Delikte?

a) die Struktur der kriminellen Delikte,

b) die Verleitung zum Ungesetzlichen: das Problem des aus fehlerhaften Verwaltungsvorschriften herrührenden Rechtfertigungseffektes.

3. Entwurf einer allgemeinen Liste krimineller Delikte

3.1 Erwerbsmäßig durchgeführte Aktivitäten, die bei normaler Durchführung direkte und sofortige Auswirkungen auf die Umgebung haben.

3.2 Erwerbsmäßig durchgeführte Aktivitäten, die mit dem Risiko verbunden sind daß sie relevante und spezifische Auswirkungen auf die Umwelt verursachen.

3.3 Aktivitäten, die zur Folge haben, daß man konkret einer Umweltkatastrophe ausgesetzt ist, oder die einen Schaden verursachen, der als Umweltkatastrophe eingestuft wird.

3.4 Vernachlässigung der Informations- oder Überwachungspflicht.

4. Von Individuen durchgeführte kriminelle Delikte

Франко Гиампиестро

МОДЕЛИ И ТИПЫ НАРУШЕНИЙ, СОВЕРШАЕМЫХ ПРОТИВ ОКРУЖАЮЩЕЙ СРЕДЫ. ПРЕДВАРИТЕЛЬНЫЕ ОБСУЖДЕНИЯ

1. Введение

Этот вклад в дискуссию, вносимый мною, отражает тезисы того доклада, который я сделал для "Рабочей группы по вопросу об охране окружающей среды посредством уголовного права" (PC-S-EN) по просьбе Совета Европы с тем, чтобы подготовить несколько предложений для будущей работы Пленарной Комиссии (PC-R-EN).

Основной идеей этого доклада является дискуссия о фундаментальном подходе к главным вопросам, фигурирующим в списке уголовных нарушений, совершаемых против окружающей среды. Я считаю, что решение этих вопросов требует предварительного выделения структуры уголовных нарушений.

2. Общие вопросы, выдвигаемые до изучения самого списка уголовных нарушений

2.1 Первый вопрос: какой предмет (или какие предметы) требует/требуют охраны ?

а) Определение окружающей среды и её составных частей.
б) Взаимоотношение между гражданскими, административными и уголовными санкциями.
в) Подвержение опасности или нанесение ущерба одной из её составных частей.

2.2 Второй вопрос: Какой общий профиль имеют изучаемые уголовные нарушения ?

а) структура уголовных нарушений
в) незаконное поведение: проблема действия оправдания, исходящая из ошибочных административных актов.

3. Конспект общего списка уголовных нарушений

3.1 Профессионально совершённые действия, оказывающие непосредственное и немедленное воздействие на окружающую среду в обыкновенной обстановке

3.2 Профессионально совершенные действия, знаменующие собой риск возникновения релевантного и специфического воздействия на окружающую среду

3.3 Действия, конкретно подвергающие катастрофе окружающую среду или наносящие ущерб, что можно определить как катастрофу для окружающей среды

3.4 Несоблюдение обязанности обеспечить информацию и контроль

4. Уголовные нарушения, совершаемые отдельными лицами

Mr. Staffan Westerlund
Professor of environmental law, Uppsala University, Sweden

THE EFFECT OF ADMINISTRATIVE LAW ON THE SHAPE AND THE APPLICATION OF ENVIRONMENTAL OFFENCES

1 Introduction

The title given to me by the organizers may be understood in more than one way. However, the background paper conclusions narrow the room for interpretation, since they define two models of control in the field of environmental control: the *Criminal Law Model* and the *Administrative Model.* On the other hand, the administrative model may contain more than what is mentioned in the background paper's conclusions. In some respects I will analyze that in this paper.

The conclusions in the background paper also state that these two models are not compatible. And that coordinating two models is one thing, mixing them is another. I agree.

I will start by applying perspectives to environment control and control strategies related to the administrative model. This is followed by a brief analysis of three main approaches in national environmental law combined with a forecast of which developments we are likely to meet in order to try to implement the sustainable development concept. This includes more administrative legislation and measures, some of which I will discuss or at least mention. In order to make those efficient, sanctions are necessary for reasons that I will give. Some of these are criminal law sanctions, much more are administrative sanctions of different kinds. Some of these I discuss in the last part of this paper.

2 Perspectives

When putting environmental policies and control strategies in perspective, we see an increasing gap between today's environmental goals and the actual environmental control in most countries. Today's problems are treated with yesterday's instruments.

To some extent old fashioned thinking, reinforced by old time legal approaches, slows down progress.

Old fashioned *political* thinking is usually based upon ideas of economic growth and of freedom for most enterprises to operate with profit.

Old fashioned legal thinking is usually based upon ideas of maximum freedom for individuals and enterprises to act. Each regulation is easily considered or treated as an exceptional restriction, even if it is necessary. However, an alternative view is the following: *Where there is no law prohibiting harmful actions, the law allows harmful actions.* When enacting a new law banning for example a certain chemical substance, we do not increase the number of rules. What we actually do is changing one rule, so far embedded in the general principles that what is not prohibited is allowed, to another rule, this time explicit and specific, with the opposite content.

3 The concept of sustainable development

Modern environmental thinking is, *inter alia,* implied in the concept of sustainable growth and in the recognition that environmental qualities and natural resources are essential, necessary, for present and future human welfare. There are

ecological limits, beyond which conditions change without us being able to negotiate with nature. The biosphere represents a capital. When that capital is diminished, we come closer to an ecological poverty. When such poverty has spread widely, the disaster for mankind is a reality.

This concept leads to, or requires, more specified environmental concepts such as:

- Preserving the biological diversity;
- Preventing the green house effect;
- Achieving and maintaining certain water and air qualities;
- Preventing high radiation doses for people and other organisms.

These concepts are based upon the insight that there are limits, set by nature, limits that will not disappear just because they do not fit into our ideas of freedom of enterprises and individuals, of economic growth and so on.1

4 Old and still valid environmental problems

In addition to the comprehensive concept of sustainable growth, there are all well known environmental problems and issues, including but not limited to human health and welfare in specific regions. Here we must distinguish between:

- Acute hazardous or damaging impact;
- Accumulated and similar cumulative and synergetic impact.

---

1. It is true that we do not know exactly where those limits are, and we also know that technology and knowledge will make it possible to use nature intensively, without diminishing its capital. One of the ideas behind the sustainable development concept is that such improvements and knowledge shall be used, but not in such a way that we endanger future welfare.

The first category is, I believe, suitable for many parallelapproaches in environment control, one of these being the criminal law model. The second category has one or more characteristics since the hazards and/or damage are more or less due to:

- Accumulation;
- Many actions, many discharges, many enterprises;
- Transboundary transport of pollution;
- Air and water borne pollution.

In addition to this, there often are:

- No direct connections between one specific emission and a specific impact;
- Virtually no actions which, if changed, alone will contribute visibly and directly to the improvement of environment;
- No specific, generally true, relationships between the amount of pollution discharged by a specific polluter and the effect of this very amount of pollution (because of regionally different sensitiveness to this pollution).

This second category is probably in the first place suitable for administrative actions, backed up by a strong sanction system. I will discuss that in this paper.

5 The administrative model, old perspective

The background paper for this seminar describes the administrative model as being based upon cooperation and bargaining, long term planning and technological considerations.

As a description of such models being practiced in many countries, we can accept it. However, it does not apply to all administrative environmental control. And, further more, it is insufficient as a description of administrative environmental control suitable for the implementation of modern environmental thinking. Here we are once again using two different perspectives. The old perspective originates from the standpoint of human beings and enterprises and their priorities. Most laws, even environmental laws, are more or less formed from that perspective. Some concepts illustrating this perspective are:

- Best Available Technology;
- Balancing environmental quality against the costs for preserving the same;
- Economic needs take over environmental concerns;
- Harmonization of rules and free trade have a priority over environmental concern;
- "You (always) have to compromise...".

6 New perspective

The new perspective is found in concepts like the following:

- Use natural resources, do not consume them. The best, although not perfect, example is international law based quoatas for fishing;
- Environmental quality standards. Imperative, binding quality standards are found in the laws of many countries, the American Clean Air Act is probably on of the most developed examples. Many European Community directives include this concept;
- The protection of endangered species. Such a concept is found in international treaties and, for example, in the US Endangered Species Act;
- Maximum total load, maximum total emissions, with respect to the

atmosphere. More and more discussed and used, not only nationally but also internationally, which calls for national legislation to be implemented;

- Bubble policies. This is closely related to more than one of the above mentioned concepts.

To incorporate and implement concepts based upon the realization that the biosphere has a limited capacity, that what was earlier called the carrying capacity of Earth is limited, calls for more administrative rules than only rules focussing on cooperation and bargaining and technical considerations. The main difference is probably that such efforts will be part of the *implementation system* in environmental control, not *ultimate rules in themselves*.

7 Three typical categories

To illustrate this, we can put countries in one of three main groups. One includes countries, where the environmental law is based upon substantive rules requiring the use of best available technology for new sources (and possibly with a "grandfather clause" saying that old facilities are allowed more freedom to pollute).

The second includes countries that has added to its substantive rules environmental quality standards but *includes the same rules on best available technology (possibly with grandfather clauses* as the first category).

The third includes countries who have rules on environmental quality but have not paid sufficient attention to the connection between these rules and rules on how each operator, land user and authorities shall act when the quality standards are not met.

8 The implications of quality standards

The difference is that environmental quality standards,provided binding and provided a suitable enforcement system,imply more rules for the enterprises than only the BAT-requirements. The quality standards restrict the actions for enterprises and authorities: BAT is not always sufficient, if the total load upon the ecosystem causes the environmental quality to be inferior to what the standards require.

Exactly which enterprises that are affected depends upon the implementation rules. One basic method is to prohibit any new source of pollution in the area, as long as the standards are not met. Another, alternative or complementary, method is to order all sources of pollution to cut back with the same percentage and to issue new cut back orders until the standards are met. A third method, complementary to any of the two previously mentioned, is to use effluent fees in addition to BAT-requirements and grandfather clauses, the fees being used for the most cost-effective protective measures in the area. A fourth method, being a modification of the first, is used in USA within non-attainment areas under the Clean Air Act and sometimes named off-set approach, namely giving an opportunity for a new polluting source provided the operator has made room for this through closing down a similar source and using only a part of the old emission quantity for the new enterprise.

9 Development within the administrative law sector

I want to demonstrate that we can look forward to a development within the administrative law sector of environment control. Even more than today, legal environment control will rely upon administrative legal instruments.

However, this does not mean that penal and similar sanctions will be of less importance than today. Humanity is probably facing its greatest problem ever, when approaching the threat of environmental disaster. One of the reasons is that many environmental goals regarding ecology and biosphere require complete achievement and no less. We are not used to such challenges. Within most legal fields, a certain malfunction of a legal system is more or less tolerable. If some people do not comply with the law, it normally does not matter very much. We normally do not entirely achieve the aims of a law and we are, never the less, partly satisfied. But many of the environmental issues differ. The environmental legal systems consisting of substantive standards, implementation rules and enforcement rules must as a whole function so effectively, so that the over all environmental goals really are achieved. At least, this is true for goals reflecting what is believed to be necessary for a sustainable development.

10 Implementation losses

The following scheme illustrates this.2

2. This scheme is based upon Gregor Holmgren's illustration in his analysis '*Legal aspects on land use - water quality*' (the title as translated into English, the text is in Swedish included in a report from Länsstyrelsen i Hallands län 1989, ISSN 0349-1412).

To the left we see the environmental goal(s) pictured as if they could be translated into a quality scale. So, the quality to be achieved is represented by A (black). The translation, or transformation, of this goal into different substantive standards is represented by B. In practice, we normally make mistakes when translating environmental policy into legal standards and at least until the legislative technique with environmental law has improved, we can expect some "losses" between A and B.

The picture then indicates (B) which environmental quality that should be achieved provided a 100 % implementation of the standards (black). However, we know that these standards will not be implemented fully, we can never expect a 100 % implementation rate.3 Therefore, we can expect losses between B and C.

However, we also know that many environmental problems are caused by a combination of many factors, transboundary pollution being one and different kinds of accumulated effects being others. Normally, we have reason to believe that this indirect impact is underestimated when constructing environmental legal standards. Therefore, we have to expect an even worse result in the physical and ecological environment.

The picture describes a sinking level through the system. We have reason to expect a loss in every step of the figure. In the end, the result will as a rule be lower than what the substantive standards imply. The sinking ratio depends on many things. The implementation system defines the sinking ratio between B and C. The technique for constructing substantive standards defines the sinking ratio between A and B but also, in some ways, between C and D. The more efficient the environmental control system is, the smaller the sinking ratio. In this picture I use a curve α - δ to illustrate a typical implementation loss situation going from environmental objectives (α) to factual result (δ).

---

3. Because when the substantive standards are to be applied in each case (C) there are cases missed, cases wrongly decided, cases of non-compliance with administrative orders, cases of poor supervising resources, etc.

In order to achieve an environmental result equivalent to the environmental objectives, countries must introduce even more stringent standards in order to compensate for the malfunction of the implementation system (noncompliance, mistakes etc). If we suppose that the same sinking ratio will occur, however we construct the substantive standards, we have to construct and move the curve β - δ so high, so that δ will be at the top level of A. The new curve α - β^1 - δ^1 indicates how the legislators have to introduce very strict environmental laws.

11 Sanctions may improve the efficiency

However, if the legislators can expect a better implementation ratio, the substantive standards do not have to be that stringent. And here we have the important connection with the topic of the seminar, namely the role of different kinds of sanctions and incentives in the implementation of environmental laws.

The loss ratio in each step can to some extent be limited by means of sanctions, penal as well as other kinds. The implementation of a certain environmental policy normally requires lots of administrative actions as well as a general obedience to the law. I will now give some examples, using a legal system with environmental quality standards and requirements on the use of best available

technology, since that probably reflects what will be required from modern environmental control systems. My example is water quality in a catch area including a part of the sea coast. This example can rather easily be changed to air quality, habitats, biological diversity, the proportion between developed and undeveloped land, etc.

12 Sustainable development

In order to transform the concept of sustainable development into a region, legislators have to decide which environmental criteria have to be met in that region. It is, for example, a fair assumption that a part of such a transformation includes water quality objectives aiming at water ecosystems good enough for healthy and reproductive fish populations. Such objectives can be given a legal status by means of imperative (binding) water quality standards and/or ecological standards for the water habitats.

However, if legislators only just lay down quality standards, nothing much is achieved. It is the same thing as ordering the water to become clean and then stay that way. But water cannot *act*. Water is no person, no actor. Water and water systems do nothing but *react* because of impact and because of physical and similar conditions in the real world. Therefore, legislators have to direct people, whether as individuals or together as companies or authorities, to act in accordance with the quality standards or quality objectives.

13 Examples

Such orders may bc part of law (substantive standards and/or other requirements) or based upon law but constructed as administrative regulations or orders etc. When parts of law, the requirement may be that best available technology be used by anyone, who otherwise might cause emissions or leakage of pollution into the environment. When based upon law, the law sets the standard and an authority transforms it into an administrative decision (a permit, an order to take precautions etc) directed at a specific person or company, or defines the legal standard into more specific regulations - many other options not mentioned here.

14 Backing up with sanctions

In order to create an effective and efficient environmental legal system, administrative decisions must be backed up by sanctions. For example the following decisions require a good sanction system:

a) Permits and similar licensing laying down conditions for the operations based upon legal, general or more specific standards;

b) Bylaws or other detailed regulations, regional or national, used as substitute or complement for a permit system;

c) Bylaws or other regulations specifying legally based standards, other requirements or prohibitions for certain categories of harmful products;

d) Implementation plans for environmental quality;

e) Zoning and other kinds of town and country planning;

f) Specially protected areas such as national parks, nature reserves, bird sanctuaries, etc.;

g) Orders directed at specific operators and land users issued in order to make

them comply with the law, with regulations or with other legally based standards or requirements.

Non-compliance concerning a) is as I understand penalized in most countries. The same goes for b), c) and f). Administrative individual orders under g) are, I think, sanctioned in different ways.

On the other hand, implementation plans with a legal force of their own are, as far as I know, not generally used in Europe. However, such an instrument will probably in the future form a very important part in modern environment control. There are embryos to these, more or less distinctly adopted in international bodies and by national political bodies but normally without a legal force of their own.

Implementation plans (for water basins, for a coastal zone, for a more or less well defined region) are probably a necessary level in such environment control systems that are based upon quality objectives, especially if transformed into legally binding quality standards.

15 Implementation regarding many actors

This is because it seems difficult to find alternative methods for making a great number of actors (persons, enterprises and authorities) coordinate decisions and actions in such away, that the total load upon the environment does not exceed harmful limits as reflected by maximum allowed total loads, environmental quality standards, etc.

A simple description of this is that implementation plans (and similar instruments) function as regional, more specified and/or precise rules within the

legal framework of the environmental laws in the country. If it is essential to back up environmental laws with sanctions, it is essential to back up implementation plans and/or rules under these plans with sanctions.

16 When criminal law model might work

At this stage, we have to look briefly upon the criminal law model within environment protection. Because of well founded, vital penal law principles, the scope for penal law in environment protection is limited. It seems that the penal law model is most suitable in connection with actions, that individually may cause great harm or damage, and in connection with plain prohibitions. One example well illustrating this is "midnight dumping" of hazardous wastes. Since one action alone in the category may be very dangerous, it is important to prevent as many as possible and penal sanctions do, however limited, play a role here. Provided the legal system also includes rules on cleaning up, on paying damages etc, the penal law model has its place in the system.

17 When administrative law model might be preferred

However, the greatest part of environmental degradation is due to a great number of actions, the impact of one maybe being very small in relation to the total impact in the environment. When so, using the administrative model seems to be the best approach. This calls for a great variety of rules and administrative actions including, but not limited to:

-

Environmental quality standards and guidelines, the former having legal force which calls for an effective and efficient implementation system;

- Implementation planning;
- Environmental impact assessments;
- Laws requiring best available technology, to be implemented by means of licensing and supervision;
- Laws introducing the precautionary principle as a substantive standard in addition to other requirements;
- Standards of performance for specific pollution sources;
- Licencing and similar types of administrative control of new and existing polluting and otherwise harmful activities;
- Supervision based upon visits, monitoring, ecological supervision investigations of areas, etc.;
- Effluent fees which in their turn call for monitoring and supervision of the monitoring results, etc.;
- Special legal or practical arrangements including the voluntary or compulsory cooperation between polluters in an area in order to improve the environment in a cost-effective way.

18 Sanctions constructed for the administrative model

All these elements in an environmental legal control system can be placed under the title administrative model. Depending on which administrative or political level sets the quality standards, the law requiring such standards should include sanctions against those responsible, who do not lay down necessary standards. An alternative is that the law states that in such an area no new sources and no expansion of existing sources may be allowed, until legally based and required standards are in force. Even such rules require sanctions, administrative and other types.

Similar approaches can be use for more of the examples mentioned above. Typical for most, maybe all, is that administrative decisions or bylaws are required. This is another way of saying that the implementation system for environmental control normally is very complex. Each essential part of such a system, the function of which is in conflict with certain interests, requires a back up system with sanctions.

19 Legal technical development to be expected

But which kinds of sanctions? Penal? Financial? Other? The implementation of environmental policies and law is generally speaking only in the beginning and we can look forward to years of increasing experience and new combinations. In some countries, maybe most, it seems that implementation has been very poor and often originally based upon pure criminal law actions, or administrative criminal law actions, normally based upon fines. In other countries, voluntary compliances has been the hope of the legislators. Gradually, administrative implementation systems have developed. But still it seems that most countries have fragmentary implementation systems. Therefore, when those systems develop, even the need for sanctions will come more into focus.

20 Sanctions as incentives

It is very important always to keep in mind the reasons for sanctions. Basically, it is very simple. Sanctions are instruments for achieving maximal possible compliance with the law and with orders. That is a legal way of expressing it. Another way is by saying that sanctions shall make people and enterprises act in spe-

cial ways and/or not act in other special or general ways. In this broader context sanctions serve together with other incitements, such as information, economic incentives etc.

Within the legal field, a distinction is often made between on one hand pure penal law sanctions, on the other hand administrative law sanctions such as fines or imprisonment, depending on what is laid down in a special law considered different to the central criminal code. In an incentive perspective, such a distinction is not important. Furthermore, it seems that this distinction is emphasized in some countries, in other countries it is not even observed. In some countries, the same principles apply, as a whole, when punishing someone under a special administrative law saying that an offence is punishable, as when punishing someone under the general criminal code.

When discussing environment control, we can apply the incentive approach upon offences and how to react against offences. Then we do not have to pay much attention to the difference between pure criminal law and administrative criminal law except for being aware that some countries may put special weight upon certain principles, when an issue is considered to be a pure criminal law issue.

Regarded as incentives, sanctions are just sanctions; and imprisonment, fines, etc., are some kinds of sanctions. Other kinds comprise compensation for damages, the canceling of permits, etc. If we broaden the concept connected with the incitement approach beyond what is normally covered by the sanction terminology, we can include, *inter alia*, cleaning up orders, orders to cease operating and others. Another branch of the incitement system I have already mentioned, namely the use of effluent fees, taxes, etc. From an incentive point of view and with regard to the operator of a polluting activity, there is no drastic difference between having to pay a fee, pay for damages, pay a tax or pay fines. A certain social difference can in some countries be connected with some of these, for example paying a "fine" may imply that you have done something that is illegal whereas paying a "fee" may not have the same implication of "illegality".

21 A general observation

It seems that most countries do have criminal or administrative sanctions in their environmental legal systems. However, the normal situation seems to be that the sanctions are handled separately from the actions in the following aspect:

The illegal activity, whether it violates penal law rules or administrative rules or decisions, normally is tolerated to go on operating in violation of the rules.

When so, we can talk about double standards. The legislators have prohibited or restricted activities and actions etc for environmental reasons, but as long as the illegal activity or action is not stopped, then the only burden for the violator (except for bad will) is the risk for being fined (or, in very rare cases, sent to prison) and/or pay for damages.

It goes without further analysis that one of the most effective and efficient sanctions against such violations, which fall under the category especially suited for administrative control as mentioned above, would be the immediate stopping of the activity until there is good reason to believe that in the future there will be full compliance with the law and the legally based rules and decisions.

It seems to me that all other kinds of sanctions rank second to this one. This does not mean that violations shall not be punished in addition to the activities being stopped. But the primary purpose for someone violating the law is that he or she thereby saves or earns money or has other kinds of benefits from the action. By stopping the action, the benefits for the violator are down to zero. It seems exactly that simple.

22 Concluding remark

Probably, the most important objective in an environmental sanction system is creating incentives for complying with the law and for acting in an environmentally harmless way.

If this is virtually correct, we have to discuss, very freely, combinations and mixtures of many incentive creating measures. Then, we have to consider the entire arsenal, ranging from penal code rules over administrative fines and actions including injunctions to effluent fees, taxes and damages.

When putting this against the probable evolution for administrative measures within the environmental field, some of which I have just mentioned, it seems that different types of administrative sanctions will play an increasing role. Such sanctions will in the first place have to strike against the most essential objective for land use and other enterprises, economy. This calls for fees and fines. But it also opens up for the most central and probably the most efficient sanction of all, injunctions the immediate closure of illegal operation.

This must not be understood as a statement that criminal sanctions are unnecessary. I have the opposite opinion. First, there are certain kinds of actions (the moonlight dumping category and others) which simply can not be efficiently sanctioned without the use of criminal law. Second, many requirements laid down in administrative regulations and decisions have to be reinforced by means of sanctions, including such sanctions typical for criminal law. However, if we avoid a typical criminal law or typical administrative law perspective upon sanctions within environment control, but adopt an incentive perspective, we most certainly will find that most development will be found within such legal techniques as are usually found within administrative law sectors.

M. Staffan Westerlund
Professeur, Uppsala University, Suêde

L'EFFET DU DROIT ADMINISTRATIF SUR LA FORME ET L'IMPUTATION DE DELITS EN MATIERE D'ENVIRONNEMENT

Résumé

Dans ma communication, je m'attache aux perspectives de contrôle de l'environnement et aux stratégies de contrôle liées au modèle administratif. Ceci est suivi par une brève analyse de trois approches principales dans le droit national de l'environnement, combinées avec une prévision des développements que nous rencontrerons vraisemblablement, afin de tenter d'appliquer un concept de développement durable. Cette approche implique davantage de législation et de mesures administratives, dont je discuterai ou, au moins, dont je mentionnerai certaines. Pour qu'elles soient efficaces, des sanctions sont nécessaires pour des raisons que j'indiquerai. Certaines de ces sanctions relèvent du droit pénal, d'autres, beaucoup plus nombreuses, sont des sanctions administratives de différents types. J'exposerai certaines d'entre elles dans la dernière partie de cette communication.

Je discute deux perspectives du contrôle de l'environnement; l'une, ancienne, basée sur ce que les pollueurs peuvent accepter, l'autre, nouvelle, basée sur le *concept de développement durable.*

La nouvelle perspective se dégage de concepts comme ceux-ci:

- Utilisation de ressources naturelles, ne pas les consommer. Le meilleur exemple, quoique loin d'être parfait, est le droit international basé sur les quotas de pêche.
- Normes de qualité de l'environnement. Des normes relatives à la qualité, impératives, contraignantes, existent dans les lois de nombreux pays; l'American Clean Air Act (Loi américaine sur l'Air pur) en est probablement l'un des exemples les plus développés. De nombreuses directives de

la Communauté européenne incluent ce concept.

- La protection des espèces menacées. Un tel concept existe dans des traités internationaux et, par exemple, dans le US Endangered Species Act (aux Etats-Unis, Loi sur les espèces menacées).
- Charge totale maximum, émissions totales maxima, au regard de l'atmosphère. De plus en plus l'objet de discussions, ils sont de plus en plus utilisées, non seulement sur le plan national mais aussi sur le plan international, ce qui parle en faveur de l'application de la législation nationale.
- Vaines politiques. Ceci est étroitement lié à plus d'un des concepts mentionnés ci-dessus.

La majeure partie des dégradations subies par l'environnement est due à un grand nombre d'actions dont une peut s'avérer très faible par rapport à l'impact total sur l'environnement. S'il en est ainsi, le recours à mode administratif semble être la meilleure approche. Ceci appelle un plus grand éventail de règles et d'actions administratives incluant, sans être restrictif,

- des normes et des lignes directrices relatives à la qualité de l'environnement, les premières ayant force de loi ce qui appelle un système d'application effective et efficace
- la planification de l'application
- les évaluations de l'impact sur l'environnement
- des lois exigeant la meilleure technologie disponible, à appliquer au moyen d'autorisations de suivis
- des lois introduisant le principe de prudence comme norme substantive s'ajoutant à d'autres exigences
- des normes ou une performance pour des sources de pollution spécifiques
- l'autorisation et des types similaires de contrôle administratif d'activités nouvelles et existantes et autrement préjudiciables
- le suivi basé sur des visites, le suivi, les enquêtes écologiques sur les sites(dans les régions etc.

- des droits relatifs aux effluents, ce qui appelle, par contrecoup, le suivi et la surveillance des résultats du suivi etc.
- des dispositions légales spéciales ou pratiques au nombre desquelles la coopération volontaire ou obligatoire entre polluants dans une région/sur un site afin d'améliorer l'environnement selon une approche d'efficacité en terme de coût.

Toutes ces règles et actions administratives nécessitent des sanctions que j'aborderai dans ma communication qui s'achève par la remarque suivante:

Il semble que la plupart des pays prévoient des sanctions pénales ou administratives dans leurs systèmes juridiques conventionnels. Toutefois, la situation normale semble être que les sanctions sont traitées séparément des actions dans la perspective suivante:

L'activité illégale, qu'elle viole les règles du droit pénal ou les règles ou les décisions administratives, est normalement tolérée comme s'exerçant en violation des règles.

S'il en est ainsi, nous pouvons parler de doubles normes. Les législateurs ont interdit ou limité des activités, des actions etc. pour des raisons qui tiennent à l'environnement mais tant que l'activité ou l'action illégales ne sont pas stoppées, le seule charge pour l'auteur de la violation (à l'exception de la mauvaise volonté) est le risque d'être frappé d'une amende (ou, dans des cas très rares, d'être envoyé en prison) et/ou de payer des dommages.

Sans analyser davantage, il apparaît que l'une des sanctions les plus effectives et les plus efficaces contre de telles violations, qui tombent dans la catégorie qui relève spécialement du contrôle administratif, ainsi qu'il est mentionné plus haut, serait la cessation immédiate de l'activité jusqu'à ce qu'il y ait une bonne raison de croire qu'à l'avenir il y aura une plus stricte observation de la loi et des règles et décisions fondées sur elle.

Il me semble que tous les autres types de sanctions ne viennent qu'ensuite. Cela ne signifie pas que les violations ne doivent pas être punies en plus de la cessation des activités. Mais le but premier de qui viole la loi est qu'il ou elle gagne ou économise ainsi de l'argent ou qu'il ou elle tire avantage de ladite action. En stoppant l'action, le bénéfice pour l'auteur de la violation est réduit à zéro.

Staffan Westerlund
Professor, Uppsala University, Schweden

DIE AUSWIRKUNGEN DER VERWALTUNGSGESETZGEBUNG AUF DIE FORM UND DIE ANWENDUNG AUF UMWELTDELIKTE

Zusammenfassung

In meinen Ausführungen beziehe ich mich auf Perspektiven der Umweltkontrolle und Kontrollstrategien, die mit dem administrativen Modell im Zusammenhang stehen. Es folgt eine kurze Analyse der drei wesentlichen Annäherungsweisen im nationalen Umweltgesetz, kombiniert mit einer Voraussage, welchen Entwicklungen wir voraussichtlich beim Versuch der Umsetzung begegnen werden, das selbsttragende Entwicklungskonzept zu verwirklichen. Enthalten sind weitere administrative Gesetze und Maßnahmen, von denen ich einige erläutern oder doch zumindest erwähnen werde. Um ihre Effizienz sicherzustellen, sind Sanktionen erforderlich, aus Gründen, die ich nennen werde. Einige von ihnen sind Sanktionen nach dem Strafrecht, der überwiegende Teil sind jedoch verwaltungsrechtliche Schritte unterschiedlichen Typs. Einige von ihnen werde ich im letzten Teil dieser Ausführungen genauer erläutern.

Ich diskutiere zwei Aspekte der Umweltkontrolle, einen alten Gesichtspunkt, der sich auf dem stützt, was Umweltverschmutzer akzeptieren könnten, der andere, neue, Aspekt stützt sich auf dem *Konzept der selbsttragenden Entwicklung.*

Die neue Perspektive findet sich in Vorstellungen wie den folgenden:

- Nutzen Sie die Ressourcen der Natur, anstatt sie zu verkonsumieren. Das beste, obwohl nicht perfekte, Beispiel sind die auf internationalem Recht basierenden Fischfangquoten;
- Qualitätsstandards für die Umwelt. Zwingende, bindende Qualitätsstan-

dards sind in den Gesetzen vieler Länder zu finden, eines der am weitest entwickelten Beispiele ist das "American Clean Air Act" (Amerikanisches Gesetz zur Reinhaltung der Luft). Viele Direktiven der Europäischen Gemeinschaft enthalten dieses Konzept;

- Der Schutz gefährdeter Tierarten. Ein derartiges Konzept findet sich in internationaien Gesetzen und, zum Beispiel, im "US Endangered Species Act" (US-Gesetz zum Schutz gefährdeter Tierarten);
- Maximale Gesamtbelastung, maximale Gesamtemission, im Hinblick auf die Atmosphäre. Immer mehr und mehr diskutiert und angewendet, nicht nur auf nationaler Ebene, sondern auch international, was eine im nationalen Rahmen durchzusetzende Gesetzgebung erforderlich macht;
- "Bubble policy". Dies ist mit mehr als einem der vorstehend aufgeführten Konzepten verbunden;

Der größte Teil der Verschlechterung der Umwelt ist Folge einer Zahl von Maßnahmen, deren einzelne Wirkung auf die Umwelt im Verhältnis zu den gesamten Auswirkungen auf die Umwelt sehr gering sein kann. Wenn dies so ist, erscheint die verwaltunsrechtliche Vorgehensweise am angemessensten. Dies macht ein großes Sortiment unterschiedlicher Vorschriften und administrativer Schritte erforderlich, einschließlich, aber nicht begrenzt auf:

- Qualitätsstandards und Richtlinien für die Umwelt, wobei die Standards Gesetzeskraft haben sollten, wofür ein effektives und effizientes Umsetzungssystem erforderlich ist;
- Planung der Durchsetzung;
- Anfertigung von Schätzungen der Auswirkungen auf die Umwelt;
- Gesetze, welche die beste verfügbare Technologie voraussetzen, die mit Hilfe von Lizenzerteilung und Überwachung durchzusetzen sind;
- Gesetze, die das Vorsichtsprinzip als materiellen Standard einführen, zusätzlich zu anderen Anforderungen;
- Standards oder Leistungsvorschriften für bestimmte Verschmutzungsquellen;

- Lizenzerteilungen und ähnliche Arten administrativer Kontrollen neuer und bestehender Aktivitäten mit verschmutzender oder in anderer Weise schädlichen Auswirkungen;
- Überwachende Beaufsichtigung, die auf Besuchen, Kontrollen und eine Überwachung der Kontrollergebnisse usw. erforderlich macht;
- Spezielle rechtliche oder praktische Arrangements, einschließlich der freiwilligen oder vorgeschriebenen Kooperation zwischen Verschmutzern in dem Gebiet, um bei der Verbesserung der Umwelt ein gutes Kosten-Wirkungs-Verhältnis zu erzielen.

Alle derartigen Vorschriften und administrativen Maßnahmen machen Sanktionen erforderlich, die ich in meinen Ausführungen erläutere. Sie enden mit den folgenden Worten:

Es scheint so, daß die Rechtssysteme der meisten Länder in den für Umweltfragen geltenden Teilen strafrechtliche oder administrative Sanktionen vorsehen. Als Normalfall scheint jedoch die Situation vorzuherschen, daß die Sanktionen hinsichtlich des folgenden Aspektes getrennt von den Maßnahmen behandelt werden:

Die illegale Aktivität, ob sie nun gegen das Strafgesetz oder die Verwaltungsvorschriften oder gegen die Entscheidungen der Verwaltung verstößt, wird im Normalfall toleriert, man nimmt es hin, daß auch weiterhin gegen die Vorschriften verstoßen wird.

Wenn dies so ist, kann man von doppelten Standards sprechen. Die Gesetzgeber haben aus Umweltgründen Aktivitäten, Handlungen usw. verboten oder eingeschränkt, aber so lange wie die illegale Aktivität oder Handlung nicht gestoppt wird, besteht das einzige Risiko für den Delinquenten (böser Wille ausgenommen), darin, daß gegen ihn eine Geldstrafe verhängt wird (oder daß er, in seltenen Fällen, ins Gefängnis geschickt wird) und/oder für die Schäden aufzukommen hat.

Ohne weitere Analyse kann man sagen, daß eine der wirkungsvollsten und effizientesten Sanktionen gegen derartige Verletzungen unter die Kategorie fällt, die - wie vorstehend ausgeführt - besonders für die administrative Kontrolle geeignet ist: die sofortige Unterbindung einer derartigen Aktivität, solange, bis es gute Gründe für die Annahme gibt, daß es in Zukunft eine vollständige Über-einstimmung zwischen dem Gesetz und den gesetzlich verankerten Vorschriften und Entscheidungen geben wird.

Ich habe den Eindruck, daß alle anderen Sanktionen von zweitrangiger Bedeutung sind. Das bedeutet nicht, daß Vergehen zusätzlich zur Unterbindung der Aktivität nicht bestraft werden sollten. Aber das wichtigste Ziel für jemenden, der gegen ein Gesetz verstößt, ist, daß er oder sie dadurch Geld spart oder in den Genuß anderer Vorteile gelangt. Unterbindet man diese Handlungen, sind die Vorteile für den Delinquenten gleich Null.

Резюме вступительного отчета на тему:

ВЛИЯНИЕ АДМИНИСТРАТИВНОГО ПРАВА НА ФОРМУ И ПРИМЕНЕНИЕ ПРАВОНАРУШЕНИЙ ПРОТИВ ОКРУЖАЮЩЕЙ СРЕДЫ

Проф. Стаффан Вестерлунд

В моем докладе я обращаюсь к перспективам контроля над окружающей средой и контрольной стратегии, относящихся к административной модели. Этому сопутствует краткий анализ трех главных подходов к национальному законодательству об окружающей среде в комбинации с прогнозом о том, какого типа развитие мы возможно встретим, с тем, чтобы попытаться осуществить поддерживаемую концепцию развития. Это включает в себя больше административного законодательства и мероприятий, которые я обсуждаю или во всяком случае упоминаю. Для получения эффекта о них санкции будут необходимы по причинам, которые я укажу. Некоторые из них относятся к санкциям по уголовному праву, а более значительная часть относится к административным санкциям разного рода. О некоторых из них я буду говорить в последней части доклада.

Я обсуждаю две перспективы контроля над окружающей средой: старая перспектива основана на том, какие загрязнители могут быть приемлемыми, и другая новая перспектива основана на **концепции о поддерживаемом развитии.**
Новая перспектива находится в концепциях, подобных следующим:
* Используя природные ресурсы, не расходуй их. Лучший, хотя и не совершенный пример, - это квоты для рыболовства, основанные на международном праве.
* Стандарты по качеству окружающей среды. Насущные, связные качественные стандарты можно найти в законах многих стран, американский закон о чистом воздухе, возможно, один из наиболее развитых примеров. Многие директивы Европейского Сообщества включают эту концепцию.
* Защита подвергающихся опасности разных видов животных, - такую концепцию можно найти в международных договорах и, например, в законе США о видах, попавших под угрозу.
* Максимум тотальной нагрузки, максимум тотальных эмиссий по отношению к атмосфере. Это все больше обсуждается и используется не только на национальном, но и на международном уровне, что требует применения национального законодательства.
* Политика "мыльного пузыря". Она тесно связана с несколькими из вышеупомянутых концепций.

Большая часть деградаций окружающей среды зависит от большого числа действий. Значение одного действия может быть очень незначительным по отношению к тотальному воздействию на окружающую среду. Исходя из этого, использование административного модуса представляется нам лучшим подходом. Он призывает к увеличению вариантов правил и административных действий, включая их, но не ограничиваясь ими:

* качественным стандартом и руководящим принципом по окружающей среде, из которых предыдущие имеют силу закона и эффективную систему

* планировка осуществления
* оценки воздействия окружающей среды
законы, требующие наилучшей технологии, которую можно осуществить посредством лицензий и наздора
* законы, ведущие предупредительный принцип как вещественный стандарт дополнительно к другим требованиям
* стандарты или реальное исполнение для специфических очагов загрязнения
* лицензирование и подобные типы административного контроля над новым и существующим загрязнением или иными вредными действиями
* надзор, основанный на посещениях, контроле, экологических исследований местности и т.д.
* вытекающие платежи, приводящие к надзору над контролируемыми результатами и т.д.
* специальные юридические и практичесие устройства, включающие добровольное или обязательное сотрудничество между загрязнителями в одной области с тем, чтобы улучшить окружающую среду эффективным по расходам путем.

Все такие правила и административные действия требуют санкций, о которых я говорю в своем докладе, оканчивающемся следующим замечанием:

Похоже на то, что большинство стран имеют уголовные или административные санкции в своих юридических системах по окружающей среде. Однако нормальная ситуация выглядит так, что санкции отделяют от действий в следующем отношении:

Нелегальные действия, поскольку они нарушают правила карательного закона или административные правила или решения, обыкновенно продолжают действовать, нарушая правила.

При этом мы можем говорить о двойных стандартах. Законодатели имеют запрещенные или ограничивающие действия, акции и т.д. по окружающей среде, но пока нелегальное действие или акция не приостановлена, единственным бременем для нарушителя /не считая злого умысла/ является риск быть оштрафованным /или в очень редких случаях заключение и/или возмещение ущерба/. Само собой разумеется и без дальнейшего анализа, что одной из наиболее эффективных и действенных санкций против таких нарушений, подпадающих под категорию особо подходящих для административного контроля, как было упомянуто выше, было бы немедленное приостановление действия до тех пор, пока не появится веская причина верить тому, что в будущем будет полное согласие с законом и юридически обоснованными правилами и решениями.

Мне кажется, что санкции другого рода на втором месте после этой. Это значит, что нарушения не будут караться в дополнение к приостановке действий.

Первичная цель для кого-либо, нарушающего закон, это то, что он или она таким образом сбережет или заработает деньги или будет иметь иного типа выгоду от этой акции. Если акция приостановлена, то выгода для нарушителя сводится к нулю.

Mr. Anatolij Naumov
Professor, Institute of State and Law, Russian Academy of Sciences

ADMINISTRATIVE AND PENAL SANCTIONS IN THE FIELD OF THE ENVIRONMENTAL CRIME

I consider it necessary to begin my report with the expression of my agreement with the initial theses submitted for discussion at our seminar. In connection with this my preliminary note comes to the fact that the problem of my report is in many respects a derivative from the problem of "Models and Types of Environmental Offences". In spite of some differences existing in the concrete solution of the problems raised to the criminal and administrative law in the field of the protection of the environment, the community of the problem presupposes in many respects the coincidence of principal approaches. On the one hand, the means usually chosen by the criminal and administrative law to control the results of the harm to the environment and the impact on the corresponding violation in the field are really different. On the other hand, the ultimate purposes of the use of these means can coincide. In both cases it is a legal impact on the injury of the environment for the purpose of its preventation and diminution. Hence, the problem consists not so much in the competition between the administrative law and criminal law sanctions as in the search of the most effective means of their correspondence to one another in the environmental field as well as of their coordination. In this connection from the general theoretical point of view the comparison of criminal law and administrative law means of impact on the ecological infringement lets us come to the conclusion that a certain approach of administrative and criminal law takes place in this field (in spite of their principal initial difference). It takes place at least in three directions arising out of the interaction of the criminal law and administrative law means in the mentioned sphere. First, out of the frontier character of many criminal law and administrative law prohibitions in the field of the protection of the environment (the latter can be explained by the coincidence, in these cases, of the objects of criminal law and administrative law protection). Secondly, out of the existence of the so called blank's disposition of criminal law with its reference to the normative

acts of administrative law. And, finally, out of the existence in these cases of the preliminary administrative liability as a necessary condition for the criminal liability.

There is no doubt that the problem consists first of all in the definition of the cases in which the injury that has been caused or is being caused to the environment is to be reacted on by criminal law and in which by administrative law (a constant problem of the legislator). Apparently, the traditional initial notions here are, first, the extent of the injury caused to the environment and, therefore, to the people who live in this area, and, secondly, the possibility of elimination of such injury. Let us take as an example such sphere as air. If an industrial enterprise begins to pollute the atmosphere but the harmful for people consequences have not come yet, in such case it is possible to stop the further pollution and therefore to prevent the negative for people's health consequences without resorting to criminal law, that is by limiting oneself to the means of administrative law. If as a result of the pollution of the air people's health has been either already harmed or there is a direct threat of such harm then criminal law must step in. In this case the criminal law sanctions are realized irrespective of whether an infringement of the ecological administrative law norm has been fixed before or whether the administrative law sanctions have been applied to the offender. Certainly, it is not a typical case of attaching the criminal law sanctions to the protection of the environment because such cases require coming of the ecological consequences of special weight. More widespread is the legislative necessity of the establishment of the criminal law sanctions as an impact on the offender who was not influenced by the preliminary use of the administrative law sanctions for the analogous administrative infringement (according to the background paper for our seminar it is called the first model of the environmental offences).

The great difficulty consists in the definition of the types of the criminal law and the administrative law sanctions and their extends. I consider it appropriate to show it in the legislation and its use (both effective and noneffective) in our country. In accordance with administrative law of Russia the administrative law

sanctions for ecological infringements are mainly of two types. First, the penalty imposed on the officials and citizens and also on the enterprises and organizations guilty of perpetration of the ecological infringement. Note should be taken that till recently these penalties have been imposed only on the officials and citizens and did not exceed 100 roubles (for example, such penalty could be imposed on the corresponding officials for putting into operation without taking into account the requirements for the protection of the air). It is obviously that such administrative law sanctions were absolutely ineffective. In December 1991 a new law of the Russian Federation "On the Protection of the Environment" was issued. In accordance with it, first, such sanctions began to be used not only to the officials and citizens but also began to be imposed directly on the enterprises and organizations are guilty of the perpetration of the ecological infringements. Secondly, the extent of the penalty imposed on the citizens and officials is determined now not in the certain sums but as the multiple of the minimal wages. On the citizens - from single to tenfold extent; on the officials - from thricerepeated to twentyfold extents; on the enterprises and organizations - from 50,000 to 500,000 roubles. The meaning of definition of the new procedure of calculation of the penalty sums imposed on the offenders, is to take stock to some extent of the results of the galloping inflation.

The second type of the administrative law sanctions (in the broad sense) is the means of administrative prevention used by the specially authorized bodies and specially administration in the field of the protection of the environment. These bodies can take a decision about the limitation or suspension of the enterprise or any other unit if this activity is ecologically harmful (for example, with the exceeding of the limit of dumping of polluting substances). The decision of these bodies is obligatory and can be appealed in legal form. Of course, theoretically such administrative law sanctions might have been more effective. Unfortunately, for some reason or other, these seemingly effective sanctions are still imposed very seldom. A question can arise in the connection with this kind of the administrative law sanctions: why are not these sanctions realized by the court? The point is that in law the court liability for an administrative infringement (as well as the criminal one) is still bound only with the guilty personal liability of physical persons. As it was already men-

tioned, the new Russian law on the protection of the environment has broadened the list of the subjects of administrative liability at the expense of the enterprises and organizations guilty of ecological infringements. But the measures of administrative compulsion connected with the closing of ecologically harmful enterprises are still taken only by specially authorized bodies in the field of the protection of the environment, courts are excluded out of this process.

In accordance with the legislation of Russia currently in force the following criminal law sanctions are foreseen for the perpetration of the ecological crimes depending on their weight:

- Penalties (to 200 roubles, to 300 roubles, to 1,000 roubles, to 10,000 roubles, to 25.000 roubles);
- Reformation works (for a period up to 1 year, to 2 years);
- Imprisonment (for a period up to 1 year, to 2 years, to 3 years, to 4 years, to 5 years).

As it was mentioned all pointed criminal law sanctions are imposed only on the physical persons guilty of the corresponding ecological crimes. But note should be taken that in the theory of criminal law at the period of changing to the market economy (market relations) opinions began to be expressed which are evidence of revusion of our traditional conception that only a physical person can be the subject of a crime as applied to the ecological crimes and several types of economic crimes. Of course, their realization requires considerable increase of maximum penalties (now they are even lower than the administrative ones). In the project of the new Criminal Code of the Russian Federation prepared under the patronage of the Minister for Justice, the extent of the penalty is fixed up to 100 minimal wages; it meets the requirements of today's inflational processes. In this case the criminal liability is put also on the physical persons (of the corresponding organizations and enterprises). The extent of the criminal law penalties will be increased considerably. To my mind in this case we can also speak of including into the system of punishment for the ecological infringement of such nontraditonal for our

criminal legislation sanctions as suspension and stopping of ecologically harmful enterprises and organizations. A new question inevitably arises about the correlation of the penal criminal law sanctions and imprisonment and their effectiveness. I think the latter sanction (imprisonment) is the extreme measure and must be calculated on the cases of grave (irretrievable) for people's health and life. In the aforesaid project of the Criminal Code of the Russian Federation imprisonment usually for 2 or 3 years fixed together with the other types of punishment for the extreme ecological infringements. But the cases of the extreme infringements such as, for example, premeditated concealment or misrepresentation of the information which entail death or serious illness of people, are punished by the imprisonment for a longer period. Here we speak about the hightened criminal liability in the case of the virtual coming of the injury to the people's life and health (it is easy to notice that the organization of such criminal law norms and the corresponding criminal law sanctions is connected with the well known situation in Chernobyl).

From the point of view if the influence of the use of the latter kind of criminal law sanctions (imprisonment) on the prevention of new heavy ecological infringement, their meaning and effectiveness must not be overestimated. Certainly, in this case the use of imprisonment is a forced criminal law reaction on the ciming heavy consequences. In such cases the criminal law sanctions are also not able to recover people's life and health. In accordance with this they are used as general preventions traditional for the criminal law (though they are also ineffective) and moral satisfaction of victims and the society. The penal criminal law sanctions are counted on less heavy ecological infringements. It is considered that their preventive meaning is more effective and their use is able in general to prevent the coming of more heavy consequences.

M. Anatolyj NAUMOV
Professeur, Institute of State and Law, Russian Academy of Sciences

SANCTIONS ADMINISTRATIVES ET SANCTIONS PENALES DANS LE DOMAINE DU DELIT EN MATIERE D'ENVIRONNEMENT

Résumé

En dépit de certaines différences existant dans la résolution concrète des problèmes dans le domaine de la protection de l'environnement, posés au droit pénal et au droit administratif, le caractère courant de ce problème présuppose une certaine coïncidence de leurs principales approches. Le problème ne se situe pas tant au niveau de la concurrence entre sanctions administratives et sanctions pénales que dans la recherche des moyens les plus efficaces de leur correspondance les uns avec les autres dans le domaine de la protection de l'environnement ainsi que leur coordination. A cet égard, le problème constant de la législation est de décider quelle loi doit intervenir dans chaque cas de d'atteinte à l'environnement - le droit administratif ou le droit pénal.

Evidemment, le point de départ doit être, traditionnellement,en premier lieu, le degré d'atteinte contre l'environnement et aux personnes qui y vivent, et, deuxièmement, la possibilité d'éliminer une telle atteinte. En principe, lorsque nous parlons des cas où il est possible d'éliminer les conséquences de la pollution de l'environnement et lorsqu'il n'y a pas de conséquences graves pour la vie et la santé des personnes, des sanctions administratives pourraient être utilisées, et, dans de tels cas, l'aptitude de ces sanctions à réparer le dommage causé est très forte (dans une certaine mesure, cette qualité les rapproche des sanctions pénales civiles). Si les conséquences causées à l'environnement et aux personnes ne peuvent être éliminées, les sanctions pénales administratives deviennent inefficaces et sont remplacées par les sanctions pénales, notamment l'emprisonnement. Ni les unes ni les autres, certainement, ne sont capables de réparer le dommage causé, c'est pourquoi le but de leur utilisation est la traditionnelle prévention générale (qui est

également inefficace) et la satisfaction morale des victimes et de la société. Comme le montre l'étude du document de fond de notre séminaire, le problème du recours aux sanctions pénales, dans le cas des personnes juridiques, reste irrésolu sur le plan législatif (par rapport aux personnes physiques).

Anatolij Naumov
Professor, Russische Akademie der Wissenschaft

ADMINISTRATIVE SANKTIONEN UND STRAFSANKTIONEN IM BEREICH DER UMWELTKRIMINALITÄT

Zusammenfassung

Trotz bestimmter Unterschiede, die zwischen den auf der Grundlage des Strafrechts und den nach dem Verwaltungsrecht erzielten konkreten Lösungen von Umweltschutzproblemen bestehen, erfordert der gemeinsame Charakter dieser Probleme eine gewisse Gemeinsamkeit ihrer grundsätzlichen Annäherungsweise. Das Problem besteht nicht so sehr in der Konkurrenz zwischen den administrativen Sanktionen und den Sanktionen nach dem Strafgesetz, sondern in der Suche nach den entsprechenden effizientesten Mittel, sowohl im Bereich des Umweltschutzes als auch bei ihrer Koordination. In Verbindung hiermit steht die Gesetzgebung vor dem ständigen Problem, zu entscheiden, welches Gesetz in jedem einzelnen Fall von Umweltschädigung zum Tragen kommt.

Offensichtlich muß der Ausgangspunkt traditionsgemäß zunächst das Ausmaß der Schädigung der Umwelt und der Menschen sein, die dort leben und in zweiter Linie die Möglichkeit der Beseitigung einer derartigen Schädigung. Grundsätzlich sollten, wenn man über Fälle spricht, bei denen die Möglichkeit einer Beseitigung der Folgen der Umweltverschmutzung besteht und wenn keine schwerwiegenden Konsequenzen für das Leben und die Gesundheit der Menschen bestehen, administrative Sanktionen verhängt werden. In derartigen Fällen sind die verhängten Sanktionen in äusserst effizienter Weise in der Lage, die verursachte Schädigung zu beseitigen (hinsichtlich dieser Eigenschaft entsprechen die verwaltungsrechtlichen Sanktionen in gewissem Masse den Sanktionen nach dem Zivilstrafrecht). Wenn es nicht möglich ist, die Konsequenzen für die Umwelt und Menschen zu beseitigen, verlieren die Sanktionen nach dem Verwaltungsrecht ihre Wirkung und werden durch strafrechtliche Schritte ersetzt, einschließlich einer möglichen Inhaftierung. Beide sind sicherlich nicht in der Lage, den verursachten

Schaden zu beseitigen, aus diesem Grund zielen sie auf die traditionelle allgemeine Prävention ab (die ebenfalls ineffizient ist) und die moralische Genugtuung der Opfer und der Gesellschaft. Wie die Untersuchung dieses Hintergrund-Papiers für unser Seminar zeigt, ist das Problem die Anwendung von strafrechtlichen Sanktionen auf juristische Personen aus gesetzgeberischer Sicht weiterhin ungelöst (im Gegensatz zu den Anwendungen auf physische Personen).

А. Наумов

АДМИНИСТРАТИВНЫЕ И КАРАТЕЛЬНЫЕ САНКЦИИ В ОБЛАСТИ ПРЕСТУПЛЕНИЙ ПРОТИВ ОКРУЖАЮЩЕЙ СРЕДЫ

(Сводка)

Несмотря на определенные различия, существующие в конкретном решении проблем в области защиты окружающей среды, поставленных перед уголовным и административным правом, общий характер этих проблем предполагает совпадение принципиальных подходов к ним. Проблема состоит не столько в соревновании между санкциями административного и уголовного права, сколько в поисках наиболее эффективных средств как их взаимного соответствия в области защиты окружающей среды, так и по их координации. В связи с этим постоянная проблема законодательства состоит в том, чтобы решить, который закон должен реагировать на каждое дело, которое наносит ущерб окружающей среде - то ли административное, то ли уголовное право.

Очевидно, исходной точкой должна быть традиционная: во-первых, объем причиненного ущерба окружающей среде и людям, живущим там, и, во-вторых, возможность ликвидации такого ущерба. В принципе, когда мы говорим о таких делах, в которых возможно уничтожить последствия загрязнения и когда отсутствуют последствия, сказывающиеся на жизни и здоровье людей, должны быть применены санкции по административному праву, и в таких случаях эффективность этих санкций для восстановления причиненного ущерба очень высока /в какой-то степени это качество приближает их к санкциям гражданского права/. Если последствия, причиненные окружающей среде и людям не могут быть уничтожены, санкции по административному праву становятся неэффективными, и санкции по уголовному праву /включая заключение/ замещают их. Они все, безусловно, не в состоянии возместить причиненную утрату, поэтому цель их использования - это традиционная общая защита /которая тоже не эффективна/ и моральное удовлетворение пострадавших и общества. Как показывает основной доклад нашего семинара, проблема использования санкций уголовного права по отношению к юридическим лицам пока еще остается не решенной законодательно /в отличие от санкций к физическим лицам/.

Mr. Hans-Jörg Albrecht
Senior Researcher, Max Planck Institute for foreign and international criminal law, Freiburg, Germany

THE ROLE OF ADMINISTRATIVE AGENCIES AND THE JUDICIARY IN THE PREVENTION AND SUPPRESSION OF ENVIRONMENTAL CRIMES

It seems self-evident that administrative agencies as well as the judiciary should play roles in the prevention and suppression of environmental crimes. Obviously the problem is rather that neither of them currently is capable of playing the roles properly or at least in a way which produces satisfying results in terms of prevention and suppression of environmental offences. Word has even gone around already, that "nothing works" in the field of implementation of criminal environmental law1, reminding the outcomes of evaluation research in the field of treatment of offenders. Evaluation research actually suggests that the outcomes of criminal environmental laws are rather poor, if measured in terms of adjudication rates and sentencing2. Research suggests furthermore that the outcomes of criminal justice are rather distorted, insofar, as criminal law enforcement is concentrating on small scale polluters or behaviour which could be labelled "everyday polluting behaviour" of individuals or ordinary citizens. Critics argue that criminal environmental law spares large scale polluters from being brought to criminal justice. We could then even arrive at the conclusion, that environmental criminal law currently faces a deep crisis. So, it is reasonable to put forward the question why the roles are not properly performed and what could be done to ameliorate role performance.

---

1 Jepsen, J.: Commentary, In Kaiser, G. & Albrecht, H-J. (eds.): Crime and Criminal Policy in Europe. Freiburg, 1990, pp. 25-33

2 Albrecht, H-J.: Evaluating the Impact of Criminal Law; The Case of Environmental Criminal Statutes, in Albrecht, G. & Otto, H.U. (eds.): Social Prevention and the Social Sciences. Berlin & New York, 1991, pp. 467-478, p. 476 in particular

3 Heine, G.: Environmental Protection and Criminal Law, in Lomas, O. (ed.): Frontiers of Environmental Law. Warwick, 1991, pp. 75-101

In analyzing conditions responsible for the current state in preventing and suppressing environmental crimes and in assessing the roles administrative and judicial agencies should or could play in this field, it seems important to distinguish three levels.

First of all the level of legislation and law-making as well as its results in terms of environmental criminal statutes are concerned. Herewith, the role of politics and the parlamentary system in preventing and suppressing criminal offences may be added to the agenda.

Next, the level of organizational aspects of prevention and suppression should be considered.

Finally, the question of which meaning prevention and suppression are given by administration and the judiciary should be addressed, and, moreover, also the question of how these meanings are transformed into feasible models or techniques of controlling behaviour.

Developments in designing environmental offences have basically led to the emergence of three distinct types of environmental offences3:

1. The first type of criminal environmental offences is based on a technique which creates absolute dependency from administrative law or even administrative decision-making. Here, criminal sanctions are used ultimately to push the offender towards compliance with administrative orders or towards better cooperation with administrative agencies. The objective of criminal law then is reduced solely to back up administrative law enforcement.
2. A second model of defining environmental offences is led by the idea to go beyond mere punishment for contempt of administrative orders or decisions and to protect certain environmental resources such as water, air, soil etc. directly through incriminating behaviour endangering or harming

these resources. With respect to this type of environmental offences administrative concerns and interests have to be taken into account, too. That means that despite the formally independent nature of the criminal environmental offences, basically dependencies are created on another level.

3. A third model is based upon the concept of complete independency of environmental criminal law from administrative environmental law or administrative agencies with incriminating behaviour creating actual serious threats to human life or health, which by no means could be eligible for administrative permits or other interventions.

Although there seems in European legislation a certain favour for the second type of environmental criminal offences4, it should be noted also that obviously the outputs of criminal justice systems do not differ along differences in the type of legislation used.

In none of the three types of legislation, simple pollution alone is sufficient to invoke criminal law. This is true with respect to the first model as well as to the second one, this is true also for the independent type of environmental criminal offence.

With respect to the independent type of environmental offences the problem arises that rather restrictive offence characteristics are used and that in criminal trials clear evidence on causal links between individual behaviour and actual harm to the environment must be established. Experiences from those countries which have made use of this legislative technique have demonstrated that convictions thus are rather rare events. It seems obvious that certain conflicts with respect to what should be regarded a criminal environmental offence have not been solved at the legislative level but - in order to broaden the base of support and to achieve a wider

4 Meinberg, V. & Heine, G.: Environmental Criminal Law in Europe; Legal Comparative and Criminological Research, in Kaiser, G. & Albrecht, H-J. (eds.): Crime and Criminal Policy in Europe. Freiburg, 1990, pp. 3-24

consensus in the legislative process - have been transferred to the implementation process. In that field, in the case of pollution, waste disposal or other behaviour endangering the natural environment, the crucial question does not concern so much "who did it", a question ordinarily arising with respect to ordinary crimes, but rather concerns the questions "did a crime actually occur"5. So, we may even say that the legislative process is to be continued in the field of enforcement of criminal law.

Thus, elements of symbolic legislation might be hidden in environmental offences, which are likely to create serious obstacles at least for one type of prevention, a type of prevention, traditionally assigned to criminal law. This type of prevention concerns general prevention or the moralizing functions of criminal law. General Prevention requires clearly defined behaviour in criminal law if criminal law should serve as a credible moral message on which expectations are justified with respect to human impacts on the natural environment and which are not. Thus, the most important function of criminal law, that is parcelling out behaviour which is not tolerated under any conditions, is not fulfilled.

As far as the organizational level of analysis is concerned, the attention should be drawn to the fact that administrative agencies on one hand, criminal justice agencies and the judiciary on the other each represent first of all independent organizations. Although the overall goal, that is the protection of the natural environment, obviously is the same for the judiciary and administrative bodies, independency in terms of organization creates a solid basis for conflicts. These conflicts arise out of the simple fact that independent organizations will operationalize this overall goal quite differently which in turn leads to differences as to how the roles in preventing and suppressing environmental crimes are defined by those independent organization. Besides organizational independency the focus must be put also on the issue of functional dependency. Here, the type of environmental criminal statutes which are to be implemented and the process of intertwining criminal and

5 Albrecht, H-J. & Heine, G. & Meinberg, V.: Umweltschutz durch Strafrecht? in Zeitschrift für die Gesamte Strafrechtswissenschaft 96(1984), pp. 943-998

administrative law as well as criminal justice and administrative decision-making create functional dependencies, which become effective in a one-way direction only, and it means that the judiciary becomes functionally dependent on environmental administration6.

Most important in framing those functional dependencies and modelling the role which the judiciary may play in the repression of environmental crimes is the way information processing is organized. Availability of information on polluting activities of a possibly criminal nature is a indispensable prerequisite for implementing environmental criminal law. While administrative bodies usually have wide powers in terms of control, investigation, access to premises, etc., criminal justice agencies are restricted by criminal procedural statutes, normally requiring a certain degree of suspicion that a criminal act has been committed, before they may engage in criminal investigations. These administrative powers and corresponding duties of companies and enterprises monitored and controlled are usually combined with obligations on the part of administrative authorities to keep the information gathered for administrative purposes within the boundaries of the administration. But, while in other areas, special secrecy laws, e.g. with respect to the tax system, have been adopted, which do not permit routine disclosure of information that might be relevant for the prosecution of tax evasion offences, the topic of cooperation and information sharing in the field of the environment do not have as yet a corresponding firm legal basis. On the other hand, it seems clear that availability of reliable and valid information on environmental crimes also depends on the degree and the nature of specialization and differentiation of organizations. Here, we have to acknowledge that from the very beginning environmental administration represents a specialized and differentiated system, while police, public prosecution, and criminal courts are non-specialized and their organizations are not differentiated along the needs of supervising and controlling different sectors of the natural envi-

6 Albrecht, H-J.: Particular Difficulties in Enforcing the Law Arising Out of Basic Conflicts between the Different Agencies Regarding the Best-suited Reactions upon Highly Sensitive Kinds of Crime, in Council of Europe: Interactions within the Criminal Justice System. Strasbourg, 1987, pp. 45-90

ronment as well as the different types of activities that may affect the environment. Efficiency of control and efficiency of implementing criminal law from the perspective of the judiciary - in other words, the degree of functional dependency - therefore may be seen as a function of the capability of criminal justice agencies to differentiate and to specialize themselves on one hand or to make use of the specialized knowledge and the organizational devices of administrative environmental agencies on the other. As we know from various studies on the relationship between the criminal justice system and the administrative system of environmental protection, basic problems arise obviously from the fact that neither proper information sharing takes place, nor have attempts to enforce reporting regulations succeeded in turning administrative agencies into a role which in the case of ordinary crimes is taken up by the victim (gate keeper of the criminal justice system) or police themselves with proactive strategies in the field of victimless crimes such as drug offences, etc.

Mere organizational devices do not seem to provide better solutions. Although in certain systems powers and competencies in investigating environmental criminal offences are concentrated in one (administrative) agency adopting thus the model which predominantly is used in the taxation system, no evidence exists that this would produce better results in terms of higher levels of prosecution and adjudication as well as less discrimination in the use of environmental criminal law[7]. Essentially enforcement problems in terms of conflicts between an administrative approach on one hand and a criminal law approach on the other are dislocated and pop up within the same organization, too.

The third level of analysis addresses the issue of models of control which shape decision-making patterns as well as patterns of attitudes and perceptions, and moreover, also middle-range goals defined within the respective organizations. Herewith, the problem is highlighted that different models of control exist which

7 Albrecht, H-J.: Umweltstrafrecht und Verwaltungsakzessorietät - Probleme und Folgen einer Verknüpfung verwaltungs- und strafrechtlicher Konzepte. Kriminalsoziologische Bibliographie 14 (1987), pp. 1-22

differ sharply from each other, obviously based upon differences in the type of prevention as well as the type of repression which are perceived to be best suited to the field of environmental protection.

Behind the terms of prevention and suppression, various techniques and methods are hidden. Especially the term prevention might be compared to a shopping basket where everybody is likely to find what he or she wants to be found. It goes without saying that the judiciary and criminal law are linked to individual or general prevention and deterrence, suppression is sought by means of adjudication and the use of criminal sanctions.

On the other hand, in the administrative system other types of prevention, e.g. prevention through planning or technical devices have been developed, repressive methods concern the use of administrative coercive means or administrative sanctions such as fines.

In order to answer the questions, which role administrative agencies and the judiciary should play in preventing and suppressing environmental crimes, it is necessary to have a look on the compatibility of the control models adopted in both systems.

Administrative control of the environment is based upon the consideration that compliance achieving mechanisms with regard to enforcement of environmental laws are rather to be based on voluntary action and persuasion or positive incentives but not on coercion and criminal sanctions. This model relies heavily on cooperation and bargaining, a model which recently has received attention in the criminal justice system, too, as far as mediation and restitutive justice are concerned. Moreover, administrative decision-making in general is characterized by wide discretionary powers. These discretionary powers concern permitting or prohibiting polluting activities in the commercial and industrial system. The rationale for empowering administrative agencies to the use of discretion lies in the goals pursued in environmental administrative law. Administrative decision-making is char-

acterized by the pursuit of two differing and conflicting goals: protection and preservation of the natural environment on one hand, and economic or commercial use of the environment on the other.

Basically, from the perspective of environmental administrative agencies, the process of invoking criminal law is rather perceived to destroy the indispensable positive relationship between administration and its industrial or commercial clients. Short-term benefits in terms of successful criminal prosecution of environmental crimes from this perspective would be exchanged for long-term benefits in terms of establishing positive relationships and achieving the goal of compliance with environmental administrative law objectives. Therefore, from the viewpoint of environmental administrative agencies, the use of criminal law evidently would result in a zero-sum game likely to increase the problem of non-compliance with administrative law and administrative orders as well as the problem of legal conflicts between the industrial system and administrative authorities. Therefore, it is evident that the conflict perspective in terms of processing environmental offenders through the justice system and attempting to achieve compliance with legal provisions and therefore prevention by means of criminal penalties is not part of efficiency calculations made within environmental administration. This is true at least as far as highly organized fields of behaviour such as industry and commerce are concerned. There, it is even argued that aggressive or militant prosecution should be rejected and, sometimes we can even hear that criminal prosecution of environmental offences is counterproductive8.

The use of both models of control and both types of prevention in the field of environmental offences as well as their consequences in terms of "role-conflicts" between administration and criminal justice and judiciary obviously lead first of all to the phenomenon of selective use of criminal laws in the envirionmental field. So, administrative bodies serve as a shield against criminal law enforcement in those

8 Royal Commission on Environmental Pollution. 5th Report. Air Pollution Control; An Integrated Approach. London, 1976

fields where they have responsibilities and powers. Criminal justice agencies are rather forced to restrict investigation and prosecution to non-organized behaviour not covered by environmental administration where conflicts about adequate control models and reactions to pollution among the different state agencies are not present and not efficient. Thus, the bulk of environmental crimes and environmental offenders found guilty and sentenced on the basis of environmental criminal law concerns rather small-scale polluters9.

The conclusions which can be drawn from the considerations presented so far concern the following points:

1. Prevention and suppression have different meanings for administrative agencies on one hand, and for the judiciary on the other.
2. These differences result partially from the mere fact that different agencies, independent from each other in terms of organization, are involved in the process of controlling behaviour harming the environment and predominantly from the fact that the conflict between industrial and legitimate use of environmental resources and protection of the natural environment has not been resolved on the level of legislation but was transferred to the level of implementation.
3. As a clear line between adequate economic use of natural resources and criminal use of natural resources is lacking the consequence consists of conflicts between the administrative model of control and the criminal justice approach to prevention and suppression.

Thus, the question arises, whether these two models may be coordinated insofar as each agency could contribute to prevention and repression of environmental crimes without serious conflicts and in a way which minimizes selective law enforcement.

---

9 Heine, G. & Meinberg, V.: Empfehlen sich Änderungen im strafrechtlichen Umweltschutz, insbesondere in Verbindung mit dem Verwaltungsrecht? Gutachten D zum 57. Deutschen Juristentag. München, 1988

But each attempt to intensify coordination and cooperation will basically result in something we might call "role confusion". The judiciary should seek to pursue the goal of general prevention by way of non-selective, non-discriminative and equal use of criminal sanctions. On the other hand, administrative environmental agencies should pursue the goal of administrative prevention and should not serve as a part of the criminal justice system. The same is true for the role of criminal justice, which should not serve as an annex of environmental administration, because the administrative model ultimately would prevail and criminal law would incorporate too many administrative features, thus loosing its most important, that is general preventive and moralizing function.

In framing the relationship between administration and judiciary coordination should be rather sought through clear separation oftasks and goals on one hand and, on the other of clear rules which help keeping up the barriers between prevention and repression based on criminal law on one hand and prevention and repression based on other means. Thus, it should be accepted that the roles of both types of agencies, administrative and judicial are different. Thus, lines which keep them apart should not be blurred. A viable strategy to achieve such coordination could be to cut back criminal law to simple and clear norms, which actually represent the most serious threats to the environment. On the other hand, administrative sanctions and administrative procedures should be used in those fields of behaviour which are characterized by mere disobedience to administrative orders or rules. Basically, this means that politics and legislation should be brought back to the field. It seems clear that the basic responsibility for the problems embedded in the use of environmental criminal law lies within politics. A conflict which is not resolved on the political and legislative level is not likely to be resolved on lower levels of administration and justice. So, the proper roles of administration and judiciary in preventing and suppressing environmental criminal offences can be defined, but the different types of prevention and suppression may be pursued in a satisfying way only if politics play their role in terms of clear decisions properly, too.

M. Hans-Jörg Albrecht
Institut Max Planck de droit pénal étranger et international, Allemagne

LE ROLE DES AGENCES ADMINISTRATIVES ET DU SYSTEME JUDICIAIRE DANS LA PREVENTION ET LA SUPPRESSION DES CRIMES CONTRE L'ENVIRONNEMENT

Résumé

Il semble aller de soi que les agences administratives et le système judiciaire aient des rôles à jouer dans la prévention et la suppression des crimes contre l'environnement. A l'évidence, le problème est plutôt que ni les unes ni l'autre ne sont en mesure de jouer ces rôles convenablement ou, du moins, de manière à produire des résultats satisfaisants. Les critiques avancent que le droit pénal en matière d'environnement épargne à ceux qui polluent sur une grande échelle d'être traduits devant la justice pénale.

Analysant les conditions responsables de l'état actuel dans le domaine de la prévention et de la suppression des crimes contre l'environnement et évaluant les rôles que les agences administratives et judiciaires devraient ou pourraient jouer dans ce domaine, il semble important de distinguer trois niveaux:

- le niveau de la législation et du législatif ainsi que ses résultats en termes de statuts pénaux en matière d'environnement. A cet égard, le rôle de la politique et du système parlementaire, dans la prévention et la suppression des délits pénaux, peut être ajouté à l'ordre du jour;
- le niveau des aspects organisationnel de la prévention et de la suppression;
- la question de savoir quel sens l'administration et le judiciaire donnent à la prévention et à la suppression, et la question de savoir comment ces acceptions sont transformées en modèles ou en techniques réalisables de comportement en matière de contrôle.

Il semble évident que certains conflits relatifs à ce qui devrait être considéré comme délit contre l'environnement n'ont pas été résolus au niveau législatif mais - afin d'élargir la base du soutien et d'atteindre un plus vaste consensus dans la procédure législative - ont été transférés à la procédure d'application. En ce qui concerne le niveau organisationnel, l'attention devrait porter sur le fait que les agences administratives d'une part, les agences de justice pénale et le judiciaire d'autre part représentent, en premier lieu, des organisations entièrement indépendantes. Mais, en plus de l'indépendance organisationnelle, l'attention doit également être accordée à la question de la dépendance fonctionnelle. La manière dont le traitement de l'information est organisé est capitale pour cerner ces dépendances fonctionnelles et modeler le rôle que le judiciaire peut jouer dans la répression des crimes contre l'environnement.

Quant au troisième niveau d'analyse, le problème est souligné par le fait que divers modèles de contrôle existent; ils diffèrent sensiblement les uns des autres, évidemment en raison des différences dans les types de prévention et dans les types de répression qui sont jugés les mieux appropriés pour la protection de l'environnement. Afin de répondre à la question de savoir quel rôle les agences administratives et le judiciaire devraient jouer dans la prévention et la suppression des crimes contre l'environnement, il est nécessaire d'examiner la compatibilité des modèles de contrôle adoptés dans les deux systèmes.

Les rôles proprement dits de l'administration et du judiciaire dans la prévention et la suppression des délits contre l'environnement peuvent être définis ; mais les différents types de prévention et de suppression ne sauraient être identifiés de manière satisfaisante que si les responsables politique joue également son rôle en terme de décisions claires à proprement parler.

Hans-Jörg Albrecht
Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Deutschland

DIE ROLLE DER ADMINISTRATIVEN BEHÖRDEN UND DER JUSTIZ BEI DER VERHÜTUNG UND VERHINDERUNG VON UMWELTDELIKTEN

Zusammenfassung

Es scheint selbstverständlich zu sein, daß die administrativen Behörden ebenso wie Justiz zur Verhütung und Verhinderung von Umweltdelikten einen Beitrag leisten sollten. Offensichtlich besteht das Problem darin, daß gegenwärtig keiner von beiden in der Lage ist, die Rollen richtig oder in einer Weise auszufüllen, die zu befriedigenden Ergebnissen führen würde. Kritiker argumentieren, daß die für die Umwelt geltenden Gesetze Verschmutzer großen Stils verschonen und diese keiner strafrechtlchen Verfolgung zugeführt werden.

Bei der Untersuchung der Verhältnisse, die für den gegenwärtigen Stand der Verhütung und Verhinderung von Umweltdelikten verantwortlich sind, und bei der Bewertung der Rollen, welche die administrativen Behörden in diesem Bereich spielen könnten oder sollten, scheint es wichtig zu sein, zwischen drei Ebenen zu unterscheiden:

- die Ebene der Legislative und Gesetzgebung sowie ihre Ergebnisse in Form von von Umwelt-Strafgesetzen. Somit kann die Rolle der Politiker und des parlamentarischen Systems bei der Verhütung und Unterdrückung von Delikten mit auf die Tagesordnung gesetzt werden;
- die Ebene der organisatorischen Aspekte der Verhütung und Verhinderung;
- die Frage nach der Bedeutung, die der Delikt-Verhütung und -Verhinderung von den Verwaltungsorganen und der Justiz zugesprochen wird sowie die Frage, wie diese Bedeutungen in durchführbare Modelle oder Techniken zur Verhaltenskontrolle umgewandelt werden können.

Es scheint offensichtlich, daß bestimmte Konflikte hinsichtlich der Frage, was als kriminelles Umweltdelikt eingestuft werden sollte, auf der legislativen Ebene nicht gelöst werden konnte, sie wurden aber - um die Basis der Unterstützung auszuweiten und einen umfassenderen Konsens im Gesetzgebungsverfahren zu erzielen - auf den Durchführungsprozeß übertragen.

Hinsichtlich des organisatorischen Niveaus der Analyse, sollte man die Aufmerksamkeit auf die Tatsache richten, daß einerseits die administrativen Behörden und andererseits die Justiz in erster Linie unabhängige Organisationen repräsentieren. Neben der organisatorischen Unabhängigkeit muß man sich auch auf die Frage der funktionellen Anhängigkeit konzentrieren. Bei der Erfassung dieser funktionellen Abhängigkeiten und der Erarbeitung der Rolle, welche die Justiz bei der Unterdrückung der Umweltkriminalität spielen könnte, ist die Art und Weise, wie die Informationsverarbeitung organisiert ist, von allergrößter Bedeutung.

Hinsichtlich der dritten Ebene der Analyse wird das Problem hervorgehoben, daß es verschiedene Kontrollmodelle gibt, die sich scharf voneinander unterscheiden, offensichtlich basierend auf Unterschieden in den Verhütungs- und Verhinderungstypen, die für den Bereich des Umweltschutzes als am besten geeignet angesehen werden. Um die Frage zu beantworten, welche Rolle die administrativen Organe und die Justiz bei der Verhütung und Unterdrückung von Umweltdelikten spielen sollten, ist es notwendig, einen Blick auf die Kompatibilität der Kontrollmodelle zu werfen, die in beiden Systemen angenommen wurden.

Die angemessenen Rollen der Verwaltung und der Justiz bei der Verhütung und Verhinderung von kriminellen Umweltdelikten können definiert werden, aber die unterschiedlichen Verhütungs- und Verhinderungstypen können nur dann in befriedigender Weise verfolgt werden, wenn auch die Politik ihren angemessenen Beitrag in Form von eindeutigen Entscheidungen leistet.

Г-н Ханс-Ёрг Албрехт
Институт зарубежного и международного уголовного права им. Макса Планка

РОЛЬ АДМИНИСТРАТИВНЫХ ОРГАНОВ И СУДА ПРИ ПРЕДОТВРАЩЕНИИ И ПОДАВЛЕНИИ ПРЕСТУПЛЕНИЙ ПРОТИВ ОКРУЖАЮЩЕЙ СРЕДЫ

Само собой разумеется, казалось бы, что как административные органы так и суд должны играть роль в предотвращении и подавлении преступлений против окружающей среды. Очевидно, проблема состоит в том, что ни те и ни другие в настоящее время не в состоянии по-настоящему исполнить свою роль или во всяком случае сделать это таким образом, чтобы это дало удовлетворительные результаты. Критики утверждают, что уголовное право по окружающей среде щадит от уголовной ответственности тех, кто в крупных масштабах загрязняет окружающую среду.

Анализируя условия, причинившие данное состояние при предотвращении и подавлении преступлений против окружающей среды и определяя ту роль, которую должны бы или смогли бы играть административные и судебные органы в этой области, кажется важным отметить три уровня:

- уровень законодательства и издания законов, а также полученных результатов, исходя из уголовных законов по окружающей среде. При этом роль политики и парламентарной системы при предотвращении и подавлении уголовных преступлений может быть включена в повестку дня;
- уровень организационных точек зрения на предотвращение и подавление;
- вопрос о том, какое значение придается предотвращению и подавлению администрацией и судом, и вопрос о том, как эти значения могут быть превращены в возможные модели или способы контроля над поведением.

Кажется очевидным, что некоторые конфликты по отношению к тому, что должно быть рассмотрено как уголовное преступление против окружающей среды, не были решены на законодательном уровне для того, чтобы расширить базу для поддержки и достичь согласия на более широкой основе, а были переключены на процесс выполнения.

Что касается организационного уровня анализа, внимание должно быть уделено такому обстоятельству, при котором административные органы, с одной стороны, и судебные органы, с другой стороны, каждые сами по себе, представляют собой прежде всего независимые организации. Но, наряду с организационной независимостью, в центре внимания должен также быть вопрос о функциональной независимости. Чрезвычайно важным при обрамлении этих функциональных зависимостей и выделении той роли, которую судебные органы смогут сыграть в подавлении преступлений против окружающей среды, является организация способа обработки информации.

Что касается третьего уровня, проблема освещается таким образом, что существуют разные контрольные модели, которые резко отличаются друг от друга и которые, очевидно, основаны на различиях между типами предотвращения, и также на тех типах подавления, которые ощущаются наиболее подходящими в области защиты окружающей среды. Для того, чтобы ответить на вопрос, какую роль административные органы и судебные органы должны бы играть при предотвращении и подавлении преступлений против окружающей среды, необходимо взглянуть на совместимость тех контрольных моделей, которые применяются в обеих системах.

Настоящая роль администрации и судебной системы при предотвращении и подавлении преступлений против окружающей среды, может быть определена, но разные типы предотвращения и подавления могут быть проведены удовлетворительно только при том, если политика будет играть свою роль правильно с точки зрения принятия ясных решений.

Mr. Peter Polt
Assistant Professor, Hungarian Ministry of Justice

THE DEVELOPMENT OF NATIONAL ENVIRONMENTAL CRIMINAL LAW CONCERNING CROSS-BORDER OFFENCES AND OFFENCES COMMITTED ABROAD

The title of my presentation is the development of domestic criminal law in the case of transboundary pollution and environmental crimes committed abroad.

However, let me, instead, make a statement concerning the subject, which will hopefully start a discussion and will be thought inducing. Primarily I wish to speak about international obligation serving as basis for the development of domestic regulation.

I truly hope that the participants of this conference will discuss the specific regulations in their nations in more detail. From the point of the domestic regulation of transboundary environmental crimes, it is important how we rank crimes impairing the environment.

Damages emerging in one country after have, today already undoubtedly, an effect on other states too. Besides it I can mention the examples of Sandoz, Bhopal, Chernobyl as an extreme cases. It is clear, that the problems were not only international or regional, but had become global.

This means, that the environmental question had intensified so much, that they reached a new quality. The accumulation of certain substances started a chain reaction of threatening scenarios and perspection of the future1.

1. 'Is Criminal Law an Appropriate Tool to Prevent and Limit Environmental Damages and Technological Risks', by Rhode, B., European Coordination Centre for Research and Documentation in Social Sciences: Vienna, Nov. 1989

Due to the global (or international) effect, the most serious environmental crimes must be considered as international offences. This idea was recognized in the documents of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. One of the basic documents of the Congress emphasizes - in connection with the necessity of international cooperation - the extreme importance of punishing the acts impairing the environment. The text reads as follows: *The national, regional and international aspects of growing pollution and the exploitation and destruction of environment should be recognized and controlled as a matter of urgency, in view of its increasing and alarming devastation, deriving from various sources*2.

At the 48. session of the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities the question of the classification of environmental crimes as a form of genocide was raised, as some members of the sub-committee have proposed that the definition of genocide should be broadened to include "ecocide". Ecocide would mean adverse alternations, often irreparable to the environment, for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destinction of rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence3.

Offences against the environment have not gained the same recognition as genocide so far. However, it would be the development of the future.

The latest version of the Draft Code of Crimes against Peace and Security of Mankind - which will be discussed in this year - provides the wilful and severe damage to the environment. The Law Commission took the view that protection of the environment was of such importance that some particularly serious attack

2. 'International Cooperation for Crime Prevention and Criminal Justice in the Context of Development', in Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of offenders (A/CONF.144/28/90, p.9)

3. E/CN.4/Sub.2/1985/6, p.17

against the fundamental interest of mankind should come under the Code and the perpetrators should incur international criminal responsibility.

What could be the consequences of this evaluation of environmental crimes. Firstly this kind of crimes cannot be controlled and punished successfully without international cooperation.

Secondly, taking into consideration that the enforcement of environmental protection would be based on international law, it seems to be useful that these offences should be brought to an International Criminal Court.

Unfortunately, to set up such Court is not timely. For this reason, the environmental crimes, involving the most serious offences, which can be qualified as an international crimes can be prosecuted and adjudicated on the basis of domestic criminal law. (The so called indirect model). However, the institutions of international cooperation can be conducted by international conventions, too.

International cooperation in environmental crimes, in the case of transboundary pollution and offences committed abroad, has particular importance.

In those cases the interstate cooperation is tightly linked to the question of state jurisdiction. According to the principle of sovereignty, the scope of the applicability of the criminal law can be determined by every state, both as to offences committed on its territory, and to offences committed abroad. This right can be limited only by conventional or customary international law.

There are many treaties imposing obligations on State parties to prevent pollution for instance, to identify and regulate specified chemical emission and hazardous waste transfer, and even to compensate the victims of nuclear energy and hazardous waste accidents under a system of civil liability, but there are no treaty provisions identifying environmental effects as a crime, or imposing criminal liability upon States or individual parties. There have been a number of scholarly publi-

cations proposing such a system in the international law context, but it has yet to be implemented, probably for political reasons and issues such as state sovereignty, etc. Criminal sanctions for activity affecting the environment are still strictly a domestic law phenomenon.

International environmental disputes resolved through treaty mechanisms, or *ad hoc*, provide for dispute resolution through negotiation, arbitration, or adjudication in the International Court of Justice. This is exemplified in documents such as the Basel Convention on Transborder Movement of Hazardous Waste, or the 1960 Paris Convention on third party liability in the field of nuclear energy, the latter of which provides for a system of compensation for persons injured in nuclear accidents, with disputes submitted to an established Tribunal. This has nothing to do with criminal liability, an issue for the domestic context alone. In case, which environmental act is a crime, and an extradition treaty exists between two states, then you can see international cooperation under the general extradition treaty.

Look at for instance treaty obligations between the United States and Mexico, whose common border has suffered extensive environmental damage. U.S and Mexico signed an agreement in La Paz in 1983 on cooperation for the protection and improvement of the environment in the border area (TIAS 10827). There is also a U.S.-Mexico agreement of cooperation in the international transport of urban air pollution. These agreements purport to create duties to monitor, regulate, and report cooperatively on the border zone's environment, but there is nothing to suggest civil or criminal liability under domestic or international law. There is, however, a Treaty on the Execution of Penal Sentences (prisoner transfer) between the two countries, so if there was a criminal prosecution in domestic courts, I would argue that the sentence could be cooperatively enforced under this treaty.

Similarly, the United States and Canada signed a Memorandum (in 1985 in Ottawa) of Understanding Regarding Accidental and Unauthorized Discharges of Pollutants on the Inland Boundary, TIAS. Enforcement mechanisms are absent from the "Memorandum". The States do, however, have a Treaty on Mutual Legal

Assistance in Criminal Matters, TIAS, and could proceed on transborder environmental crimes in domestic courts.

Europe is proceeding along the same lines with agreements like the 1976 Bonn Convention on the Protection of the Rhine against chemical pollution. France, Luxemburg, Switzerland, the Netherlands, and the EEC are parties to the Convention, which resolves to eliminate pollution of the Rhine by procedures such as setting up a Commission to limit concentrations of specified chemical pollutants by requiring authorization for discharges. Article 8 state that "the contracting parties will ensure that discharges are controlled in application of this Convention", and Article 15 provides that "any dispute not resolvable through negotiation will be arbitrated." But I can mention here other important conventions, such as Basel Convention or Espoo Convention.

Thus, criminal liability has yet to be incorporated in international environmental law documents. Scholars have advocated such a system vigorously, citing the need for punishment of offenses4. However, note is made that certainty, accessibility of recovery for victims, and insurance efficiency might favor the channeling of liability. This concentration of liability is a trend in hazardous waste treaties and international sea transport of nuclear substances and oil, resulting in a system of civil liability and compensation for damages.

As we have seen, it is clear that every state has to respect the interests of other states. This principle has a great importance in the field of environmental offences.

This principle was confirmed by several decisions of the Permanent Court of International Justice, and *ad hoc* International Tribunals. I would like to mention here - among others, - the cases of Island of Palmas (1928), the Trail Smelter (1941)

---

4. 'The Responsibilities of the Competent Authorities in Regard to Transfrontier Movements of Hazardous Waste', by Hannequart, J.P., OECD, 1985, at 17

and the Corfu case (1949). In the case of Island of Palmas, the Court stated, that the territorial sovereignty involved the duty of state to protect the interest of other states within their own territory.

In the Trail Smelter case the ad hoc International Tribunal held, that the state had no right to use its own territory which causes damage to persons or properties in the territory of another state. In connection with the Corfu case, the Court declared that every state had an obligation to prohibit such a using of its territory as contrary to the rights of other states.

All of these decisions are the clear consequences of the famous principle: *Sic utero tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another).

To cite Weston et al.: *This principle constituted recognition of the fact, that territorial sovereign rights in general were correlative and interdependent and were consequently subject to reciprocally operating limitations. This rejection of the absolute view of sovereignty was an acknowledgement of the fact that activity within a state's territorial bounds ceased to be within the exclusive competence of that state and became instead a matter of international concern, if such action caused international effects*5.

It means, that the states have to take every necessary measure to prevent the activities polluting the environment of another state under their jurisdiction.

One of the measures could be to punish such behaviour. To introduce a criminal sanction to the similar activities establishes the basis of the penal coopera-

---

5. 'International Law and World Order', by Weston, B.H. & Falk, R.A. & D'Amato, A. West-Publishing Co.: St. Paul, Minn., 1990. Pt. 2, Ch. 4, 'Problems in Environmental Protection', p. 359-360

tion in the field of the protection of the environment. To avoid a possible gap (or negative conflict) of jurisdiction is a fundamental base of the international criminal protection of the environment. However, with the establishment their jurisdiction, the states have to face the positive conflict of jurisdiction.

The principles of jurisdiction can be divided into two groups. The first consist of principles based on territorial theory, the second group gathers the theories on extra territorialism.

Comparing these theories, unquestionably territorialism must have priority, because this follows from the principle of state sovereignty. According to it territorial principle must precede the extra territorial principles, resolving the positive conflict of jurisdiction. However, in case of transboundary pollution, it is hard to define the place where the crime is committed, since the basic elements of the offence are completed in more countries at the same time. The act leading to the harmful result, is completed in one state and the damage as the result burdens an other state. According to one form of the doctrine of ubiquity, an offence may be considered to have been committed in the place where the consequences or effects of the offence become manifest. The doctrine of effects is accepted in several member states of the Council of Europe6.

Thus it follows, that the territorial jurisdiction must be in force in every affected state. In that case the collision of territorial jurisdictions are almost unavoidable. But this raises the question how can the damaged state enforce its jurisdiction. This problem is brought up more clear-cut in cases where the act committed results in damage ensuring only in one another state.

---

6. 'Extraterritorial Jurisdiction'. Council of Europe: Strasbourg, 1991, p. 9

In the majority of these cases the state trying to enforce her jurisdiction will quite likely face some difficulties. Usually the offenders are outside the territory, there is only then hope for their extradition if they are not citizens of the state they stay in. Otherwise the prohibition of extradition of own citizen came into effect. Thus in most of the cases other solutions must be found. Seemingly, there is still the possibility of transferring the proceeding. It is not without problems to transfer the procedure even to the home state of the offender. The offender may not leave his country where the results of his act might not be noticeable. However, the other state, where the damage might be caused, quite often has problems gathering the needed information of the crime. Usually only the fact and the quantity of the pollution is known. The situation could be very special in these cases, since the offender's person is unknown, thus he/she must be found firstly. For these reasons, the application of mutual assistance could be a first step to detect the all circumstances of the cases. It seems to be necessary to establish such an obligation system which makes this kind of investigation following such request mutual assistance compulsory for the states.

In my opinion most recent multilateral and bilateral treaties on mutual assistance are not sufficient, because they require more exact fact from the requesting state. I would like to mention, that the draft of Hungarian International Legal Cooperation Act permits to denunciate such crimes in the another state, instead of transfer of procedure or asking a mutual assistance.

Sometimes the traditional principles of jurisdiction seem to be unable to solve the problems. The escaping of the offender of environmental crime to a third country and crime committed abroad arouse a lot of problem. In those cases the establishment of universal jurisdiction seems to be the best solution. This principle appoints as competence a court of this state, where a perpetration has been apprehended, irrespective of his nationality and of the law of the place where the offence was committed. However, an establishment of international convention seems to be necessary to introduce the universal jurisdiction in the case of environmental offences. This convention would provide at least a vicarious jurisdiction base on the maximum *aut dedere aut judicare*.

It is important to note, that the connection between the universality principle and international crimes is closer in national criminal laws. National penal provisions establishing jurisdiction relate very often this principle (I can mention here Hungary, Poland, Romania, Spain, Germany, Greece) to the international crimes7. Opinions about the usefulness of the applicability of universal jurisdiction are divided. It cannot be denied that the offender of environmental crime should be rather brought to justice by the state whose interests have been directly affected by the crime or with whom the perpetrator has social ties.

However, the universal jurisdiction can be an effective device protecting the international community against serious environmental crimes. The universality principle can also lead to the conflict of jurisdiction and increase the risk of double punishment of the same person.

I think we should avoid the violence of the *ne bis in idem* principle. This principle serves the interests of offender but is at the same time a fundamental guarantee of the state ruled by law.

This principle must be approached from two sides. One side is the recognition of foreign judgements, the other side is internationalization of the national judgements. These two meanings are obviously connected. However, this principle would be an important instrument controlling conflicts of jurisdiction. In national laws, the principle of *ne bis in idem* is already a long established, firm legal institution.

Internationally this principle does not gain such a wide acknowledgement. State sovereignty reserve from recognition of decisions of other states is more typical.

The complete similarity of criminal laws, more trust among states would be the basic condition of the enforcement of the idea of *ne bis in idem.*

7. 'Legal Problems Emerging from the Implementation of International Crimes in Domestic Criminal Law', by Gardocki, Lech, in Revue Internationale de Droit Penale, vol. 60, 1989, p. 105

First of all, the consistent use of the active personal principle leads to the injury of the *ne bis in idem.* In international level, the European Convention on the International Validity of Criminal Judgements and The European Convention on the Transfer on Proceedings in Criminal Matter have already recognized this principle.

But the unfortunate fact that these Conventions were signed and ratified only by a small number of states and by some regulatory problems its effect is further weakened. The regulatory problems can be summarized as follows:

- Contracting Parties are not obliged to recognize the effect of *ne bis in idem* in certain cases directed against the particular interests of state;
- The unclarified idea of "identical actions".

The Convention of European Community on Double Jeopardy had a big impact on the diffusion of the *ne bis in idem* principle. By creating possibilities of negotiations on the problem of identical actions this Convention has already taken some measures to solve this problem.

The parties to the Convention might take into account not only the judicial decision but resolutions of other authorities. Besides the question of identical action it raises lot of problems - if the offender having committed crime against environment returns to his home country or leaves for a third state. If the offender returns to his own country in most cases - as I mentioned - an application for his extradition can not be fulfilled because of the general rule prohibiting the extradition of own citizen. The most appropriate mean of criminal cooperation seems to be the transfer of proceedings. It must be emphasized that in cases like this the home country does not use the territorial principle anymore, but the active personal principle and the universal principle are still effective.

If the offender escapes to a third country it is possible to make an application for extradition. However, some countries refuse the request if the offence was

committed partly in their own territory (for instance Switzerland). Other countries exclude extradition if criminal proceedings have been taken for such offence.

Otherwise, the double incriminality (or identical action) is the main condition of both the transfer of proceeding and the extradition. It is important to note that the definition of emissionary and imissionary values by the same standards is essential condition of successful cooperation, because the requirement of double criminality. However, it must be considered that in cases where the punishment is lesser than one or two years of imprisonment either the extradition or transfer of procedure should be obligatory.

It could be considered also whether the domestic law could allow for extradition of own nationals for the transboundary offences and the crimes committed abroad. As you see, in the domestic laws the basic rules of extradition, and other forms of criminal cooperation do not differ very much in transboundary environmental offences and environmental crimes committed in abroad. However, I think that the specialty of this kind of criminality requires some changes in the traditional principle.

Finally, let me list the most important questions that are to be discussed. The first one is the introduction of universal jurisdiction to the domestic laws in the cases of transboundary offences. The second is the qualification of the transboundary offences as an international crimes. The third is the obligation to establish a territorial jurisdiction on the basis of principle *sic utero tuo non laedas.* The fourth is the possible solution of the positive conflicts of jurisdiction.

The last one is the possible changes in the traditional principles of international cooperation in case of environmental crimes, especially in the case of transboundary offences and offences committed abroad.

M. Peter Polt
Ministère de la Justice, Hongrie

LE DEVELOPPEMENT DU DROIT PENAL NATIONAL RELATIF A L'ENVIRONNEMENT, CONCERNANT LES DELITS TRANSFRONTIERES ET LES DELITS COMMIS A L'ETRANGER

Résumé

La présentation aborde la question de la cohérence des délits internationaux en matière d'environnement sous des angles divers.

En premier lieu, elle examine la possibilité de réglementer les délits en matière d'environnement les plus graves, sur une base internationale similaire à celle du génocide; les Nations Unies ont en effet initié une sorte de solution, dans ses caractéristiques majeures très voisine de cette idée. Une telle approche de réglementations aurait pour effet de jeter les bases d'une relation de travail international plus étroite entre les Etats dans les cas de pollution transfrontière, même au moyen de l'institution d'une juridiction pénale internationale.

Devant le fait que la création d'un tel tribunal ne serait pas opportune aujourd'hui, la répression de tels délits reste la tâche du droit national. Néanmoins, la coopération est indispensable si l'on veut obtenir de réels résultats.

L'un des thèmes fondamentaux de la coopération est la définition des juridictions de chaque Etat. Selon le droit international, les Etats contemporains ne doivent autoriser sur leur territoire aucune action susceptible d'entraîner une pollution affectant également d'autres Etats (le principe SIC UTERO TUO NON LAEDAS). De telles actions susceptibles d'aboutir à de graves conséquences doivent être punies, échappant aux conflits de juridiction négative.

Par ailleurs, les confrontations juridictionnelles positives seraient également éviter. La solution est impensable en terme de doctrine territoriale, puisque les actes criminels de cette nature confirmeraient le plus souvent les juridictions territoriales d'un plus grand nombre d'Etats.

Le principe de NE BIS IN IDEM est étroitement lié aux questions juridictionnelles. Les considérations relatives aux droits de l'homme font le succès de cette doctrine; dans les cas des délits en matière d'environnement elles sont aussi indispensables.

Enfin, de possibles modifications des diverses formes de la coopération dans le domaine pénal liée aux délits en matière d'environnement devraient être considérées. Ainsi, par exemple, les problèmes relatifs à l'extradition de citoyens ou de la double accusation pourraient être de bons points de départ.

Peter Polt
Ministerium der Justiz, Ungarn

DIE ENTWICKLUNG DER NATIONALEN UMWELT-STRAFGESETZGEBUNG IM HINBLICK AUF GRENZÜBERSCHREITENDE DELIKTE UND IM AUSLAND BEGANGENE DELIKTE

Zusammenfassung

In den Ausführungen wird die Frage der Kohärenz internationaler Umweltdelikte von verschiedenen Seiten aus erläutert. Zunächst wird die Möglichkeit einer Einführung von regulativen Vorschriften für schwerste Umweltdelikte auf internationaler Basis untersucht, in ähnlicher Weise wie sie für den Völkermord bestehen, da die UNO schon eine gewisse Lösung in die Wege geleitet hat, die dieser Idee in ihren wichtigsten Carakteristiken äußerst Nahe kommt. Eine derartige Regelung würde bei grenzüberschreitenden Verschmutz-ungen die Voraussetzung für intensivste internationale Zusammenarbeit zwischen Staaten schaffen, die als Mittel sogar die Gründung eines internationalen Gerichtshofes mit einschliesst.

Angesichts der Tatsache, daß für die Gründung eines derartigen Gerichtshofes derzeit nicht der günstigste Zeitpunkt besteht, bleibt die Verhinderung derartiger Delikte die Aufgabe der nationalen Gesetze. Für die Erzielung wirklicher Resultate ist eine Kooperation jedoch unabdingbar.

Eine der grundsätzlichen Fragen der Kooperation ist die Definition der Gerichtsbarkeit in jedem Land. Nach internationalem Recht dürfen diese Länder heutzutage auf ihren Territorien keinerlei Maßnahmen dulden, die möglicherweise auch zu einer Verschmutzung in anderen Ländern führen könnte (das Prinzip *sic utero tuo non laedas)*. Derartige Maßnahmen, die zu gefährlichen Ergebnissen führen könnten, müssen bestraft werden, unter Vermeidung der Konflikte einer negativen Gerichtsbarkeit.

Auf der anderen Seite sollte man eine positive gerichtliche Konfrontation ebenfalls vermeiden. Die Lösung ist unter der territorialen Doktrin undenkbar, da kriminelle Delikte dieser Art in den meisten Fällen die territoriale Rechtssprechung weiterer Staaten ins Leben rufen würde.

Das Prinzip *ne bis in idem* ist eng mit juristischen Fragen verbunden. Menschenrechts-Aspekte machen den Erfolg dieser Doktrin aus, die in Fällen von Umweltdelikten ebenso unverzichtbar ist.

Abschließend sollten mögliche Modifikationen der verschiedenen Formen der kriminellen Kooperation untersucht werden, die mit Umweltdelikten verbunden sind. So könnten die Probleme der Auslieferung von Bürgern oder einer doppelten Anschuldigung ein guter Ausgangspunkt sein.

Петер Полт

РАЗВИТИЕ НАЦИОНАЛЬНОГО УГОЛОВНОГО ПРАВА ПО ВОПРОСАМ ОКРУЖАЮЩЕЙ СРЕДЫ, ИМЕЯ В ВИДУ НАРУШЕНИЯ, ПЕРЕСЕКАЮЩИЕ ГРАНИЦЫ И НАРУШЕНИЯ, СОВЕРШАЕМЫЕ ЗА ГРАНИЦЕЙ

Резюме:

В данном изложении рассматривается вопрос о взаимосвязи международных преступлений против окружающей среды по разным направлениям.

На первом месте в нем изучается возможность регулировать наиболее серезные преступления против окружающей среды на международной основе: как геноцид, поскольку ООН уже приступила к определенному решению этого вопроса в главных чертах, весьма близкому к этой идее. Такой способ регулирования создал бы предпосылки к самому тесному международному сотрудничеству между государствами в случае загрязнения окружающей среды идущего через границу, даже посредством учреждения международного суда.

Учитывая тот факт, что создание такого суда в данное время не является уместным, подавление таких нарушений остается долгом национального законодательства. И тем не менее, наладить сотрудничество необходимо для того, чтобы достичь реальных результатов.

Одним из фундаментальных вопросов этого сотрудничества является вопрос об определении юрисдикции в каждом отдельном государстве. В данный момент государства, согласно международному праву, не должны разрешать каких-либо действий на своей территории, приводящих, возможно, к таким последствиям, при которых загрязнение будет распространяться и на территории других государств (принцип: SIG UTERO NUO NON LAEDIES). Действия, которые смогут привести к серьёзным последствиям, должны подвергаться наказаниям, избегая при этом конфликтов в смысле негативной юрисдикции.

С другой стороны, надо также избегать позитивной подсудной конфронтации. Такое решение немыслимо при территориальной доктрине, поскольку уголовные действия этого типа привели бы, чаще всего, к территориальной юрисдикции возрастающего числа государств.

Принцип: NE BIS IN IDEM тесно связан с подсудными вопросами. Вопросы, касающиеся прав человека, обеспечивают успех этой доктрины, которая становится необходимой в тех случаях, когда совершаются преступления против окружающей среды.

ANNEX III
REPORT OF AN EUROPEAN SURVEY

Priv-Doz. Dr. Hans-Jörg Albrecht
Senior Researcher, Max Planck Institute for foreign and international criminal law, Freiburg, Germany

SURVEY ON COOPERATION AND COMMUNICATION BETWEEN AUTHORITIES IN THE FIELD OF CONTROLLING HARM TO THE ENVIRONMENT

1. Introduction: Aims and Scope of Study

Environmental protection today is given high priority in virtually all industrialized countries and on all political levels including international bodies. Value patterns in societies have changed and the idea that the environment has to be protected also by legal control mechanisms is widely accepted. Whereas in the fifties and sixties attitudes and beliefs were characterized by an over-whelming trust in positive outcomes of an ever-growing economy and modern technology, the seventies and eigthies saw deep changes in these belief-patterns. Growing evidence on the destructive effects of uncontrolled exploitation of natural ressources, unresolved problems of waste disposal and air and water pollution, shock-waves triggered by spectacular environmental disasters and growing distrust towards disaster-prone advanced technologies led to considerable changes in public opinion as well as environmental policies. In many countries civil, public and criminal laws have

been amended during the last twenty years in order to strengthen legal control of dangers to the environment1. But although there seems to exist a certain basic agreement that criminal law must play a role in societies' responses to the problem of environmental protection2, it is by no means clear how far criminal law in the field of environmental protection should reach and what may be done in making criminal environmental law an efficient tool in the endeavours to protect the environment3. However, it seems clear on the other hand that serious problems arise out of environmental administrative and criminal law enforcement. In order to understand the nature of these problems as well as to develop remedies international comparative research is needed.

The data and information reported here stem from a survey on the control of environmental harm by means of criminal law in various European countries (Poland, The Netherlands, Hungary, Scandinavian countries [Denmark, Finland, Norway and Sweden], The Federal Republic of Germany, France, Italy, Spain, Switzerland, and United Kingdom)4. Data collection was based on an uniform questionnaire designed to cover key information on the control systems which are run in different European countries. Responses have been received from all countries which were asked to participate in the study. The questionnaires have been answered by competent authorities (predominantly ministries of justice; partially information was added through ministries of the interior and ministries of the environment).

---

1 Heine,G.: Environmental Protection and Criminal Law, in Lomas, O. (ed.): Frontiers of Environmental Law. Warwick, 1991, pp. 75-101, p. 78 in particular

2 See the UN-Resolution on 'The Role of Criminal Law in the Protection of Nature and the Environment', adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

3 See e.g. the different views expressed in Report of the International Conference on Criminal Justice and the Protection of the Environment, Hamburg, Germany, 14-17 September 1989. Vienna, 1989, pp. 7-14

4 See also the Report: Umweltstrafrechtliche Sanktionen in den 12 EG-Mitgliedstaaten - Überblick -, prepared by Generaldirektion Wissenschaft, Luxembourg, 1990

2. Basic Questions

Questions addressed in the questionnaires focus on the topic of **cooperation** and **communication** between authorities in the field of controlling harm to the environment.

The reasons to put the focus on this special aspect of environmental control policies are readily at hand when studying recent and ongoing research on the problems of environmental protection by means of administrative, criminal and civil law5. Criminal statutes devised to respond to events and behaviour endangering or harming the environment first of all have to deal with the problem of drawing a clear and practically feasible line between environmental crimes on one hand and legitimate or necessary use of natural resources or legitimate and indispensable industrial or commercial activities on the other. Thus, the **definition of environmental offences** must in one way or another take into consideration both ecological, industrial and commercial interests. Research throughout the seventies and eighties has demonstrated that the bulk of environmental offenders is linked to small-scale pollution6, while on the other hand legal pollution seems to account for most of the harm done to the environment7.

The outcomes of environmental criminal law therefore have been considered to display serious deficits as regards implementing and enforcing criminal law, but also deficits in terms of implementing administrative environmental law, especially in those fields which are regarded in the public to pose the most serious

5 See e.g. Meinberg, V. & Heine, G. : Environmental Criminal Law in Europe. Legal Comparative and Criminological Research, in Kaiser, G. & Albrecht, H-J. (eds.): Crime and Criminal Policy in Europe. Freiburg, 1990, pp. 3-24; Albrecht, H-J.: Evaluating the Impact of Criminal Law; the Case of Environmental Criminal Statutes, in Albrecht, G. & Otto, H-U. (eds.): Social Prevention and the Social Sciences. Berlin & New York, 1991, pp. 467-478

6 See Albrecht, H-J., 1991 (footnote 5)

7 Christophersen, J.G.: Alternative Ways of Controlling Environmental Crime, in Bishop, N. (ed.): Scandinavian Criminal Policy and Criminology 1985-1990. Stockholm, 1990, pp. 30-37

threats to the natural environment, human health and safety. The problem may be discussed in terms of conflicting perspectives provided by the criminal law approach to environmental control on one hand and administrative models of control on the other. Although the overall goal, that is the protection of the natural environment, underlies both environmental criminal law and administrative law, the means which have been elaborated to achieve this goal are basically different. From the perspective of environmental administrative agencies invoking criminal law is rather assessed to destroy an indispensable positive relationship between administration and industrial clients8. Short-term benefits in terms of successful criminal prosecution of environmental offences from this perspective would be exchanged for long-term benefits in terms of achieving the goal of future compliance with administrative law objectives. Given this perspective, the use of criminal law evidently results in a zero-sum game likely to increase the problem of non-compliance as well as to increase the problem of other legal conflicts between companies and administrative authorities.

A second point of concern refers to problems of keeping criminal environmental statutes in line with basic principles of traditional criminal law while on the other hand demands for efficient law enforcement argue for alleviation of restrictions placed upon enforcement by those basic principles. These restrictions concern e.g. the need to provide clear evidence on the existence of causal links between an individual offender and pollution or the need to provide full proof of negligence or intent. Improvements may be sought through introduction of reversal of the burden of proof or the principle of strict liability. Functioning of traditional criminal law is based on solid knowledge on causal links between human behaviour on one hand and harm or damages on the other. Furthermore solid knowledge on values and interests protected by criminal law and on the dangerousness of certain types of behaviour is required if criminal law should fulfill its basic functions, that is to give precise and clear answers to the questions what should be regarded to represent criminal behaviour. Obviously environmental criminal law is not backed up by such knowledge as behavioural stan-

8 See Heine, G., 1991, p. 80 (footnote 1)

dards with respect to the environment are not yet developed in a way that would allow transformation into clearly defined penal prohibitions.

Two characteristics of environmental criminal law may be identified which basically determine the kind of crime definitions used in environmental law as well as in their implementation. These characteristics finally help in explaining the importance of centering problems of environmental criminal law around the issue of cooperation and communication between administrative and criminal justice agencies, and, moreover, around the issue of integration and coordination of differing legal approaches to environmental control and differing theoretical propositions on how to achieve compliance with the goal of preserving or ameliorating the natural environment.

First, we have to acknowledge that environmental criminal law interferes in a complex and well organized (and we may add powerful) system (that is the industrial, commercial, etc., system) which in turn is deeply interrelated with other important sectors of society, especially the political and state administration systems. If criminal law is invoked in such a context it has to be considered from the very beginning that important functions of the economic and commercial systems may be affected and that unintended **side-effects** may occur with respect to other sectors of society.

Secondly, intertwining criminal law and criminal justice on one hand, administrative law and administrative decision-making on the other create dependencies which determine the degree to which environmental criminal law may be enforced as well as the outcomes in terms of the types of offences and offenders prosecuted, adjudicated and sentenced. Environmental administration and the industrial system are represented by organizations specialized and differentiated along different types of polluting behaviour, dangerous technologies and substances, etc. With these conditions two options emerge for criminal justice agencies in organizing the response to environmental offences. The criminal justice system may adopt the structure of specialization and differentiation of the system which is to be controlled or may make use of the resources in terms of specialization and dif-

ferentiation available in environmental administration. As the first proposition seems to be less plausible and attractive because of the enormous costs it is reasonable to rely on the second option when attempting to enhance efficiency in criminal law enforcement. As a consequence the major questions which must be answered are centered around the issue of coordination between:

- the central concepts guiding creation and enforcement of criminal law on one hand and administrative law on the other[9], and
- decision-making on the side of criminal justice agencies/departments and environmental administration.

3. The Questionnaire

In framing the questionnaire some general topics have been choosen and transformed into various questions which were thought to produce relevant information in terms of analysing the problems of co-ordination and communication between different agencies involved in control of pollution and the protection of the natural environment.

The first issue addressed refers to general and specific aspects of the organizational structure of environmental control. Here, questions concerning **centralization** and de-centralization of the control structure, the degree of division of competence and power related to administrative and criminal justice tasks, specialization in criminal law control have been put forward besides other questions highlighting particular powers of administrative control agencies, e.g. rights of access to industrial plants as well as special duties of factories, etc., to provide relevant information to the environmental administration.

9 See also Delmas-Marty, M.: The legal and practical problems posed by the difference between criminal law and administrative criminal law, in Revue Internationale de Droit Penal 59 (1988), pp. 21-25

A second group of questions covers the relationships between administrative and criminal law authorities. In this respect information on general principles of cooperation as well as on models of cooperation and communication between public authorities was sought. Furthermore, information has been gathered as regards duties of administrative staff to report criminal offences to police/public prosecutor and consequences of non-compliance with those duties.

Another section of the questionnaire focussed on the basic problem of definition of environmental criminal offences, values and interests underlying those statutes.

A fourth field of concern has been criminal sanctions provided for environmental offences. Answers were sought with respect to the range of penalties available for environmental offences as well as to the type of sanctions.

Rather neglected in legal and criminological research, although of particular relevance for the control of pollution seems to be administrative (non-criminal) sanctions as well as other coercive administrative measures designed also to promote compliance with environmental norms.

As all efforts to prevent harm to the natural environment and to reduce pollution by means of criminal and/or administrative law should be subjected to thorough evaluation, valid and reliable longitudinal data describing the actual state of different parts of the environment, quantity of specific emissions and immissions as well as the outcome of control in terms of administrative decisions taken, criminal offences reported, prosecutions, convictions and sentences are of paramount importance. That is why questions regarding monitoring systems have been included in a final section of the questionnaire.

4. Problems of International Comparative Analysis of Environmental Legislation and Law Enforcement Policies

The information provided through responses to the questionnaires sheds light on the diversity of regulations, norms and general policies. Moreover, the responses draw the attention to the problem of comparative approaches in the field of environmental criminal law. Problems go far beyond those we face in traditional fields of international comparative legal research. In assessing and evaluating environmental criminal law and its enforcement, administrative law and administrative law enforcement as well as general aspects of state organization have to be taken into account, too. Thus, multiple sources of variation in crime definitions emerge which are not easily controlled for in the attempt to arrive at conclusions from a comparative view on criminal environmental laws. Therefore, emphasis has been laid in the survey also on the administrative system of control and sanctions.

5. The Organizational Framework of Environmental Control: Fragmentation of Responsibility and Competence or Uniformity and Centralization?

One of the major similarities in the structure of organization of control seems to be that in environmental law enforcement and control of pollution investigation and prosecution of environmental criminal offences fall under the competence of regular police while various environmental administrative bodies are responsible for the enforcement of administrative laws or the administrative parts of environmental laws. Exceptions from this general trait represent the English system of control where enforcement authorities under the regime of Integrated Pollution Control, brought into force in 1991, are concerned with both administrative and criminal law. For the French system, it was stated that administrative bodies responsible for enforcement of administrative law may also investigate criminal cases. In Italy, finally, within the Ministry of the Environment, a special police force has

been established (N.O.E.), but obviously regular police forces do most of criminal investigations. In Switzerland, variation may be observed insofar as for practical reasons small cantons have vested administrative and criminal law enforcement powers in a single agency, while in large cantons the respective powers are separated and assigned to different agencies.

Another similarity concerns the **vertical** division of competences in (administrative) control with regularly three, sometimes four levels in terms of central governments (or Federal governments), districts, provinces, departments, cantons, etc., finally municipalities or local communities. While law-making in the field of environmental protection usually is centralized (with Spain having special arrangements for the autonomous provinces and Italy obviously depending heavily on decentralized, regional law-making), lower levels are competent for administration and enforcement (e.g. the "Länder" in the FRG, the cantons of Switzerland and the provinces in Italy). However, the point has been made for Denmark that with including local communities or municipalities environmental administration may finally turn out to become political in nature again on the lowest level if elected officials and with them local political interests influence and shape decision-making[10].

On the other hand rather large differences may be observed as far as the degree of **horizontal** segmentation of powers and administration is concerned. In Scandinavian countries, Poland and in England/Wales competences are rather concentrated in central administrative bodies headed by the Ministry of the Environment (e.g. the National Board of the Environment in Denmark or the National Environmental Supervisory Commission in Norway, an exception is made in Finland for the protection of water). Uniform administration and control in a vertical or sectoral perspective surely is dependent on the type of environmental laws which were adopted in European countries with central laws on environmental protection covering most or at least the most important environmental media and polluting activities (Scandinavian countries, England/Wales, Poland, and Switzerland). With

10 Jepsen, J.: Commentary, in Kaiser, G. & Albrecht, H-J. (eds.): Crime and Criminal Policy in Europe. Freiburg, 1990, pp. 25-33, p. 29 in particular

specific sectoral environmental laws (e.g. in Germany, France, and Netherlands) competences are spread over various ministries. But in countries with strong federal elements (Switzerland, Spain) it is found that despite little sectoral differentiation on the central governmental level, administration and law enforcement is split up again on the cantonal level or on the level of autonomous regions.

6. To What Extent Does Specialization of Police, Prosecutorial Services and Criminal Courts Occur?

According to the information received specialization in environmental criminal law enforcement is not a phenomenon which may be observed throughout the countries surveyed. In the Scandinavian, Polish, French, English, Hungarian, and Spanish reports responses indicate that specialization does not occur within police forces, public prosecutors' offices or criminal courts. But specialization, if actually taking place, obviously is primarily related to police forces. Some specialization is reported also for prosecutorial services (Germany, Switzerland). In Norway a special department within the public prosecutors office has been established in 1988 empowered to investigate and to prosecute in cases of environmental crime[11]. The Dutch concept of "liaison-prosecutors" seeks to coordinate prosecution of environmental offences not only internally but also with respect to environmental administration[12]. Least specialization seems to occur in the court system. However, in the Netherlands serious environmental offences are handled by so-called "economic chambers" at the level of the district courts, in some large Italian cities at the level of first instance courts special sections have been assigned exclusive competence in handling environmental offences. Furthermore, internal case assignment procedures are sometimes, but obviously not systematically, used to concentrate environmental offences in certain courts (Germany).

---

11 Christophersen, J.G., 1990, p. 31 (footnote 7)

12 Waling, C.: Das niederländische Umweltstrafrecht. Freiburg, 1991, p. 192

As far as police forces are concerned there seem to exist **two trends** in specialization. One of these trends may be seen in the development of specialized police units at a central level (e.g. in Germany at the State Police Investigation Bureaus [Landeskriminalämter]) where control technology and experts can be made available at a lower cost-benefit ratio than would be possible in a decentralized system. In the Netherlands however, since the second half of the eighties local police forces are increasingly participating in environmental law enforcement, a policy which recently was backed up by providing considerable state funding for an extension of this strategy. On the other hand, besides Poland where establishing an "ecological police" has been discussed, no voices were raised in other reports in favour of truly separate environmental police forces, but the idea is predominantly rejected (Germany, The Netherlands).

7. Basic Models of Defining Environmental Offences

As was outlined in the introductory remarks environmental offences deviate from traditional offences in one important aspect. The point is that environmental offences may not be defined without making some kind of reference to or at least taking into consideration administrative laws or standards, norms, decisions established and made within the system of environmental administration.

Although variation in European countries can be observed as far as placement of environmental offences is concerned (with some jurisdictions placing offences in the basic criminal code [Germany, Hungary], others in a central environmental protection act [England], still others annexing criminal provisions to special administrative environmental laws [Italy, France]), more importance should be attached to the differences in the extent and the nature of links between criminal environmental provisions and administrative laws.

Developments in designing environmental offences have basically led to the emergence of three different models:

A. The **first model** concerns criminal environmental offences which are **absolutely dependent** from or **accessory** to **administrative law** or even administrative decision-making (e.g Italy). Here, criminal sanctions are used ultimately to push the offender towards compliance with administrative orders, etc., or towards better cooperation with administrative agencies. The objective of criminal law then is reduced solely to back up administrative law enforcement. In order to reduce flexibility inherent in crime definitions and to comply with the basic penal law principles of predictability and legality some jurisdictions have resorted (at least partially) to the introduction of fixed limits to emissions or immissions which are laid down by upper administrative bodies (Denmark, Switzerland, Italy). Although such techniques in defining environmental offences help in overcoming certain shortcomings of the dependency on individual administrative decision-making (reducing discretion, binding administrative authorities, ensuring predictability and avoiding some of the problems of evidence), a major problem arises with the question of where the limits should be set. Obviously concern for economic interests results in setting limits rather high which in turn allow only peaks in pollution to be covered by criminal environmental law.

B. A **second model** of defining environmental offences is led by the idea to go beyond mere punishment for contempt of administrative orders or obligations provided by administrative law and to protect certain environmental media (water, air, soil, etc.) directly through incriminating behaviour endangering or harming these medias. But nevertheless, these types of environmental offences have to take into account administrative concerns and interests, too. Environmental authorities may e.g. grant permits thus justifying the polluting behaviour. Problems arising from this type of environmental offences ("relatively dependent" on administrative law and

decision-making) are found e.g. in the consequences faulty or unjustified administrative permits should have on the punishability of polluting behaviour or in the question of whether and to what extent judicial authorities should have the competence to review and control administrative decision-making. The basic problem then concerns which authority should be given priority in defining ultimately environmental offences.

C. A **third model** is based upon the concept of complete independence of environmental criminal law from administrative environmental law with incriminating behaviour creating serious threats to human life or health (public danger or concrete dangers to life and limb) and therefore not eligible for administrative permits. With respect to these "independent" criminal offences it should be pointed to the problem that in criminal trials clear evidence on causal links between individual behaviour and harm to the environment must be established. Experiences with these types of offences have demonstrated that convictions are rather rare events (Sweden, Federal Republic of Germany, Poland)13. In general, there has been a tendency to extend environmental criminal law and to alleviate problems of establishing sufficient evidence through criminalizing merely abstract dangers with setting no in particular requirements to establish links between behaviour and any impacts on environmental media. But as a consequence then obviously the need for restricting criminal law again is felt and techniques are sought to parcel out certain types of behaviour by way of either trivializing the event or by allowing defences (e.g. pollution matches with good agricultural practice, etc.) against criminal indictments.

13 Heine, G.: Zur Rolle des strafrechtlichen Umweltschutzes. Rechtsvergleichende Beobachtungen zu Hintergründen, Gestaltungsmöglichkeiten und Trends, in Zeitschrift für die Gesamte Strafrechtswissenschaft 101 (1989), pp. 722-755, p. 747

8. Penalties Provided by Environmental Criminal Law

Considering the penalties provided by environmental criminal provisions it can be stated that in all systems surveyed imprisonment and fines (in terms of summary or day fines) may be applied. However, rather large differences can be observed in the maximum penalties, be it imprisonment or fines. The maximum terms of imprisonment for the crime of water pollution (including aggravating circumstances) in the countries surveyed, e.g. range from one year in Denmark to 10 years in the Federal Republic of Germany[14].

Besides these traditional penalties various new sanctions and sentencing options have been introduced in some jurisdictions. Such new sanctions include monetary penalties or forfeiture aiming at illegal profits (including financial advantages derived from non-compliance with administrative orders, laws, etc., e.g Art.58 Swiss Criminal Code; Art.73 German Criminal Code), reparation and compensation, reinstatement of the environment (Italy), but also incapacitative and coercive measures such as interdiction of professional activities (Italy, Germany), (temporarily) closing down factories (Italy), etc. In France wide use is made of Art. 469-3 Code of Criminal Procedure which empowers the court to postpone sentencing and order restitution. Furthermore, the use of (civil) injunctions backed up by imprisonment or fines in the case of environmental offences has been reported. But despite these various alternatives which are made available in many jurisdictions the penalties most commonly used are simply fines.

14 See for details Heine, G., 1991, p. 92 (footnote 1); in France the maximum term of imprisonment for environmental criminal offences is 2 years (in the case of recidivism 4 years), the maximum fine is 10 million FF

9. Administrative Sanctions

Besides criminal penalties most countries provide for administrative sanctions in the case of breaches of administrative orders or administrative law. The most commonly sanction provided here concerns administrative fines which partially may be also used to forfeit profits or savings derived from these illegal acts. Be- sides administrative sanctions, compensative or restitutive, coercive and preventive measures are made available in administrative laws. These include clean-ups, closing of factories, revocation of permits, etc. In general, there exists interchangebility among administrative coercive measures and criminal sanctions.

10. Criminal Liability of Corporations

Although consensus can be observed with respect to the proposition that negative impacts on the environment are rooted to a large extent in decisions made in corporations conclusions drawn split European countries, roughly spoken, into two groups. Some countries, following a rather pragmatic line in criminal law thinking, accept the idea of criminal liability of corporations (The Netherlands, England, Denmark, Norway; in France the Draft Criminal Code envisages criminal liability of corporations). Another group of countries sticks to the principle that criminal penalties must be based on individual and personal guilt *(societas non delinquere potest)* 15. But nonetheless, even in the second group of countries liability of corporations is controversially discussed and some exemptions are even already made as far as administrative sanctions are (Federal Republic of Germany) or criminal

---

15 For an overview see Heine, G.: Zur Rolle des strafrechtlichen Umweltschutzes. ZStW 101(1989), pp. 722 & 745

16 Stratenwerth, G.: Strafrechtliche Unternehmenshaftung?, in Geppert, K. u.a.(eds.): Festschrift für Rudolf Schmitt. Tübingen, 1992, pp. 295-307

fines are concerned (Austria, Sweden [where company fines and confiscation may be used to punish corporations although conceptually companies cannot commit offences], in Switzerland a corporation may be sentenced to a criminal fine if the fine does not exceed 5000 SFr and if identification of suspects would result in investigative work assessed to be unproportional compared to the offence in question)16. Difficulties in tracing and successfully prosecuting individuals for environmental crimes obviously create certain pressures to extend criminal liability to corporations. Furthermore, public activities performed by the state and municipalities can be punished in Norway. In Denmark municipalities can be punished if they carry on business along with other activities17.

11. Relationships Between Administrative Authorities and Criminal Justice Agencies

In describing the relationships between administrative authorities and criminal law enforcement agencies several issues seem to be of special importance. First of all the general issue of principles of cooperation shall be reviewed. Here, virtually all reports stated that as a general principle state authorities should cooperate and give each other mutual support in fulfilling their respective tasks. General assessments of how this principle is implemented differ with some reports stating that problems or conflicts cannot be observed (e.g. France) while others denied the existence of patterns of proper cooperation or mentioned that implementation of principles of cooperation is not satisfactory (e.g. Italy). In the field of environmental criminal law enforcement cooperation first of all refers to the reporting duties of officials if there is some evidence that an environmental offence has been committed. Most countries where administrative and criminal law enforcement tasks fall

17 In Sweden company fines may as well be used for both private and public business

apart have stated that legal duties to report suspicion of environmental crimes either to police or to the public prosecutors office exist. Others require reporting of suspicion on the basis of administrative ordonances. But besides the Italian system (Art.361, 362 Italian Criminal Code), violations of such duties do not lead to criminal penalties but are subjected to disciplinary sanctions.

Cooperation and coordination which go beyond the rather traditional mutual support principles and punctual inter-ministry cooperation is reported from the Netherlands and Italy. In the Netherlands regular round table meetings including the judiciary, the public prosecutor and police besides environmental authorities are used in exchanging views and promoting coordination of policies. Similar efforts are reported from the canton Zürich, where recently two coordination agencies were established. Furthermore, in the Dutch report the need for **vertical coordination** has been mentioned. In Italy the recently enacted Law on Administrative Proceedings (1990) prescribes that "conferences of public authorities" competent in specific sectors of the environment are held to achieve simultaneous and comprehensive evaluation of problems and to allow final decision-making.

Another issue which belongs to the topic of relationships between administrative and criminal justice agencies concerns the phenomenon of **condoning:** an authority which has the power of enforcement decides **not** to enforce administrative environmental laws or, another facet of this problem, the authority makes decisions which are not compatible with obligations or goals laid down in environmental laws. Here, the problem occurs whether officials behaving this way should themselves be made liable on the basis of the environmental offence (which was tolerated or triggered by the administrative authority). It goes without saying that all jurisdictions know those traditional offences like **corruption** or other offences committed by public servants. Furthermore, criminal laws may be invoked if some

18 Nevertheless application of this provision is rather restricted as discretionary powers of administrative authorities are beyond the reach of criminal law, see Heine, G. & Catenacci, M.: Umweltstrafrecht in Italien, in Zeitschrift für die Gesamte Strafrechtswissenschaft 101(1989), pp. 163-187, p. 183 in particular

kind of **complicity** in the environmental offence can be ascertained. But of the special criminal statutes covering the types of behaviour of officials mentioned above, until now only the Italian Penal Code contains provisions providing penalties. According to Art. 328 Italian Penal Code civil servants commit an offence if pollution activities are tolerated or demands put forward by administrative law are disregarded thus creating dangers for public health18. In the Federal Republic of Germany a hot debate did go on throughout the eighties whether such behaviour should be penalized on the ground that omitting action which is suited to prevent an environmental offence may be punished if the official was statutorily obliged to make appropriate preventive decisions19. But although in principle such extension of environmental law is accepted, only one criminal conviction because of such behaviour of civil servants is known until today20. In other systems (e.g. France) civil servants face but disciplinary measures in case of condoning.

A last point on cooperation should be made with respect to sentencing procedures. Here, in some jurisdictions conditions of suspension of prison sentences may partially be set by administrative agencies, e.g. in terms of reparation, clean-ups, etc.

12. Monitoring Systems and Statistics on the Enforcement of Environmental Criminal Law

Monitoring systems with respect to environmental protection and especially implementation of environmental criminal law in European countries are very poorly developed. Monitoring systems which have been implemented are not yet

19 See Rengier, R.: Das moderne Umweltstrafrecht im Spiegel der Rechtsprechung - Bilanz und Aufgaben. Konstanz, 1992, p. 42

20 Bericht der Interministeriellen Arbeitsgruppe 'Umwelthaftungs- und Umweltstrafrecht' - Arbeitskreis 'Umweltstrafrecht'. Bonn, 1989

integrated but provide sectoral information on the state of various environmental media. But the need for integrated information systems is recognized.

While some countries could provide data on police recorded environmental crimes, convictions and sentences, others could not at all (Spain, Hungary, Poland, the Netherlands). However, it should be noted that complete statistical data on environmental offences, prosecution and conviction could nowhere be made available.

With respect to statistical accounts on administrative control measures, administrative sanctions, etc., deficits are still larger. Obviously in the Netherlands as part of the "National Environmental Policy Plan" statistics on control measures, offences and administrative and criminal procedures currently are developed.

But in general and based upon criminological and legal research on implementation of environmental criminal law we may note that nothing has changed in recent years. When looking at crime, prosecution and court statistics available from England/Wales, Germany, France, The Netherlands, Poland, Denmark, Switzerland, Sweden we observe that:

1. only minor proportions of environmental cases are brought to the criminal court (ranging from 18 to 55%)[21],
2. sanctions meted out concern almost exclusively fines (86 to 100%),
3. the size of fines usually is rather modest[22].

21 See also Faure, M.: Umweltrecht in Belgien. Freiburg, 1992, p. 343 for Belgium; Christophersen, J.G., 1990, p. 31 (footnote 7) for Norway; the point has been made for Scandinavian countries that the somewhat elevated level of criminal environmental proceedings in Denmark, as compared to other Scandinavian countries, is due to less developed possibilities to impose administrative sanctions

22 E.g. 35 day fines on average in Sweden

Sentencing therefore may be regarded to be rather lenient, although the structure of sentences may also reflect the mere trivial and petty nature of environmental cases coming to the attention of criminal courts.

However, it should be noted that even if sophisticated monitoring systems would produce valid and reliable data on the state of various environmental media as well as course and outcomes of criminal proceedings in environmental cases, attempts to assess the relative (causal) impact criminal law may have on the prevention of pollution and harm done to the environment still would pose enormous problems23. These difficulties are underlined by the magnitude of problems which have to be faced in research on deterrence and general (positive) prevention even in the case of traditional crimes where well-elaborated instruments are available.

13. Revisions and Amendments of Criminal Environmental Statutes

In Poland the Draft Criminal Code provides now for a section on environmental offences. The Swiss Draft Criminal Code will bring upon total revision of environmental criminal offences extending the reach of criminal law and introducing new penalties. So does the Spanish Draft Criminal Code where it is suggested to introduce a rather differentiated structure of criminal environmental offences compared to the existing law. Revision of environmental criminal law is discussed in Italy, too; the Italian Government actually proposes a new general environmental law focusing also on better coordination of existing provisions. In the Federal Republic of Germany an amendment of environmental criminal law has passed the parliament which extends penal protection of the soil and increases penalties for certain environmental offences. Plans for criminal code revisions are reported from Hungary bringing upon also more severe penalties for environmental criminal

23 Albrecht, H-J., 1991 (footnote 5)

offences. New provisions regarding water pollution (extending criminal law) are being prepared in France. In the Dutch report it is given notice of an ongoing discussion of increasing penalties for environmental offences.

14. Suggestions Concerning Improvement of Environmental Criminal Law Enforcement

It seems quite clear from the responses to the questionnaire that **intensification of environmental law enforcement** has high priority. But it was also argued that criminal sentences should be tougher (Switzerland, Hungary). Relief from deficits in implementation of environmental criminal law is sought through better training of law enforcement staff, improvement of control technology as well as closer cooperation between criminal law and administrative authorities. Legal training, it is suggested, should also be provided to the staff of administrative agencies having usually a technical educational background. Moreover, it is argued that core problems of administrative and criminal law enforcement are embedded in the complexity of the legal system. Therefore, voices are raised in favour of simplifying and clarifying the legal framework24. It was argued that criminal environmental law should be more restricted and specify cases of danger or damage to the environment. In some reports it was noted that administrative sanctions and administrative procedures should be assessed to represent a superior device compared to criminal sanctions and traditional criminal procedure, because of basic restrictions placed upon criminal law and the criminal process.

15. Conclusions

Summarizing the information received through the questionnaires we may conclude the following:

(a) We observe throughout Europe that environmental protection is sought by means of criminal law enforcement, although debates are going on whether criminal law in fact can fulfill its very functions in this field;

(b) Attempts to intensify criminal law enforcement have relied heavily on the extension of the reach of environmental offences through penalizing mere abstract dangers created for environmental media. These changes have brought strong dependencies from decision-making in administrative bodies and from technological knowledge, in general dependencies from interests and values **external** to criminal law;

(c) At least legislative bodies obviously prefer sometimes to resort to amendments of criminal laws and especially to increasing maximum penalties because this may serve as a symbol and does not produce much costs, at least if law enforcement is not considered;

(d) Outcomes of criminal law enforcement appear to be rather poor if confronted with promises given when introducing environmental offences;

(e) Basically, two models of control can be found in the field of environmental protection: the criminal law model and the administrative model, the latter being based upon cooperation and bargaining, long-term planning and technological considerations. These two models are not compatible as they are based upon different goals and methods;

24 It was e.g. argued that the number of authorities competent in the field of control should be reduced (Italy)

(f) But problems of enforcement stem also from the fact that environmental criminal law should be deployed in a complex and powerful system (which creates the very same problems also for the enforcement of administrative law);

(g) Mere organizational devices do not seem to provide better solutions. Although the ways powers and competencies are divided or concentrated vary very sharply in Europe, there exists no evidence that any specific system would produce better results. Essentially enforcement problems are rather dislocated;

(h) In coordinating the two models of control it seems better not to mix because ultimately the administrative model will prevail and criminal law will take up many administrative or even civil features thus loosing its most important, that is, moralizing functions;

(i) Coordination through separation could therefore represent an adequate strategy. This would mean to cut back criminal law to simple and clear norms while administrative sanctions and procedures could be used in those fields of behaviour which represent mere disobedience to administrative orders or rules;

(j) On the other hand in coordinating both models criteria derived from criminal law must be incorporated into administrative decision-making. Here, it seems absolutely necessary to establish consistent guidelines fo reporting and prosecuting environmental criminal offences. These guidelines must reflect the seriousness of the events in question (expressed rather in objective measures) and not as is the case today, the seriousness of conflicts between administration and their industrial clients;

(k) Upon such basic coordination of different perspectives of control other methods of interagency coordination and communication may then lead to better results of enforcement.

ANNEX
SURVEY QUESTIONNAIRE

I Organizational structure of the environmental control

(1) Please outline briefly the organizational structure of the environmental control administration of your country, as to the following dimensions:

(a) Is the structure of control the same throughout the environmental protection system, or is there variation between different sectors (water, air, noise, soil, flora and fauna, landscape, cultural heritage, etc.)? If variance exists, please specify.

(b) Is the structure centralized or decentralized:

- in terms of environmental laws,
- in terms of administrative organization?

(c) Are there separate control organs based on both administrative law and criminal law, or just one relevant control structure, based on either administrative law or criminal law, respectively?

(d) Is the structure based on either regional or sectorial division of powers, or is the system a mixed one?

(2) Are there in your country any special organs to handle control of environmental cases within:

(a) police forces,

(b) prosecutorial authorities,

(c) court system?

(3) Please describe the grade of independence/dependence of the prosecutorial organs from the central authorities at the ministerial level.

(4) Please give a brief overview of the legal framework of the environmental protection control structure of your country.

(5) Assessing the system of control, is it rather based on the principle of strict legal regulation or rather guided by the principle of a free market?

(6) Are factories/companies, etc., required to participate in controlling pollution by:

- establishing internal controls,
- providing relevant information to the environmental administration?

(7) Is access to industrial plants, etc., facilitated for environmental administrative agencies?

(8) Is access to industrial plants, etc., for the purpose of criminal law enforcement facilitated for criminal justice agencies?

(9) Are there any provisions in administrative environmental law or other statutes protecting environmental data provided by companies/factories, etc., to environmental agencies?

(10) May that information be used to launch criminal investigations by the administrative agency itself?

(11) May that information be channelled to criminal justice agencies with the purpose of initiating criminal investigations?

II Relationship between administrative and criminal law authorities in general, and in the field of environment in particular

(1) Please describe the general guiding principles concerning co-operation and communication between different authorities in the environmental field, as a subcategory of public authorities in general.

(2) Is it possible to envisage in your country a legally enforced co-operation between authorities in general?

(3) Are there general provisions requiring that criminal justice agencies are informed about environmental offences by administrative agencies?

(4) Are there other means of encouraging closer co-operation and communication between different agencies (e.g. round-table meet- ings):

- between public authorities in general (please describe if any),
- between authorities in the field of environmental protection in particular (please describe if any)?

(5) Please give example, if any, of a spectacular case that indicates conflicts or co-operative strategies between administration and criminal justice agencies in the field of environmental protection.

(6) If a government officer responsible for the control of environmental protection is not reporting suspicion of known environmental offences, are there:

- general statutes providing punishment (please describe if any),
- specially designed provisions in environmental law (please describe if any)?

III Basic criteria in defining environmental criminal offences

(1) In your national legislation, are environmental interests and values protected by penalties defined either:

- in the criminal code,
- in a special code for environmental offences,
- by administrative provisions with a criminal penalty character,
- by administrative provisions with penalties of non-criminal character (if two or more categories are valid, please explain)?

(2) Please describe briefly the provisions concerning the protection of:

- water,
- air (including protection from noise),
- soil (including protection from dangerous substances and dangerous waste),
- flora and fauna,
- landscape (e.g. special protection of wildlife reserves or water reserves).

(3) Are those environmental criminal offences devised to cover primarily organizational behaviour (companies, etc.) or behaviour of individuals in general?

(4) Which of the following interests and values are predominantly protected by your national environmental legislation (please provide also a ranking of the interests):

- human life and health,
- foundations of human life,
- ecological balance in the nature,
- public security,
- contempt of relevant public authorities,
- concern of customary law,
- colliding interests at place of work (occupational safety vs. production concerns)?

(5) Does the national environmental legislation or general criminal law of your country allow also juridical persons (enterprises, companies) to be prosecuted and made criminally liable in the case of environmental offences (if yes, please describe briefly)?

(6) Are there provisions providing criminal penalties for general misuse of administrative powers (if yes, please describe briefly)?

(7) Are there criminal law provisions providing criminal penalties for civil servants/government officials:

- tolerating pollution activities (if yes, please describe briefly),

- allowing emissions or other pollution disregarding demands put forward by administrative law (if yes, please describe briefly)?

(8) Do criminal provisions concerning protection of environment also cover pollution occuring outside the national jurisdiction?

(9) Is initiation of criminal investigations based on the principle of mandatory prosecution or is it left to the discretionary power of:

- environmental agencies,
- criminal justice agencies?

IV Criminal sanctions provided by criminal law/procedural particulars of environmental crime investigation

(1) What kind of criminal sanctions are available for environmental offences either in the penal code or in a special environmental offences code of your country?

(2) Is it possible to use forfeiture as a separate criminal sanction according to your national legislation (if yes, please describe briefly)?

(3) Is it possible to use other sanctions (primarily associated with civil or administrative law) as criminal penalties, e.g. reparation, closing down of factories, interdiction of professional activities (if yes, please describe briefly)?

(4) May prosecutorial agencies (public prosecutor's office, police) dismiss criminal cases in exchange for certain conditions or sanctions (if yes, please describe briefly)?

(5) Has sanction cumulation in stipulating sanctions for environmental crime been considered as a problem in your country (if yes, please specify)?

(6) Has the intertwining of sanctions stipulated in penal code and sanctions stipulated in the realm of administrative law been considered as a problem in your country (if yes, please describe briefly)?

(7) Are administrative agencies in environmental cases required by law:

- to give criminal justice agencies access to administrative files or documents in the course of criminal law enforcement,
- may documents or files be seized by prosecutorial agencies if administrative bodies do not comply with those demands?

(8) Characterizing criminal policy with respect to implementation of environmental criminal law, are investigative efforts concentrated rather on the industrial sector or rather on individuals in general suspected of having committed environmental criminal acts?

(9) Characterizing criminal policy with respect to environmental crimes, is it led by the principle of the economy of of resources concentrating investigative efforts on exemplary serious cases, or is the policy led by strict enforcement of environmental laws?

V Non-criminal sanctions provided by administrative law

(1) Is it possible to punish violations against following environmental interests and values by non-criminal sanctions included in your national administrative legislation (please describe briefly):

- water,
- air (including protection from noise),
- soil (including protection from dangerous substances and dangerous waste),
- flora and fauna,
- landscape (e.g. special protection of wildlife reserves of water reserves)?

(2) What administrative non-criminal sanctions are available in your national legislation in general (e.g. fines, etc.)?

(3) Is it possible to use general coercive measures provided by your national administrative legislation in dealing with environmental criminal offences (if yes, please specify)?

VI Monitoring and data production

(1) What are the existing systems of monitoring the level of environmental protection in your country?

(2) If monitoring systems do not exist, please describe what kind of plans there are to create a functioning system in the near future in your country.

(3) What are the sources of statistical and other factual data as to the control of environmental protection of your country (please provide examples, if possible)?

(4) Are there, in particular, statistics on offences, offenders and criminal procedure in environmental crime cases (please provide examples, if possible)?

(5) If statistical data on environmental crime is available, is it possible to produce data on discretion and other decisions at the pre-trial stage (please provide examples, if possible)?

(6) Could you provide the latest figures (on a separate sheet) on:

- reported environmental crimes (broken down by types of offences),
- offenders (broken down by types of offences)?

VII Enhancement of the efficiency of the procedures in the field of environmental control

(1) Describing the general trait of your system of sanctions provided for environmental crimes, is it in general nearer to:

- criminal law,
- administrative law,
- civil law,
- sanctions sui generis?

(2) According to your opinion, should criminal law provisions and measures with respect to environmental cases be:

- more enforced (if yes, please specify),
- more restricted (if yes, please specify)?

(3) In framing environmental criminal laws, is there a tendency to go away from basic criminal law principles (e.g. liability, guilt, intent, etc.) and to move towards administrative or civil systems of liability (if yes, please describe briefly)?

(4) Do you have any suggestions for enhancing the co-operation and communication between relevant authorities in the control of harm to the environment?

(5) Are there in your country at the moment ongoing revisions of legislations which shall have impact on:

- the criminal law provisions and measures in the field of environment (if yes, please describe),
- the criminal procedural law provisions in the field of environment (if yes, please describe),
- the provisions of administrative law in the field of environment (if yes, please describe)?

(6) If no revision is imminent at the moment, is there anything initiated in the foreseeable future in respect of subcategories of the previous question (if yes, please describe)?

Thank you!

Respondent:

Name

Title

Address