

# Exploring the potential of criminal law in protecting the environment

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<b>1</b>	<b>Introduction</b> .....	<b>2</b>
1.1	General context.....	2
1.2	Authors' vision.....	3
1.3	Structure of the reflection paper.....	5
<b>2</b>	<b>Offences and prohibitions</b> .....	<b>5</b>
2.1	Classification of offences and prohibitions.....	6
2.1.1	Environmental offences, arising from regulatory disobedience....	6
2.1.2	Environmental offences, other than the regulatory disobedience.	9
2.1.3	Non-environmental offences gaining environmental status.....	10
2.2	Issues related to offences and prohibitions.....	11
2.2.1	Causation.....	11
2.2.2	Mens rea.....	11
<b>3</b>	<b>Sanctions and Liability</b> .....	<b>12</b>
3.1	The typology of the sanctions.....	12
3.2	Scope of application of the sanctions.....	12
3.2.1	Liability of legal persons.....	12
3.2.2	Public entities and state responsibility.....	13
<b>4</b>	<b>Jurisdiction</b> .....	<b>14</b>
4.1	International jurisdiction.....	14
4.1.1	Multiple forums possible.....	14
4.1.2	Ne bis in idem and conflicting truths issues.....	15
4.1.3	Complementing with FATF-like EATF.....	15
4.2	National jurisdiction.....	15
4.2.1	Obligations to prescribe and enforce jurisdiction.....	15
4.2.2	Finding the best national forums.....	17
4.2.3	Ne bis in idem.....	18
<b>5</b>	<b>International cooperation</b> .....	<b>19</b>
5.1	Vertical cooperation.....	19
5.2	Horizontal cooperation.....	19

5.2.1	Mutual legal assistance.....	20
5.2.2	Extradition.....	22
5.2.3	Other forms of cooperation.....	22
<b>6</b>	<b>Bibliography.....</b>	<b>23</b>
6.1	Selected international instruments .....	23
6.2	Selected literature.....	25

## 1 Introduction

### 1.1 General context

In recent years, the protection of the environment has increasingly gained importance.<sup>1</sup> However, to date a long-term and consistent policy plan to elaborate and enforce (international) environmental offences is lacking. Because of thematic and ad hoc policy making at international level, criminal accountability for environmental harms derives from a wide array of norms scattered among a diverse set of treaties that often impose differing, sometimes obscure standards of protection.<sup>2</sup>

Two main challenges arise with regard to international environmental criminal law.

Firstly, the interpretation of the jumble of provisions is complicated by the lack of a common understanding of the concepts used. Even though their meaning might seem self-evident, no clear definition exists of what constitutes *environment*, what constitutes *environmental harm*, and which *environmental values* should be subject to legislative provisions.<sup>3</sup> Definitions that do exist are often vague and open-ended.<sup>4</sup> Reference is made to vague provisions, such as “substantial damage”, “significant impact” or “reasonable harm”. From a criminal law perspective, this potentially amounts into a breach of the legality principle. Linked to this, some authors argue that the vague provisions lack

<sup>1</sup> EPP, H. "Global action for the protection of environment." *unpublished reflection paper*, p 1-11, ABRAMS, R. "The maturing discipline of environmental prosecution." *Columbia Journal of European Law* 1991, 16, p 279-190, BRICKEY, K. "Environmental crime at the crossroads: the intersection of environmental and criminal law theory." *Tulane Law Review* 1996, 71, p 487-528, FORTNEY, D. C. "Thinking outside the "Black Box": Tailored Enforcement in Environmental Criminal Law." *Texas Law Review* 2003, 81, p 1609-1635, O'HEAR, M. M. "Sentencing the green-collar offender: punishment, culpability and environmental crime." *Journal of Criminal Law and Criminology* 2004, 95, p 133-276, WHITE, P. C. "Environmental justice since hammurabi: from assigning risk "eye for an eye" to modern-day application of the responsible corporate officer doctrine." *William and Mary Environmental Law and Policy Review* 2005, 29, p 633-679

<sup>2</sup> ORELLANA, A. "Criminal punishment for environmental damage: individual and state responsibility at a crossroad." *Georgetown International Environmental Law Review* 2005, 17, p 673-696, p 673. MCCAFFREY, S. "Criminalization of environmental protection", in BASSIOUNI, C., *International criminal law*, The Hague, Martinus Nijhoff, 2008, 1, p 1013-1035, p 1021.

<sup>3</sup> MCCAFFREY, S. "Criminalization of environmental protection", in BASSIOUNI, C., *International criminal law*, The Hague, Martinus Nijhoff, 2008, 1, p 1013-1035, p. 1013-1014.

<sup>4</sup> However, it must be added that provisions do exist that are technical and very detailed.

sufficient moral weight to provide a basis for severe criminal sanctions.<sup>5</sup> The difficulty to define what constitutes environmental harm is attributed to the *partial acceptability* of harmful activities, depending on the economic and social desirability of the activity.<sup>6</sup> In cases where every contact of the pollutant with the environment constitutes harm, where is the threshold at which “criminal” harm starts? Furthermore, what constitutes *environmental harm* is said to be often linked to either *harm to human wellbeing* or to *harm to private property*.<sup>7</sup> Finally harm is often only examined in short term.<sup>8</sup>

Secondly, the matter is further complicated by the complex interactions and interrelations between criminal law, administrative law and civil law. Even where international criminal law obligations are elaborated in international instruments, significant differences remain in national legislation. Because international obligations work with *minimum standards*, states are left with significant discretion to go beyond the international agreed minimum standards and develop a more strict policy at national level. Furthermore, with regard to the *liability of legal persons* for example, it is left to the States to decide on the nature of the liability, be it criminal, administrative or civil. Even though this reflection paper predominantly reflects on criminal law, suggestions are made with regard to the possibility of setting up an international compensation committee, competent to deal with international environmental harm, regardless of the traditional diversity in national legal systems.

## 1.2 Authors’ vision

Standardisation and a long term policy plan is indispensable not only for consistent and adequate enforcement, but first and foremost for the credibility of protecting the environment through the use of criminal law.

The link between environmental law and criminal law is stronger than one might expect. Even though explicit references to environmental wrongdoing as a criminal offence and the obligation to criminalise a certain behaviour is rare, implicit references are plentiful. When assessing the national implementation and enforcement of provisions *prohibiting* a certain behaviour, analysis revealed that most States seek recourse to criminal law. Because the link is *evident* at national

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<sup>5</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 477.

<sup>6</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 470.

<sup>7</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 469.

<sup>8</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 474.

level, international provisions prohibiting a certain behaviour are included in the analysis as *quasi criminal provisions*.

Relevant international provisions were brought together in a grid, serving as the basis for this reflection paper. Based on the (quasi) criminal provisions, a classification was developed, inspired upon other classification systems of both environmental offences and other international offences (e.g. terrorist offences). For terrorist offences for example, a distinction is made between *newly created* terrorist offences (e.g. participation in a criminal organisation) on the one hand, and *other terrorist offences* consisting of traditional offences committed with a terrorist intent (e.g. terrorist kidnapping or hostage taking, terrorist activities related to weapons or terrorist seizure or transport) on the other hand.

Similar to that approach and classification, the threefold classification for environmental offences developed and elaborated in this reflection paper consists of (1) environmental offences arising from regulatory disobedience, (2) environmental offences other than regulatory disobedience and (3) other non-environmental offences obtaining the status of environmental offence in two possible situations: because of the intent to significantly(?) adversely effect the environment, and/or because of the non intended but significant(?) and foreseeable(?) adverse effect to the environment.

Besides a classification of the environmental offences, attention was paid to the possibility to introduce criminal law principles and provisions from traditional criminal law conventions into an environmental context. In this respect it is interesting to note that a parallel can be drawn between on the one hand the evolution from the 1961 Single Convention on Narcotic Drugs<sup>9</sup> and the 1971 Convention on Psychotropic Substances<sup>10</sup> to the 1988 Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances<sup>11</sup>, and on the other hand the evolution from traditional environmental law to international environmental criminal law.

Both the 1961 and 1971 Conventions contain technical provisions limiting and regulating (amongst other things the) manufacturing, trade and distribution of narcotic drugs and psychotropic substances. The 1988 Convention supplements those prior conventions by regulating the breaches of their provisions and providing a legal framework for the fight against illicit trafficking. To that end the 1988 Convention enumerates a series of offences and sanctions building on the regulations from the previous conventions, and includes provisions on jurisdiction, confiscation, extradition, mutual legal assistances, transfer of proceedings and other forms of cooperation. To a certain extent, a parallel evolution could now be triggered from the traditional environmental law to a new international environmental criminal law. Therefore, the provisions from the 1988 Convention serve as a basis to analyse

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<sup>9</sup> Single Convention of 1961 in Narcotic Drugs, as amended by the 1972 Protocol

<sup>10</sup> Convention on Psychotropic Substances of 1971

<sup>11</sup> Convention against the illicit trafficking in Narcotic Drugs and Psychotropic substances of 1988.

the compatibility with and feasibility to introduce them in an environmental context.

### 1.3 Structure of the reflection paper

This reflection paper considers different ways criminal law can support environmental protection and conservation of natural resources and explores the potential of criminal law in enforcing international obligations. States assume various types of obligations, such as ensuring respect for the substantive terms of a treaty, assisting in criminal enforcement efforts at an international level, criminalizing conduct in national legislation, and trying or extraditing individuals accused of international crimes.<sup>12</sup>

Firstly the reflection paper elaborates on the classification system in which the different international environmental offences can be categorised. Secondly, the paper goes into the sanctions application when committing an environmental offence with a special focus on the liability of both legal persons and public entities and states. Thirdly, attention is drawn to jurisdiction both from a national and an international perspective, before finally going into international cooperation.

## 2 Offences and prohibitions

There is a wide range of possibilities to counter behaviour that adversely affects the environment. Several classification systems have been elaborated based on national environmental law provisions.<sup>13</sup> The question arises whether these classification systems are also valid in an international context. As clarified in the introduction both strict criminal law provisions and *quasi criminal law* provisions have been included in the analysis. This explains this section's title *offences and prohibitions*.

Based on the analysis, three main categories ought to be distinguished – namely *environmental offences arising from regulatory disobedience* and *environmental offences other than regularoty disobedience*, supplemented by *non-environmental offences that have gained environmental the status* because of the link with the environment.

The following paragraphs will elaborate on each of these categories and will go into specific issues linked to them.

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<sup>12</sup> ORELLANA, A. "Criminal punishment for environmental damage: individual and state responsibility at a crossroad." *Georgetown International Environmental Law Review* 2005, 17, p 673-696, p 676.

<sup>13</sup> See for example the classification developed by MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511

## 2.1 Classification of offences and prohibitions

### 2.1.1 *Environmental offences, arising from regulatory disobedience*

#### *Clarifying the concept*

This first category is closely linked to what is labelled as *administrative disobedience offences* in literature. Different authors argue that environmental policy is preliminary based on a command and control approach of permits and licenses.<sup>14</sup> The administration will set a baseline of acceptable contact between the environment and the polluter, based on the society's need for the polluting activity and the existence of technology to mitigate the damage. Because of this, it is concluded that environmental law in many countries is aimed largely at an administrative control of pollution, usually through a licensing system. When aspiring to introduce criminal law in an Environmental law context, criminal law could be used to punishing the lack of permit or a violation of requirements and conditions. In such an interpretation, the role of criminal law is limited to punishing administrative disobedience.<sup>15</sup>

We deem a reference to the term *administrative* confusing because of the existence of administrative sanctioning as opposed to criminal sanctioning. Furthermore, confusion may arise with the *ordnungswidrichkeiten*. This category consists of criminal offences arising from disobedience for administrative regulations. Therefore, we prefer to label this category as environmental offences, arising from *regulatory* disobedience.

#### *Basic typology of regulatory disobedience offences*

All offences included in this category are linked to environmentally inspired regulations.

- Operating without a permit
  - e.g. Art 8 Whaling Convention*<sup>16</sup>
  - e.g. Art 7 Fauna and Flora Convention*<sup>17</sup>

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<sup>14</sup> See for example FAURE, M., KOOPMANS, I. and OUDJIK, J. "Imposing criminal liability on government officials under environmental law: a legal and economic analysis." *Loyola of Los Angeles International and Comparative Law Review* 1996, 18, p 529-569, p 529. EPP, H. "Global action for the protection of environment." *unpublished reflection paper*, p 1-11, p. 3

<sup>15</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 448.

<sup>16</sup> Convention for the Regulation of Whaling, approved at Geneva, 24 September 1931, 155 U.N.T.S. 349, 49 Stat. 3079, T.S. No.880 (entered into force 16 January 1935; entered into force with respect to the U.S.A. 16 January 1935)

- Violate paperwork requirement  
*e.g. Art 9 Nature and Wildlife Convention*<sup>18</sup>  
*e.g. Art 9 Fauna and Flora Convention*<sup>19</sup>  
*e.g. Art 4.3. d) MARPOL*<sup>20</sup>
  
- Hindering/obstructing monitoring/inspection  
*e.g. Art 6.2 MARPOL*<sup>21</sup>  
*e.g. Art 220.2 UNCLOS*<sup>22</sup>
  
- License or permit violations  
*e.g. Art 14 MARPOL*<sup>23</sup>
  
- Incompliance with international rules and standards  
*e.g. Art 217 UNCLOS*<sup>24</sup>

*Including climate change in the typology*

Especially with regard to climate change<sup>25</sup>, the application of traditional criminal law is said to be challenging or even impossible, because of the

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<sup>17</sup> Convention Relative to the Preservation of Fauna and Flora in Their Natural State, approved at London, 8 November 1933 (entered into force 14 January 1936)

<sup>18</sup> Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Inter-American), approved at Washington 12 October 1940, (entered into force 30 April 1942; entered into force with respect to the U.S.A. 28 April 1941)

<sup>19</sup> Convention Relative to the Preservation of Fauna and Flora in Their Natural State, approved at London, 8 November 1933 (entered into force 14 January 1936)

<sup>20</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)

<sup>21</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)

<sup>22</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (EIF 16 November 1994)

<sup>23</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)

<sup>24</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (EIF 16 November 1994)

<sup>25</sup> Himmeloch asserts that global warming, acid rain and ozon layer depletion, are the most significant problems related to climate change. The causes of global warming are everyday activities. Deforestation and fossil fuel use are the major sources of the carbon dioxide accumulating in the atmosphere. Cattle, rice fields, and landfills produce most methane gas. Chlorofluorocarbons are used as refrigerants, and in computers, cooling systems, aerosol cans, and styrofoam production. Nitrous oxides are released by internal combustion engines and microbes that consume chemical fertilizers. Purely intranational control of greenhouse gases will not prevent global warming; treaties and international agreements are an essential element of any program to address global warming. Sulfur dioxide and nitrous oxides suspended in the atmosphere interact with water to create acids. Automobiles, as well as electrical plants,

scientific uncertainties, the difficulties in indicating the polluter and the fact that each of the individual behaviours often do not sufficiently “*significantly*” harm the environment.<sup>26</sup>

As a result, as many other authors have agreed, climate change is best addressed through international agreements eliminating (or at least reducing) the use of harmful substances.<sup>27</sup>

Therefore, the only feasible way of including climate change in the sphere of international environmental criminal law, seems by advising governments to work with licences and permits so that regulatory disobedience offences can be linked to them. This approach also ensures that only the most significant polluters and polluting activities – being the one’s subject to licences or permits – fall within the scope of the criminal provisions. In doing so, it is avoided that international environmental criminal law has the perverse effect of including the individual insignificant acts.

#### *Adding aggravating circumstances*

The offences included in this category of regulatory disobedience offences make behaviour subject to punishment as soon as the regulatory provision is violated. Therefore, behaviour is subject to punishment regardless of actual harm or treat of harm to the environment.

However, this does not mean the link with the environment is totally inexistent or irrelevant. On the contrary, endangering or actually harming the environment can constitute an aggravating circumstance. Different *degrees* of aggravation can be introduced depending on the link with the environment (endangering vs actual harm), depending on the intent or even depending on the foreseeability of the harm.

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nonferrous metal smelters, and other industries that rely on fossil fuels produce sulfur dioxide and nitrous oxides. Nitrous oxides are also produced during the breakdown of chemical fertilizers by microbes. Ozone is found in the stratosphere ten to thirty miles above the surface of the earth. The ozone layer acts as a filter, preventing ultraviolet rays from reaching the Earth. Refrigerants, computers, cooling systems, and styrofoam production processes release chlorofluorocarbons into the atmosphere. See more elaborately HIMMELHOCH, S. "Environmental Crimes: recent efforts to develop a role for traditional criminal law in the environmental protection effort." *Environmental Law* 1992, 22, p 1469-1507

<sup>26</sup> HIMMELHOCH, S. "Environmental Crimes: recent efforts to develop a role for traditional criminal law in the environmental protection effort." *Environmental Law* 1992, 22, p 1469-1507, p 1474. LAZARUS, R. "Meeting the demands of integretation on the evolution of environmental law: reforming environmental criminal law." *Georgetown Law Journal* 1995, 83, p 2407-2529, p 2422.

<sup>27</sup> HIMMELHOCH, S. "Environmental Crimes: recent efforts to develop a role for traditional criminal law in the environmental protection effort." *Environmental Law* 1992, 22, p 1469-1507, p 1478.



### *The licencing system*

Nowadays, licencing and permit systems are used as part of the policy to protect the environment. Baselines of acceptable contact between the environment and the polluter, vary according to the economical and social desirability of an activity and the availability and access to technology to mitigate harm to the environment.

The current State licencing practice, can be complemented with objective standards set at international level, depending on – amongst other variables – the type of activity and the geographical location. It is imaginable that criteria are elaborated for the carbon dioxide emission of enterprises according to their activity, volume and location. In doing so, the national licencing standards are complemented by international standards, which can be more strict. In the latter case, both the enterprise and the issuing authority can be in breach of international obligations: the issuing authority because it issued a licence in non-compliance with the international standards for the specific enterprise, and the enterprise itself, because the national licence will not be accepted as a shield to skirt international standards.

This line of argumentation also allows to go even further and act against *delocation practices* prompted to benefit from more lenient requirements in another State. Inspiration can be drawn from the legal formula used in the context of seconding employers to another state, to further elaborate this idea. Regardless of the secondment, the applicable provisions relating to employment and labour law are those of the seconding home state. As a *partial analogy*, the international standards applicable to enterprises can *move with them* in cases of delocation to a more flexible region. This is referred to as a *partial analogy* because a moving operation is obviously only desirable for delocation to a more flexible region. Delocation to a region with a more strict limits and requirements will not allow an enterprise to claim the more flexible regime applicable in the region of former settlement.

#### **2.1.2 *Environmental offences, other than the regulatory disobedience***

We have labelled the second category of offences *environmental offences other than regulatory disobedience*, eliminating the link with regulations.<sup>28</sup>

Examples of behaviour included in this category are legio.

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<sup>28</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 480.

*e.g. Art 10 Fauna and Flora Convention stipulates that the Contracting Governments shall prohibit in their territories the surrounding of animals by fires for hunting purposes.<sup>29</sup>*

*e.g. Art 5 Whaling Convention stipulates that The taking or killing of calves or suckling whales, immature whales, and female whales which axe accompanied by calves (or suckling whales) is prohibited.<sup>30</sup>*

*e.g. Art V Arctic Treaty stipulates that Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.<sup>31</sup>*

### **2.1.3 Non-environmental offences gaining environmental status**

Finally, as a third category of environmental offences, it is argued that aggravating circumstances can give non-environmental offences an environmental status.

Two observations are used as a basis for this category. First, in parallel to the specific circumstances that render a traditional murder a terrorist murder (because of the terrorist intent) or a racial murder (because of the racial motivation), the aggravating circumstances brought up when discussing the regulatory disobedience should not be limited thereto. Second, the link can be drawn with Article 8 (iv) Rome Statute which criminalises intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Based on these observations, this rather new category consist of traditional offences which obtain the status of environmental offence because of the intent to significantly(?) adversely effect the environment, and/or because of the non intended but significant(?) and foreseeable(?) adverse effect to the environment. In theory, almost any offence can fall within this scope.

Intentionally raising a fire to a private premises which subsequently spreads to a forest can be labelled as an environmental offence using the traditional arson and the environmental harm as an aggravating circumstance.

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<sup>29</sup> Convention Relative to the Preservation of Fauna and Flora in Their Natural State, approved at London, 8 November 1933 (entered into force 14 January 1936)

<sup>30</sup> Convention for the Regulation of Whaling, approved at Geneva, 24 September 1931, 155 U.N.T.S. 349, 49 Stat. 3079, T.S. No.880 (entered into force 16 January 1935; entered into force with respect to the U.S.A. 16 January 1935)

<sup>31</sup> The Antarctic Treaty, done at Washington, Dec. I, 1959,(entered into force for the US. June 23,1961).

## 2.2 Issues related to offences and prohibitions

### 2.2.1 Causation

Causation is not a problem in cases of a single polluting event that immediately results in clear damage. However, in most environmental cases, this presents challenges to the prosecution and significantly reduces the number of cases.<sup>32</sup> Environmental harm is a special kind of harm: the relationship between cause and effect is rarely direct. It is argued that environmental harm tends to be continuing in character and to be latent. There can be a significant delay between exposure and manifestation of harm. The adverse effects are frequently long-lasting.<sup>33</sup>

To avoid that this problem prevents effective prosecution of environmental offences, punishment should not be made solely dependent on the concrete result or harm to the environment. This approach is perfectly in line with and applicable to the *environmental offences arising from regulatory disobedience* we have elaborated upon. However, eliminating causation is not appropriate in the context of *environmental offences other than regularoty disobedidence* nor for the *non-environmental offences that have gained environmental status* distinguished in the classification system.

### 2.2.2 Mens rea

In parallel to the line of argumentation which suggests to exclude the actual link with the environment or the significant harm as a constituent element, similar concerns can be made with regard to the mens rea. The defendant's moral culpability is the feature most frequently invoked to justify severe criminal sanctions.<sup>34</sup> Mens rea can take different shapes, ranging from intentional offences to criminal negligence and should have known culpability for foreseeable harm. Technical branches of criminal law, such as environmental law, often do not require a specific form of mens rea as a constituent element. The simple breach of a provision can make behaviour subject to punishment.

It is advised to carefully consider mens rea elements for the different categories of the developed classification system.

For *environmental offences arising from regulatory disobedience*, mens rea is not necessary and the simple breach of a provision can give rise to punishment.

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<sup>32</sup> MANDIBERG, S. F. and FAURE, M. "Graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe." *Columbia Journal of Environmental Law* 2009, 34, p 447-511, p 478.

<sup>33</sup> LAZARUS, R. "Meeting the demands of integretation on the evolution of environmental law: reforming environmental criminal law." *Georgetown Law Journal* 1995, 83, p 2407-2529, p 2421.

<sup>34</sup> LAZARUS, R. "Meeting the demands of integretation on the evolution of environmental law: reforming environmental criminal law." *Georgetown Law Journal* 1995, 83, p 2407-2529, 2443.

For the *environmental offences other than regulatory disobedience*, mens rea is required, so that the technique allowing for punishment upon the simple breach of a provision cannot be maintained.

For the *non-environmental offences that have gained environmental status*, the mens rea is dependent on the general mens rea requirement for the offence they are based upon. The question arises whether for the aggravating circumstances foreseeability of significant harm to the environment is required.

### 3 Sanctions and Liability

#### 3.1 The typology of the sanctions

Traditional UN level international criminal law provisions, refer to the obligation of states to introduce “appropriate sanctions”.<sup>35</sup> Usually it is left to the discretion of the States to decide on the type and level of sanctions.

It can be suggested to introduce at UN level a formula generally used at EU level. In EU instruments, States are required to take all measures to ensure that the offences are subject to *effective, proportionate and dissuasive sanctions*.<sup>36</sup>

In international environmental law, little or not reference is made to sanctions themselves. In cases where references exist, it is usually limited to a simple reference to the obligation to punish. Only very rarely, a reference is made to monetary penalties.<sup>37</sup>

However, when specific types or levels of sanctions are prescribed at international level, it is worth referring to less “traditional sanctions”<sup>38</sup> and introduce of so-called functional disqualifications (e.g. temporary or permanent disqualification from the practice of commercial activities).

#### 3.2 Scope of application of the sanctions

##### 3.2.1 Liability of legal persons

(Criminal) liability of legal persons is not generally accepted. However, several international instruments refer to the principle of liability of legal

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<sup>35</sup> Art 4 1999 International Convention for the Suppression of the Financing of Terrorism; Art 4 1997 International Convention for the Suppression of Terrorist Bombings; Art 4 Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; Art 3.4 Convention against the illicit trafficking in Narcotic Drugs and Psychotropic substances of 1988;

<sup>36</sup> This formula also appears for example in Art. 10 UNTOC, but is not generally introduced across all UN level international criminal law conventions. United Nations 2000 Convention against Transnational Organized Crime

<sup>37</sup> See for example UNCLOS.

<sup>38</sup> e.g. deprivation of liberty and financial penalties are perceived as *traditional offences*.

persons.<sup>39</sup> In those texts *liability* is used as a neutral concept, because it is left to the States to decide whether this liability has a criminal, administrative or civil character. To make a suggestion on how to deal with this in the context of international environmental offences, a distinction needs to be made, between the international liability of legal persons and the national liability of legal persons.

#### *International liability of legal persons*

At international level a parallel can be drawn with the well known international principle of *command responsibility*. Anticipation on the vulnerability of a natural person within the legal person (be it based on the power to represent the legal person, based on the authority to take decisions on behalf of the legal person, or based on the authority to exercise control within the legal person) will significantly impact on the behaviour of the legal person. This parallel with command responsibility, can place natural persons for example within the jurisdiction of ICC.

#### *National liability of legal persons*

At national level, the liability of legal persons can be mirrored to the provisions of UNTOC.<sup>40</sup> Art. 10 UNTOC requires States to establish the liability of legal persons for the UNTOC offences. It is left to the discretion of the States to decide whether the liability has a criminal, civil or administrative character.

In parallel to the international liability of legal persons, the command responsibility–like liability can also be introduced at national level.

### **3.2.2 Public entities and state responsibility**

International criminal law conventions never make an explicit reference to criminal responsibility of public entities and states. Nevertheless, public entities and states can be guilty of environmental offences. The question is whether the breach of an international legal obligation, which is an internationally wrongful act that gives rise to state responsibility, may give rise to criminal responsibility.<sup>41</sup>

Some authors refer to the liability for wrongfully issuing permits, criminal liability for non-intervention or neglecting the obligation to install public entity

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<sup>39</sup> See for example Art. 10 UNTOC

<sup>40</sup> United Nations 2000 Convention against Transnational Organized Crime

<sup>41</sup> See also McCaffrey's conclusion that no agreement exists on this topic: MCCAFFREY, S. "Criminalization of environmental protection", in BASSIOUNI, C., *International criminal law*, The Hague, Martinus Nijhoff, 2008, 1, p 1013-1035, p 1026 and 1034.

enterprises (such as for example sewage purification plants).<sup>42</sup> However, in our opinion, the abovementioned acts simply amount to a breach of State treaty obligations which do not justify recourse to criminal liability of public entities and states.

Roughly, we consider the offences possible committed by public entities and states twofold. Firstly, public entities and states can be liable for example for the use of chemical weapons leading to acid rain. Secondly, states can act via public enterprises who are similar to private enterprises. It is only logical for those enterprises to be subject to the same liability as mirroring private sector enterprises.

## 4 Jurisdiction

### 4.1 International jurisdiction

#### 4.1.1 *Multiple forums possible*

At international level, three scenarios seem conceivable.

First, the ICC could be used as a forum for traditional individual responsibility or for the *common responsibility like* liability explained above. This means the ICC can play a role as a forum for the enforcement of international environmental criminal law, be it a modest role. This is of course subject to an extension to the mandate, for e.g. grave crimes against the environment.<sup>43</sup>

Second, the ICJ could play a role as a forum for state responsibility for international environmental criminal offences.

In the margin of these two possible forums, it can also be recalled that the general notion of *war crimes*, as it appears in the Geneva Conventions, can also provide a legal basis to bring environmental offences within the competence sphere of be it ICC or ICJ, in that the texts of the conventions and the protocols stipulate that without prejudice to the application of the Convention and of its protocols, grave breaches of instruments shall be regarded as war crimes.

Third, it is imaginable that a permanent international compensation committee be set up inspired upon the United Nations Compensation Commission established by the Council in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. Compensation is payable to successful claimants from a special fund that receives a percentage of the proceeds from sales of Iraqi oil. The United Nations Compensation Commission received approximately 2.7 million claims

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<sup>42</sup> FAURE, M., KOOPMANS, I. and OUDIJK, J. "Imposing criminal liability on government officials under environmental law: a legal and economic analysis." *Loyola of Los Angeles International and Comparative Law Review* 1996, 18, p 529-569, p 540.

<sup>43</sup> See also EPP, H. "Global action for the protection of environment." *unpublished reflection paper*, p 1-11, p 6.

seeking approximately US\$352.5 billion in compensation for death, injury, loss of or damage to property, commercial claims and claims for environmental damage resulting from Iraq's unlawful invasion and occupation of Kuwait in 1991. Such a committee need not to be linked to the UN Security Council, but may also have a treaty base similar to the ICC.

#### ***4.1.2 Ne bis in idem and conflicting truths issues***

Considering the different possible scenarios, problems can occur in terms of the ne bis in idem principle or the establishment of conflicting truths when different forums deal with the same conduct. Similar problems are now being witnessed between for example the ICJ and the international criminal tribunals.

#### ***4.1.3 Complementing with FATF-like EATF***

The international jurisdiction to prosecute environmental offences could be complemented with a compliance mechanism, inspired on the work of the Financial Action Task Force (FATF). Established in 1999, the FATF plays a key role in the development and promotion of policies and strategies in the fight against money laundering and the financing of terrorism. One of the aspects of its work consists of ensuring global compliance with international standards through a sophisticated peer review and follow up mechanism. There isn't a bank in the world that does not know the FATF standards.

Similar to the work of FATF, an Environmental Action Task Force (EATF) could be set up and could become a vital partner in the development and promotion of environmental policies and quality standards. It is worth analysing the feasibility of establishing standards, which not only states, but also individuals and entities need to comply with.

## **4.2 National jurisdiction**

### ***4.2.1 Obligations to prescribe and enforce jurisdiction***

In the context of international offences, UN conventions<sup>44</sup> and the 1988 Convention in particular<sup>45</sup>, a standard provision is introduced with regard to

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<sup>44</sup> See for example: Art. 5 Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984., Art 15 United Nations 2000 Convention against Transnational Organized Crime, Art 7 1999 International Convention for the Suppression of the Financing of Terrorism, Art 6 1997 International Convention for the Suppression of Terrorist Bombings.

<sup>45</sup> Art 4 Convention against the illicit trafficking in Narcotic Drugs and Psychotropic substances of 1988. As explained in the introduction, the basis for the introduction of mirroring provisions from the 1988 Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic substances, lies in the analogy in the development of the 1988 Convention from the 1961 and

jurisdiction. States are required to establish their jurisdiction when an offence is committed in their territory, or on board a vessel or aircraft registered under their laws. Furthermore, both the active and passive personality principle are accepted as subsidiary grounds for jurisdiction. Coordination is required in case of simultaneous prosecution and the *aut dedere aut judicare* principle is included.

However, in light of the liability of legal persons, it is important to take this into account when elaborating on jurisdiction. Inspiration can be drawn e.g. from the EU Framework Decision on Corruption, in which states are also to establish jurisdiction with regard to offences committed to the benefit of a legal person that has its head office in the territory of that State. It is advised to also include a similar provision in international criminal law.

In environmental law, such jurisdiction provisions are not a standard inclusion. Only rarely<sup>46</sup>, similar provisions can be found.

*e.g. Art VII Dumping Waste Convention requires contracting parties to apply the convention to a) vessels and aircraft registered in its territory or flying its flag; b) vessels and aircraft loading in its territory or territorial seas matter which is to be dumped; c) vessels and aircraft and fixed or floating platforms under its jurisdiction believed to be engaged in dumping.*<sup>47</sup>

*e.g. Art 15 Convention on Dumping from Ships and Aircrafts requires contracting parties to undertake to ensure compliance with the provisions of this Convention: a) by ships and aircrafts registered in its territory; b) by ships and aircraft loading in its territory the substances and materials which are to be dumped; c) by ships and aircraft believed to be engaged in dumping within its territorial sea.*<sup>48</sup>

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1971 Convention and the current evolution towards international environmental criminal law from general environmental law conventions.

<sup>46</sup> Most provisions relating to jurisdiction in environmental law clarify the permission of states to institute proceedings or sort out conflicts of jurisdiction. See for example Art. 216 UNCLOS which clarifies that enforcement shall take place (a) by the coastal State with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf; (b) by the flag State with regard to vessels flying its flag or vessels or aircraft of its registry; (c) by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals.

<sup>47</sup> Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 December 1972

<sup>48</sup> Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 15 February 1972



Also, traces of the *aut dedere aut judicare* principle can be found in environmental law.

*e.g. Art 9 Draft Code of Offences Against the Peace and Security of Mankind holds an obligation to extradite or prosecute stipulating that without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.*<sup>49</sup>

Because no problems are expected with regard to the application of the general jurisdiction clauses<sup>50</sup> nor with the *aut dedere aut judicare* principle – as is corroborated by the existing similar provisions found in environmental law – it is suggested to introduce this general jurisdiction clause in relation to international environmental criminal law, as supplemented by jurisdiction for offences committed to the benefit of a legal person that has its head office in the territory of that State.

#### **4.2.2 Finding the best national forums**

At national level, the traditional forums will deal with international environmental cases. Both individual liability and the liability of legal persons may be applied. With regard to the liability of legal persons, the two main ideas are recalled. First, it is at the discretion of each of the states to decide whether the liability of legal persons has a criminal, civil or administrative character. Second, the idea of command responsibility to attribute liability of the legal person to an individual national person, can also be introduced at national level.

Multiple jurisdiction claims are not unimaginable. Inspiration can be drawn from UNTOC which calls for consultation with a view to coordinating actions if a state exercising its jurisdiction has been notified or has otherwise learned that another state is conducting an investigation, prosecution or judicial proceeding in respect of the same conduct.

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<sup>49</sup> Draft Code of Offences Against the Peace and Security of Mankind (Int Law Commiss), 28 July 1954

<sup>50</sup> Similarly, Epp states that the territoriality principle and the passive personality principle will not amount in insurmountable problems. With regard to the passive personality principle he refers to the application of the instrument relating to the transfer of criminal proceedings. EPP, H. "Global action for the protection of environment." *unpublished reflection paper*, p 1-11

### 4.2.3 *Ne bis in idem*

Furthermore it should be noted that also in international criminal law the application of the ne bis in idem principle is very important. Interpretation of the current environmental law provisions as criminal provisions could sometimes amount in a violation of the ne bis in idem principle.

*e. g. Art 228.3 UNCLOS stipulates that the provisions of this article are without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State.<sup>51</sup>*

However, the same instrument also stipulates that

*Art. 216.2 UNCLOS relating to the enforcement with respect to pollution by dumping stipulates that no State shall be obliged by virtue of this article to institute proceedings when another State has already instituted proceedings in accordance with this article.<sup>52</sup>*

It is advised that clear ne bis in idem provisions are inserted in the context of international environmental criminal law.

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<sup>51</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (EIF 16 November 1994)

<sup>52</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (EIF 16 November 1994)

## 5 International cooperation

### 5.1 Vertical cooperation

The term *vertical cooperation* is used for cooperation between states on the one hand and international bodies, institutions and organisations on the other hand. Considering the possibility of establishing international jurisdiction for international environmental offences, it is also important to reflect on the cooperation of states. For ICC and ICJ the existing mechanisms should be used, but no such standard mechanism exists if the choice is made to establish a permanent international compensation committee. Obviously the choice to link such a committee to the UN security council or to give such a committee a treaty base might impact on the vertical cooperation mechanism to be elaborated.

### 5.2 Horizontal cooperation

The term *horizontal cooperation* is used for cooperation between states, such as mutual legal assistance and extradition. Because most forms of cooperation are made (partially) dependant on a form of double criminality, this preliminary issue needs to be addressed.

Considering the top down perspective of this reflection paper and the obligation of states to take all measures to ensure that jointly identified behaviour constitutes an offence in their national legislation, double criminality issues should not occur. However, as States are left considerable discretion as to how offences are constructed and how to comply with their international obligation, it is imaginable that the jointly identified behaviour is an offence in all states, but is not labelled as the exact same 'type of environmental offences'. A similar problem has appeared in the context of fiscal offences. Inspiration on how to deal with this issue, can be found in existing legal instruments. Art 8 2001 EU MLA Protocol for example deals with mutual assistance with regard to fiscal offences. Besides clarifying that assistance may not be refused solely on the ground that the request concerns a fiscal offence, the article stipulates that the request may not be refused on the ground that the law of the requested State does not impose *the same kind of tax or duty* or does not contain a tax, duty, customs and exchange regulation *of the same kind* as the law of the requesting State. A similar provision could be introduced in the context of international environmental criminal law.

### 5.2.1 *Mutual legal assistance*

In traditional UN criminal law conventions<sup>53</sup>, and in the 1988 Convention in particular<sup>54</sup>, a standard provision is included with regard to mutual legal assistance. States agree to afford each other the widest possible measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in criminal matters, in relation to the enlisted offences. Additionally, a list is included of purposes of mutual legal assistance (e.g. taking of evidence or statements from persons, executing searches and seizures, examining objects and sites, providing information and evidentiary items).

In environmental law, such mutual legal assistance provisions are not a standard inclusion. However, many variations to what could constitute mutual legal assistance can be found.

*e.g. Art 217 UNCLOS stipulates that flag States conducting an investigation of the violation may request the assistance of any other State whose cooperation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag States.*<sup>55</sup>

*Art V Modification Techniques Convention requires States Parties to undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objectives of, or in the application of the provisions of, the Convention.*<sup>56</sup>

*Art 14 Land Based Marine Pollution Convention stipulates that [...] the said Contracting Party shall endeavour to cooperate with the non-Contracting State so as to make possible the full application of the present Convention.*<sup>57</sup>

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<sup>53</sup> Art 9 Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.; Art 18 United Nations 2000 Convention against Transnational Organized Crime; Art 12 1999 International Convention for the Suppression of the Financing of Terrorism; Art 10 1997 International Convention for the Suppression of Terrorist Bombings

<sup>54</sup> Art 7 Convention against the illicit trafficking in Narcotic Drugs and Psychotropic substances of 1988.

<sup>55</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (EIF 16 November 1994)

<sup>56</sup> Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, adopted by the General Assembly of the United Nations on Dec. 10, 1976, A/RES/31/72, 31

<sup>57</sup> Convention for the Prevention of Marine Pollution from Land-Based Sources, 4 June 1974, U.K.T.S. 64 (1978)

*Art 9.5 Basel Convention states that each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article.<sup>58</sup>*

*Art 15.4 Convention on Dumping from Ships and Aircrafts states that Contracting Parties undertake to assist one another as appropriate in dealing with pollution incidents involving dumping at sea, and to exchange information on methods of dealing with such incidents. The Contracting Parties further agree to work together in the development of co-operative procedures for the application of the Convention, particularly on the high seas.<sup>59</sup>*

*Art VII.3 Dumping Waste Convention requires Parties to agree to co-operate in the development of procedures for the effective application of this Convention particularly on the high seas, including procedures for the reporting of vessels and aircraft observed dumping in contravention of the Convention.<sup>60</sup>*

*Art 4 MARPOL stipulates that where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence and the Organization, of the action taken.<sup>61</sup>*

Because no problems are expected with regard to the application of the general provisions of mutual legal assistance – as is corroborated by the existing similar provisions found in environmental law – it is suggested to introduce this general provision in relation to international environmental criminal law.

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<sup>58</sup> Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal Adopted By The Conference Of The Plenipotentiaries On 22 March 1989 (Eif Date 5 May 1992)

<sup>59</sup> Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 15 February 1972

<sup>60</sup> Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 December 1972

<sup>61</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)

### 5.2.2 *Extradition*

A similar analysis can be made for extradition provisions. Extradition provisions in traditional UN criminal law conventions<sup>62</sup> and in the 1988 Convention particular<sup>63</sup>, stipulate that offences covered by the convention shall be deemed extraditable and that the international provisions with regard to extradition apply unimpaired.

Here too, there are no problems expected with the application of the traditional extradition provisions.

### 5.2.3 *Other forms of cooperation*

The instruments used as a basis to analyse the compatibility of provisions from traditional international criminal law conventions with (and the feasibility to introduce them in) an environmental context, also include other forms of cooperation. Reference can be made for example to provisions with regard to joint investigation teams, confiscation and controlled delivery. These should be reflected upon when exploring the potential of criminal law in enforcing UN and international environmental law.

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<sup>62</sup> See for example: Art 16 United Nations 2000 Convention against Transnational Organized Crime, Art 11 1999 International Convention for the Suppression of the Financing of Terrorism, Art 9 1997 International Convention for the Suppression of Terrorist Bombings.

<sup>63</sup> Art 4 Convention against the illicit trafficking in Narcotic Drugs and Psychotropic substances of 1988

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