INTERNATIONAL MEETING OF EXPERTS ON THE

USE OF CRIMINAL SANCTIONS IN THE PROTECTION OF THE ENVIRONMENT; INTERNATIONALLY, DOMESTICALLY AND REGIONALLY

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Organized by the

International Centre for Criminal Law Reform and Criminal Justice Policy
Vancouver, Canada

The Portland Organizing Committee
Portland, Oregon, USA

In co-operation with

The United Nations Interregional Crime and Justice Research Institute
Rome, Italy

at Portland, Oregon, USA
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REPORT

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Portland, Oregon (United States of America), March 19-23, 1994

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R E P O R T

INTRODUCTION

The International Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment; Internationally, Domestically and Regionally was held in Portland, Oregon, United States of America from 19 to 23 March 1994 inclusive. Participants in the meeting were 81 experts attending in their personal capacity from 27 countries, from intergovernmental and non-governmental organizations and from academe. The meeting was organized on behalf of the United Nations Crime Prevention and Criminal Justice Branch by the International Centre for Criminal Law Reform and Criminal Justice Policy, the Portland Organizing Committee, and the United Nations Interregional Crime and Justice Research Institute (UNICRI) in Rome, Italy. Financial and organizational support for the meeting was provided by:

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A welcoming address was made by Professor Tom Mason, Co-Chair, Oregon Representative and Professor, School of Urban and Public Affairs, Portland State University. Mr. Vincent Del Buono, President, International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver, Canada gave an opening speech in which he asserted that we have now embarked on the process of creating a new international criminal law which will initially deal with three or four discrete subject areas: first, the entire area of international humanitarian law which includes war crimes, crimes against humanity, genocide, and torture; second, degradation of the environment; third, criminal behaviour in international financial transactions; and finally, terrorism and narcotics especially where the two over-lap. He also noted that

after the 1992 Rio Summit, it is clear that the issues of environmental protection and economic development are inextricably linked at its local, national, regional and international levels. In many ways the experiences of individual jurisdictions like Oregon in attempting to reconcile these competing demands will find echoes everywhere internationally. He attested to the depth of talent and experience in Oregon in the development of new services and technologies relating to environmental protection. Addresses were also delivered to the opening session by Dr. Slawomir Redo representing the United Nations Crime Prevention and Criminal Justice Branch and Dr. Ugljesa Zvekic, United Nations Interregional Crime and Justice Research Institute (UNICRI). During the course of the meeting participants were also addressed by the Honorable Elizabeth Furse, United States Congress Representative of the Oregon First District and Commissioner Mike Lindberg of the City of Portland. The Honorable Barbara Roberts, Governor of the State of Oregon, addressed the participants at a reception hosted by her.

Meetings were held in plenary sessions as well as in three working groups which reported to the plenary. A full list of participants is at attachment "A".

Working group 1 dealt with recommendations as to the terms of a possible convention in relation to offences against the environment. The working group was comprised of 21 members representing 13 countries and a variety of legal systems. The list of members of that working group is at attachment "B".

Working group 2 considered a possible draft domestic criminal statute addressing environmental issues. This working group had 20 participants from 13 countries representing the common law, civil law and Islamic legal systems. The list of participants is at attachment "C".

Working group 3 considered recommendations as to a possible structure and operation of a regional and international enforcement regime. It was composed of 18 participants from 8 countries, again representing a broad mix of legal systems. The list of participants is at attachment "D".

The working group reports, as adopted by the plenary and which constitute the conclusions of the meeting, are contained in chapters E, F and G of this report.

Prior to the division of the meeting into three working groups, there were six plenary sessions commencing on 19 March 1994 and concluding on the morning of 21 March 1994. These sessions were addressed by eminent experts and designed to flesh out in broad terms the various issues which would need to be addressed by the working groups in formulating proposals for the consideration of its concluding plenary session. In addition, a debate took place on 20 March 1994 on the question of who should have the right to initiate and pursue prosecutions for crimes against the environment. Should this be left to governmental prosecuting authorities or should citizens, or groups of citizens, have this right? The point was made that in many countries the principal polluters were governments, in which case leaving prosecutorial decisions and discretions in the hands of government officials was akin to "letting the fox guard the chickens". On the other hand, in those countries where citizens did have

the right to prosecute it was recognized that there might be a need to guard against frivolous or vexatious proceedings. It was suggested that the courts could exercise this function - indeed in some countries this already occurred.

A recurrent theme during the plenary sessions was the need to address the fact that, as the protection of the environment was of universal concern, criminal and other measures designed to achieve that objective had to be effective at national, regional and international levels. In this context there was also some discussion of the extraterritorial application of national laws.

OVERVIEW

As mentioned above, the aim of the opening six plenary discussions was to identify issues and set the parameters for the three working groups.

At the outset the question was posed as to what values or interests we need to protect. In this context it was pointed out that the concept of "environment" is normally not known to the criminal law. Different approaches are possible in defining "environment". These definitions could be based on ecology, on socio-biology (relational, humans versus environment), on philosophy or on constitutional grounds. Whatever approach was adopted in order to preserve the principle of legality, the concept would need to be statutorily defined. It was suggested that the environment had become an important value per se and that hence a philosophical approach should be adopted.

By reference to both American federal and State of Oregon laws, the traditional approaches to environmental protection were discussed, particularly with reference to protection of the air, water and land. The aim was to protect both human health and the environment, but the need to protect flora and fauna was also adverted to. Protection standards, however, tended to be based on risk assessment or technological feasibility rather than on economic feasibility, notwithstanding that pollution was often engaged in as a response to "cost signals". It was recognized that the traditional approaches - which could be described as "limit it, manage it, treat it, ban it or fence it" - had not been successful.

There was a need to create a "pollution prevention" attitude on the part of individuals and corporations by making prevention cost effective in the broadest sense. Costs in this context could include the price of environmentally unfriendly inputs (eg. CFCs), the cost in terms of public goodwill, savings which could be effected by alternative means of production as well as the avoidance of liability for damages and clean up costs. It was regarded as necessary to adopt a strategic approach, particularly where "windows of opportunity" existed in early decision making processes. Directing public opinion was also seen as important. Companies, for example, would wish to avoid the ill will of an environmentally sensitive clientele.

It was stated that the legitimacy of utilizing criminal sanctions was traditionally founded on the protection of interests of individuals and hence, by extension, to societies and nations in their entirety. Under this approach, which could be regarded

as anthropocentric, it was arguable that only actual damage should be punished. Other environmentally damaging conduct could then be left to civil, administrative or, in some cases, diplomatic measures.

Reference was also made to the Aboriginal view, described by the Americans as the Tribal perspective, to the need to co-exist with the land, water and air, and that this was considered a sacred trust. The non-indigenous way of life, in which material values come first, is incompatible with this view. Education in relation to, and support for, the natural environment was seen as imperative for the future of our children.

Discussion then turned to an examination of the strengths and limits of the use of criminal sanctions in achieving environmental protection, both at the national and international levels.

It was noted that in the past few years there has been an unprecedented interest in environmental issues, including the role of the criminal law in the protection of the environment, at the national and international levels. Examples were given of the domestic legislation of some countries, whilst the Rio de Janeiro "Earth Summit", the environmental side agreement to the North American Free Trade Agreement (NAFTA) and certain existing conventions evidenced the interest of the international community. Also, the Council of Europe is currently engaged in an attempt to draft a European Criminal Law Convention which is designed, inter-alia, to encompass all important areas of the environment.

Questions were raised as to the appropriateness of the use of the criminal law in the protection of the environment, and an outline was given of developments in the criminal law in a number of countries. It was suggested that in some countries, greater improvement in the quality of the environment had been achieved by means of regulation rather than by the imposition of criminal liability.

Various criteria for the imposition of criminal liability were raised. It was recognized that some acts were so far out of the norm - "beyond the pale" - that they merited the "ultimum remedium" of stigmatization as criminal. On the other hand, both civil and administrative law should also be utilized. One reason is that victims could usually institute civil proceedings whereas they were not always empowered to institute and pursue criminal proceedings.

Other weaknesses in the use of criminal law were identified as the high cost factor involved, the higher onus of proof required, the need to establish knowledge or intent, the fact that in a number of jurisdictions it was not possible to convict corporations of criminal offences, and the fact that often only sanctions which are perceived to be mild or inadequate are imposed.

There were also advantages to utilizing the criminal law. For example, the deterrent effect of exposure to conviction of a criminal offence was seen as greater than exposure to merely civil liability, particularly given the growing range of innovative sanctions which might be imposed. In some jurisdictions these included fines, community service orders, restoration, restitution or a combination of these. The

possibility of terms of imprisonment for individuals, including officers of corporations, was also seen as a powerful deterrent.

It was noted that whilst criminal sanctions may have a greater deterrent effect, this benefit would be lost if the chance of detection, and hence prosecution, was negligible. In these cases the prohibited conduct would be engaged in with the risk of detection merely being factored in as a cost of carrying on business. This could, however, be offset if the sanctions were sufficiently severe.

One speaker also referred to a "culture problem" in dealing with environmental crimes. Persons and bodies engaged in this type of activity tend not to be regarded as criminals in the traditional sense. This was in many ways illogical, as persons engaged in this conduct usually were quite aware of the consequences of their action. In this context, it was suggested that the term "crime against the environment" might be preferable to the term "environmental crime". This would be consistent with other criminal law concepts such as crimes against the person, crimes against property etc.

The concept of environmental terrorism was also adverted to, namely conduct which amounts to criminal acts designed to achieve psychological effects and political results. In this context there were two types of terrorism, namely State conducted or sanctioned terrorism - of which the destruction of oil wells and deliberate oil spillages by Iraq in Kuwait was an example - and terrorist activities engaged in by individuals or groups of individuals in order to achieve their objectives.

It was noted that as a consequence of perceived lack of action in protecting the environment by governments, there were now certain groups of radical environmentalists who are resorting to terrorist type activity in order to draw public, and hence governmental, attention to their aims. Examples were given of acts of sabotage engaged in by groups such as those advancing the cause of animal liberation.

A number of speakers addressed the question of transborder enforcement in relation to offences against the environment, including issues as to jurisdiction and issues relating to fundamentally different approaches by common law and civil law jurisdictions. International agreements were seen as a possible way of addressing some of these issues. Existing conventions and bilateral mutual assistance in criminal matter treaties were also seen as rendering investigation and enforcement more effective.

An outline was given of the likely approaches of the proposed Council of Europe Convention, which would determine two levels of offences, namely a mandatory list of serious or "hard core" offences, with the option of also regarding the proposed convention as relating to less serious offences. It was stated that in order to comply with the principle of legality, it was necessary to specifically spell out the elements of the proposed offences. It is axiomatic that this equally applies to national legislation, whether purely domestic or designed to give effect to international obligations.

On the question of what offences should be contained in the criminal legislation of jurisdictions some issues were adverted to which frequently arise in developing countries, with particular reference to Central America, where environmental

protection is closely linked to sustainable development. Poverty coupled with the inadequacy of the institutional and legal framework had led to an inability to cope with issues such as deforestation. Since 1990, the Central American agenda for environment and development has focussed on the sustainable use of biodiversity, including the elimination of adverse consequences of unsustainable deforestation.

In order to facilitate developing countries to develop environmental national laws, a model project on "Basic Law Proposals for Environmental Protection" was mentioned. The project proposes a model code oriented to protect the values of human health and quality of life, including preservation of the ecosystem. The model includes criminal sanctions for environmental damage. Lower penalties can be imposed in cases where the damage is reversible, and restoration of the environment can be required. It also imposes criminal responsibility on public officials and employees.

Another important issue is community involvement in reporting cases of environmental crime. In order to familiarize the public with the role of the criminal law in environmental protection, manuals for prevention and denouncement of crimes against the environment should be developed.

The meeting next took an indepth look at compliance and enforcement issues, considering ways and means of enhancing compliance and comparing the effectiveness of traditional enforcement versus alternative mechanisms. This is of particular interest given that any environmental convention, including the NAFTA side agreement will be rendered nugatory in the absence of effective enforcement mechanisms.

At the outset it was noted that prima facie international law cannot be enforced for three principal reasons. First, there is a rule of international law whereby one State does not, in the absence of a specific binding agreement to the contrary, enforce penal sanctions imposed on an individual or corporation by the courts of another State. Secondly, there is no supranational police force, such peacekeeping activities with a civilian police component as have occurred in recent years have resulted from Security Council decisions invoking Chapter 7 of the United Nations Charter. This would be inappropriate in all but the most extreme cases. Finally, there is no international or regional tribunal which has civil jurisdiction over all the States and none which has criminal jurisdiction over any State. It was noted, however, that the European Court of Justice at Luxembourg has the power to enforce compliance with European Community environmental laws. It was also noted that since 1993 the International Court of Justice has established an ad hoc Environmental Chamber, composed of seven judges, to deal with applications lodged by States. However, the jurisdiction of that court is binding only on States which have accepted it and the court does not have a criminal jurisdiction. Also, the Court has no jurisdiction over individuals or corporations.

Where there is a treaty or convention to which a State is a party, there is an obligation on that State to give effect to requirements under that treaty or convention. However, this can only be effective if the treaties or conventions make specific enforcement provisions and the signatory States, where necessary, pass domestic legislation to give effect to those obligations. The latter is not necessary in countries where treaties, once ratified, become part of the domestic law.

In the absence of an international dispute resolution mechanism or effective treaty provisions, the solution can only be provided by national law. This immediately gives rise to questions such as who may bring actions, whether criminal, civil or administrative, and in cases involving transboundary issues, in which jurisdiction. Existing self-help mechanisms - which in any event are only available to States - such as retorsion, reprisal or reciprocal treatment are of only limited value, and the exercise of the latter two is further limited by the provisions of the United Nations insofar as resort to them might involve a threat to international peace. Consideration could be given to an enhanced role for international organizations, particularly in the area of information gathering, data collection, monitoring and possibly dispute resolution.

It was stated that a number of conditions had to be met to ensure effective enforcement of international crimes against the environment. First, any regime has to be truly international and be applicable to both States as well as persons including legal personae such as corporations. It would need to address the question of degree of proof required and to authorize States and persons to claim benefits under the treaty by making a claim - a departure from normal international law principles where the benefits and obligations accrue only to the signatory States. It would also need to establish the institution(s) to determine the dispute or claim, spell out the remedies or sanctions and provide enforcement mechanisms.

Consideration should also be given, it was said, to providing for regional or bilateral arrangements similar to the above. These may be easier to achieve. The European Union model was cited as an example, although it must be recognized that the European Court does not exercise a criminal jurisdiction.

Where a State is the alleged "offender", other complications also arise, including the concepts of act of State, sovereign immunity and sovereignty.

An overview was given of the NAFTA side agreement provisions, which do not create a comprehensive set of environmental obligations but are primarily directed at the integrity of domestic environmental law enforcement in each of the three signatory States and the creation of new institutional cooperative mechanisms. Of these new institutions, the governing body is the Commission on Environmental Cooperation comprised of a Council composed of persons of cabinet rank, an independent Secretariat and a Joint Public Advisory Committee. The Committee consists of five members from each signatory State and could provide a scope for non-governmental participation.

In relation to alternative mechanisms for enforcement, it was proposed that there should be a shift to environmental planning involving compliance systems such as care programmes and negotiations between governments and public interest groups leading to a transparent policy.

Another approach suggested was the proactive method of Environmental Compliance Audits as a means of providing managements of corporations that the corporation's health, safety and environmental responsibilities are being adequately

discharged and that no significant noncompliance exists. Benefits, for corporations thus include an independent verification of compliance with environmental legislation, the identification of deficiencies in management or systems problems, an added incentive for self evaluation and an improved capacity to consider environmental issues in business planning.

Questions arose as to whether the audit disclosures could be used as evidence in a prosecution; if so, corporations may be unwilling to undergo them. In the State of Oregon, audit disclosures and reports are privileged, thus making audits more attractive to corporations and engendering a corporate culture of compliance. Several speakers expressed significant concern regarding the provision of such a privilege.

A. WHAT ENVIRONMENTAL VALUES OR INTERESTS DO WE NEED/WANT TO PROTECT OR ADVANCE?

The meeting agreed that the environment should be considered a value per se.

The concept of environment should include human health and safety; media such as water, air and soil, and flora and fauna. In other words, it includes both the natural environment and the cultural environment associated with it.

The protection of the environment is an integral part of development. Efforts must be made to assure sustainable utilization of natural resources in order to maintain a balance which will not hamper future generations. Lack of resources and poverty should not impede environmental protection.

Preventive policies must be promoted in order to improve environmental awareness and education. Quality standards should be established and monitored. Technical assistance should be provided particularly to developing countries to avoid systems or management failures which might lead to environmental damage.

Another way of protecting or advancing these interests is by governments adopting pro-active strategic measures to produce a compliance culture by individuals and corporations, eg. by compliance audits and by utilizing "windows of opportunity" to ensure that environmental concerns are addressed early in the business decision making process.

B. WHAT ARE THE STRENGTHS AND LIMITS OF THE USE OF CRIMINAL SANCTIONS IN ACHIEVING THESE GOALS?

The meeting agreed that there was a clear role for the use of criminal sanctions in the protection of the environment. Some conduct was simply so heinous that, even applying ordinary criminal justice principles, it warranted being stigmatized as criminal, carrying appropriate penalties including sentences of imprisonment for convicted individuals.

It was also agreed that for a number of reasons it was neither appropriate nor practical to rely solely on the criminal law. There is a need to have an appropriate mix of criminal, civil and administrative laws to deal with the problem. One significant reason is that frequently States themselves are the most significant polluters and the concept of State liability for criminal acts is not recognized at international law. Nor is it likely that States would agree to create an international criminal tribunal which could exercise criminal jurisdiction over them. Another reason is that in many jurisdictions, individuals can institute civil, but not criminal, proceedings.

At the national level

At the national level, there are significant strengths in relying, at least in the past, on its use of criminal sanctions, particularly where actual environmental damage has occurred.

The strengths of the use of criminal sanction were identified by the meeting as being:

- in relation to domestic conduct, offences could be clearly defined in conformity with substantive and procedural domestic law and hence ensure compliance with the principle of legality;

- the possibility of domestic laws having extraterritorial application, and hence being capable of dealing with some transboundary conduct;

- the increased deterrent effect both for individuals who could face imprisonment and for corporations - where corporate criminal responsibility is possible - which would not wish to be stigmatized as criminal in the eyes of an environmentally sensitive clientele; and

- the reflection of increasing public concern in relation to the protection of the environment.

Paradoxically, some of these strengths could become weaknesses depending on how they are implemented. For example, the imposition of strict liability might be regarded as equating criminal proceedings with administrative ones thus "cheapening the currency". Similarly, the deterrent effect of the use of criminal sanctions would be lost if only low penalties were imposed or if prosecutions did not take place.

The effectiveness of the criminal law could be further enhanced by the development of innovative penalty options including, for example, community service orders, separation or restoration orders or a contribution of these.

Limitations on the use of criminal sanctions were identified as including:

- the normally higher cost factors;

- the higher burden of proof which needs to be discharged by the prosecution;

- the fact that not all jurisdictions recognized the concept of corporate criminal responsibility, or recognize it in only very limited circumstances;

- that frequently private individuals, including victims, would not have the power to initiate or pursue criminal proceedings; and

- that States could not be the subject of criminal proceedings.

At the regional level

For similar reasons as at the national level, the meeting agreed that there is also good reasons for relying on the criminal law at the regional level. "Regional" in this context is not necessarily limited in the geographical sense, eg. Council of Europe, Gulf States, West African Group (ECOWAS) or Organization of American States, but could also include groups of nations with similar legal systems, eg. the States which are members of the Commonwealth of Nations whose legal systems are based on the Anglo-Saxon, or common law, system, or Francophone nations whose systems are based on the continental civil law system.

Other strengths at the regional level include:

- the likelihood of being able to reach agreement on common definitions of the elements of offences;

- the greater deterrent effect in relation to transborder conduct;

- the contribution towards achieving greater consistency in legal provisions; and

- the existence of regional extradition and mutual assistance in criminal matters arrangements which could contribute to effective investigation and prosecution.

The limitations on the use of the criminal law at the regional level are similar to those applicable at the national level. Additionally, differences in procedural, evidentiary and substantive laws between countries could result in additional limitations.

At the international level

In many cases, damage to the environment has universal consequences. Consequently an interdependence of effort must be recognized at the international level to ensure that there is sufficient consistency in national laws to satisfy, for example, dual criminality requirements found in extradition law and in many mutual assistance treaties. Given the absence of accepted international standards dealing with the environment in a comprehensive manner, this is where most remains to be done.

Whilst in theory the same strengths in the use of criminal sanctions are applicable in this context as in the national context, in practice there are far more limitations.

Significant variations in national laws, coupled with the embryonic state of mutual assistance in criminal matters at the global level severely inhibits the effective use of the criminal law at this level. Additionally, there is no comprehensive convention dealing with the environment as a whole. Existing conventions are subject specific, dealing only with certain aspects of damage to the environment.

The principal Conventions are:

- the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water (Moscow 1963);

- the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction (London, Moscow, Washington 1972);

- the Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel 1989);

- the International Convention on Civil Liability for Oil Pollution Damage (Brussels 1969, as amended London 1976);

- the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington 1972);

- the United Nations Convention on the Law of the Sea (Montego Bay 1982);

- the International Convention on the Regulation of Whaling (Washington 1946, as amended 1956);

- the International Convention for the Prevention of Marine Pollution from Ships (MARPOL) (London 1973, as modified by the Protocol of 1978); and

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington 1973).

Notwithstanding the above conventions, an additional limitation on the effective use of criminal sanctions at the international level is the need in many countries either to pass domestic legislation or to undertake ratification procedures, in order to give effect to international obligations. Experience has shown that in many countries that the process of transformation of international prescriptions into national law is very slow.

In order to alleviate these difficulties the meeting makes the following recommendations:

- that convention-administering intergovernmental bodies undertake activities to ensure the widest possible effective application of their international instruments;

- that support should be given to the codification work of the International Law Commission with a view to ensuring that the Draft Code of Crimes against the Peace and Security of Mankind includes the necessary core offences against the environment which give recognition to the principles enunciated by the United Nations Conference on Environment and Development; and

- on the basis of proposals put forward by the International Law Commission, the most serious forms of environmental crimes should be acknowledged as international crimes on the basis of an international convention which also includes extradition and mutual assistance in investigation and prosecution provisions, and the application of the principle of aut dedere aut judicare.

Jurisdictional issues

The meeting considered jurisdictional issues at various levels, viz locus standi, law enforcement and the jurisdiction of courts.

On the question of locus standi, some participants recommended that individuals and non-governmental organizations should be permitted to initiate prosecutions for offences against the environment. This would still not address the question of pollution by States, as these as entities are not amenable to any criminal jurisdiction.

The question in relation to law enforcement is dealt with in section D below.

In relation to the jurisdiction of courts, the meeting recognized the work being done by the International Law Commission in the preparation of a draft Statute for an International Criminal Court which is to be considered by the Sixth Committee of the General Assembly of the United Nations. It is clear, however, that in the immediate future, jurisdiction in relation to offences against the environment will continue to be exercised by national courts.

This raises the question of the exercise of jurisdiction over transnational offences against the environment, particularly in cases where jurisdiction is based on territoriality. Similar problems could arise where jurisdiction is based on nationality, whether active or passive, or on the effects doctrine in cases where the offender is outside the jurisdiction.

In the view of the meeting, this makes it all the more important that comparable offences against the environment are created, ensuring that the "double criminality" requirement found in extradition and mutual assistance arrangements can be met.

As stated earlier, the meeting recommends that core offences against the environment should be recognized as international crimes on the basis of an international convention. Such a convention could be based on the concept of universal jurisdiction, which result could be achieved, inter-alia, by allowing the prosecution of extraterritorial offences.

The question of the relationship between the jurisdiction of an international court of criminal justice, if created, and that of national courts would be addressed in the statute creating the former.

C. WHAT CRIMINAL OFFENCES AND PRINCIPLES SHOULD BE CONTAINED IN NATIONAL LEGISLATION?

As stressed by the 1992 United Nations Conference on Environment and Development, enforceable and effective laws, regulations and standards should be based on sound economic, social and environmental principles and appropriate risk assessment, incorporating sanctions designed to punish violations, obtain redress and deter future violations.

Technical cooperation, including initiatives to provide models to develop environmental national laws, such as the "Basic Law Proposals for Environmental Protection" and the "Council of Europe Draft Model Act on the Protection of the Environment", should be enhanced.

In most countries, environmental criminal legislation is scattered in criminal codes and usually relates to protection of water, air and soil. The meeting agreed that consideration should be given to the creation of substantive offences against the environment. The same intention was expressed by the Council of Europe as regards the proposed "Convention for the Protection of the Environment through Criminal Law".

In this respect, a "Model Domestic Criminal Statute Addressing Environmental Issues" and "Recommendations as to the Terms of a Possible Convention re: Transnational Offences Against the Environment" were discussed and in sections E and F below specific offences are identified.

D. COMPLIANCE AND ENFORCEMENT

Compliance and enforcement of criminal provisions present a variety of problems. Enforcement particularly at the transnational and international level is generally regarded as inadequate.

Among the problems highlighted by the participants, the discretion to prosecute in countries with absolute discretion leads to uneven implementation of environmental laws. In addition, in crimes against the environment it is often difficult to identify a victim, and therefore nobody starts the prosecution process.

On the other hand, in most civil law countries the absence of corporate liability impedes the use of criminal law against large scale enterprises which are often major polluters.

Developing countries often lack resources which are needed to enforce criminal provisions. In some cases, enforcement may be incompatible with the economic policy of the country.

Care should be taken to ensure that environmental laws are enforceable: fixing impossible quality standards or unrealistic sanctions will inevitably lead to absence of enforcement and will negatively reflect on public opinion.

It is important to build alternative compliance processes which might induce corporations to comply with environmental laws: self-monitoring, auditing systems, and environmental impact assessment should be encouraged.

At the international level, there is no system to ensure enforcement of international law. Each country should implement in its domestic legislation the obligations undertaken as a result of international treaties and conventions. Similarly, extradition and mutual assistance should be available in order to give effect to these obligations.

E. RECOMMENDATIONS AS TO THE TERMS OF A POSSIBLE CONVENTION RE: TRANSNATIONAL OFFENCES AGAINST THE ENVIRONMENT

On the recommendation of working group 1, the plenary adopted the following recommendations:

I. <u>On the national level</u>

1. Offences against the environment committed partly within and partly outside the territory of a State should be brought within the jurisdiction of either of the States concerned (application of the principle of ubiquity);

2. Jurisdiction should be established for offences committed in the following circumstances:

   i. where the offence is committed in the territory of a State;

   ii. where the offence is committed on board a ship or an aircraft registered in the territory of that State or flying its flag; and

   iii. in cases where the offence has been committed outside the territory, an extension of jurisdiction should be considered in the following circumstances:

      a. where the offender is a national of that State;

b. where the victim of the offence is a national of that State;

c. where effects of the offence are on that State; and

d. where the alleged offender is present in the territory of that State and that State does not extradite the offender.

II. On the international level

1. Acknowledged instruments of international cooperation in the prosecution of offences (eg. on extradition, mutual assistance, or transfer of proceedings) should be utilized (eg. seizure of proceeds);

2. Serious offences against the environment should be recognized as extraditable offences;

3. On the basis of the resolution of the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, harmonization of legislation (at least on a regional level) should be encouraged;

4. For the purpose of the international protection of the environment efforts should be supported to create international minimum standards or other international instruments which should at least include the following offences for which criminal penalties could be imposed:

i. The intentional causation of widespread, long term or severe pollution to the air, the soil, natural water bodies or outer space or damage to other specific components of the environment of important ecological value;

ii. The intentional unauthorized discharge of substances into the air, the soil, natural water bodies or outer space which is likely to pollute them severely or cause severe damage to persons, animals or plants;

iii. The intentional disposal, export or import of hazardous waste in violation of international rules or regulations, national prohibitions or without the necessary permit;

iv. The intentional

a. operation of a hazardous installation, or

b. handling, export or import of specified radioactive, or other specified hazardous chemicals or biological materials,

in violation of international rules or regulations, or national prohibitions or without the necessary permit, which is likely to

severely pollute the air, the soil, natural water bodies or outer space or to cause severe damage to persons, animals or plants.

5. In addition such guidelines or instruments might be supplemented in relationship to an environmental offence as described by the inclusion of the following:

i. A provision on jurisdiction on the basis of I. 2., and

ii. provisions on

a. corporate liability which would allow the use of criminal or other measures against an enterprise as a legal person;

b. the possibility

- to order restoration of the environment and/or compensation for damages in criminal, administrative or civil proceedings;

- to confiscate instrumentalities and proceeds.

6. In the above, words or expressions have the following meanings:

"water bodies" includes groundwater, lakes, rivers, other surface water including seas and oceans;

"air" includes layers of the atmosphere;

"unauthorized" includes the violation of:

- an international instrument whether bilateral or multilateral;
- a national law or regulation; or
- the terms of a permit or other recognized form of authorization;

"necessary permit" includes permits issued by a national or international body or organization.

7. i. States are encouraged to contribute to refining the concept of environmental crimes in Article 26 of the Draft Code of Crimes against the Peace and Security of Mankind and the concept of international crimes and delicts in Article 19 of the draft articles of State Responsibility.

ii. Insofar as a serious offence against the environment is acknowledged as an international crime in a convention, its inclusion in the list of offences

of Article 22 of the Draft Statute for an International Criminal Court should be considered.

8. Related to the prosecution of offences against the environment, international technical cooperation between States and by the help of international organizations, like the United Nations and regional organizations, which could include the establishment of a roster of experts, the development of standard-setting manuals for practitioners and the exchange of experiences between practitioners, should be supported.

Explanations to the recommendations

The meeting had the following documents before it:

The background document of working group 1 which was supplemented by an outline of questions;

Economic and Social Council resolution 1993/28 on the Role of Criminal Law in the Protection of the Environment, including the Annex;

The Draft Statute for an International Criminal Court;

Article 26 of the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (including the Commentary to this Article and Commentaries of Governments and others);

Resolution (77) 28 of the Committee of Ministers of the Council of Europe and resolution No. 1 of the European Ministers of Justice (Istanbul 1990);

A compilation of penal provisions in international conventions.

It was agreed that the proposals were a minimum and that States are free to enact more stringent measures (eg. by extension of the offences to reckless or even negligent acts).

There was considerable discussion on clause II.4.i which is based on the concept of Article 26 of the Draft Code of Crimes against the Peace and Security of Mankind. However, that provision would require proof of each of the elements of "widespread, long term and severe pollution". The majority of the meeting regarded the use of the conjunctive "and" as imposing an impossible burden and preferred the disjunctive "or".

Similarly, there was considerable discussion on whether the protections advocated should extend to "outer space". A majority agreed that they should. The minority opposed both changes.

F. POSSIBLE DRAFT DOMESTIC CRIMINAL STATUTE ADDRESSING ENVIRONMENTAL ISSUES

Working group 2 dealt with this topic. That working group reported that having achieved broad consensus on the goals and strategies, and modes of implementation, discussions had centered on the main crimes that should be put into a Special Criminal Statute for the Protection of the Environment, the issue of criminal responsibility of organizations such as corporations, governments and local authorities, the appropriate sanctioning mechanisms, and the involvement of non-governmental organizations in the criminal justice process.

There initially appeared to be irreconcilable differences among the three main legal systems represented by the participants, namely the Anglo-American, Civil Law and Islamic Law, and even within those systems. Where consensus was not possible in the working group as a whole, the issues were addressed in smaller working groups representing a mix of those systems. Through debate and discussion in these sub groups, a surprising amount of consensus emerged. On the recommendations of this working group, the plenary adopted the following model Domestic Law of Crimes Against the Environment. Where consensus was not possible and the need to express the views of a strong minority of participants was recognized, the text of the provisions contain words or terms in brackets. In one case, namely on the issue of public involvement in the criminal justice process, an entire section has been placed in brackets.

The plenary adopted the following model law of crimes against the environment and explanatory notes where regarded as necessary:

CRIMES AGAINST THE ENVIRONMENT

This draft includes certain provisions in brackets; these bracketed provisions are regarded as optional.

(a) GENERIC CRIMES

1. Every person commits a crime against the environment who:

(a) knowingly, recklessly *[dolus eventualis]* , or through negligence, whether or not in violation of a statutory or regulatory duty, causes or contributes to serious injury or damage to the environment, whether local or regional.

(b) knowingly, recklessly *[dolus eventualis]* , or through negligence, whether or not in violation of a statutory or regulatory duty, emits, discharges, disposes of, or otherwise releases a pollutant, and thereby causes or contributes to death, serious illness, or severe personal injury to a human being.

(c) knowingly, recklessly *[dolus eventualis]* , or through negligence and in violation of a statutory or regulatory duty causes or contributes to a substantial risk of serious injury or damage to the environment, whether local or regional.

(d) knowingly, recklessly *[dolus eventualis]* , or through negligence, and in violation of a statutory or regulatory duty emits, discharges, disposes of, or otherwise releases a pollutant, and thereby causes or contributes to a substantial risk of death, serious illness, or severe personal injury to a human being.

(b) <u>SPECIFIC CRIMES</u>

2. Every person commits a crime against the environment who: (a) knowingly and in express disregard of a statutory or regulatory duty, or (b) through recklessness *[dolus eventualis]* or negligence, and in violation of a statutory or regulatory duty,

(i) releases or discharges a pollutant into the environment,
(ii) operates a hazardous installation,
(iii) imports, exports, handles, transports, stores, treats or disposes of a toxic, hazardous, or dangerous article, substance or waste, or in any manner facilitates the import, export, international circulation, handling, transport, storage, treatment, or disposal of such materials,
(iv) causes or contributes to serious injury or damage to the environment, whether local or regional, or
(v) supplies false material information or omits or conceals material required information, or tampers with monitoring devices.

Definitions

3. "Environment" means both the natural environment and the cultural environment associated with it.

4. "Person" means individuals and organizations, whether incorporated or not, and includes governments.

Legal entity liability

5. (a) The crimes set forth above may lead to criminal liability for either or both individual persons and legal entities, where it is established that the crimes were committed in the exercise of organizational activities.

(b) This liability of legal entities comes into being if: (i) there has been faulty risk management of the legal entity over time and a generic crime mentioned in section 1 has been committed; or (ii) there has been a breach of a statutory or regulatory provision by the legal entity.

(c) The criminal liability of the legal entity applies in addition to the personal liability of managers, officers, agents, employees or servants of that legal entity.

(d) The criminal liability of the legal entity applies regardless of whether or not the individual through whom the entity acted, or omitted to act, is identified, prosecuted, or convicted.

(e) All sanctions mentioned in sections 7, 8 and 9, with the exception of the prison sanction, may be imposed upon the legal entity that is found criminally liable.

Complicity

6. Every director, officer, manager, or other official who was responsible to the corporation, organization or other entity, and who authorized, permitted, directed, consented to, participated in, connived at, acquiesced in or condoned the commission of the crime, or through negligence failed to prevent its commission by a person under his supervision, may also be held liable.

(This section #6 may not be necessary or appropriate in jurisdictions that already have similar provisions under a different legal regime.)

Imprisonment

7. (a)(1) The penalty for commission of the generic crime (section 1, above) may include a term of imprisonment up to ____ years [, or life].

(a)(2) The term of imprisonment allowed in 7(a)(1) above may be increased by [___] where the court finds that any of the following circumstances are present:

(i) the conduct constituting the crime was committed knowingly;
(ii) the conduct constituting the crime is part of a pattern or practice of violation of statutory or regulatory duty; or
(iii) the person has been previously convicted of a crime against the environment.

(b) (1) the penalty for commission of specific crime in section 2(a) may include a term of imprisonment up to ____ years.

(b)(2) The term of imprisonment allowed in 7(b)(1) above may be increased by [___] where the court finds that either of the following circumstances are present:

(i) the conduct constituting the crime is part of a pattern or practice of violation of statutory or regulatory duty; or
(ii) the person has been previously convicted of a crime against the environment.

[(c) (1) the penalty for commission of specific crime section 2(b) may include a term of imprisonment up to ____ years.

(c)(2) The term of imprisonment allowed in 7(c)(1) above may be increased by [___] where the court finds that any of the following circumstances are present:

(i) the conduct constituting the crime was committed knowingly;
(ii) the conduct constituting the crime is part of a pattern or practice of violation of statutory or regulatory duty; or
(iii) the person has been previously convicted of a crime against the environment.]

Monetary sanctions

8. (a) At a minimum, the court shall impose a monetary sanction that (1) fully recoups any economic benefit realized by the convicted person as a result of its crime and (2) fully or in part recovers any costs of investigation and reparation of any harm caused by the convicted person.

(b) The court may also impose a fine or other penalty commensurate with the gravity of the crime and the culpability of the convicted person, up to ___ per day for each day the crime continued.

Additional powers of the court

9. Where a person has been convicted of a crime against the environment, in addition to any other sanctions that may be imposed under sections 7 and 8, above, the court shall, having regard to the nature of the crime and the circumstances surrounding its commission, also have the power to make an order having any or all of the following effects:

(a) prohibiting the person from doing any act or engaging in any activity that may result in the continuation or repetition of the crime;

(b) ordering the temporary of permanent closure or discontinuance of the activity, annulment of the licenses issued for the activity, dissolution or winding up of the business, and forfeiture of the company's charter;

(c) forfeiting the property used in, and the proceeds derived from, the commission of the offence, with provision for the protection of the rights of bona fide third parties;

(d) excluding the person from government contracts, fiscal advantages, and subsidies;

(e) ordering the removal of managers and disqualifying officers from holding office for a period of years;

(f) directing the person to take such action as the court considers appropriate to remedy or avoid any harm to the environment that results or may result from the act or omission that constituted the crime;

(g) requiring the person to comply with reasonable conditions the court considers appropriate and just in the circumstances for securing the person's good conduct and for preventing the person from repeating the same crime or committing other crimes against the environment;

(h) directing the person to publish, in the manner prescribed by the court, the facts relating to the conviction;

(i) directing the person to notify, at his own cost and in the manner prescribed by the court, any other person aggrieved or affected by the person's conduct of the facts relating to the conviction;

(j) directing the person, if an organization, to fully disclose to the public of all countries in which it operates, the criminal environmental liabilities or sanctions imposed upon it, its subsidiaries (if any), or their directors, officers, managers, or employees; and

(k) directing the person to perform community service, subject to reasonable conditions.

[Rights of Persons to Complain/Prosecute]

[10. No court may take cognizance of any crime under this Act *except* on a *complaint* made by

(a) the Attorney General, the Director of Public Prosecution or any authority or office authorized in that behalf by the government that has jurisdiction to prosecute the crime; or

(b) any person or a registered association one of whose principle purposes is the protection of the environment, who or which has given notice of not less than 60 days in the manner prescribed, of the alleged crime and his/its intention to make a complaint to the person/authority referred to in paragraph (a), subject however to the right of that person/authority to intervene, assume, take over, stay or set aside at any stage of the prosecution.]

Explanations to the Model Law

In the view of the meeting, there is a spectrum of offences against the natural and cultural environment; the most serious offences against the environment must be regarded as crimes. Seriousness is a measure of harm and culpability. Harm includes both actual harm and threatened harm to the environment and public health because it is understood that harm in the context of environmental offences is not often readily or immediately apparent or quantifiable.

Several purposes are served by imposition of criminal sanctions for crimes against the environment. First, criminal sanctions educate the public concerning the moral wrongfulness of proscribed conduct. Second, criminal sanctions serve to deter potential offenders from environmentally irresponsible conduct. Finally, criminal sanctions impose just punishment upon those who seriously degrade the environment.

In addition to traditional criminal sanctions, such as incarceration and monetary fines, states should be encouraged to use other means available both to repair the environmental harm and to remove the economic benefit derived from the violation.

Because serious environmental offences are often committed by organizations, in addition to individuals, governments are encouraged to obtain the necessary statutory authority and to provide special mechanisms to enforce environmental criminal laws against organizations.

The model law reflects the agreement of the meeting that there should be two basic categories of offences against the environment, namely generic and specific. Generic offences are not linked to any statutory or administrative law or regulation whilst specific offences would be so linked.

On the question of defenses, there was inadequate time to give in depth consideration to these.

The corporate criminal responsibility recommendations recognize the basic differences in legal systems on this question. Common law jurisdictions, which recognize the concept of criminal responsibility of corporations, are at one end of the spectrum and civil law countries at the other. A few civil law jurisdictions, including France and Japan, have moved away from the principle that corporations cannot commit offences. The model law provisions reflect the consensus of the meeting.

Governments, in their capacity as governments, are normally immune from criminal prosecution. On the other hand, corporations or other entities owned and operated by governments do not necessarily share this immunity. The meeting recognized that governments should not be immune from criminal responsibility for acts which are contrary to law. This is achieved through the definition of "person". The overwhelming majority were of the view that when governments act as regulators, if there is any illegality in the actions of officials through whom governments act, the application of the appropriate liability standards should be left to the jurisprudence of each country and to statutory reform.

On the question of penalties, the meeting recognized that each jurisdiction may choose to punish crimes against the environment with traditional criminal sanctions of imprisonment and fines in accordance with normal criminal justice principles which grade sanctions according to the degree of harm caused and the degree of culpability. The meeting was of the view that the arsenal of sanctions could also contain license suspension or revocation, disqualification from eligibility for government contracts or subsidies, forfeiture of assets, publicity in relation to the conviction and sentence, restitution to victims, community service as well as orders requiring offenders to institute effective programmes to prevent and detect future environmental violations.

The right of members of the public to be involved in the enforcement of environmental law has been recognized in some jurisdictions. However most jurisdictions do not permit members of the public to institute criminal proceedings. Generally, in civil law countries the public prosecutor has a duty to prosecute in respect of all felonies and serious offences. On the other hand, prosecutors in common law jurisdictions enjoy a wide discretionary power. Notwithstanding these differences in most countries prosecution is the exclusive right of government-appointed prosecutors.

Where prosecutors enjoy wide prosecutorial discretion, non-prosecution of cases which in the public's view should be prosecuted results in perceptions of arbitrariness and inequality of justice. To prevent arbitrary or selective enforcement particularly in the absence of any written rules or guidelines the meeting proposed the formulation contained in the model law.

Finally the question arises as to how States should implement this model law. Specifically, is it necessary that this model law, or parts of it, should be implemented in a certain legal form such as a penal code?

An argument against specifying in too much detail how and in what form a State should implement the model law is that in many States the powers to legislate might be divided between federal and regional entities. This also makes it difficult to specify that the whole model law should be incorporated in one statute. In some States different statutes might deal with substantive criminal provisions and procedural provisions.

On the other hand, it is important that no matter at what level of government the implementing laws are made, some provisions should be included in the penal code where such exists. The meeting regarded this as particularly important in relation to the generic crimes contained in Article 1. The specific offences could also be incorporated in such a code but might also be included in other statutes or administrative regulations. The meeting recommends that States should implement the model law of crimes against the environment in whole or in part in their penal codes or other laws in which crimes against the highest individual and societal values are punished or partly in the said laws and partly in other laws as may be appropriate within each State.

G. RECOMMENDATIONS AS TO A POSSIBLE STRUCTURE AND OPERATION OF A REGIONAL ENFORCEMENT REGIME

Working group 3 made the following recommendations to the plenary as to the possible structure and operation of a regional scheme of enforcement of criminal environmental law.

The aim of these recommendations is to facilitate the enforcement of international norms that are implemented either through an international convention to provide for criminal enforcement of transnational offences against the environment or through domestic criminal statutes addressing criminal environmental law issues.

The plenary adopted the following recommendations, taking into consideration various models throughout the world, including but not limited to the Nordic Convention, the NAFTA Environmental Side Agreement and the ECOWAS (Convention on Extradition of the Economic Community of West African States and the Convention on Mutual Assistance on Criminal Matters of Economic Community of West African Communities).

The Environmental enforcement in the criminal law context should be viewed as encompassing a spectrum of activities ranging from information gathering, to detection, investigation, prosecution, and dispute resolution.

National, regional and international institutions for criminal environmental law enforcement should be established and maintained. Regional enforcement should be complementary to enforcement mechanisms in individual States.

In the short term regional institutions should focus on the following means of enforcement: inspections, enforcement gathering, reporting, monitoring, auditing and dispute settlement.

These are activities that will facilitate the building of mutual trust and understanding between contracting parties without impinging upon the sovereignty of individual States.

Regional schemes for criminal environmental law enforcement should be designed to expedite the gathering of information, to assist environmental prosecutions in an expeditious manner and to assist in compliance with international instruments to which regional states are signatories.

States should strive in the longer term to facilitate criminal environmental law enforcement by working towards the establishment and maintenance of institutions that encompass more than one region.

Such institutions should strive to build trust and cooperation among participants through focussing on activities, such as information gathering, that are not perceived as impinging upon the sovereignty of other States in a region.

States should strive to enter into agreements on a regional basis to facilitate the enforcement of crimes against the environment on the basis that one of the states in the region has engaged in a persistent pattern of non-enforcement of national laws relating to offences against the environment.

The objective of this provision is to emulate the NAFTA side agreement on the environment, where a similar provision has the potential to significantly facilitate the enforcement of domestic environmental laws in general.

States should strive to ensure that individuals, associations and non-governmental organizations in one state are accorded a right to participate in and initiate prosecutions for environmental crimes committed by persons or entities associated with other states in the region.

In applying this provision, there should not be any discrimination based on residence or nationality.

This recommendation is to make it possible for both transboundary litigation initiated by private parties and states to complement the actions of host states in

protecting the environment. This recommendation is based on the proposition that citizen intervention and transboundary litigation is a necessary and useful adjunct to augment host state action to facilitate the enforcement of criminal environmental law.

Proceedings brought against a state by any victim of harm or damage arising from any harmful or dangerous activity should not be subject to the rule of exhaustion of local remedies.

This recommendation is that there may be a great deal of urgency to act quickly and gather evidence as soon as possible in the case of environmental crimes which significantly impair the environment, eg. the Gulf war.

States should in the longer term pursue the formation of dispute resolution mechanisms, including regional criminal courts, to deal with environmental crimes.