

# Desperately Seeking Reason – New Directions for European Environmental Criminal Law

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## 1 Introduction

According to the 2008 Environmental Performance Index (EPI) Sweden ranks first in the world in environmental sustainability out of 149 countries. Norway, Finland and Iceland are not far-off either, as they are placed third, fourth and eleventh in the EPI rankings. The lowest ranked Nordic country is Denmark. With a placing of 25<sup>th</sup> Denmark is the last of its Nordic peers, but its position is nevertheless very satisfactory.<sup>1</sup> Thus, it seems obvious that the Nordic countries have been fairly successful in their environmental policymaking. It is important to notice, however, that impressive EPI rankings give no grounds for plaudits. The central message of these rankings is that no country, not even the highest ranked, is on a sustainable course. Consequently, more efforts are required before states are truly directed towards sustainability.<sup>2</sup>

The relevance of effective environmental legislation is evident in this context, albeit legal instruments are naturally not sufficient on their own. In the Nordic countries comprehensive regulations have been introduced with the objective of protecting the environment. These Nordic efforts are strengthened by environmental co-operation within the European Union (EU). The Nordic Member States – Denmark, Finland and Sweden – have a high profile in environmental issues in the EU and their compliance with the common environmental legislation is also at the top-level.<sup>3</sup>

The administrative, organizational and legal solutions chosen by these northern countries vary from each other.<sup>4</sup> This exemplifies the fact that good environmental policy performance can be reached through many channels. For our purposes it is interesting to notice that despite certain divergences related to the methods of implementation these countries do share a common understanding concerning the basic role of criminal law in the protection of the environment. Criminal law is considered as a last resort and its possibilities to contribute to environmentally sustainable development are likewise regarded as fairly modest.<sup>5</sup>

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1 For the full report and data see Esty, Daniel C. et al., *2008 Environmental Performance Index*, available at “[epi.yale.edu](http://epi.yale.edu)” (last visited 3.3.2009).

2 See Esty et al. *supra* note 1, p. 9.

3 According to the latest surveys on the implementation and enforcement of Community environmental law the Nordic Member States have only had a few non-conformity and bad application cases, see SEC(2006) 1143, 8.9.2006; SEC(2005) 1055, 17.8.2005 and SEC(2004) 1025, 27.7.2004. One must naturally be careful in drawing conclusions from these quantitative analyses given the differences in population size between the Member States. Nevertheless, in association with the EPI rankings these figures give support to the statement that the Nordic environmental policies can be regarded as fairly successful.

4 For a more detailed analysis of the relevant differences between the Nordic countries see e.g. Joas, Marko, *Building Up and Splitting Down: Environmental Policy Organisation in the Nordic Countries*, in Joas, M. and A.-S. Hermanson (eds.), *The Nordic Environment: Comparing Political, Administrative, and Policy Aspects*, Aldershot 1999, p. 133-162.

5 There obviously exist different opinions about the necessity of environmental criminal law and about its relevance in the context of environmental protection. Most of the Nordic scholars would probably agree with the balanced statement presented by Nils Jareborg: Environmental criminality includes some very harmful acts and it is evident that these must

Despite this inherent skepticism the use of penal provisions in protecting the environment has been given greater emphasis within the Nordic countries during the past decades. Modern legislation has been enacted, crime control agencies have focused their attention to these new offences and scholars have become interested in the perplexities of environmental criminality.<sup>6</sup> Furthermore, environmental criminal law is actually considered as entailing a certain ideological shift within criminal law as it clearly signals that these modern environmental offences are as unacceptable as traditional crimes, even though environmental criminality in many respects differs from the more traditional forms of criminality.

One specific feature which differentiates environmental criminality from its traditional counterparts is the transboundary nature of the problem. International co-operation has in fact been on the agenda since the beginning of the discussions regarding the possibilities of criminal law to protect the environment.<sup>7</sup> From a Nordic point of view, the most important international development is currently taking place within the EU. The reason for this is the noteworthy judgment in *Commission v Council*<sup>8</sup>, concerning the annulment of the Council Framework Decision on the protection of the environment through criminal law.<sup>9</sup>

The legal dispute concentrated primarily on the question whether the Council had violated the Treaties as it had adopted this Framework Decision although the Commission had presented a proposal for a Community Directive<sup>10</sup> in the area of environmental crime.<sup>11</sup> What makes this judgment a landmark case is,

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be incorporated into the list of “worldly sins of the criminal code.” We should not, however, pretend that by doing this we have solved environmental problems. *See* Jareborg, Nils, *Scraps of Penal Theory*, Uppsala 2002, p. 103-104.

- 6 For an overview of this development from a Swedish perspective *see* Korsell, Lars (2001), *Big Stick, Little Stick: Strategies for Controlling and Combating Environmental Crime*, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 2001, p. 127-148.
- 7 For the earlier stages of this co-operation *see* Prabhu, Mohan, *General Report, Crimes against the Environment*, *International Review of Penal Law* 1994, p. 701-705 and Alvazzi del Frate, Anna et al., *Environmental Protection at National and International Levels: Potentials and Limits of Criminal Justice, An overview of the empirical study*, in Günther Heine – Mohan Prabhu – Anna Alvazzi del Frate (eds.): *Environmental Protection – Potentials and Limits of Criminal Justice: Evaluation of Legal Structures*, Freiburg im Breisgau 1997, p. 19-57.
- 8 Case C-176/03, *Commission of the European Communities v Council of the European Union*, Judgment of the Court (Grand Chamber), 13 September 2005.
- 9 Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, OJ 2003 L 29, p. 55.
- 10 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2001) 139 final, 13.3.2001. *See also* the Amended Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2002) 544 final, 30.9.2002.
- 11 For an overview of the dispute *see* White, Simone, *Harmonisation of criminal law under the first pillar*, *European Law Review* 2006, p. 81-92 and Wasmeier, Martin & Thwaites, Nadine, *The “battle of the pillars”: does the European Community have the power to approximate criminal laws?*, *European Law Review* 2004 p.613-635 and House of Lords,

however, the fact that after this decision it is increasingly difficult to argue that criminal matters are a separate policy matter in the Community. The traditional idea of criminal law as a reflection of national sovereignty is, at least in some extent, giving way to a more instrumental view. This turn is illustrated in the following citation, where the Court justifies the Community competence:

“As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence --. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”<sup>12</sup>

Protection of the environment has gradually obtained a place among the essential objectives of the Community. The judgment in Case C-176/03 links this objective to the sphere of criminal law. From an environmental perspective this is not world-shattering *per se*. The tacit revolution lies in the fact that the Community may actually become a very dynamic actor in the field of penal law.<sup>13</sup>

As a follow-up to the Case C-176/03, the Commission presented in February 2007 a new proposal for a Directive on the protection of the environment through criminal law.<sup>14</sup> The proposed Directive has ambitious intentions: it seeks to establish a minimum set of serious environmental offences that should be considered criminal throughout the Community. These offences are defined in the Directive and they include, *inter alia*, dangerous emissions; unlawful treatment of waste or nuclear substances and unlawful possession or trading of endangered species.<sup>15</sup> Participation in and instigation of such offences should equally be criminalized. The proposal also establishes a minimum level of maximum sanctions for offences committed under certain aggravating circumstances.

Whether we like it or not, Community legislation is going to influence environmental criminal law in future. Accordingly, the central question is no longer whether European co-operation is desirable. We Europeans should instead analyze what this co-operation should strive for and how deeply we should engage in it. The aim of this article is to analyze what contributions criminal law could offer and how we could focus our common concern for the

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European Union Committee, 42nd Report of Session 2005-2006, *The Criminal Competence of the European Community*, paras. 23-37.

12 Case C-176/03, *Commission v Council*, paras. 47-48.

13 It may be that the question of the EU competence in the field of criminal law is actually a bigger issue for criminal lawyers than for environmental lawyers. We might even say that for a criminal lawyer the judgment in question was a little revolution, whereas it most likely represented only a natural stage of evolution for an environmental lawyer.

14 COM(2007) 51 final, 9.2.2007.

15 See Article 3 of the proposal.

European environment in this field of law. In these deliberations Nordic experiences are valuable. Firstly, it is fair to argue that the Nordic countries have been successful in their environmental politics. Additionally, the Nordic ideas about criminal policy are certainly useful in a larger European debate about the possibilities and limits of criminal law in protecting the environment.

## 2 Great Expectations v Nordic Skepticism

The aim of every criminalization, national, international or transnational, is general prevention. The purpose of criminal law is to control people's behaviour, to deter us from committing acts that are detrimental to the most central values in a given society. These values change. The crimes of old are not the same as their modern counterparts, nor are the lists of sins similar in every society of today. The debate about the sphere of criminal law is nevertheless constant: every organized society is obliged to decide where the limits of acceptable behaviour are to be drawn.

There may be diverging opinions about the appropriate role of criminal law in protection of the environment, but few of us question the importance of effective environmental legislation. As *David Freestone* states it, "effective implementation must surely be the *leitmotif* of international environmental law in the twenty-first century."<sup>16</sup> The same aim can be found in the above-mentioned new proposal for a Directive on the protection of the environment through criminal law. According to Article 1 "[t]his Directive establishes measures relating to criminal law in order to protect the environment more effectively."

In the light of the judgment in Case C-176/03 the main reason for the harmonization of environmental criminal law seems to be a consequence of the implementation deficits of EC environmental law.<sup>17</sup> While it is certainly true that there are numerous cases where Member States fail to comply with environmental law, it is still very difficult to see how criminal sanctions could effectively solve these shortcomings. It is important to remember that it is the Member States and their authorities that do not comply with the existing EC obligations.<sup>18</sup> The passive or ignorant attitude of the Member States towards

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16 Freestone, David, *The Challenge of Implementation*, in Alan Boyle & David Freestone (eds.): *International Law and Sustainable Development. Past Achievements and Future Challenges*, Oxford 1999, p. 364.

17 See, e.g., Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*), 24.11.2005 COM (2205) 583 final/2.

18 Peter Pagh, e.g., stresses that the passive attitude of the Member States is one of the major problems concerning implementation, see Pagh, Peter, *Administrative Criminal Law Systems in Europe: An Asset for the Environment?*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p. 174.

environmental law is not easily changed by imposing penal provisions: the target of the blame will simply be mistaken.<sup>19</sup>

The question of effective implementation of EC law is crucial for European integration and it is therefore not a surprise that numerous efforts have been made during the past 20 years in order to improve the realization of the common aims of European legislation.<sup>20</sup> The Commission itself stresses that “[g]ood implementation requires a range of complementary approaches under which the Commission strives to be proactive and prevent infringements in the first place.”<sup>21</sup> These instruments include, e.g., the production of interpretation and guidance documents for many pieces of legislation. Better implementation can also be promoted through multilateral contacts with Member States in expert groups and committees. The establishment of informal implementation networks such as the informal EU network for the Implementation of Environmental Law (IMPEL) also have a key role in discussing the practical application and enforcement of existing legislation.<sup>22</sup> In comparison to all these efforts the role of criminal law remains almost trivial.

According to *Françoise Comte* the statistics over implementation and enforcement of European environmental law “underline the need to close the implementation deficit plaguing EC environmental law”.<sup>23</sup> I agree with her concern, but I do have serious doubts about whether this problem can be solved by penal provisions. If we take the Nordic failures in compliance as an example, it seems that the most effective strategy to avoid implementation deficits is to co-operate with the Member States.<sup>24</sup> If constructive co-operation does not lead to the desired results, Member States can be pressured into compliance with infringements proceedings.<sup>25</sup> In this context the main “dilemma” with criminal law is that it is heavily dependent upon the principle of legality. Consequently, this means that penal provisions cannot become useful instruments for

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19 See also Heine, Günter & Ringelmann, Christoph, *Approximation of European Criminal Legislation*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p.205.

20 See Faure, Michael, *European Environmental Criminal Law: Do we really need it?*, *European Environmental Law Review* 2004, p. 20.

21 SEC(2005) 1055, 17.8.2005 p. 4.

22 See SEC(2006) 1143, 8.9.2006 p. 7-11.

23 Comte, Françoise, *European Environmental Criminal Law – Recent Developments*, *The Yearbook of European Environmental Law* 2005, p. 212.

24 Interestingly, according to Neal Shover and Aaron S. Routhe the most significant change in the context of environmental crime is the move away from deterrence-based strategies. It is possible that the focus is generally moving towards cooperative and flexible enforcement, which will naturally diminish the role of criminal law from before. See Shover, Neal & Routhe, Aaron S., *Environmental crime*, *Crime and Justice* 2005, p. 353-359.

25 For instance, in those cases where Finland has breached against its obligations under EC environmental law, penal provisions would not have made any difference whatsoever. See, e.g., Case C-240/00, *Commission v Republic of Finland*, judgment of 6 March 2003, where the Court concluded that by failing to classify fully, by the end of the period laid down in the reasoned opinion of the Commission, the SPAs provided for by the Birds Directive, Finland had failed to fulfil its obligations under article 4 (1) and (2) of the Directive.

enforcement until environmental laws are properly implemented in a given Member State.

However, my suspicions of the relevance of criminal law in a struggle against non-compliance do not justify the conclusion that “nothing works.” The basis for European environmental criminal law needs just to be found elsewhere.

### 3 To Think Regionally, or Locally – That is the Question

#### 3.1 *The Myths and Facts of Transfrontier Criminality*

According to the recitals of the latest proposal for a Directive on the protection of the environment through criminal law, the Community “is concerned at the rise in environmental offences and their effects, which are increasingly extending beyond the frontiers of the States in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response.”<sup>26</sup> This concern about the transfrontier effects of environmental crimes has been one of the most frequently used arguments in favor of international co-operation within the field of environmental criminal law. The reasons for this are manifold.

Firstly, it is common knowledge that environmental problems do not respect national frontiers. An oil spill that occurs in the Finnish archipelago continues its way to Swedish territorial waters totally irrespective of the will of these sovereign powers. Furthermore, the interest in international co-operation in the field of criminal law derives from the awareness that differences between national criminal legislation may lead to adverse effects. From an environmental perspective it is naturally unfortunate if hazardous activities or businesses can benefit from the legal disparities between states. Harmonization of penal provisions could be an effective tool when the states try to prevent various free-riders from abusing the system. Thirdly, the international dimension of environmental criminality is obviously related to internationalization as a general phenomenon. We are striving for free movement of goods, services, capital and people; it is inevitable that by promoting these freedoms we are also creating better opportunities for criminal activities.

In comparison with the somewhat theoretical arguments presented above it is useful to shed some light on the practical aspects of transfrontier environmental criminality. A recent report drafted by *Michael Faure* and *Günther Heine*, ‘Criminal Enforcement of Environmental Law in the European Union’, produces interesting insight into the experiences in the various Member States in the EU in practice. According to this study, which is based on country reports, transfrontier criminality is not an enormous issue in reality, or at least the country reports do not show any alarming rate of problems in this respect.<sup>27</sup>

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26 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2007) 51 final, 9.2.2007.

27 See Faure, Michael and Heine, Günther, *Criminal Enforcement of Environmental Law in the European Union*, The Hague 2005, p.29-30 and 68-73. As my viewpoint is mainly a Nordic one, I take the liberty to focus on the reports made by Danish, Finnish and Swedish contributors. According to the Danish report, transfrontier incidents do not involve any

These conclusions should, however, be regarded with caution. The fact that many contributors state that they have not experienced any problems with transfrontier cases may *de facto* mean that these cases are never investigated or prosecuted.<sup>28</sup> Actually, it is probable that in a case of transfrontier crime the resulting difficulties are enormous. As Michael Faure and Günther Heine put it, these are most likely “all or nothing” situations.<sup>29</sup>

In the discussions about environmental criminality the missing link is often the empirical evidence concerning the number of environmental offences. International discussions do not make any exception in this regard. As this important argument in favour of penal provisions – the level of environmental criminality – is unclear, the debate occasionally falls into irrelevant controversies over the lack of evidence. Although the exact amount of transfrontier offences escapes us, states ought to consider whether international co-operation could provide them with effective instruments in order to limit the negative effects of this form of criminality.

It should be remembered, however, that we cannot have very high ambitions here. It is evident that environmental criminality is not the most apparent threat to sustainable development. There is, in other words, no reason to enthrone environmental crimes as the environmental problem number one in the EU, or elsewhere for that matter. Likewise it is important to keep in mind that environmental criminality has its structural causes as all forms of deviant behaviour. These are especially visible when the rich meets the poor: the famous odyssey of the *Probo Koala*, e.g., is most of all a sad story of the dark side of the international trade.<sup>30</sup> Disasters like this are unlikely to be avoided with the help of penal law only. Nevertheless, it is possible to indicate certain areas within the field of environmental protection where criminal law can be of some use and, specifically, where common European standards would be desirable.

### 3.2 *The Limits of Criminal Law*

Every debate about the role of criminal law should start by pondering the following basic question: Why do we need criminal law? We all know that at a general level this question is not all that difficult to answer. Criminal law aims at protecting the interests of individuals, public and collective interests or State interests, by using threats of punishments and by executing these in order to make the threats credible.<sup>31</sup> The starting point is the same for all criminal justice systems irrespective of the origin of penal provisions. This means that each

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particular problems. Finland reported problems with oil spills. The Swedish contribution did not include any information concerning these issues.

28 Faure & Heine, *supra* note 27, p. 72.

29 Faure & Heine, *supra* note 27, p. 69.

30 I am referring to one of the most serious dumping incidents in the African continent. In August 2006 the *Probo Koala* cargo ship, operated by a Dutch company, offloaded approximately 500 tonnes of toxic waste to a local firm which dumped it in the rubbish tips of Ivory Coast’s capital Abidjan. Most of them were open-air sites. The toxic cocktail killed ten people and around 44,000 people sought medical care after the incident.

31 *See, e.g.*, Jareborg 2002, *supra* note 5, p. 93.

sphere of criminal justice, national, regional and international, exists for the same reason: they are striving for the protection of essential interests in a given society. A crucial question in this regard is which interests the emerging European criminal justice system<sup>32</sup> should pay its attention to. What are those values and interests that need protection at a European level?

In the EU, we share a common concern for the environment. This concern has led to common legislation in order to preserve the environment. The Habitat Directive states beautifully this idea in its recitals: “- - the threatened habitats and species form part of the Community's natural heritage - -.”<sup>33</sup> It is therefore not a surprise that there has been pressure to co-ordinate the enforcement of these legal efforts. Environmental problems have actually created a very challenging situation. On one hand we have an interest which is to a great extent common for all Europeans (and for the mankind in its entirety) and the protection of which is extremely important. On the other hand we have criminal law, a field of law which for the Member States represents one of the most important bastions of state sovereignty and the use of which is dependent upon several legal and moral restrictions.

In this balancing we can choose two strategies. We can emphasize that the protection of the environment is one of the most essential objectives of the Community, which logically should lead to co-operation in the sphere of criminal justice. We can also approach these tensions from a more pragmatic perspective and see all this as a question of division of labor. As a somewhat typical representative of a Nordic scholar I am inclined to favour the latter mentioned option. As *Kimmo Nuotio* has stated, criminal law should not be seen so much as a means of recognizing European interests, but instead as an instrument to react upon concrete social problems.<sup>34</sup>

The first natural step is to attain a realistic picture as regard the area of criminalization. First of all, environmental offences are diverse in nature and in the harm they cause. This aspect is often neglected in discussions upon environmental criminality. Environmental crimes are considered as a homogeneous group of offences, although e.g. littering, illegal trade in endangered species, discharge of hazardous substances into watercourses or operation of a plant without proper permits have rather little in common. It is also evident that the profile of environmental criminality varies from one Member State to another. The diversity is reflected in the victims of these crimes as well. The victims of some offences are few and easily identified, whereas victims in other cases are countless and anonymous. In fact, in regard to environmental criminality the whole concept of ‘a victim’ is blurred. This

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32 The field of European legal activity concerned with crime and its control is a complex and fragmented legal environment. For an excellent typology of European criminal law, see Christopher Harding, *Exploring the intersection between European law and national criminal law*, *European Law Review* 2000 p.377-388.

33 See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 22.7.1992 L206/7.

34 Nuotio, Kimmo, *Should Criminal Law be Our Common European Concern?*, in Veijo Heiskanen & Kati Kulovesi (eds.): *Function and Future of European Law*, Helsinki 1999, p. 229.

conceptual confusion is also visible in the environmental criminal laws of the Member States. All these perplexities should, in other words, be taken into account in designing the standards of the European criminal policy concerning the protection of the environment.

In addition to a more diversified approach to environmental criminality we should analyze which environmental offences would profit from European standards. To begin with, it is important to emphasize that punishments are society's most intrusive and degrading sanctions. Accordingly, criminalization should be used only as a last resort or for the most blameworthy offences. Criminal policy measures should, furthermore, be socially defensible. The goal is not to abolish criminality, but rather to keep it at a tolerable level.<sup>35</sup>

Both the respect of the principle of *ultima ratio* and the awareness of the limits of the criminal justice system speaks in favour of a certain pragmatism. Instead of forcing the Member States to accept the whole package of environmental criminal law, the Community should concentrate on those offences that are especially problematic at a European level in practice. In this context it is essential to remember that criminal law is a rather archaic instrument. To begin with, criminal law is at its best when the criminal act or omission is relatively simple. Complicated social processes, as blameworthy as they may be, are not suitable for criminalization. This naturally narrows the possibilities of environmental criminal law; we all know that the most important environmental problems, such as the climate change, are not easily converted into individual punishable acts or omissions. These inherent shortcomings of criminal law probably become even more visible when we move from national to regional level.

It is furthermore clear that whatever criminal policy alternatives the Community decides on, the rationality and legitimacy of these decisions will lead to heated discussions in the Member States. Even though the traditional idea of criminal law as a last bastion of sovereignty is no longer supported, it is nevertheless important to take into consideration that the Member States are reluctant to give the Community a bigger role in the sphere of criminal justice.<sup>36</sup> If we want to strive for a common criminal policy in environmental matters, we should focus on the politically possible, or else there is a danger of losing the legitimate basis for those co-operative efforts that are necessary in the field of criminal law.

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35 These premises are also characteristic to the ideal image of Nordic criminal policy; see Tråskman Per Ole, *The Dragon's Egg – Drugs-Related Crime Control*, in Ulla V. Bondeson (ed.): *Crime and Justice in Scandinavia*, København 2005, p. 302-303, and Jareborg 2002, supra note 5, p. 94-95.

36 This reluctance is illustrated, e.g. in the reactions on the judgment in Case C-176/03. The Times stated in its editorial on 14 September 2005 as follows: "In a landmark ruling that is as ominous as it is deluded, the Luxembourg-based court yesterday overruled the governments of EU member states, removing from them the sole right to impose their own penalties on people or companies breaking the law, and giving the unelected EU Commission an unprecedented role in the administration of criminal justice."

### 3.3 *Some Thoughts about Checks and Balances*

'United in diversity' states the motto of the European Union. It basically means that different cultures, traditions and languages are considered as a positive asset for the continent. This also includes, naturally, acceptance of judicial diversity. Simultaneously, it is evident that the whole idea of a union with common objectives disappears if all the national legal systems can flourish without restraint.

In this balancing the principle of subsidiarity constitutes a logical starting point.<sup>37</sup> According to the normative basis of this principle, the second paragraph of Article 5 of the EC Treaty, the Community shall take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

In practice it is naturally rather difficult to determine when a given action is 'better achieved' by the Community. In order to make this principle operational we need something more, some guidelines or criteria for our analysis. In this case we can also rely on official documents, more precisely on the Protocol (No 30) on the application of the principles of subsidiarity and proportionality, an annex to the Treaty of Amsterdam. According to this Protocol, Community action is needed, a) if the issue under consideration has transfrontier aspects that cannot be satisfactorily regulated by Member States, b) if actions by Member States alone would conflict with the requirements of the Treaty or c) if an action at the Community level would produce clear benefits by reason of its scale or effects compared with activities of the Member States.

When applied in an environmental context, these criteria lead to the primary focus on problems with transfrontier effects. It goes without saying that the Member States have difficulties in achieving effective results concerning transfrontier environmental problems without international co-operation. Whether these common efforts should involve penal responses is another issue. In practice, modern societies nevertheless co-operate in this field. Their collaboration is actually one of the most pressing issues in criminal policy at the moment. The rapid expansion of the material scope of international criminal law illustrates this clearly; we have conventions on drug-trafficking, trafficking in human beings, money laundering, cybercrime, terrorism, corruption, environmental offences, just to name a few. States themselves seem to believe that they profit from this co-operation, and they most likely believe that international suppression conventions reflect legitimate political, social and economic interests of states.<sup>38</sup>

European criminal law would be a step further than the interstate co-operation illustrated by the suppression conventions mentioned above. As the newest proposal for a Directive on the protection of the environment through criminal law indicates, the Community really aspires to rule over the will of the

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37 The content of this principle is unclear. An exploration in depth into the doctrinal divergences related to this principle nevertheless falls outside the scope of this article.

38 See Boister, Neil, *Transnational Criminal Law?*, European Journal of International Law 2003 p. 956-957.

states, which is in principle something more than multilateral negotiations over crimes of international concern.<sup>39</sup>

It should nevertheless be remembered that the scope of these international arrangements is partially overlapping. For instance, unlawful possession, taking, damaging, killing or trading of or in specimens of protected wild fauna and flora species or parts or derivatives thereof – one of the offences listed in the Commission's proposal – is linked with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It is therefore not especially dramatic to assume that the Member States should also take common actions in this field within the EU. In this case, the necessity of interstate co-operation is in a way already justified. The same relates to unlawful treatment, export or import of waste; some of the offences included in the proposal are parallel to the treaty obligations according to Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

These multilateral agreements represent examples of those areas of environmental law where European environmental criminal law could be useful. In other words, if there are already multilateral arrangements regarding the issue at hand, it strongly suggests that European co-operation could also be desirable. As the states have ratified these conventions, they have admitted that these issues have transfrontier aspects that they cannot satisfactorily regulate by themselves. European environmental criminal law would in fact constitute a valuable method of enforcement of such international mechanisms as CITES or Basel.

European integration is, however, more than traditional international co-operation. The question of how the Community proceeds is as crucial as the question of what it aims to regulate. It is obvious that many of the offences listed in the Commission's proposal are either included in international conventions or they are criminalized in the national laws of the Member States. The idea of environmental penal provisions is consequently not a novelty. Furthermore, the definition of offences in Article 3 of the proposal corresponds largely to those definitions set out in the Framework Decision 2003/80/JHA which was accepted by the Member States. Until the judgment in Case C-176/03 the controversy was mainly connected with the choice of the legal basis of the Community actions. As the Court of Justice decided that the Community may take measures relating to criminal law in order to ensure environmental protection, the legal basis is for the present clarified.

Until the judgment in Case C-440/05<sup>40</sup> there were, however, differing opinions about the desirable scope of Community action in the field of environmental criminal law. The Commission has supported a broadest possible interpretation of the judgment in Case C-176/03 whereas the Council has had a

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39 From an ordinary citizen's point of view these processes are, however, remarkably similar. He or she has no genuine possibilities to participate in neither diplomatic negotiations nor the discussions in the EU organs. When these criminal policy issues finally advance to the national parliaments, to the place where he or she has some power over things, the important issues have already been decided upon.

40 Case C-440/05, *Commission of the European Communities v Council of the European Union*, Judgment of the Court (Grand Chamber), 12 October 2007.

more stringent approach. In the latest version of the Directive, e.g., the Commission not only insisted that the sanctions for environmental offences should be effective, proportionate and dissuasive, but it also demanded an approximation of the levels of penalties.<sup>41</sup> Without such approximation, argued the Commission, perpetrators could exploit loopholes in the national legislation of Member States.<sup>42</sup> Theoretically, the Commission's assumption is most likely correct, national divergences may cause free riding, but at the moment there is not enough evidence to support this hypothesis. If this kind of 'forum shopping' was a significant problem, perhaps environmental criminality should have been paid more attention to, e.g. in the work of Europol. In fact, environmental crimes were not even mentioned in Europol's Annual Report 2007.<sup>43</sup> In these circumstances it is difficult to see why the Member States should not be free to decide upon their own penalty levels.<sup>44</sup>

The judgment in Case C-440/05 nevertheless put an end to these disagreements as the Court clearly stated that "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence."<sup>45</sup>

In my opinion, one way to diminish the inherent tensions between national criminal justice systems and that of the EU is to leave behind the idea that environmental criminality is a homogenous group of offences. I am convinced that if we instead take into account the diverse nature of these offences, the question concerning what is a suitable intensity in European co-operation might also get its answer.

The origins of different environmental crimes are diverse, just as their motives and the legal instruments regulating them. What works with illegal trade in wildlife does not necessarily work with illegal oil spills or with dumping of hazardous waste into the oceans. Therefore, the more detailed analysis concerning the intensity of the European co-operation is presented with the aid of one specific field of environmental criminality, namely the illegal trade of endangered species. The examples from this field with all their peculiarities will

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41 Member States shall ensure, e.g. that the commission of the most serious offences is punishable by a maximum of at least between five and ten years imprisonment. See Article 5 of the proposal.

42 See Explanatory Memorandum, COM(2007) 51 final, 9.2.2007, p. 8.

43 The report is available at "www.europol.europa.eu/publications/Annual\_Reports/Annual%20Report%202007.pdf" (last visited 3.3.2009).

44 As Advocate General Ruiz-Jarabo Colomer explained it in his opinion concerning the Case C-176/03: "The objective, as has been seen, is to afford an 'effective, proportionate and dissuasive' penalty in response to serious contraventions of Community environmental policy. Criminal punishment fulfils those conditions, and the Community, in order to ensure the effectiveness of its activity in the field, can therefore constrain the Member States to impose such penalties, but it is not entitled, in my view, to go further. That statement has its basis, on the one hand, in the tenets of the case-law which confirms that authority and, on the other, in the nature of the Community's power in environmental matters." See Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 26 May 2005, para. 83. See also House of Lords, European Union Committee, 42nd Report of Session 2005-2006, supra note 11, paras. 47-61.

45 See Case C-440/05, *Commission v Council*, para. 70.

hopefully contribute to a more analytical picture of the crimes against the environment. The fictional tale of the sturgeon could obviously be replaced by many true tales, such as the story of the *Probo Koala* or the catastrophe of the *Erika*. My choice can nevertheless be defended by two arguments. Firstly, the legal framework concerning the illegal trade in endangered species is somewhat simpler to introduce than the legal peculiarities connected to the *Probo Koala* or the *Erika*. Secondly, fiction gives me the possibility to orchestrate different elements freely, which makes the storytelling easier.

## 4 One of Those Stories

### 4.1 *A Fistful of Black Gold*

The European Union is the largest importer of caviar in the world. Between 1998 and 2004 the EU imported 591 tons of caviar, which constitutes approximately 50% of the total global trade.<sup>46</sup> All the gourmets in Europe know the mythical reputation of this luxury food. The rarity of sturgeon eggs – in addition to symbolic values attached to this commodity – leads to high market prices. These factors create prerequisites for a significant black market of caviar. The actual levels of the illegal trade are difficult to quantify, as this is by nature a hidden activity. However, considerable seizures of illegal caviar in Europe do indicate that there is a flourishing black market in salted roe.<sup>47</sup> Caviar smugglers are usually well-organized and enjoy strong links with organized crime. The prospect of profit is enormous and the risk of getting caught is very low. These incentives have led to an overexploitation which, in turn, has resulted in declining sturgeon populations. Exhaustive fishing is in fact threatening the overall survival of sturgeon species.

Sturgeons are a species with prehistoric roots, it has in fact been estimated that they are one of the oldest vertebrates living on Earth. In addition to this, these species tend to live long: the oldest ones can live up to 150 years old. Sturgeons reach sexual maturity at between six and 25 years of age, which makes them extremely vulnerable to over-fishing.<sup>48</sup>

Sturgeons produce both meat and caviar, the latter being more important in trade. Caviar, the unfertilized roe of sturgeon, is extracted from the fishes in two alternative ways. When the traditional method is used, the sturgeon is simply cut open and the roe is scooped out. As this means that the fish is killed, new methods of extraction have been developed. In the “Caesarean” method, which is not yet widely applied, the roe is gently squeezed out after a small incision is made in the fish. Once this cut is healed, the fish can be returned to the wild or be kept in captivity for future extraction.<sup>49</sup>

46 Available at “[www.eu-wildlifetrade.org/pdf/en/teur\\_caviar\\_leaflet\\_English\\_8febr07\\_WEB.pdf](http://www.eu-wildlifetrade.org/pdf/en/teur_caviar_leaflet_English_8febr07_WEB.pdf)” (last visited 3.3.2009).

47 See supra note 46.

48 See Lawson, Trevor, *Traded towards extinction? The role of the UK wildlife trade*. A WWF Report 2002, p. 19. The report is available at “[www.wwf.org.uk/filelibrary/pdf/tradedextinction01.pdf](http://www.wwf.org.uk/filelibrary/pdf/tradedextinction01.pdf)” (last visited 3.3.2009).

49 See CITES World, Issue Number 8 December 2001.

As mentioned earlier, caviar is universally recognized as the symbol of exclusivity and wealth. This, and the scarcity of this environmental good, has consequently led to very high market prices. For instance, in 1999 the London price per gram for Beluga caviar was £ 3.17, for Sevruga £ 1.47 and for Osietra £ 1.67.<sup>50</sup> It is as unfortunate as it is evident that these facts constitute a heavy incentive for criminality. As there is a gap between demand and supply, unscrupulous individuals may seek to fill the missing market for caviar for personal profit by bypassing the rules and restrictions.<sup>51</sup>

The illegal market of caviar is a complex mixture of ordinary luxury-seeking citizens, ignorant tourists, organized and semi-organized leagues involved in export and import, corrupt or otherwise confused enforcement officials and many others. As the motives of all these groups' actions are so distinct, it is in general rather difficult to state what should be done in order to prevent the trade. One way to grasp these difficulties is to apply the classification made by *Gavin Hayman* and *Duncan Brack*. They have classified illegal trade in four separate subcategories which all have their own distinctive features. According to Hayman and Brack it is possible to see clear differences between (a) low-volume, low-value 'tourist' cases; (b) high-volume, low-value opportunist smuggling; (c) high-volume, high-value smuggling by organized criminal networks, and (d) low-volume, high-value 'smuggle to order' operations for collectors.<sup>52</sup>

All these groups have different criminal profiles and it is likely that crime prevention efforts will be more effective if they are individually tailored for each group. This, and the fact that we are dealing with the regularities of a market, makes the whole issue complicated, but at the same time it is a relief to realize that the fate of the sturgeon – or of the other endangered species – is not solely in the hands of the well-organized criminals. Firstly, a battle against ignorance is possible to win. Secondly, black markets may be black, but they are also markets. It is thus possible to interfere with them and make a difference.

#### 4.2 *Legal Exercises*

Commercial international trade in wildlife is conducted within the legal framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. CITES was concluded in Washington in 1973 and it entered into force on 1 July 1975. The Convention has currently 175 Parties.<sup>53</sup>

The basic ideas of CITES are fairly straightforward. The Convention regulates international trade in wild animals and plants which are listed in the three Appendices to the treaty. The Convention prohibits, with a few exceptions,

50 See Lawson 2002, supra note 48.

51 See Hayman, Gavin & Brack, Duncan, *International Environmental Crime, The Nature and Control of Environmental Black Markets*, London 2002, p. 10. The same logic was seen in the emergence of the illegal market of ozone depleting substances. See Bankobeza, Gilbert M., *Ozone-depleting Substances: Facts and Figures*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p. 27-35.

52 Hayman & Brack 2002, supra note 51, p. 7.

53 For the list of Parties, see "www.cites.org/eng/disc/parties/alphabet.shtml" (last visited 3.3.2009).

international commerce in species that face the danger of extinction. These species are listed in Appendix I. CITES allows a controlled trade in species whose survival is not yet threatened; these are listed in Appendix II. Export of these species is limited to a level which will not risk their survival. Appendix III provides a mechanism whereby a Party can seek support of other Parties in enforcing its own domestic legislation regulating species not in Appendix I or II.<sup>54</sup> Most of the sturgeons are included in the CITES Appendix II. Two species – the Shortnose sturgeon (*Acipenser brevirostrum*) and the Common or Baltic sturgeon (*Acipenser sturio*) are listed in CITES Appendix I.

CITES operates by means of a permit system. It prohibits, with a few exceptions, international trade in specimens of species included in any of the Appendices without a CITES permit. The Convention lays down strict conditions for granting the permit and it requires each Party to establish especial authorities that are responsible for ensuring that these conditions have been satisfied. In addition to the national authorities, there is a Secretariat in Switzerland whose task is to oversee the permit system and to review the implementation of the treaty.<sup>55</sup> The structure of the CITES – a detailed but workable operational system with national and international element – is rather effective. In fact, CITES has been assessed as one of the most successful international conservation treaties.<sup>56</sup>

The European Community has been implementing the Convention through common regulations since 1984. The most important of these is Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. It is directly applicable in all EU Member States and forms, together with Regulation (EC) No. 865/2006 of 4 May 2006, the legal basis for the implementation of CITES in the EU.<sup>57</sup> The basic principles in these instruments are parallel to the ones in the Convention. It is nevertheless important to notice that these texts contain additional provisions to CITES. The Regulation (EC) No. 338/97 has, for instance, four Annexes (A-D) instead of three and these Annexes also contain several non-CITES species.<sup>58</sup> The permit system is also much more rigorous in the EU.<sup>59</sup>

According to Regulation (EC) No. 338/97 commercial trade from, to and within the Community is, as a general rule, prohibited for wild specimens of

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54 See Lyster, Simon, *International Wildlife Law*, Cambridge 1994, p. 240.

55 Lyster 1994, supra note 54, p. 240-241.

56 See Birnie, Patricia & Boyle, Alan, *International Law & the Environment*, Second Edition, Oxford 2002, p. 625-626.

57 The Regulation (EC) No. 865/2006 lays down the details concerning the implementation. See also Commission Regulation (EC) No 100/2008 of 4 February 2008 amending, as regards sample collections and certain formalities relating to the trade in species of wild fauna and flora, Regulation (EC) No 865/2006.

58 These Annexes have been amended in March 2008. See Commission Regulation (EC) No 318/2008 of 31 March 2008 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

59 For differences between these two systems, see “ec.europa.eu/environment/cites/pdf/differences\_b\_eu\_and\_cites.pdf” (last visited 3.3.2009).

Annex A species. Annex A contains all CITES Appendix I species and any other species that are threatened with extinction or are so rare that any trade would imperil their survival. Annex B contains all those species for which trade into and from the Community requires the issuance of permits. These include, e.g. all CITES Appendix II species that are not listed in Annex A. The focus of our interest, the sturgeons, are listed in Annex B. The Shortnose sturgeon and the Baltic sturgeon make an exception; they are included in Annex A.<sup>60</sup>

It was mentioned earlier that the effectiveness of the CITES Convention is partly connected to its detailed, but nevertheless workable, character. The same comment can be made as regards the CITES system within the EU. Trade is controlled by comprehensive documents; for any animal or plant species (or parts or derivatives made thereof) that is listed in Annex A, B or C of the EU Regulations a document is required before trade can take place. These documents will only be issued if certain conditions are satisfied and they must also be presented to the relevant customs offices before a delivery can be authorized to enter or leave the EU.<sup>61</sup>

EU Regulations are directly applicable in all EU Member States. Consequently, Member States do not have to transpose the provisions included in them into national law. Enforcement of these rules takes place at the national level. Article 16 of the Regulation (EC) No. 338/97 stipulates that Member States shall take appropriate measures to ensure the imposition of sanctions for the infringements of the Regulation. In addition, Member States shall ensure that these measures are appropriate to the nature and gravity of the infringement and that there are provisions relating to the seizure and confiscation of specimens.<sup>62</sup>

The web of rules regulating the trade in wildlife has three levels. At the top, there is the multilateral convention striving to control the commerce worldwide. The EU system is a detailed version of the Convention and administrates the trade from, to and within the Community. The implementation of all these rules, including criminal enforcement, finally takes place in Member States (or Parties to the Convention).

Although the basic idea of this system is rather straightforward, it would be wrong to argue that this mixture is intelligible. The legal exercises required in order to determine whether a certain species is protected by the CITES may be rather complicated. The fact that national enforcement systems vary a lot does not increase the clarity of the picture. There are significant divergences both in the maximum sanctions that can be imposed and in the application of the

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60 Annex C lists the species included in CITES Appendix III that are not listed in Annex B. Annex D lists species that have no CITES equivalent.

61 These are only the main points of this rigorous system. For a quick guidance to the CITES-system within the EU, see European Commission and TRAFFIC Europe, *Wildlife Trade Regulations in the European Union. An Introduction to CITES and Its Implementation in the European Union*. Luxembourg 2007.

62 The provisions concerning the enforcement of the CITES Convention are rather similar to those of the Regulation, see Article VIII of the Convention.

provisions in the different Member States.<sup>63</sup> As this may be an acceptable solution from a criminal justice perspective, it may very well be a problem from a broader environmental viewpoint. It is possible to argue that these varieties in fact create inconsistencies in the treatment of European citizens.<sup>64</sup> Whether these inconsistencies are tolerable depends upon the perspective we choose.

### 4.3 *Criminal Law and the Protection of the Sturgeon*

Evolution has its own logic: some species stay, while others come and go. When human interference threatens the existence of a species the situation is different, because unlike Mother Earth, we have a choice and the rationality of our behaviour can be questioned. It is always a tragedy when our actions lead to the extinction of a species. We have killed and destroyed many of our fellows on Earth, most of them in the name of our own legitimate interests. Illegal trade in endangered species does not, however, involve any such grounds for excuses.

Whatever type of criminality we are pondering upon, the starting point must naturally be crime prevention. As regards to low-volume, low-value 'tourist' cases – these commonplace offences – the best results would probably be provided by comprehensive information strategy. Tourists tend to purchase protected species randomly and their motives are seldom blameworthy. This type of ignorance is best cured by knowledge; penalties will probably not be that effective. Transit places like airports, harbours and railway stations could provide information about the fate of the endangered species as effectively as we are warned of the injurious effects of drugs. European travel agencies could design informative brochures about the Do's and Don'ts in wildlife trade. The stories of species in risk of extinction are supposedly not difficult to market to the European public. The fate of the sturgeon is really a story worth telling.

It is, however, essential to remember that these tourist offences, as minor as they may be, constitute together a considerable problem. It is not a big issue when someone takes home 400 grams of caviar instead of the legal amount of 250 grams, but if we multiply this minor offence by the enormous amount of these petty offenders, we get another perspective to the problem. If these violations are totally ignored, the sturgeon's situation may get very critical.<sup>65</sup> It seems that in addition to information we need sanctions as well. As regards to these commonplace offences, administrative sanctions might be the most suitable and, above all, the most practical alternative to consider.

The situation is slightly different concerning category b) including high-volume, low-value opportunist smuggling and category c) which involves low-

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63 See Wijnstekers, Willem, *Protection of Endangered Species of Fauna and Flora*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p. 19-23.

64 This aspect is decisively pointed out by Françoise Comte, *see* Comte 2005, *supra* note 23, p. 245.

65 *See* also Young, Tomme Rozanne, *National Wildlife Trade Regulation in EU Member States*, in Monika Anton et al. (eds.) *Proceedings of the International Expert Workshop on the Enforcement of Wildlife Trade Controls in the EU*, 5-6 November 2001, Frankfurt/Germany, TRAFFIC Europe, Brussels, Belgium and IUCN, Gland, Switzerland and Cambridge, UK 2002, p. 33.

volume, high-value ‘smuggle to order’ operations for collectors. In these cases (the latter group is naturally not very relevant as regards the sturgeon) ignorance is normally not a very credible explanation. It is likewise not probable that information campaigns or minor administrative sanctions would constitute a sufficient deterrent for these types of offenders. It seems that these crimes should be treated in the same way as other forms of illegal trade or smuggling. This kind of reasoning would require some changes in sanctioning in those Member States where penalties for environmental crimes are especially low. Whether these penalties should be totally harmonized in the EU depends on how mobile these offenders are. If it is confirmed that they in fact take advantage of the loopholes of the fragmentary EU system, a coherent attitude towards these actions would naturally be useful.

Category c) – high-volume, high-value smuggling by organized criminal networks – is the most spectacular form of wildlife criminality. In fact, the need for strengthening of criminal environmental law is often connected to the activities of organized criminal networks. It has been suggested that illegal wildlife trafficking is highly attractive to organized criminal rings as this trade is a remarkably profitable business. In addition to this, organized criminal groups would be attracted to wildlife crimes because of the ease and low risk with which traffickers can move species from one country to another. The attractiveness of the illegal trade in wildlife is presumably connected to the possibilities to incorporate this type of trade with other types of contraband.<sup>66</sup>

While organized crime has been a hot topic in research lately, relatively little attention has been paid to environmental organized crime. Consequently, the scope, structure and extent of environmental organized crime is currently problematic to measure.<sup>67</sup> It would be highly desirable that some of the growing interest in organized criminality was directed to environmentally relevant topics such as the trafficking in ozone depleting substances, waste disposal and trafficking in endangered species. Although the lessons learned from efforts to combat other illicit markets such as drugs are not very positive – these markets have proven to be very difficult to influence – organized environmental crime should be taken seriously. The blameworthiness of it is obvious. Large-scale activities of criminal groups are also very detrimental to the environment.

Although the actions of these groups do not inspire any sympathy, it should be pointed out that criminal networks grow up easier in societies where the level of trust between people is generally low. Mature democracies with a respect for human rights have lesser problems with organized criminality than instable and undemocratic societies. Criminal carriers are normally chosen by those who do not have other alternatives, which might be the explanation for the relatively low level of organized criminality in such welfare societies as the Nordic countries. Here again, the final solution to the problem cannot be found in criminal law.

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66 See Zimmermann, Mara E., *The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade*, Vanderbilt Journal of Transnational Law 2003 p. 1667-1672.

67 See Albrecht, Hans-Jörg, *The Extent of Organized Environmental Crime*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p. 88-91.

Organized environmental criminality would nonetheless be the sector where common European standards might create an effective deterrent. Firstly, their activities include calculation of risks; penalty levels might very well affect the outcome of these considerations. Secondly, unlike the other categories of environmental offenders these groups can easily take advantage of free riding and move their activities to places with ineffective legislation and poor enforcement measures. In this respect common European standards might also have a positive effect.

## 5 Concluding Remarks

Many voices have been raised in order to demand better control of environmental criminality. In an introductory speech made at a conference on environmental crime arranged by the European Commission in November 2003, *Margot Wallström* pointed out several problems concerning environmental criminality. She, however, considered it to be possible to resolve all these problems. In fact, she hoped that “in the near future it will be possible to convict and punish environmental criminals – not just lightly, but severely!”<sup>68</sup> In the aftermath of the dramatic voyage of the *Probo Koala* the tone was ever more tightened. In a debate at the European Parliament *Stavros Dimas* stated as follows:

“Environmental crime is one of the most serious problems which the Community is called upon to combat. The environmental damage which may be caused is huge. It is often part of international organised crime, which makes it difficult but imperative to stamp out. Provision for effective sanctions, including criminal sanctions, is necessary for the proper application of Community environmental legislation. That is precisely why urgent action is needed at Community level.”<sup>69</sup>

Recent developments indicate that these outcries were more than simple rhetoric.

There are undeniably circumstances where a harsher attitude towards environmental crimes might be worth trying. Although it is very doubtful whether environmental crime is really one of the most serious future challenges for the Community, it is easy to understand the shocked reactions after such incidents as the recent dumping catastrophe in Abidjan. Illegal trade in endangered species is another example of criminality that presupposes reactions. It imposes major damage on rare and unique populations; the risk of getting caught is mostly rather minimal and penalties are seldom at a deterrent level.

It nevertheless seems obvious that the problem of wildlife criminality – or any other criminality – cannot merely be solved by harsher punishments. A diversified approach is required in trying to understand the complexities of this

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68 See Wallström, Margot, *Introductory Speech on Environmental Crime*, in Françoise Comte & Ludwig Krämer (eds.): *Environmental Crime in Europe*, Groningen 2004, p. 5.

69 European Parliament, 25 October 2006: Export of Toxic Waste to Africa – Use of criminal law to protect the environment (debate). Available at “[www.europarl.europa.eu/sides/](http://www.europarl.europa.eu/sides/)” (last visited 3.4.2009).

fatal business. In addition to front-line enforcement, we must address the supply and demand pressures creating the illegal market. Better enforcement measures are indeed needed, but these should be accompanied by a balanced criminal policy agenda. European gourmets should, in other words, be made aware of the fate of the sturgeon.

The principle of diversified approaches is relevant within a certain type of environmental criminality, as the example above demonstrated. This principle becomes even more important when the analysis moves from one group of environmental criminality to another. What works with illegal trade in wildlife does not necessarily work with illegal oil spills or with dumping of hazardous waste into the oceans. The origins of different environmental crimes are diverse, just as their motives and the legal instruments regulating them. In order to focus our attention, we need a more analytical approach to environmental criminality. A blind outcry for harsher penalties is not enough.

The main point is not to punish but to prevent. We all know that there are several ways to prevent environmental criminality. I am convinced that it would be very useful to give more attention to crime prevention. We need innovations, we need pro wildlife campaigns, we need schemes for phasing out unsafe vessels, and so forth. In other words, we need a good and coordinated criminal policy, not just new penal laws. The European Union has actually already many schemes and programmes that constitute a part of European criminal policy regarding to the protection of the environment. In fact, good environmental policy constitutes necessarily good criminal policy.

It should be remembered that we cannot have very high ambitions here. Criminal law is not the most important instrument of sustainable development, and it does not play a primary role in the redefinition of the relationship between humankind and nature or in the enhancement of precaution. Criminal law can, however, take some small steps, through which it is more capable than before to consider the changes brought by environmental values.

It is possible to indicate certain areas within the environmental sector where criminal law can be useful and, specifically, where common European standards would be desirable. In my mind, at least the following areas of environmental criminality could be included on the common European agenda in future: illegal trade in wildlife, dumping and illegal transport of hazardous waste and hazardous chemicals, illegal trade in ozone-depleting substances, illegal fishing and illegal dumping of oil and other wastes in oceans. Within these areas the focus should be on organized criminality, whereas minor offences could be left to the Member States to take care of.

The Nordic countries have good standing in environmental performance. The development in these societies is, however, by no means sustainable; the production of waste is showing no signs of decrease, the demand after energy is all the time expanding and biodiversity is constantly threatened by the needs of the people living in these modern industrialized countries. All these are problems that criminal law – national, transnational or international – is unable to solve. That is why it is so crucial not to exaggerate the possibilities of criminal law in the protection of the environment. If we focus too much on environmental criminal law, we are fooling ourselves.

What nevertheless turns the overall picture into something positive is the growing environmental awareness of the public. This is illustrated, for instance, by the calm reactions of ordinary Finnish citizens as they received the news of the Commission comprehensive strategy to reduce carbon dioxide emissions from cars and vans sold in the EU.<sup>70</sup> When a Finnish TV-reporter asked a middle-aged man whether this strategy appears acceptable although it will most likely lead to higher car prices, the answer was “Yeah, yeah, of course, we all have to do more for nature.”

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<sup>70</sup> For the strategy, *see* COM(2007) 19 final, 7.2.2007.