



Addressing Environmental Crimes and Marine Pollution in the EU

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Acknowledgments

The purpose of this handbook is to provide to judges, prosecutors, forensic officers and other legal practitioners an overview of the existing European and international instruments and rules aimed at tackling environmental crimes and in particular marine pollution, as well as an analysis of the challenges faced in their implementation and enforcement process.

This publication draws upon the materials and outcomes of a training course for legal professionals from selected EU Member States as well as countries on the road to EU membership, geographically located along the coast of the Adriatic sea (namely Italy, Bulgaria, Albania, Montenegro, Croatia), which was organised by the Department of Legal Studies of the University of Salento, in partnership with The Center for the Study of Democracy and Droit au Droit. The purpose of the training sessions, held in Lecce, Italy, and Sofia, Bulgaria, was to train legal professionals on the EU legislation and jurisprudence on environmental crimes in order to strengthen their knowledge and competence in the sector as well as their capacity to contribute to their effective enforcement.

It also includes a CD-ROM containing a presentation of the most relevant international treaties and conventions related to the matter as well as of the comprehensive legal framework established by the EU to ensure the implementation of its environmental protection policy.

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For more information and recent updates (including case studies and relevant domestic legislation in the target countries) on the Project please visit <http://www.judt.unisalento.it/>.

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1. Introduction

Over the last decades environmental protection has gained considerable attention at the international level and has become one of the highest priority areas for EU policy making. Critically, efforts at the EU level have also been made to ensure successful implementation of EU environmental policies, by ensuring that infringements are subject to effective sanctions, including, in serious cases, criminal sanctions. As such, environmental crimes can be broadly defined as acts or conducts that breach environmental legislation and cause significant harm or risk to the environment and human health for which criminal sanctions can be proscribed. The most known areas of environmental crime are the illegal emission or discharge of substances into air, water or soil, the illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste.

Very often, environmental crimes have a cross-border nature, allow for very high profits for perpetrators and relatively low risks of detection. For instance, most of the 2.1 million tons of oil discharged into the sea each year goes undetected. According to the United Nations Environmental Programme (UNEP), the worldwide turnover of organized green crime is estimated at \$31 billion annually.

Finally, and despite the numerous past and ongoing efforts at the national and supranational level, environmental justice remains a relatively new field that does not always receive sufficient and adequate institutional recognition and judges are often unfamiliar with its concepts or technicalities.

The present corpus of international environmental obligations – in conventions and multilateral environmental agreements (MEAs) passed since the Second World War – is very rich but also fractured and often overlapping. Most of these international treaties are in force in EU Member States territories. A brief analysis devoted to the international principles of environmental marine protection and the law of the sea, with a specific focus on the strict shipping regulation established by MARPOL and UNCLOS Conventions, is therefore necessary before considering the EU legal framework in the field. In this context, particular attention should be devoted to the new perspectives or frontiers in terms of EU competence in criminal matters that have emerged after the Lisbon Treaty, as well as to the successive adoption of regulations and directives to give substantive effect to the EU competence on environmental protection.

Criminal law and procedural criminal law are generally deemed to be basic segments of State's sovereignty. The existing difficulties or hurdles in transposing the EU Directives and international law into national law underline the need of harmonisation between potentially overlapping international, EU and domestic criminal and procedural provisions, especially in the case of transboundary criminal offences like the marine pollution ones. General environmental standards on marine pollution are enacted, respectively, by international organizations (like the United Nations, and more specifically the International Maritime Organization (IMO)), the EU and single States. Consequently, coherence

among these various sources of law has to be found when a Court is considering a legal case.

As highlighted in the final chapter, cases like Erika and Prestige put in evidence the complexities and the difficulties faced at the various stages of judicial proceedings (investigations, trial debates and Courts decisions), stressing that problems arising from a lack of legal harmonisation and in the development of a common definition of pollution crime and penalties are still persistent.

2. Defining environmental maritime crime

It is now well known that the Earth has limited capacities to absorb human waste. In the late 1960s and early 1970s many scholars and thinkers observed that continual economic growth was causing environmental decline, and argued that it could not be sustained forever. The raising awareness of environmental offences as a serious and growing global problem with devastating effects on the environment and human health spurred the international community to take the lead in adopting relevant regulations.

There are six general environmental principles that have been incorporated at the supranational level (into international treaties and EU legislation) as well as in national laws: the sustainability principle; the polluter pays principle; the precautionary principle; the equity principle; human rights principles and the participation principle¹.

By their very nature, environmental problems tend not to stop at national borders and pollution created in one country often causes problems far away. The pollution of the seas provides a critical example of this spatial dimension as a specific characteristic of environmental issues and challenges.

While ship-source marine pollution has an international dimension, criminal law, instead, remains primarily a national prerogative. This situation raises problems with other state's sovereignty and underlines the need for a major harmonisation of the provisions contained in the variety of international, EU and Member states instruments and legislations.

Another challenging issue is related to the definition of "environmental crime" and more specifically of "maritime crime". It must be stressed that, even in the absence of a comprehensive definition of "environmental crime"², some of its main characteristics can however easily be defined.

First of all, an environmental crime is a violation of environmental laws that are put into place to protect the environment. In this context, the crime includes all illegal acts that directly cause environmental harm. Such offences are subject to effective sanctions, including, in serious cases, criminal sanctions.

Although international bodies³ have identified some specific crimes that come under the environmental crimes category⁴, the list is not exhaustive, also due to the fact that illegal acts and forms of environmental harm can be multiple and variegated.

¹ Birnie-Boyle, *International Law and the Environment*, Oxford, 1992, pp. 454-456. ¹ Further information on these principles are available in the CD-Rom included in this handbook.

² See Mary Clifford (edited by), *Environmental Crime: Enforcement, Policy and Social Responsibility*, Aspen publishers, Maryland, 1998, pp 1- 25.

³ Such as the UN Interregional Crime and Justice Research Institute, G8, Interpol, EU, and UN Environment Programme.

⁴ These include: Dumping industrial wastes into water bodies, and illicit trade in hazardous waste in contravention of the 1989 Basel Convention on the Control of Trans boundary Movement of Hazardous Wastes and Other Wastes and their Disposal; Unreported, un-

As previously mentioned, marine pollution offers a critical example of the spatial dimension inherent to environmental issues.

For the purpose of defining “maritime crime”, we can determine that it consists in a series of actions or malpractices which harmfully modify the natural equilibrium of the sea and of its wildlife and comprises all those crimes that can cause variation of Flora and Fauna in the surrounding environment⁵.

Human activities have an increasing effect in changing marine biodiversity and ecosystems, especially in coastal areas. Thus, the importance of collecting evidence of environmental marine crime becomes fundamental to prove that the crime itself has been caused by human actions. As human impacts rarely act in isolation, methods of analysis of human impacts on marine ecosystems have to rely on the use of multiple analytical approaches.

There are some main issues at the basis of an investigation. If an altered status is detected, the question is: was it always like that? And if not, who might be responsible for this change? During the investigation process, it is therefore necessary to assess and compare the quality of the environment before the impact of the action and the quality of the environment after its impact.

Leaving aside the problems related to the collection of evidence inherent to the investigative phase, we must assume that some of the major characteristics of environmental (marine) crimes are as follows:

- It consists in a conduct harmful to the environment for which criminal sanctions can be prescribed;
- It causes considerable damage to the environment and human health and is particularly difficult to tackle;
- It is often likely linked to organized crime because of the high profits involved;
- The effects of environmental crime are of an increasingly cross-border nature (the so called spatial dimension).

This last characteristic has led to the conclusion that action for preventing environmental (including marine) crime was needed not only at the national level but also at the European and international level.

regulated, and illegal fishing in contravention to controls imposed by various regional fisheries management organizations; Buying and selling endangered species in contravention to the Convention on International Trade in Endangered Species of Fauna and Flora (CITES); Smuggling of Ozone depleting substances (ODS) in contravention to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; Illegal logging and trade in stolen timber in violation of the wildlife laws.

⁵ Main forms of this kind of crime are: Ship discharging sewage or oil; Fishing; Armament residue; Power Plant heat exchangers; Factories fluid residuals; Cities sewage discharges.

3. International legal framework tackling environmental maritime crimes

After the Second World War, the concerns of coastal states about increasing ship-source marine pollution and oil spills started to grow. Oil pollution in the ocean comes overwhelmingly from shipping activity and offshore oil production, while sea-bed activities for oil exploration and production constitute a relatively small part of the pollution of marine environment with oil. Some of the incidents with tankers over the past decades clearly demonstrated that oil spills in an environmentally or economically sensitive area could cause irreparable damage.

In addition to national laws and regulations, numerous measures taken at the international level led to the development of a comprehensive regulatory regime on prevention of marine oil pollution (particularly oil spills). Two of the main international instruments that deal with marine pollution from vessels are the MARPOL and the UNCLOS conventions.

3.1. MARPOL Convention

On 18 March 1967 in the English Channel the accident with the oil supertanker “Torrey Canyon” occurred. The grounding of the vessel was caused by human error. The entire cargo of the vessel - 120 000 tons of crude oil – was spilt. Around 15 000 sea birds died because of the spill. Damage claims in Great Britain amounted to GBP 6 million and to FRF 40 million in France. This incident was the first major oil pollution incident. It also demonstrated that there was no internationally agreed means of responding to accidents that had environmental implications. The regulation of compensation to be paid also did not exist on the international level.

The Torrey Canyon spill accelerated negotiations about the need to respond, leading to the adoption in 1973 of the International Convention for the Prevention of Pollution from Ships (MARPOL), at the International Maritime Organization⁶ to cover pollution by oil, chemicals, harmful substances in packaged form, sewage and garbage. Tanker accidents which took place in 1977/78 led the Inter-Governmental Maritime Consultative Organization to convene an International Conference on Tanker Safety and Pollution Prevention (TSPP Conference) in February 1978. This conference adopted the MARPOL Protocol of 1978 in order to speed up the adoption of the MARPOL convention. This 1978 Protocol is also known as the Tanker Safety and Pollution Protocol. The combined instrument is referred to as the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), and it entered into force on 2 October 1983 (Annexes I and II). Later further Annexes (III-VI) were adopted to this document.

⁶ IMO – the International Maritime Organization – is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships. For more information visit the official web site at <http://www.imo.org/>.

MARPOL 73/78 undeniably constitutes the main international instrument designed for the prevention of marine environment pollution by ships from operational or accidental causes. The main objective of the Convention is to eliminate intentional pollution and to reduce or minimize accidental pollution from ships but also to create an environmental enforcement regime which balances conflicting jurisdictional claims made by flag States and coastal States⁷.

The scope of the MARPOL Convention is the prohibition of all discharges (of substances regulated in Annexes⁸) except where certain conditions are met. Standards and levels of permitted discharges are set in Regulation No. 10. It introduces the concept of “special areas” which are considered to be highly vulnerable to pollution by oil. Therefore, oil discharges within them have been completely prohibited with minor and well defined exceptions.

To be part of the MARPOL Convention⁹, the State must also accept its Annexes I and II (which are mandatory), while adoption of the other four Annexes is optional¹⁰. Once ratified, in order to implement the international convention, the State must adopt specific domestic legislation. It is foreseen that the MARPOL Annexes can be amended through the ‘tacit acceptance’ process¹¹.

All ships flagged under State party countries are subject to the MARPOL requirements¹² and the responsibility for certifying the ship’s compliance with MARPOL’s standards is of the flag State (i.e. where the vessel is registered). This means that, under the enforcement regime foreseen by this Convention, flag States are primarily responsible for enforcing its provisions.

As stated in article 3 of the Convention, MARPOL provisions apply not only to ships entitled to fly the flag of a State party to the Convention but also to ships which operate under the authority of this latter, even if they are not entitled to fly its flag. Pursuant to the provisions of Part XII of the later adopted UNCLOS Convention, MARPOL also applies to ships operating inside the Exclusive Economic Zone (EEZ) of a State party to MARPOL.

⁷ Griffin, Andrew (1994) “MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?”, *Indiana Journal of Global Legal Studies*: Vol. 1: Iss. 2, Article 10, at <http://www.repository.law.indiana.edu/ijgls/vol1/iss2/10>.

⁸ - Annex I deals with regulations for the prevention of pollution by oil ;
- Annex II details with noxious liquid substances carried in bulk and their discharge criteria ;
- Annex III deals with the prevention of pollution by harmful substances carried by sea in packaged form. It contains general requirements for issuing standards on packing, marking, labeling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances;
- Annex IV contains requirements to control pollution of the sea by sewage;
- Annex V deals with of the disposal of different types of garbage, including plastic;
- Annex VI sets limits on sulfur oxide, nitrogen oxide, and other emissions from marine vessel operations and deals with the prevention of air pollution from ships.

⁹ Its entry into force requires “that States which constitute not less than 50 per cent of the world’s merchant shipping, have become parties to it in accordance with article 13” (Article 15 of the MARPOL Convention 1973 and Article 5 of the 1978 Protocol).

¹⁰ Article 14 of the MARPOL Convention (1973) and Article 2 of the 1978 Protocol.

¹¹ Article 16 of the MARPOL Convention.

¹² Claudia Copeland, “Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues,” CRS Report for Congress, July 2008, p. 8 at <http://www.earth-forum.com/NLE/CRSreports/08Jun/RL32450.pdf>.

MARPOL also prescribes a set of technical standards for the vessels. The responsibility to control if the ships meet these technical standards belongs to the flag State¹³. In addition to the flag States, port States have some authority in order to monitor ships' compliance with the MARPOL standards. If the vessel carries out a certificate by its flag State, the authority of the port State is limited: it must honor the certificate of the flag State¹⁴.

MARPOL requires all States parties to cooperate in detecting ship violations and to monitor vessel discharges. According to MARPOL provisions, if a State has collected evidence of a MARPOL 73/78 violation, it must forward this proof to the flag State responsible for the deviant vessel¹⁵. Thus, the flag State is obliged to carry out a relevant investigation and then to initiate a legal proceeding to judge the matter.

In case of punitive measures to be adopted, the flag State must impose penalties that are *“adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur”*, according to the MARPOL's criminal law regime.

Scholars¹⁶ underline that two of the main provisions of MARPOL directly connected with such criminal law regime are: Article 4 and Regulation 11 of Annex I (together with corresponding rules in other Annexes).

According to these provisions, any violation of the requirements of MARPOL shall be prohibited and sanctions shall be established under the law of the Administration of the ship concerned [i.e. flag State] wherever the violation occurs.

While annexes 1 and 2 of MARPOL prohibit some types of discharges especially in the so-called “special areas” (Annex 1) and within the territory of 12 miles of the nearest land (Annex II), as foreseen in Reg. 4 and Reg. 11 of Annex I, there are three cases where prohibited pollution can be «excused»:

- discharges necessary for securing the safety of the ship or the saving of life at sea;
- discharges (approved by the flag State) for the purposes of combating specific pollution incidents¹⁷;
- discharges resulting from damage to the ship or its equipment¹⁸.

Undeniably, with the MARPOL Convention, the whole issue of marine pollution was addressed for the first time. As the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes, this document serves as a kind of “environmental code” for the shipping industry. Furthermore, if earlier anti-pollution conventions

¹³ Annex I of the MARPOL Convention.

¹⁴ The port state can go beyond the flag state certificate only in the case foreseen by Art V (2) of Annex I.

¹⁵ Art. VI (3).

¹⁶ Alla Pozdnakova, “Criminal Jurisdiction Over Perpetrators of Ship Source Pollution: International Law, State Practice and EU Harmonization”, Martinus Nijhoff Publishers, University of Oslo, 2013.

¹⁷ It must be noted that such discharge shall be subject to the any Government in whose jurisdiction it is contemplated the discharge will occur (MARPOL Convention, Annex 1, Regulation no. 3).

¹⁸ If all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purposes of preventing/minimizing the discharge; with exception of the case the owner or the master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.

had been limited to pollution by oil, MARPOL aimed at all kinds of sea-borne pollution: oil, chemicals, sewage, garbage, and other harmful materials. In order to maintain its impact in light of constantly developing technical innovations, the convention is being updated by amendments. However, the implementation of its rules when transposed into national law put in evidence discrepancies, especially in relation to penalties which differ significantly among EU member States.

3.2. UNCLOS jurisdictional rule system

Another comprehensive document for the different aspects of ocean matters including marine environment protection is the United Nations Convention on the Law of the Sea (UNCLOS) adopted on 10 December 1982 at Montego Bay (and entered into force on 16 November 1994).

While MARPOL lays down international rules and standards for the prevention of pollution from ships, UNCLOS sets forth international rules of jurisdiction applicable to ship-source pollution.

Jurisdictional rights and responsibilities of States are defined by the 1982 U.N. Convention on the Law of the Sea (the Convention or UNCLOS III¹⁹). Comprised of 320 articles and 9 annexes addressing a large number of topics (including pollution of the sea), the treaty represents the codification of customary international law and its progressive development. One of the primary purposes of UNCLOS III is to regulate all aspects of resources of the sea, contributing to create a stable regime for the world's oceans.

Undoubtedly, on one side, UNCLOS III does provide a general framework for the development and implementation of marine environmental standards and, on the other, it sets forth the duties and jurisdiction of States with respect to each source of marine pollution. As such the UNCLOS III provisions on vessel-source pollution have become norms of customary international law²⁰.

The Convention proclaims general obligation of States to protect the marine and coastal environment and its resources (Art. 192), requiring them to establish, prescribe, and enforce vessel-source pollution²¹ rules and standards as well as to cooperate among themselves to that end, either directly or through the "competent international organization" (i.e. the IMO).

Furthermore, UNCLOS sets forth minimum obligations for flag States to prescribe and enforce vessel-source pollution standards and places limits on the jurisdiction of coastal and port States.

More specifically, within the UNCLOS III provisions, coastal States are empowered to enforce their national standards and anti-pollution measures within their territorial sea and within their EEZ.

¹⁹ On 1982 the "constitution for the seas" UNCLOS III was adopted and came into force on 16 November 1994, one year after Guyana became the 60th state to adhere to it. Full text of the UNCLOS III Convention at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

²⁰ Daniel Bodansky, "Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond", HeinOnline – 18, Ecology L.Q. 719 1991, p. 723.

²¹ There are six main sources of ocean pollution addressed in the Convention: land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere.

UNCLOS lays down two specific competencies. In cases of marine pollution from dumping land-based sources or seabed activities subject to national jurisdiction²², coastal States are allowed to control, prevent and reduce pollution by applying national jurisdiction rules. The second category of cases taken into consideration regards marine pollution from foreign vessels²³: coastal States can exercise jurisdiction only for the enforcement of laws and regulations adopted in accordance with the Convention or for “generally accepted international rules and standards”²⁴. Coastal State jurisdiction is also defined in terms of different zones²⁵. In case of vessel-source pollution, the coastal State jurisdiction depends on the location of the vessel at the time of the pollution²⁶.

Nevertheless, the duty to enforce the rules adopted for the control of marine pollution from vessels, irrespective of where a violation occurs, falls on the flag State²⁷ whose jurisdiction primacy has been preserved by the UNCLOS III provisions.

For the port States²⁸, it is foreseen that, as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals, the port States can enforce any type of international rules or national regulations adopted in accordance with the Convention or other applicable international rules.

Compared to prior customary norms, the UNCLOS jurisdictional rules expand the powers of coastal and port States but States’ jurisdictional competence remains subject to substantial restrictions.

The implementation of the various kinds of vessel-source pollution standards as described by the Convention involves the exercise of three types of jurisdiction: jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to adjudicate²⁹. Although the rules concerning the different forms of jurisdiction are set in part XII of the Convention, the Convention does not draw a clear distinction between enforcement and adjudicative jurisdictions. Furthermore, other ambiguities are also evident in some of the UNCLOS provisions³⁰.

²² Part XII, Articles 208 – 210.

²³ Part XII, Article 211.

²⁴ Such rules and standards, many of which are already in place, are adopted through the competent international organization, namely the International Maritime Organization (IMO).

²⁵ Oceans-internal waters, the territorial sea, the contiguous zone, the EEZ.

²⁶ In case of internal waters a coastal State is sovereign and has plenary prescriptive and enforcement authority, subject only to restrictions accepted by treaty; in case of territorial sea the UNCLOS III clarifies but does not change the rules designed by the 1958 Territorial Sea Convention. On the one hand the coastal state is sovereign, on the other its authority is circumscribed by the interest of maritime states in free navigation. In addition UNCLOS III gives some more specific competencies like the one foreseen by art. 220.

²⁷ United Nations – Division for Oceans Affairs and Law of the Sea, The UN Convention on the Law of the Sea (A Historic Perspective), at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Menu.

²⁸ Within the UNCLOS III the port State jurisdiction has been expanded, for the first time port states are given authority over pollution incidents occurring on the high seas or in another state’s coastal waters. For more see Article 218.

²⁹ Bodansky specifies in its work that “Prescriptive jurisdiction is jurisdiction to mandate a vessel’s compliance with particular pollution standards. Enforcement jurisdiction is jurisdiction to prevent or punish violations of those standards, for example, by investigating the offense, detaining the boat, or arresting, prosecuting, and sanctioning the offender. Adjudicative jurisdiction is the power of a court or administrative tribunal to hear a case against a vessel or person”. Daniel Bodansky, *op. cit.*, p. 731.

³⁰ This is the situation of the provisions contained in article 21 in relation to the ones of article 211. For an analytic vision of the ambiguities contained in UNCLOS III see Daniel Bodansky, *op. cit.*, p. 764 – 767.

This is due to the fact that UNCLOS III serves as a “framework convention”, which does not contain detailed rules but only general provisions for the protection of the marine environment. These rules shall be implemented by means of the further regulations of international law. In other words, it sets off the basic scope but then leaves to the States parties or to other organizations, such as the International Maritime Organisation (IMO), the duty to balance the different interests involved. An example of such a situation may be given by the need to decide how to allocate criminal jurisdiction between two or more coastal States affected by the same pollution violation: UNCLOS does not address such situations in any detail.

Consequently, although UNCLOS constitutes a further step in the protection of marine environment from pollution, there is still much to be done, especially in some areas where the UNCLOS provisions are not clear. Provisions like the ones of Articles 210 and 220 may be used more incisively but in order to achieve this, more clarification of international law is necessary and more research on States practices is required.

As a conclusion, we can note that large scale maritime catastrophes (such as the “Torrey Canyon” (1967), “Amoco Cadiz” (1978), “Exxon Valdez” (1987), “Erika” (1999) accidents) served as a dramatic catalyst for the adoption of new safety and anti-pollution rules. Special attention was thus paid to the regulation of marine oil pollution by shipping, so the existing rules cover mostly vessel-source pollution. However, the elaborated rules need to be enforced and complied with. Closer co-operation and sharing of informational resources within the international community is urgently required, especially in the cases of the ratification of conventions and their amendments.

4. EU competence in criminal law matters: the new perspectives after the Lisbon Treaty

Since the creation of the European Community, Member States have transferred significant portions of their competences from the national to the Community level, in order to foster harmonisation of principles and rules in certain fields, implicitly recognizing the added value of common policies in better achieving the goals pursued in disarray by individual national policies. Providing citizens with a high level of safety within an area of freedom, security and justice is one of the EU's main goals, specifically in the areas of asylum, migration and other related issues of the *acquis communautaire*³¹.

Nevertheless, States still remain suspicious of transferring criminal matters to the EU. Criminal matters have always been perceived as a symbol of national sovereignty, influenced by traditions and values of national culture, thereby constituting a monopoly area which States are reluctant to lose. Such a perception is inherent to fundamental values of criminal law like: the principle of legality (*nullum crimen sine lege parlamentaria*) and the constitutional consistency of criminal offences³². Moreover, differences in national criminal laws and procedures (methods of investigation, rules of evidence and modes of trial) also hampered the development of European common area of criminal justice, be it in procedural or substantive terms.

On the other hand, the major principles characterizing the EU law are: primacy³³, direct effect³⁴, loyal cooperation (including obligation to conform interpretation of national law)³⁵ that together with the infringement procedure³⁶ form some of the peculiarities that distinguish the EU law from the international law.

Although the Rome Treaty establishing the European Economic Community (the EEC Treaty) did not mention any express attribution of competences in the field of criminal law or procedure, the development of new forms of transnational criminality (terrorism, drug trafficking, environmental offenses) strengthened the awareness that the absence of instruments for a common European criminal policy had negative effects on the European integration process.

³¹ Luigi Melica, "European Constitutional Development", Edizione Scientifiche Italiane, Napoli, 2012; Andre Klip (ed.), "Substantive Criminal Law of the European Union", Maklu Publishers, Portland, 2011; Andrea Biondi, Piet Eeckhout, Stefany Replay (edited by), "EU Law After Lisbon", Oxford University Press, New York, 2012; Paul Craig, "The Lisbon Treaty: Law, Politics and Treaty Reform", Oxford University Press, Oxford - New York, 2010; Samueli Miettinen, "Criminal Law and Policy in the European Union", Routledge, New York, 2013.

³² As they are provided for by the law, fall under the scrutiny of the Constitutional Court(s) that means "consistency with fundamental rights stated under Constitution(s)".

³³ CoJEC, Judgment of 15 July 1964, Flaminio Costa v. ENEL, Case 6-64.

³⁴ CoJEC, Judgment of 5 February 1963, Van Gend & Loos, Case 26-62.

³⁵ Art. 10 TEC (now art. 4.3 TEU).

³⁶ Arts. 226 ss. TEC; now arts. 258 ss. TEU.

EU competence in criminal matters was established by the Treaty of Maastricht on European Union (TEU), signed on 7 February 1992 and entered into force on 1 November 1993. The extent of the European Union's legislative competence in relation to criminal law and procedure was generally considered to be limited to Title VI of TEU (Provisions on Police and Judicial Cooperation in Criminal Matters (JHA), commonly referred to as the "Third Pillar"), which was further reformed by the Treaty of Amsterdam - signed on 2 October 1997, and entered into force on 1 May 1999 - by laying down more precise objectives and more effective instruments³⁷. The new Title VI underlined the importance of fighting organised crime and made provision for coordinating the national rules on offences and penalties applicable to organised crime, terrorism and drug trafficking. Although several initiatives in the field of JHA³⁸ were taken, the EU competence in criminal matters as foreseen by the third pillar under the Treaty of Maastricht remained limited, leaving a marginal and merely consultative role to the European Parliament and restricted powers to the European Court of Justice (ECJ).

Before the first major leap forward marked by the Lisbon Treaty, two milestone judgments issued by the European Court of Justice (ECJ)³⁹ contributed to the recognition EU competence in the field of criminal law. The ECJ judgment handed down on 13 September 2005 in Case C-176/03 *Commission v Council* is particularly relevant as it relates to environmental protection. In Case C-176/03, the Court struck down a Council Framework Decision (2003/80/JHA of 27 January 2003) on criminal sanctions applying to environmental protection which had been adopted on a Third Pillar legal base. While the ECJ confirmed that, as a general rule, criminal law and criminal procedures are matters which do not fall within the scope of the EC Treaty, that did 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"⁴⁰. That the Community has competence, albeit possibly quite limited, to require Member States to impose criminal sanctions came as a surprise to many. The national model was customary until this landmark ECJ judgment. Previously, member states had autonomously determined the penalties for violations of EU law laid down in directives and transposed into national legislation.

On one hand, the ECJ Judgment of 13 September 2005 clarifies the distribution of powers between the First and Third Pillars as regards provisions of criminal law even though, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (point 16). On the other, it recognizes that in order to ensure the full effectiveness of EU environmental protection rules, fundamental measures to combat serious infringements are required. Although, in

³⁷ Articles 29 and 31 TEU.

³⁸ Respectively on "combating terrorism" (2002/475/JHA); on the "European arrest warrant and the surrender procedures between Member States" (2002/584/JHA); on "combating trafficking in human beings" (2002/629/JHA); on "combating the sexual exploitation of children and child pornography" (2004/68/JHA); on laying down "minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking" (2004/757/JHA); on "attacks against information systems" (2005/222/JHA) and on the "fight against organized crime" (2008/841/JHA).

³⁹ Court of Justice of the European Communities (commonly known as the "ECJ"). CoJEC 13 September 2005, *Commission v. Council*, C-176-03 and CoJEC 23 October 2007, *Commission v. Council*, C-440-05.

⁴⁰ Judgment of 13 September 2005, at para 48

accordance with the principle of subsidiarity, Member States remain the more appropriate level to introduce criminal penalties, in some cases it is necessary to direct their action to achieve a partial harmonisation of national laws, by stipulating explicitly (1) the type of behaviour which constitutes a criminal offence and/or (2) the type of penalties to be applied and/or (3) other criminal-law measures appropriate to the area concerned⁴¹.

The Treaty of Lisbon amending the “Treaty on European Union” and the “Treaty establishing the European Community” was signed on 13 December 2007 and it entered into force on 1 December 2009. With the formal scrapping of the pillar division, the Lisbon Treaty provided for a new legal framework for criminal legislation, which corrected the deficiencies of the former system and opened new frontiers for Community action in the field, including the possibility to foster harmonisation of offences and sanctions.

As stated in Art. 67 of TFEU⁴², “the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”. The need for harmonisation in order to achieve the prerogatives referred to Article 67 TFEU is more evident within the provisions of Title V, Chapter 4 (Judicial cooperation in criminal matters) and art. 83 (directives of criminal law harmonisation) which contains minimum rules with regard to the definition of criminal offenses and sanctions.

The Lisbon Treaty grants the EU competence both in the field of criminal procedure and substantive criminal law. While it is not the role of the EU to replace national criminal codes, EU criminal law legislation can, however, add, within the limits of EU competence, important value to the existing national criminal law systems.

The EU can adopt, under Article 83 of TFEU, Directives providing for minimum rules⁴³ regarding the definition of criminal offences if they are essential for ensuring the effectiveness of a harmonised EU policy. Such minimum rules can be adopted for the so-called ‘Euro crimes’⁴⁴, a list of areas of crimes that merit, by definition, an EU approach due to their particularly serious nature and their cross-border dimension, according to the Treaty itself.

The abolition of the former ‘third pillar’ has led to the harmonisation of legislative instruments. Instead of framework decisions and conventions, the EU now adopts only the standard Community instruments (regulations, directives and decisions). Member States are still able to propose legislative measures, but now an initiative requires the support of a quarter of the Member States.

⁴¹ See COM(2005)583 final: 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* at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0583en01.pdf.

⁴² The Lisbon Treaty amends the Maastricht Treaty (also known as the Treaty on European Union) and the Treaty establishing the European Community (the Treaty of Rome was renamed as such after the Maastricht Treaty). In this process, the Rome Treaty was renamed to the Treaty on the Functioning of the European Union (TFEU).

⁴³ Rules setting out which behaviour is considered to constitute a criminal act and which type and level of sanctions are applicable for such acts.

⁴⁴ The Euro crimes refer to terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. Additional “Euro crimes” can only be defined by the Council acting unanimously, with the consent of the European Parliament.

The Lisbon Treaty essentially completed the Integration of JHA into the EU decision-making structure, generalising (with a few exceptions) the Community method (the use of the ordinary legislative procedure⁴⁵, which includes co-decision with the Parliament and qualified majority in Council)⁴⁶, on the vast majority of crime and policing legislation. It also provided for the recognition of a comprehensive judicial control by the European Court of Justice with regard to the enforcement of EU legislation in the JHA field.

In conclusion, the Lisbon Treaty enlarged the frontiers of EU competence to foster harmonisation both in the field of criminal procedure and substantive criminal law⁴⁷. While it is not the role of the EU to replace national criminal codes, EU criminal law legislation can, however, add, within the limits of EU competence, important value to the existing national criminal law systems.

Last but not least, under the Lisbon Treaty, the protection and improvement of the environment have also become an explicit objective of the EU. Undoubtedly the legislative activity of the EU in this area had already been one of the most extensive⁴⁸. Having said that, for the first time, the Treaty contains the objective of “improvement of the quality of the environment”, rather than just preservation of the environment. In addition, the Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon treaty, recognises “a high level of environmental protection” as a fundamental right of EU citizens.

Consequently, secondary European law, through the adoption of regulations and directives, has been used to give substantive effect to the Treaty competence on environmental protection. In particular, the entry into force of the Lisbon Treaty has prompted a review of EU law relevant to the shipping industry, through Directive 2008/99/EC on the protection of the environment through criminal law, and Directive 123/2009, amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

⁴⁵ Art. 294 TFEU.

⁴⁶ In case of Member States concerns about the impact of a draft Directive on fundamental aspects of their criminal justice systems, Art. 83.3 allows them to pull out a so-called “emergency brake” in order to suspend the ordinary legislative procedure and refer the draft to the European Council.

⁴⁷ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, was the first directive of criminal law harmonisation to be adopted. It was followed by Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography and in the same direction goes the proposal for a Directive on criminal sanctions for insider dealing and market manipulation, COM (2011) 654 final.

⁴⁸ Some of the most important steps made in this direction just to name a few are: the 1987 Single European Act was the first treaty to give a legal basis to the protection of the environment as an explicit competence within the EU; the 1992 Treaty on European Union included an express reference to the precautionary principle; The Council of Europe Convention on the protection of the environment through criminal law (PECL Convention) ready for signature on 4 November 1998, but has not yet entered into force because of little State support so far; In October 1999 the Tampere European Council established political guidelines and priorities specifically mentioned environmental crimes.

5. The European Environmental Crime Directives

After lengthy institutional discussions and following the two aforementioned judgments of the European Court of Justice on the extent of the Community's competence in the area of criminal law, on 19 November 2008 the European Union adopted the Directive 2008/99/EC on the protection of the environment through criminal law. Studies carried out by the Commission showed that there were wide disparities between the Member States in developing a definition of environmental crime, meaning that the same offences were sanctioned with different penalties and often times the penalties were insufficient. That is the reason why the Commission proposed a directive which requires the Member States to provide for criminal sanctions for the most serious environmental offences, because only this type of measures seems adequate and dissuasive enough, to achieve proper implementation of environmental law.

One year later it adopted Directive 2009/123/EC of 21 October 2009, amending Directive 2005/35/EC, on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences.

This section aims to offer a brief overview of these two Directives which represent important steps towards a truly European environmental criminal law⁴⁹.

5.1. Directive 2008/99/EC on the protection of the environment through criminal law

The adoption of Directive 2008/99/EC on environmental crime is particularly significant because it marks a qualitative shift in the EU's approach to enforcing environmental legislation. The Directive 2008/99/EC entered into force on 26 December 2008 and had to be implemented by all EU Member States by 26 December 2010⁵⁰.

Through this Directive, for the first time, EU Member States are obliged to provide for criminal penalties in their national legislation in respect of serious infringements of certain EU laws on the protection of the environment, in accordance with the provisions contained in Art. 83, paragraph 2 and art. 174 (2) of TFUE. The type and level of criminal penalties are not specified, but as this directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment.

⁴⁹ For more information on the aim of both Directives see: Faure LL.M, Michael G., The Implementation of the Environmental Crime Directives In Europe, Ninth International Conference on Environmental Compliance and Enforcement - Brussels 2011.

⁵⁰ According to Article 8, 26, Directive 2008/99/EC.

The Directive lays down a list of unlawful activities that must be considered environmental crimes⁵¹ by all Member States, if committed intentionally or with serious negligence, and the Member States, by transposing this Directive have to attach to these existing prohibitions some criminal sanctions. Article 5 provides that Member States shall take the necessary measures to ensure that the offences referred to in articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties. The Directive also introduces specific provisions regulating liability of legal persons. According to Article 6 legal persons Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person. Furthermore, liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

The Directive sets a minimum standard of environmental protection through criminal law to be adopted by the Member States, leaving the Member States free to maintain or introduce more stringent protective measures. On the other hand it does not lay down measures concerning the procedural part of criminal law nor does it touch upon the powers of prosecutors and judges.

As mentioned, environmental offenses should be addressed through “effective, dissuasive and proportionate penalties”. This is a notion which comes from the European Court of Justice that held that even though Member States remain free in the choice of instruments for the implementation of a directive, the penalties in case of violation of implementing legislation should at least be effective, proportionate and dissuasive⁵². Member States have to implement these three notions through their own legislative provisions and therefore legal provisions are often not univocal.

⁵¹ In the text of the 2008/99 EC Directive the following activities are listed:

- the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the collection, transport, recovery or disposal of waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- any conduct which causes the significant deterioration of a habitat within a protected site;
- the production, importation, exportation, placing on the market or use of ozone-depleting substances.

⁵² ECJ 21 September 1989, Case C-68/88 (Greek Corn Case).

The main problems related to implementation of the Directive are strictly connected to the variety of its *vague* notions⁵³ whose use in criminal law might hamper the respect of the fundamental principle of *lex certa* (legal certainty).

Although the margins of interpretation of these *vague* notions might be narrowed by referring to the provisions listed in Annexes A and B of the Directive, its implementation⁵⁴ relies on transposition into national legislation. In consequence, it is up to the Member States, in the relevant implementing national legislation, to provide more precision and guidance when referring to these notions in order to satisfy the *lex certa* requirement and to provide a harmonising effect in the EU area.

However, it must be stressed that there are large differences between the criminal sanctions provided for environmental offenses among Member States. The so called “minor cases” with “negligible” impact on the environment are not considered as crimes in certain Member States criminal justice systems. This is the case of the provision contained in article 3 of the Directive that is not taken in consideration by the criminal law of some countries like Italy, Bulgaria or Montenegro.

Other problems arising from transposition of EU Directive 2008/99 can be found within the provisions contained in Article 4 that deal with the punishment of conduct committed intentionally or with at least “serious negligence”. For example, Italian environmental law and the Croatian penal code don’t specify which level of negligence is required.

Further problems can be found in the case of determination of proof where the concrete evidence of having caused damage to the environment or to human health put the judges in the position that they should prove case by case the causation link between the conduct and the effect on the environment or human health, or at least the endangerment of these interests.

In accordance with the EU enlargement and due to the conditionality criteria, compliance with the EU law on maritime pollution crimes is required also in other Adriatic Sea States (candidate or potential candidate States), like Albania, Croatia and Montenegro. In some of these States environmental offenses are punished with administrative sanctions, while in others they are punished with criminal sanctions.

In conclusion it must be noted that an integrated sanction system, founded on both punishment models aforementioned is needed: for minor cases, administrative sanctions and for significant offences, criminal sanctions, but in both cases sanctions need to be harmonised in the EU.

⁵³ For example Articles 3(c), (f) and (g) of Directive 2008/99 refers to “(non) negligible quantities or impacts” and Article 3(d) of Directive 2008/99 refers to “dangerous activities and substances”. Also vague seems to be the notion of “substantial damage” used in article 3(a), (b), (d) and (e) of Directive 2008/99.

⁵⁴ Faure, M., “Vague notions in environmental criminal law”, *Environmental Liability*, 2010, pp. 119-133 and 163-170.

5.2. Directive 2005/35 as amended by Directive 2009/123 on ship-source pollution and on the introduction of penalties for infringements

Directive 2005/35/EC entered into force on 1 October 2005 and had to be implemented by EU member states by 1 March 2007. The directive states that ship-source discharges of polluting substances constitute a criminal offence if committed with intent, recklessly or by serious negligence. The directive was supplemented by detailed rules on criminal offences and penalties set out in Council Framework Decision 2005/667/JHA, which was annulled by the European Court of Justice (ECJ) in October 2007 on the ground that it had not been adopted on the correct legal basis. To fill the resulting legal vacuum, the Directive 2005/35/EC was amended by the Directive 2009/123/EC.

Directive 2005/35 as amended by Directive 2009/123⁵⁵, contains the EU applicable requirements on ship source pollution and on the introduction of penalties, including criminal penalties for pollution offences. The text of the amending directive is similar to the annulled decision, but leaves the nature and level of penalties at the member states' discretion. The entry into force of Directive 2009/123/EC, amending Directive 2005/35/EC (the Directive), makes the system of criminal penalties mandatory⁵⁶. Its purpose and scope⁵⁷ is to incorporate international standards on ship-source pollution into EU law, underlining the need for harmonisation between international and EU relevant rules and provisions⁵⁸.

Mainly, this Directive states that EU Member States shall ensure that ship-source discharges of polluting substances, including minor discharges, into any area specified in Article 3(1) will be formally regarded as infringements, if committed with intent, recklessly or with serious negligence. Article 5 of the Directive marks the "red line" that separates infringements that constitute or not a criminal offence. Such distinction is applicable in all Member States.

The Directive does not only deal with the obligations for the Member States (port and coastal ones), in respect of the infringements caused by ships in port or in transit, but furthermore, it sets out the penalties (Article 8a) underlying that "each Member State shall take the necessary measures to ensure that offenses are punishable by effective, proportionate and dissuasive criminal penalties". Such penalties cover offences committed by natural persons and legal persons.

⁵⁵ Full text of the Directive and of its amendments at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:280:0052:0055:EN:PDF>.

⁵⁶ The Directive entered into force on 16 November 2009 and the deadline for its implementation by Member States, according to Article 2, was 16 November 2010. Deadline by which Member States had to adopt and publish the national laws and regulations transposing the provisions of the revised Directive into national law. Those national provisions shall be communicated to the Commission.

⁵⁷ Articles 1 – 3 of the 2009/123 Directive.

⁵⁸ In some cases the issues arising from such a necessity have been part of decisions by the ECJ. Some of the most important ones are:

- On 3 June 2008 the European Court of Justice delivered judgment in Case C-308/06 concerning the validity of EU Directive 2005/35/EC on Ship Source Pollution.
- The Court case law C-308/06, *Intertanko and others v Secretary of Transport UK* evidenced the relationship between EC Law and MARPOL convention and the scrutiny of the concept of "serious negligence" in the light of the principle of legality.
- Other important cases where the EU Directive has been involved are: *Dobrudja*, Bulgarian flag, pollution in French EEZ, July 2003; *Zuara*, Maltese flag, pollution in French EEZ, October 2004; *Maersk Barcelona*, Bahama flag, pollution in French EEZ, September 2005; *Full City*, Panama flag, pollution at the coast of Norway, July 2009.

The effectiveness, dissuasiveness and proportionality of “a sanction”, being a binding obligation for the Member States to be transposed in their national law, is to be assessed with regard to the whole range of measures provided by the national legislator in view of compliance with the European legislation.

The most controversial aspect of the Directive is the criminalization of the pollution caused by “serious negligence”, the meaning of which is subject to various interpretations. The case was referred to the ECJ which decided in June 2008 that the validity of the Directive cannot be assessed by reference to MARPOL or UNCLOS and it also held that “serious negligence” does not infringe the requirement of certainty in Community legislation⁵⁹.

The Directive 2005/35 EC also provided the legal basis for the creation of CleanSeaNet: a European satellite-based oil spill and vessel detection and monitoring system⁶⁰. This system is maintained by EMSA (The European Maritime Safety Agency), one of the EU’s decentralized agencies. Among other activities, the mandate of EMSA is to work with Member States in: developing technical solutions and providing technical assistance in relation to the implementation of the Directive; in actions such as tracing discharges by satellite monitoring and surveillance; publishing studies on the nature and efficiency of penalties issued by Member States and also studies on the type of proof to prove pollution and link with a suspected ship.

In accordance with art.10 of the Directive 2005/35 EC, it offers assistance to participating States in activities such as: identifying and tracing oil pollution on the sea surface; monitoring accidental pollution during emergencies; contributing to the identification of polluters.

This service is based on radar satellite images, covering all European sea areas, which are analyzed in order to detect possible oil spills on the sea surface.

Its operational use means that CleanSeaNet performs a routine monitoring of all European waters looking for illegal discharges and can effectuate: detection of possible spills; detection of vessels; identification of polluters by combining CleanSeaNet and vessel traffic information available through SafeSeaNet.

Also, CleanSeaNet supports enforcement actions by the Coastal States on site verification and follow-up or in case of inspection of suspected vessels in the next port of call. It also supports response operations in case of accidental pollution.

⁵⁹ ECJ Judgment of 3 June 2008 in Case C-308/06. “It has upheld that as the Community itself – unlike its member states - is not a party to MARPOL, it is not bound by the convention. The Court has also taken the view that although the Community is a party to UNCLOS, that convention does not establish rules intended to apply directly and immediately to individuals. As it also held that “serious negligence” does not infringe the requirement of certainty in Community legislation, the decision remains of concern to the shipping industry”. Gonciari I., An update on EU Environmental Legislation, Legal Briefing, UK P&I Club, February 2010.

⁶⁰ For further information on the system visit the official website at <http://cleanseanet.emsa.europa.eu/>.

CleanSeaNet operates like a near real time service. In case of a possible oil spill identified in national waters, the relevant country is alerted by a message and within 30 minutes of the satellite passing overhead, images are available to national contact points. Each coastal State has access to the CleanSeaNet service through a dedicated user interface, which enables them to view ordered images.

As such, one of the main objectives of the CleanSeaNet system is to assist participating States to locate and identify polluters in areas under their jurisdiction.

6. Beyond theoretical approach: learning lessons from practice cases

6.1. Erika and Prestige: untying legal and judicial knots

The framework of legislative provisions concerning the protection of marine environment from pollution is certainly a complex one: international, EU, as well as State-level legislation, need to be taken into careful account by judges and prosecutors during the investigative and decision-making phase.

Cases like Erika and Prestige demonstrate in a blatant manner that the provisions may conflict with each other and that more harmonisation and clarity is needed. Both cases also evidenced the lack or inefficiency of safety checks on vessels which were over 20 years old and sailing under a flag of convenience. Besides, the international regime is founded on the principle of channeling civil liability to a single liable party, the ownership, while sanctions should be applied to any person (owner, shipper, charterer, classification society, carrier) who causes or contributes to marine pollution. But ships are often chartered according to complex arrangements and their ownership ambiguous or unclear.

On 12 December 1999, a Maltese tanker called “Erika” sank in heavy seas off the coast of Brittany (France) while carrying approximately 30,000 tons of heavy fuel oil and broke into two: 14,000 tons of oil were spilled and more than 100 miles of Atlantic coastline were polluted. The cargo belonged to a Panama branch of the French company “Total International Ltd” (TOTAL).

The Erika sinking was followed by a lengthy legal battle, having brought about both criminal and civil claims. In 2008, the case first came before the French courts, and after the decision of a Paris-based Court of appeals in 2010, the case was finally brought to the Supreme Court of Appeal which handed down its decision on 25 September 2012.

On 19 November 2002, Prestige, an Bahamas-flagged single-hull tanker sank off the Atlantic coast of Spain spilling a huge amount of one of the most polluting types of oil into the ocean⁶¹. While the Prestige sinking caused an ecological and economic catastrophe of unprecedented proportions, difficulties in determining exactly who was responsible for the oil spill also arose from the unclear ownership of the ship. The Prestige was a Greek-operated, single-hulled oil tanker, officially registered in the Bahamas, but with a Liberian-registered single-purpose corporation as the owner. The classification society which had certified the ship was the Houston-based American Bureau of

⁶¹ Veronica Frank, Consequences of the Prestige Sinking for European and International Law, *The International Journal Of Marine And Coastal Law*, Vol 20, No 1, 2005; M. Micciché, M. and Montebello C., “La sicurezza in mare. Interrogativi urgenti e proposte dopo il caso Prestige”, *Rivista di diritto dell’economia, dei trasporti e dell’ambiente*, 2006; Arroyo, I. *Problemi giuridici relativi alla sicurezza della navigazione marittima (con particolare riferimento al caso Prestige)*, *Diritto marittimo*, 2003, 1198 ss.

Shipping (ABS). The Spanish authorities' decision to deny the distressed vessel entry to a safe harbour also raises the question of their responsibility. After a lengthy and complicated investigation, the trial against officers and merchant shipping companies over the Prestige disaster was opened on 16 October 2012, at the Galicia regional High Court, which is expected to deliver its verdict in September 2013.

In both Erika and Prestige legal cases, the development of judicial proceedings demonstrated that there were multiple "knots to be untied" in assessing: a) which jurisdiction was competent to rule the case b) who was liable or responsible; c) what types of crime had been committed (damage of protected species - property damage – ecological/environmental crimes)? These controversial "knots" illustrate in a critical manner some of the main hurdles that environmental criminal law faces in addressing ecological and economic catastrophes of similar proportions.

6.2. The Erika legal case: liability and jurisdictional challenges

The Erika legal case is symptomatic of the difficulties in assigning jurisdiction when a ship sinks outside territorial waters. By focusing on the motivations on which the different French Courts (and in particular, the French Supreme Court of Appeal) grounded their decisions, the present section aims to offer a brief but comprehensive overview of the several jurisdictional problems that judges have to address in dealing with similar cases⁶².

One of the main issues affecting the judicial proceedings (and the decisions of the various Courts involved) was to establish whether or not France had jurisdiction over the Erika oil spill case. In other words, whether or not international law was able to prevent French legislation on environmental and maritime crimes to apply and to develop⁶³.

In 2008, when the case first came before the French courts, TOTAL, Italian certification authority RINA, which found the ship to be seaworthy, the Erika's owner Giuseppe Savarese and the ship's handler Antonio Pollara were all convicted⁶⁴. In its decision handed down on 16 January 2008, the Criminal Court of First Instance of Paris⁶⁵ while recognizing the risks inherent with oceangoing vessels, found TOTAL „guilty of imprudence,“ adding that the company had been negligent in its procedures for verifying and selecting the vessel, by failing to take into account „the age of the ship“ (nearly 25 years at the time it sank), and „the discontinuity of its technical handling and maintenance.“ The Court endorsed the argument that oil companies should be held responsible for the state of the tankers they use and backed the idea of „environmental responsibility“ in such cases.

⁶² The case was complicated jurisdictionally in that the Erika was owned by a company registered in Malta whose principal shareholder, Giuseppe Savarese (one of those found guilty along with TOTAL), was an Italian living in London. TOTAL relied heavily on the fact that the Italian body responsible for ship safety, the Registro Italiano Navale (RINA) had regularly reported that the tanker was in good condition.

⁶³ Rella, A. (2009) "Le conclusioni della Corte di Giustizia sull'interpretazione della responsabilità per il caso "Erika", AP Argomenti, 2: 42.

⁶⁴ Conclusions of the Prior-Trial investigations revealed the following: ship repairs were inadequate given the deficiencies (corrosion) that affected the ship's body; SpA RINA delivered the certificates without considering these defaults; the vetting operations tasked on by TOTAL should have lead the Charterer to refuse to charter the ship. Therefore, if the different ship actors had showed more caution, the shipwreck could have been prevented. The shipwreck actors are thus sent to Trial for involuntary pollution by hydrocarbon

TOTAL had sought to argue that it could not be responsible since the Erika was sailing under the Maltese flag and, since the ship had foundered in international waters, the French courts had no jurisdiction.

Lastly, the advisory opinion provided by the Deputy Prosecutor (*Avocat Général*) also argued that part of France's Anti-Pollution Bill passed in 1983, on which the decision of the court was based, is not compatible with the international MARPOL convention that places primary liability for oil spills with ship owners rather than companies chartering the vessels. An international convention is deemed to take precedence over national legislation when the country in question has ratified that convention, and France has ratified MARPOL.

The ruling of the Court rejected this advisory opinion, confirming that France had jurisdiction over the case as well as clearly recognizing the right of environmental associations to claim compensation for damage done to the environment *per se*.

Following a request for appeal presented by the Public Prosecutor, defendants and plaintiffs, the Court of Appeal of Paris (The Court) was charged with reviewing the 2008 judgment. In its judgment handed down on 30 March 2010, the Court basically upheld the lower court judgment, except on its legal and conventional argumentation⁶⁶. The Court held the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and TOTAL criminally liable for the offence of causing pollution. It confirmed that TOTAL "had been imprudent" in implementing its vessel-vetting process for the Erika tanker, ordering the company to pay a €375,000 fine. The Court decided, however, that TOTAL could not be held responsible on civil grounds under international conventions, but confirmed the civil liability imposed on the other three parties, awarding compensation totaling €200 million to a number of civil plaintiffs, including the French state, local business co-operatives and numerous French communes (local authorities) affected by the oil spill⁶⁷.

& endangering the crew. Verdict: Every defendant is discharged on the basis of endangering the crew. Ship captain and Charterers (SELMONT and TOTAL subsidiaries) are discharged of involuntary pollution by hydrocarbon. SpA RINA, Ship owner (TEVERE), Ship manager (PANSHIP) and TOTAL (vetting operations) are sentenced for involuntary pollution by hydrocarbon.

⁶⁵ Judgment of the Tribunal de Grande Instance de Paris of 16 January 2008, 9934895010.

⁶⁶ While the decision issued by the first level jurisdiction was based on the premises that "MARPOL does not apply and the French law prevails", the Court of Appeal (second level jurisdiction) justified its position as follows: "MARPOL applies and French law complies".

⁶⁷ It should also be noted that the Erika accident had already brought about a preliminary ruling (C-188/07) from the ECJ. The Court explained that oil washed up on the shore following the accident classifies as waste under Directive 75/442/EEC on waste. The Court found that in principle, according to the "polluter pays" principle, TOTAL as the producer of the oil, based on its conduct to fail to prevent the oil spill, could also be held responsible and be ordered to finance the clearing up. Further, the Court concluded that the previous holder and ship charterer can be regarded as "previous holders" if they failed to take the appropriate measures and basically contributed to the risk of the pollution.

On 6 April 2010, TOTAL brought the case to the French Supreme Court of Appeal (*Cour de Cassation*), which handed down its decision on 25 September 2012⁶⁸. The public prosecutor's office had proposed the Court of Cassation to annul the defendants' conviction by the Court of Appeal. On the basis of relevant international treaties, his main argument was that France had no jurisdiction to prosecute oil spills occurring outside its territorial waters, which means it should have been the courts of the country where the tanker was registered (ie. Malta) that were competent to rule the case.

The Supreme Court of Appeal (SC) had to deal with three fundamental questions: (1) Can the French 1983 law (art.8) apply to the Erika case? ; (2) Are the French jurisdictions competent to rule the Erika case? ; (3) Who is guilty and to what extent?

Concerning the first issue the SC had to decide whether in accordance with the Montego bay rules⁶⁹, Article 8⁷⁰ of the French 1983 law could apply to an EEZ⁷¹ or not. According to TOTAL's argument, it was not the case as Article 8 did not include any specific reference to EEZ as well as to MARPOL provisions. In addition, the French Penal Code rules that French legislation (a few specific exceptions apart) only applies to home territory and seas. Therefore, there was no French legal basis to prosecute a foreign ship that has caused a non-intentional waste dumping pollution in an EEZ.

The SC instead argued that if MARPOL rules aim the waste dumping place, the 1983 French law applies to all pollutions that affect home waters, whatever their origins. The 1983 French law does not enforce any exemption and it opens the possibility to retain liable and therefore prosecute more actors than MARPOL. In addition, according to the SC argumentation, the French legislator considered that international law conditions to prosecute non-intentional sea pollutions were too conciliatory with actors in charge of a ship thus its intention was to deliberately not refer to MARPOL Convention.

In conclusion the SC considered Article 8 of the French 1983 law as a specific legislation prescribing an autonomous offense more severe than offenses foreseen in International Law, but in compliance with its main aims and goals⁷². The SC therefore confirmed the Court of Appeal's decision on this point.

⁶⁸ France Court of Cassation Decision of 25 September 2012, n° 10-82.938.

⁶⁹ In specific the motivation refers to: Art 56 Part V/ Art. 211 Part IX/ ART. 221 Part IX; ART. 4/ Rule 9 and 11 of Appendix I of the Montego Bay Convention.

⁷⁰ Article 8 of the 1983 French law states "Carelessness, negligence & non-observance of legislation rules that have led to a sea damage (as defined by the Brussels Conv.) are punished in the person of the Ship Captain, or the person in charge of the Ship's conduct or exploitation on board, if this sea damage has lead to the pollution of home waters, and if these people have provoked the accident or didn't take the necessary measures to avoid it. Are also punished in the same conditions, the Ship owner, the Ship manager and more generally all people that have a control or leadership power on the Ship".

⁷¹ Although the ship went down in International Waters, it sank within France's Exclusive Economic Zone which extends 200 nautical miles from the French coast.

⁷² Such conclusion was achieved basing on the following considerations: 1983 French law (art. 8) clearly does not transpose MARPOL Rules and related offenses. No matter the fact that French law doesn't explicitly say it applies to damages in EEZ. By choosing an offense that builds up as soon as home waters are polluted, whatever the origins of the damage, it intends to protect sea environment according to MONTEGO BAY Rules.

The second issue to be solved was related to the competent ruling jurisdiction in the Erika case: the coastal State (France) or the flag State (Malta)?

The SC found the French jurisdictions as competent to rule the case, on the basis of the place where the “serious involuntary damages have been observed”. The main provisions which came into play in this decision are Articles 220⁷³ (coastal State) and 228⁷⁴ (flag State) of the Montego Bay Convention, while also taking into account MARPOL rules concerning competent jurisdictions.

On one hand, pursuant to the Montego Bay Convention rules, French criminal jurisdictions are competent to prosecute pollution offenses that occur beyond the French territory and which have caused serious damages to its maritime environment. On the other hand, following MARPOL rules, Malta criminal jurisdictions (flag state) were uppermost competent to rule the case.

As a matter of fact, in the Erika case, Malta having not started any prosecutorial action on the basis of MARPOL rules, French criminal jurisdictions were therefore competent, as foreseen by the Montego Bay Convention rules.

In conclusion, France was held competent ultimately because Malta jurisdictions stayed inactive. If this had not been the case, France would have been competent only after Malta ruled the case⁷⁵.

The third issue the SC had to deal with concerned the definition of criminal and civil responsibilities. Who was guilty and to what extent: the owner of the ship, the ship manager, the charter company (Total SA)?

In its 2010 judgment, the Court of Appeal of Paris held TOTAL only guilty of a “negligence” fault, without sufficient awareness of a possible damaging pollution, because it did not have all the information necessary to oppose the ship’s departure. Thus the company was not found guilty in a way that led to engage its civil responsibility.

⁷³ Montego Bay, Art. 220, § 6 : coastal State can prosecute pollution offenses that occur beyond its territory and which have caused serious damages (because this State is globally competent to protect its maritime environment, on the basis of Montego Bay, Art. 56, §1),

⁷⁴ Montego Bay, Art. 228: if coastal State prosecuted on the basis of Art. 220 §6, it must suspend its action if the ship’s Flag State has also prosecuted on the basis of MARPOL rules concerning competent jurisdictions.

⁷⁵ French 1983 law has been changed by a 2004 law (March 9th) which now rules that 1983 law also applies to offenses that take place in the French EEZ. According to the 2004 law, French criminal jurisdictions can also be competent on the basis of a waste dumping initial place analysis, if the ship’s flag’s State does not prosecute. Even if the legal basis for French jurisdictions competence is more solid, there still remains the problem of MARPOL rules giving a priority to ship’s Flag State jurisdictions.

The SC instead held that the vetting process⁷⁶ was sufficient to conclude that TOTAL did have (or could have had) all the information necessary to oppose the ship's departure. Therefore, the fault is "a reckless negligence" (*faute téméraire*), in other words where an awareness of possible damages makes it possible to equate to an intentional malfeasance. TOTAL's responsibility was, thus, increased, and paved the way to sentence the company also on civil grounds. The court upheld the fine of 375,000 euros – the maximum possible – and ordered to pay 200 million euros in compensation for the damage caused⁷⁷.

⁷⁶ For the Supreme Court, the vetting process gave the charter company a clear mastery of the ship, because TOTAL was able to inspect all aspects of the ship's condition and all documents concerning the ship. This process should have dissuade TOTAL to load its cargo in the ship, and order the trip.

⁷⁷ On the basis of the International Convention on Civil Liability for Oil Pollution Damage (adopted in 1969 and amended by the 1992 Protocol) (CLC), the SC held that those participating in the act of transport who were sued before a criminal judge and who committed a reckless negligence, could be held liable in respect of all categories of damage for which the Court of Appeal had assessed civil liability. The SC therefore held that TOTAL, who had been ruled exempt from civil liability in the Court of Appeal decision of 2010, and which decision held other parties liable for such civil damages, would also be liable for such damages.

7. Conclusions

Undoubtedly, the landmark decision handed down by the French Supreme Court of Appeal in the Erika case made legal history, by establishing the principle of ‘polluter pays’ on solid grounds and by recognizing that plaintiffs can seek compensation for damage to the environment as well as for moral or material damage. The Erika case was also instrumental in bringing about new European Union legislation. In its aftermath, the EU adopted stricter regulations on the transport of goods and commodities by sea, imposing new controls on maritime safety and eliminating single-hull tankers like the Erika⁷⁸.

Large scale maritime catastrophes like Erika, Amoco Cadiz and Prestige, constitute dramatic milestones in the history of environmental offenses, which also triggered major advances in marine pollution legislation. These incidents contributed not only to put in evidence the complex interaction between international and national rules but also to encourage the relevant Courts to clarify the principles and the application of competing provisions in handing down their decisions. Nevertheless, enhanced harmonisation efforts are still required to build a truly efficient and effective environmental justice system able to address and to prevent serious infringements of its provisions.

⁷⁸ The Erika legislative packages of the European Union are maritime laws intended to improve safety in the shipping industry and thereby reduce environmental damage to the oceans. The Erika packages comprise modifications of the existing legislation (Erika I), innovations in the EU law (Erika II), and integrate international standards with the Community legislation (Erika III). The laws reinforce certification requirements for shipping and establish inspection and verification controls. They also imply greater responsibilities for the shipping companies. Each EU country was required to install appropriate authorities and new or reinforced methods of control. The third package was spurred in part by the 2002 sinking of the oil tanker Prestige off the coasts of Spain and France. European Council officials claimed that the Prestige disaster would not have been possible if the first two Erika packages had been fully implemented and enforced at the time.

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