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EU ENVIRONMENTAL CRIMES AND MARINE POLLUTION FRAMEWORK: BEYOND THEORICAL APPROACH ERIKA AND PRESTIGE CASE LAW[1]

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ABSTRACT:*The present research offers an overview of the main instruments and measures foreseen by the European legislation on environmental crime and marine pollution aiming to make greater efforts to combat against environmental crime and marine pollution in the European zone.*

Criminal law and procedural criminal law, are generally deemed basic segments of State sovereignty, thus, there are some main difficulties in transposing EU and international law. In this context, the need of harmonization between international, EU and domestic criminal and procedural provisions, especially in the case of trans-boundary criminal offences like marine pollution, will be underlined. This aspect is evident if we assume that the general environmental standards on marine pollution are enacted, respectively, by international organizations like the United Nations, the International Maritime Organization (IMO), the European Union and by single States. Consequently, a coherency among these sources of law has to be found when a decision on a single case has to be taken.

The research concludes with a reference to the sinking of the oil-tankers Erika and Prestige. These accidents (I) highlight the complexities and the difficulties that emerged in the investigation phase and in the judgments adopted, (II) and stress that a lack of harmonization and the failure to develop a definition of pollution crime and penalties are still persistent.

Thus, the present paper provides a useful guide on key issues pertaining marine pollution by conducting a brief analysis of the main relevant theoretical and practical instruments.

KEYWORDS: *Environmental crime, Marine pollution, Legal rules harmonization, Erika, Prestige*

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1. DEFINING THE ENVIRONMENTAL MARITIME CRIME

It is now well known that the Earth has limited capacity to absorb human wastes. In the late 1960s and early 1970s, many scholars and thinkers observed that steady economic growth was causing environmental decline and argued that it could not be sustained

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forever (Boero, 2012). Thus, being a common global goal, environmental protection is typically regulated by international law (Di Plinio, 2008).

There are six general environmental principles that have been incorporated into international treaties, EU and national legislation: the sustainability principle; the 'polluter pays' principle; the precautionary principle; the equity principle; human rights principle and the participation principle (Birnie-Boyle, 1992, pp. 454-456).

According to the EU institutions and bodies, environmental crime is a serious and growing international problem with devastating effects on the environment and human health. Hence, environmental protection has gained considerable attention as one of the highest priority areas for EU policy-making over the last decades (Comte, 2006, p.190). Environmental harm is not restricted by national borders as pollution may affect neighboring countries and become a matter of common concern. Sea pollution gives a good example of this spatial dimension being a specific feature of environmental harm.

While ship-source pollution has an international dimension, criminal law is regulated at domestic level. Given the trans- boundary nature of environmental harm and considering States sovereignty, harmonization of the provisions contained in international, EU and national instruments is urgently required.

To start with, the definition of environmental crime and more specifically of maritime crime should be given. It must be stressed that although a comprehensive definition of environmental crime is missing, some of its main characteristics can be drown (Clifford, 1998, pp. 1-25).

Environmental crime is a violation of environmental laws that are introduced to protect the environment. In such cases, all illegal acts that directly cause environmental harm are included. Such offences are subject to effective sanctions, including, in serious cases, criminal sanctions.

Although, international bodies have identified some specific crimes that fall under the environmental crimes category, because illegal acts and forms of environmental harm can be multiple, the list is not exhaustive.

As mentioned above, marine pollution offers an example of the trans-boundary nature of environmental harm.

Trying to define maritime crime, the following can be stated: it consists in a series of actions which modify the natural equilibrium of the sea and of its wildlife and includes all those crimes that can cause variation of flora and fauna in the surrounding environment.

Human activities have an increasing adverse impact on the marine biodiversity and ecosystem, especially in the coastal areas. Thus, the importance to collect the evidence of maritime crime becomes fundamental to prove that the crime itself has been caused from human actions. As it rarely acts in isolation, methods of analysis of human impact on marine ecosystems have to rely on 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? If not, who might be responsible of this change? During the investigation process, it is necessary to make a comparison between the environment before the impact and the quality of the environment after the impact.

Leaving apart the investigation problems, we must assume that some of the characteristics of environmental (marine) crime can be identified as below:

- It consists in a conduct to the detriment of the environment for which criminal sanctions can be introduced;

- It causes considerable damage to the environment and human health and it is particularly difficult to tackle;
- It is often 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 leads to the conclusion that action for preventing environmental (marine) crime is needed not only at the national level but also at the European and international level.

2. INTERNATIONAL LEGAL FRAMEWORK FOR ENVIRONMENTAL MARITIME CRIME: MARPOL AND UNCLOS

At the international level two of the main instruments dealing with marine pollution from vessels are: the MARPOL and the UNCLOS conventions.

Shipping sector is not immune to criminal prosecutions for pollution infringements and some general international standards introduced by these two international treaties will be assessed in the following sections.

2.1. MARPOL Convention

The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), adopted on 2 November 1973 at IMO, constitutes the main international instrument covering prevention of marine pollution environment by ships from operational or accidental causes. The main objective of the Convention is to eliminate intentional pollution and to reduce/minimize accidental pollution from ships but also to create an environmental enforcement regime which balances conflicting jurisdictional claims made by flag States and coastal States (Griffin, 94: Di Leo, 95, p. 505).

Scope of the MARPOL convention is the prohibition of all discharges (of substances regulated in Annexes), except where certain conditions are met (Vidas, 2000, p. 375). Standards and levels of permitted discharges are set in Regulation no. 10, thus, the MARPOL convention contains the international rules and standards applicable for the prevention, reduction and control of marine pollution. It introduces the concept of "special areas" which are considered hardly vulnerable to pollution by oil. Therefore, oil discharges within them have been completely prohibited while minor and well-defined exceptions are allowed.

In order to enter into force, it is necessary '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'. In order to be Party to the MARPOL Convention, a State must accept Annex I and II (mandatory ones), while the others are optional annexes. 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' process.

All ships flagged under State parties are subject to the MARPOL requirements and the responsibility for certifying the ship's compliance with MARPOL's standards is of the flag State that is, where the vessel is registered. (Copeland, 2008, p.1). So, under the enforcement regime, flag States are primarily responsible for enforcing the Convention.

Within the meaning of Article 3, the MARPOL convention applies not only to ships entitled to fly the flag of a Party to the Convention but also to ships which operate under

the authority of a Party, even if they are not entitled to fly the flag of a Party. Furthermore, pursuant the provisions of Part XII of the United Nations Convention on the Law of the Sea (UNCLOS), MARPOL applies also to ships operating inside the Exclusive Economic Zone (EEZ) of a Party to MARPOL.

In brief, MARPOL foresees some technical standards for the vessels.

The responsibility to control if the ships meet these technical standards belongs to the flag State. In addition to the flag States, port States have some authority in order to survey on the ships compliance with the MARPOL standards. If the vessel carries out a certificate by its flag State, the above-mentioned authority of the port State is limited: it must accept the validity of the certificate of the flag State.

MARPOL requires all Parties to cooperate in detecting ship violations and to monitor vessel discharges. According to the MARPOL provisions, if a State has evidence of a MARPOL 73/78 violation, it must forward this proof to the flag State responsible for the deviant vessel (Art. VI (3)). Thus, the flag State is obliged to carry out obligatory investigation and then to initiate a legal proceeding to judge the matter.

When a punitive measure is 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"*, in line with the MARPOL's criminal law regime.

Scholars 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, combined with corresponding rules in other Annexes (Pozdnakova, 2013).

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

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 incidents; discharges resulting from damage to the ship or its equipment.

In the second case, it must be noted that such discharge shall be subject to the jurisdiction of any State where the discharge will occur (MARPOL Annex I).

However, MARPOL has been largely ignored worldwide. The implementation of its rules put in evidence some discrepancies among EU Member States. It must be stressed that harmonization is needed, especially in relation to penalties which differ significantly among Member States.

2.2. UNCLOS jurisdictional rule system

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.

The 1982 U.N. Convention on the Law of the Sea (the Convention or UNCLOS III), defines jurisdictional rights and responsibilities of States. Consisting 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 sea resources by creating a stable regime for the world's oceans.

Undoubtedly, on one side, UNCLOS III does provide a constitutional framework for the development and implementation of marine environmental standards and, on the other, it sets forth the States obligations and jurisdiction with respect to each source of marine pollution. As such, the UNCLOS III provisions on ship-source pollution have become norms of customary international law (Bodansky, 1991, p. 723; Gioia, 2010, p. 49).

UNCLOS III sets forth the general duties and rights of States to establish, prescribe, and enforce ship-source pollution standards and requires States to cooperate, either directly or through the 'competent international organization' (i.e., the IMO), to establish ship-source pollution rules and standards.

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

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

UNCLOS lays down two specific competencies. In cases of marine pollution from dumping land-based sources or seabed activities subject to national jurisdiction (part XII, art. 208-210), coastal States are allowed to control, prevent and reduce pollution by applying the national jurisdiction rules.

The second aspect taken into consideration regards marine pollution from foreign vessels (part XII, article 211): 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'. Furthermore, costal State jurisdiction is defined in terms of different zones, thus, in case of ship-source pollution, the costal State jurisdiction depends on the location of the vessel at the time of the pollution.

On the one hand, the obligation to enforce the rules adopted for the control of marine pollution from vessels, regardless where a violation occurs, shall be fulfilled by the flag State, whose primary and plenary jurisdiction has been preserved by the UNCLOS III provisions.

As to the port States, 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, they can enforce any type of international rules or national regulations adopted in accordance with the Convention or other applicable international rules. On the other hand, compared with prior customary norms, the UNCLOS jurisdictional rules broadens the powers of coastal and port States while jurisdictional competence of the States remains subject to substantial restrictions. The implementation of the various kinds of ship-source pollution standards, as described by the Convention, involves the exercise of three types of jurisdiction: jurisdiction to prescribe, enforce, and adjudicate (Bodansky, 1991, p. 731).

Although the rules concerning the different forms of jurisdiction are set in Part XII of the Convention, the latter does not draw a clear distinction between enforcement and adjudicative jurisdiction, as well as other ambiguities are evident in some of the UNCLOS provisions (Bodansky, 1991, pp. 764-767).

This is due to the fact that UNCLOS III serves as a 'framework Convention', it sets the basic scope but then leaves to the State parties or to other organizations, such as IMO, the duty to balance the different interests involved. An example of such 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.

Lastly, it must be stressed that, although UNCLOS marks a step forward in the protection of marine environment from pollution, there is still much to do, especially in some areas where the UNCLOS provisions are not clear. Provisions like those of Articles 210 and 220 may be used more incisively but to achieve this, a clarification of international law is necessary and a study of States practice is required.

3. EU COMPETENCE IN CRIMINAL LAW MATTERS: THE NEW PERSPECTIVE AFTER THE LISBON TREATY

The observation that the effects of environmental crime are of an increasingly cross-border nature led to the conclusion that action was needed at European level.

Since the establishment of the European Communities, Member States have transferred significant portion of their competencies to the Community level in order to foster the harmonization of principles and rules in certain fields (Mangiameli, 2006). Providing citizens with a high level of safety within an area of freedom, security and justice is one of the Union's main goals, specifically in the areas of Asylum, Migration and other related issues of the EU *acquis* (Salazar, 2009; Craig, 2010; Melica, 2012). Nevertheless, Member States are still reluctant to transfer to the EU their competence on criminal matters since it has always been understood like 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 criminal law values such as the principle of legality *(nullum crimen sine lege parlamentaria)* and criminal offences. As the law provides them, they fall under the scrutiny of the Constitutional Court(s) that means 'consistency with fundamental rights stated under Constitution(s)'.

Some of the peculiarities that distinguish EU law from international law are the following: primacy (ECJ, *Costa vs Enel*, 1964), direct effect (ECJ, *Van Gend and Loos*), loyal cooperation (including obligation of conforming interpretation of national law) as foreseen by Art. 10 TEC (now Art. 4(3) TEU) and the infringement procedure (Arts. 226 ss. TEC; now Arts. 258 ss. TEU). Considering the primary role of the Council, the EU law-making process suffers from a 'democratic deficit'. Such a situation makes Member States unwilling to establish a criminal law competence to be exercised without democratic legitimacy and without a judicial control aimed at guaranteeing fundamental rights.

Although the Rome Treaty did not foresee any explicit attribution of competence in criminal matters to the European Union, EU criminal law and Member States criminal law influenced each other (Guerini, 2008; Bernardi 2011; Klip 2011; Marchetti, 2012; Miettinen, 2013).

In the EU, the development of new forms of transnational criminality (terrorism, drug trafficking, environmental offences) made it clear that the absence of instruments for a

common European criminal policy has proved to be a negative element for the European integration. At the same time, we can witness the need for a closer and proactive cooperation among national authorities in adopting several international Conventions.

EU competence in criminal matters was established by the Treaty of Maastricht within the so-called third pillar (Justice Home Affairs - Title VI TEU) and later reformed by the Treaty of Amsterdam that laid down more precise objectives and more effective instruments (artt. 29-31 TUE) like Eurojust (Salazar, 2001; Aprile & Spezia, 2009, p. 226) and Europol (Bassiouni, 2005). Specifically, Article 34 TEU conferred to the EU some more specific competences in criminal matters. The case - law of the European Court of Justice (ECJ) contributed to the development and the recognition of the EU criminal law competence. Specifically, a milestone judgment (ECJ, *Commission v. Council*, C-176/03) led to the recognition of EU competence in criminal matters by allowing it to foresee criminal measures for environmental protection in cases where the conditions of 'necessity and consistency' were met (Dawes & Linskey, 2008).

By its judgment of 13 September 2005, in Case C-176/03 *Commission v Council*, the Court of Justice clarified the distribution of powers between the first and third pillars as regards provisions of criminal law even though, as a general rule, criminal law did not fall within the Community's competence (point 16).

The Court held that, in the environment field there were fundamental measures to combat serious infringements and to ensure the full effectiveness of EU law. Although, in accordance with the principle of subsidiarity, criminal penalties should be introduced at the level of the Member States, it is sometimes possible that supranational laws recognize that States have the power to adopt measures that explicitly oblige them to punish criminal behaviors to achieve a partial harmonization of national laws.

Such a decision led to the approval of several instruments pertaining EU competence in criminal matters: Directive 2008/99/EC on the protection of the environment through criminal law; Directive 48/2009 on safety of toys (Article 51); Directive 52/2009, minimum standards on sanctions and measures against employers of illegally staying third- country nationals (Articles. 9-10); Directive 123/2009, amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (Articles 5-6).

On 13 December 2007, the Lisbon Treaty was signed and after having been ratified by the 27 EU Member States, it entered into force on 1 December 2009.

The Lisbon Treaty, by the abolition of the three-pillar structure, introduced one single institutional framework in the EU and helped in the creation of new frontiers of the EU criminal law.

As stated in Article 67 (Treaty on the Functioning of the European Union (TFEU) "*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 of harmonization in order to achieve the prerogatives referred to by Article 67 TFEU is more evident under the provisions of Title V, Chapter 4 (Judicial cooperation in criminal matters) and Article 83 (directives of criminal law harmonization) which contain minimum rules with regard to the definition of criminal offences and sanctions.

The Lisbon Treaty conferred on 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 add, within the limits of EU competence, important value to the existing national criminal law systems.

The EU can adopt under Article 83 of the TFEU directives with minimum rules on EU criminal law for different crimes. Measures can be adopted under Article 83(1) TFEU entailing a list of explicitly listed crimes (the so-called 'Euro crimes') that need, by definition, "an EU approach due to their particularly serious nature and their cross-border dimension" (Ennio & Ugo, 2013, p 102 ss).

In case a Member State has concerns on the impact of the criminal law Directive on national criminal systems, Article 83(3) plays the role of "emergency break", a kind of counterbalance to address such concerns.

The first directive of harmonized criminal law was *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*. Then *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*.

The mentioned Directives aimed at a harmonization of the criminal law but some obstacles to the establishment of an EU competence in criminal matters still persist.

As outlined above, the Treaty of Lisbon provided the EU with further competences in criminal matters and extended the area of crimes while penal law still belongs to the sovereign powers of the Member States. The EU will therefore play a stronger role in the harmonization of criminal law systems.

4. THE EUROPEAN ENVIRONMENTAL CRIME DIRECTIVES: DIRECTIVE 2008/99/EC AND DIRECTIVE 2005/35 AS AMENDED BY DIRECTIVE 2009/123

Undoubtedly, the protection of the environment constitutes an area where the legislative activity of the EU has been one of the most extensive. Some of the most important steps made in this direction 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 European Community; the 1992 Treaty on European Union included an explicit reference to the precautionary principle; on October 1999 the Tampere European Council established political guidelines and priorities specifically mentioned environmental crimes; within the 2007 revisions in the Treaty of Lisbon, the protection of the environment – and sustainable development, were underlined as being main legal and political principles of the EU.

Secondary European law, through the adoption of regulations and directives, gave substantive effect to the Treaty competence on environmental protection.

After the above mentioned ECJ judgment '*Commission v. Council'* that paved the way for the adoption of directives aimed to enforce environmental protection through criminal law, important steps were taken by means of the adoption of directives to oblige Member States to provide for criminal penalties in their national legislation in cases of serious infringements of EU law provisions on the protection of the environment (ECJ decision of 13 Sept. 2005, *Commission v. Council*, C-176/03, par. 48).

Ship-source pollution is regulated by the MARPOL Convention (Annexes I and II), Directive 2005/35 on ship-source pollution and criminal penalties for infringements as

amended by Directive 2009/123, and Directive 2008/99/EC on the protection of the environment through criminal law.

These two main Directives constitute an important step towards a truly European environmental criminal law.

This section aims to provide a brief overview of the contents, importance and of the potential implementation problems of the environmental crime Directives.

4.1. Directive 2008/99/EC

As stated above, the extension of the EU competence in the area of criminal law has been largely discussed and addressed, by the judgments of the European Court of Justice. As a result, Directive 2008/99 on the Protection of the Environment was adopted.

Through this Directive, for the first time the EU obliged Member States to criminalize actions detrimental to the environment and health of human beings. This in accordance with the provisions contained in Art. 83(2) and Art. 174(2) of the TFUE.

It requires Member States to provide for criminal sanctions for the most serious environmental offences in order to achieve proper implementation of environmental law.

The EU Directive lays down a list of environmental offences considered criminal offences by all Member States, if committed intentionally or with serious negligence, and the Member States, by transposing this Directive have to introduce appropriate 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 penalties.

In addition, specific provisions have regulated liability of legal persons. According to Article 8, legal persons held liable will be punishable by effective, proportionate and dissuasive penalties.

It sets a minimum standard of environmental protection through criminal law to be adopted by the Member States, leaving them 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 intervene as to the powers of prosecutors and judges.

The Directive underlines that penalties will have to be effective, dissuasive and proportionate.

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 dissuasive" elaborated this notion (ECJ, C-68/88 *Greek Corn Case*).

Member States have to implement these three notions through their own legislative provisions that often are not univocal.

The main problems related to the implementation of the Directive are strictly connected with the variety of its vague notions whose use in criminal law might hamper the respect of the principle of *lex certa*.

Although the vague notions referred to in the 2008/99 Directive must be interpreted by referring to the provisions listed in Annexes A and B, it is up to the national legislation to implement the European Environmental Law Directive (Faure, 2010, pp. 119 ss.).

Consequently, Member States have to provide more precision and guidance in the implementation of these vague notions in order to satisfy the *lex certa* requirement and to provide with a harmonizing effect in the EU area.

However, it must be stressed that there are large differences between criminal sanctions provided for environmental offences in the Member States. Sometimes the so-called 'minor cases' are not considered as crimes by Member States criminal law. This is the case of the provision contained in Article 3 of the Directive not taken into 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 in the provisions contained in Article 4 covering the punishment of conduct committed intentionally or with at least 'serious negligence'. For example, the Italian environmental law or the Croatian penal code does not specify which kind of negligence is required.

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

In the context of the EU enlargement and in line with the conditionality criteria, compliance with EU law on marine pollution crimes is required also in other Adriatic Sea States (candidate or potential candidate States), like Albania, BiH and Montenegro. In some States, environmental offences are punished with administrative sanctions, while in others they are punished with criminal sanctions (Ilceva, 2012; Cukani, 2012; Ruga Riva, 2011).

In conclusion, it must be noted that an integrated and harmonized sanction system, founded on both punishment models aforementioned is needed: administrative sanctions for minor cases and criminal sanctions for significant pollution.

4.2. Directive 2005/35 as amended by Directive 2009/123

Directive 2005/35, as amended by Directive 2009/123, entails EU applicable requirements on ship-source pollution and the introduction of penalties, including criminal penalties for pollution offences.

The entry into force of Directive 2009/123/EC made the system of criminal penalties mandatory.

The purpose and scope of the Directive is to incorporate international standards for ship-source pollution into EU law, thus some similarities with MARPOL, (especially with Annex I and II), underlining the need for harmonization between international and EU law.

In particular, the 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 deals with the obligations for the Member States (port and coastal ones), in respect of the infringements caused by ships in port or in transit. 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 and legal persons.

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'. This 'vague term' was open to various interpretations. Therefore, the question concerning its interpretation was referred to the ECJ (Case C-308/06) concerning the validity of EU Directive 2005/35/EC on Ship-Source Pollution. The ECJ held 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 legislation (Gonciari, 2010).

The Directive foresees also the creation of EMSA (European Maritime Safety Agency), as one of the EU decentralized agencies. Another useful body foreseen by the Directive is CleanSeaNet: a European satellite-based oil spill monitoring and vessel detection service.

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

Such a 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.

CleanSeaNet performs a routine monitoring of all European waters looking for illegal discharges and can make detection of possible spills; detection of vessels; identification of polluters by combining CleanSeaNet and vessel traffic information available through SafeSeaNet.

Furthermore, 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. It operates like a close real time service. In case of a contingent 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.

5. BEYOND THEORETICAL APPROACH: ERIKA AND PRESTIGE

The framework of legislative provisions concerning the protection of marine environment from pollution is certainly a complex one: international, EU, State-level legislation, need to be taken into account by judges and prosecutors during the investigation and decision-making phase. Cases like Erika and Prestige demonstrate that the provisions may conflict with each other and that more harmonization and clarity is needed.

Both ecological disasters that occurred in EU waters paved the way for the adoption of the EU Directive 2005/35/EC, which strengthened the criminal law framework for the enforcement of the law against ship-source pollution (Ferraro, 2000; Schiano Di Pepe, 2006).

They also highlighted the inefficiency of safety checks on vessels that were twenty-six years old and sailing under a flag of convenience. 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. Both cases are symptomatic of the difficulties arisen in the related judicial proceedings in France and Spain.

On 12 December 1999, the tanker Erika sank in heavy seas off the coast of Brittany (France) while carrying approximately 30,000 tons of heavy fuel oil: 14,000 tons of oil was spilled and more than 100 miles of Atlantic coastline were polluted.

A lengthy legal battle followed. In 2008, the case first came before the French courts, and after the decision of a Paris based Court of appeal in 2010, the question whether the French courts had no jurisdiction in the Erika case was brought before the French Supreme Court which delivered its decision (no. 10-82.938) on 25 September 2012.

On 19 November 2002, Prestige, a 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 ocean (Frank, 2005; Miccichè & Montebello 2006; Arroyo, 2003).

5.1. The limits of the Prestige case decision

The Prestige case caused an ecological and economic catastrophe of unprecedented proportions. On 16 October 2011, ten years after the ecological catastrophe, the legal proceeding began. In the Prestige case, Ulrich Beck's theory of 'criminal law of the risk' finds its limits (Beck, 2002).

There can be found two crucial moments of 'organized irresponsibility' in the Prestige case: on the one hand, the responsibility of the ship captain (well as of the vessel owner, the shipping company, the operating company) and on the other, the Spanish authorities decision.

There are multiple 'knots to be untied' in the Prestige case: i) who was responsible for; ii) what types of crimes had been committed (damage of protected species - property damage – ecological/environmental crimes)?

These and other aspects of the Prestige case highlight some of the main problems that environmental criminal law faces in addressing ecological and economic catastrophes of these proportions (Frank, 2005).

In the Prestige case, section 331 and 325 of the Spanish Criminal Code, were recalled by Spanish prosecutors in connection with criminal liability for negligence pollution offence.

Indeed, the Spanish courts in their decision refer to the Prestige case as being a typical case of "organized irresponsibility". Even if the Prestige had all mandatory reporters in order, all certificates required for the navigation of merchant's navigation in safety, and prevention of pollution in the marine environment met the MARPOL requirements for the navigation of the ship, the prosecutors found some responsibilities.

The "master valve" was unrepaired from months making the automatic safety devices inoperative. Therefore, the Captain ship was found responsible. The awareness of the lack

of all safety conditions, according to the Provisional Court of Coruña (order n. 96 of 9 September 2003), identifies responsibilities also in the hands of the ship-owner, the shipping company and the operating company.

Thus, in the Prestige case, two or more negligent acts, carried out separately, have created a so called "accessory negligence perpetration" (Bauccells & Petit, 2013).

In addition, after one of the Prestige tanks cracked by approaching to the Galician coast, the Spanish authorities decided to tow the ship out to verify the problem instead to follow the decision of the Captain of the ship to tow it in a sheltered area. The wrong decision of the Spanish authorities led to a pollution in the whole Cantabrian coast.

In this case, the decision of the Spanish authorities would constitute an offence under Articles 330 (damage to protected natural areas) and 263 (offence of patrimonial damage) of the Spanish Criminal code.

In fact, despite the great number of potential liable persons involved, the Spanish prosecutor attributed criminal liability only to the Captain. Such a decision puts in evidence the limit of the criminal proceedings in cases of organized irresponsibility.

5.2. Jurisdictional challenges in the Erika case

The present section deals with the main jurisdictional challenges emerged in the Erika case. By analyzing the reasons adduced by the French Supreme Court, its aim is to provide a brief but comprehensive overview of the several jurisdictional problems that judges have to address in dealing with similar cases.

One of the principal issues affecting the Courts decision in the Erika case was to establish whether international law was able to prevent French legislation on environmental and maritime crimes to apply and to develop (Rella, 2009).

In its decision of 16 January 2008, the *Tribunal Correctionnel de Paris* clearly recognized the right of environmental associations to claim compensation for damage caused to the environment per se. In its decision, the French Court held that: the Ship captain and Charterers (SELMONT and TOTAL subsidiaries) were discharged of involuntary pollution by hydrocarbon; Spa RINA, Ship owner (TEVERE), Ship manager (PANSHIP) and TOTAL (vetting operations) were sentenced for involuntary pollution by hydrocarbon.

On 30 March 2010, the Paris Court of Appeal handed down its judgment on the Erika case: it upheld the lower court judgment; but while doing so, it reviewed all fundamental considerations.

On 6 April 2010, Total brought its case to the Court de Cassation that handed down its decision on 25 September 2012.

The Supreme Court had to address three fundamental questions: (1) Can the French 1983 law (Art.8) apply to the Erika case? (2) Is French jurisdiction competent to rule the Erika case? (3) Who is guilty and to which extent?

As regards the first issue, the French Supreme Court followed the Public Prosecutor's reasoning on this issue and therefore confirmed the Court of Appeal decision on this point.

The question was whether in accordance with the Montego bay rules Article 8 of the French 1983 law could apply to the EEZ or not.

Total argued that Article 8 could not apply to EEZ since it does not include any reference to it or to MARPOL. In addition, the French penal Code rules that French legislation (a few specific exceptions apart) applies only to home territory and seas. No

French legal basis to prosecute a foreign ship that has caused a non-intentional waste dumping pollution in the EEZ was found therefore.

The Supreme Court (hereinafter referred to as 'SC') instead put forward that if MARPOL rules refer to the waste dumping place, the 1983 French law applies to all pollutions that affect home waters, regardless of their origins.

As a result, the 1983 French law does not enforce any exemption and it allows prosecuting more actors than MARPOL. In addition, the SC was of the view that the French legislator considered that international law conditions to prosecute non-intentional sea pollutions were too conciliatory with the 'polluters', thus its intention was to deliberately not refer to MARPOL Convention. In conclusion, the SC considered Article 8 of the French 1983 law providing an autonomous offence and a *lex specialis* for the purpose of Montego Bay rules.

The SC found that French legislation complied with international law as, although it provided for stricter conditions, its scope was in line with the purposes of MARPOL and Montego Bay conventions.

Indeed, the *objects* and the *goals* of the two international conventions, have to be read in conjunction with Article 31 (1) of the 1969 Vienna Convention. This Article states that International Agreements shall be interpreted in the light of their object and goal. Furthermore, Article 4 of the MARPOL Convention explicitly invites the Parties to enforce rigorous legislation in order to dissuade potential offenders. Thus, the application of the domestic French Law of 1983 was consider in compliance with the obligations arising from international law applicable to the case. The French Supreme Court followed SC's reasoning on this issue and therefore the Court of Appeal's decision was confirmed on this point.

The second issue to be solved concerned the competent ruling jurisdiction: the French jurisdiction (costal State) or the Maltese flag State?

The French Supreme Court found the French jurisdiction as the competent one, based on the place where the 'serious involuntary damages have been observed'. The main provisions which come into play in this decision are Articles 220 (coastal State) and 228 (flag State) of the Montego Bay Convention.

In fact, in the *Erika* case, Malta (flag State) did not take a legal action based on MARPOL rules, thus, French criminal jurisdictions were competent as foreseen by Montego Bay rules.

In this context, on one side, on the basis of the waste dumping consequences, French criminal jurisdiction was competent on the basis of international rules concerning marine environment protection as they allowed to prosecute in case of serious damages caused by sea pollution. On the other side, based on the priority given by MARPOL to analysis on the waste dumping initial place, Malta criminal jurisdiction was uppermost competent based on MARPOL to rule on sea pollution offences in an EEZ.

In conclusion, if no criminal prosecution is started based on waste dumping initial place analysis, it will then started because of waste dumping consequences. French 1983 law has been amended by a Law of 9 March 2004, which provides that it apply to offences committed in the French EEZ. According to the 2004 law, French criminal jurisdiction can also be competent based on a waste dumping initial place analysis, if the ship flag State does not prosecute. Although French provisions were more solid, the issue of MARPOL rules recognizing the ship State jurisdiction was still controversial.

In conclusion, it must be stressed that France was found competent only because Malta stayed silent. If Malta had not, France would have been competent only after Malta ruled the case.

The last issue addressed by the Supreme Court was the definition of criminal responsibilities. Who was guilty: the owner of the ship/ the ship manager/ the charter company (Total SA)?

The Court of Appeal held Total guilty only for a 'negligence' fault, without sufficient awareness of a possible damaging pollution, because it did not have all information necessary to oppose the ship's departure.

Thus, it was not found guilty in a way that could engage its civil responsibility.

The Supreme Court instead found that the vetting process was sufficient to conclude that TOTAL did have (or could have had) all information necessary to oppose the ship's departure. Therefore, the fault is a 'recklessness' fault with conscience of possible damages that can be assimilated to an intentional fault.

Thus, Total's criminal responsibility was increased. Such a situation paved the way to find the company's civil liability.

6. CONCLUSIONS

Cases like Erika, Lotus, Amoco Cadiz and Prestige constitute a milestone in the history of marine pollution legislation as they put in evidence the interaction between international and national law. Furthermore, they enabled the competent Courts to clarify the principles and the application of competing provisions in each single case.

The cases examined above put in evidence the difficulty to identify the causes of environmental crimes and the inadequacy of the criminal legal requirements together with the purpose of environmental offenses.

In the Prestige case, the environmental protection laws or general provisions have been infringed, the need of domestic criminal laws to consider punishable only the serious negligence, led the criminal liability of more negligence non - attributable to the many parties involved.

The French Supreme Court's decision in Erika case, issued after 10 years of judicial proceedings, highlighted some fundamental issues concerning the Costal States' competences where maritime oil – pollution was caused beyond their territorial Sea. Instead of the fuzzy law outlined by the international and conventional rules, in the French Supreme Court's decision the emerging approach is that at national level it is possible to enact more severe offences.

Indeed, even the MARPOL Convention provision of Article 211(5) states that national legislation must comply with international law, instead of the MARPOL rules 9 and 11 (appendix 1) that identify responsibilities only with reference to the captain and not even to its charterer, the Court applied Article 8 of the Law of 5 July 1983 which is more severe than the conventional rules.

In that decision, the French Supreme Court for the first time highlighted that even the EEZ has been created and used only for economic reasons, environmental considerations must be preeminent over business considerations.

From these judgments, on one side, a high level of tolerance in environmental offences can be found in accordance of the type of the negligence of the offence, and on the other,

a more harmonized legal system in the European area was stressed and for some aspects was enriched.

It was just a result of the consequences brought about by these two cases, that at the EU level the proposals for a Directive on the protection of the environmental through criminal law in 2001 led to the Directive 2005/35 EC of the European Parliament as amended by Directive 2009/123 and to Directive 2008/99/EC on ship source pollution, introducing penalties, including criminal ones for pollution offences in the EU legal framework.

After the adoption of the Treaty of Lisbon, as in section 3 of the present research has been underlined, EU has been provided with further competences in criminal matters and areas of crimes have been extended while penal law still belongs to the sovereign powers of the Member States. The EU will therefore play a stronger role in the harmonization of criminal law systems in accordance with the provisions contained in Art. 83(2) and Art. 174(2) of the TFUE.

Legal solutions in Erika and Prestige cases have been different, even France and Spain have harmonized the environmental legal framework with the provisions set at the EU and international level. It must be outlined that, the Courts judgments in the above-mentioned cases contributed to the harmonization of legal sources and the 2004 French law provides an example of such evolution. On the other hand, the French Court Supreme decision, in particular, sets a fundamental precedent for the future defense of marine from oil pollution.

Environment is of general interest and its protection must prevail over economic ones. International law rules can set only a minimum standard but in case of damage from oil pollution the Costal State stricter legislation must be applied. In this case, especially in the EU area, the European Regulations and legal framework must bring Member States to a harmonization of national laws in order to defend in a more appropriate way environment from pollution, by guaranteeing sustainable development for future generations.

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