

Possibilities and limits of environmental criminal protection

Reflections on the Erika and Prestige cases (or how an organized irresponsibility system carries on)

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*Abstract**

En muy poco tiempo de diferencia Francia y España vivieron los dos desastres de contaminación marítima más graves de su historia. Pese a los parecidos fácticos de ambos accidentes y a pesar que ambos países tienen una normativa ambiental armonizada, muy distintas han sido sus soluciones jurídicas. El análisis de los casos Prestige y Erika desde una perspectiva comparada permite a los autores reflexionar sobre las posibilidades y los límites de la protección penal del medio ambiente y mostrar la indignación contra un sistema legal global que establece una irresponsabilidad organizada para la contaminación marítima.

In a short time difference France and Spain experienced the two most serious maritime pollution disasters in their history. Despite the factual similarities of both accidents and although both countries have harmonized environmental regulations, the legal solutions in each case have been very different. Analysis of the Prestige and Erika cases from a comparative perspective allows the authors to reflect on the possibilities and limitations of the criminal protection of the environment and show the indignation against a global legal system that establishes an organized irresponsibility for sea polluters.

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1. Introduction: the symbolic functions of environmental criminal law

1. In barely three years' time, two marine pollution accidents took place off European Atlantic coasts. In 1999 the *Erika* and in 2002 the *Prestige* were involved in the biggest environmental accidents that have ever occurred in France and Spain respectively. Apart from the coincidence in time and the catastrophic consequences¹, both cases have a great deal of features in common. Both ships were following the same route along the English Channel, they were flying a flag of convenience, their shipowners and operators had different nationalities, and in spite of their deplorable state of preservation they both had all mandatory reports in order. Moreover, besides these factual aspects, they both have involved procedural difficulties typical of such environmental offences². These common aspects, which are not mere coincidences, should all alone allow us to draw some final conclusions³.

2. Nevertheless, in spite of the similarities, there are a great deal of differences as to the criminal resolutions of both accidents. We may say in advance that while the enforcement of the Spanish Criminal Code by the Spanish courts in the *Prestige* case may allow us to reflect on the limits of environmental criminal law, the enforcement of French criminal law by French courts in the *Erika* case may be used as a counterpoint to draw some conclusions on its possibilities. At any rate, the fact that two so similar marine pollution situations have lead to such different legal resolutions – and in two countries integrated within a European Union having a harmonized legislation and high environmental protection standards – should allow us to reflect on the causes in national and international law of such failure.

Even though we are strongly in favor of criminal prosecution to protect the environment, we are also aware of its limits, especially since the criminal doctrine successfully started to interpret environmental criminal law from the perspective of the “*risk society*” sociological paradigm put forward by Ulrich BECK⁴.

¹ As for the *Erika*, more than 20.000 tons of oil were spilled, polluting about 400 kilometers of coast in the south of Brittany, the estuary of France's biggest river – the Loire –, and the Vendée coast, one of France's main touristic areas. In the case of the *Prestige*, the oil slick covered more than 1,600 kilometers of coast, from the mouth of the Minho River, on the Portuguese-Galician border, to the French Atlantic coast. In total approximately 1,900 kilometers of Spanish and French coast were affected. In Spain around 141,000 tons of oily waste were collected, with a particular impact in the National Park of the Atlantic Islands, in Galicia, while in France the waste collected amounted to around 18,300 tons. The massive arrival of volunteers – up to 11,366 people per day – minimized the consequences of the catastrophe.

² As for the *Prestige*, it is without a doubt the biggest legal case ever tried in Spain: the committal proceedings amount to 230,315 pages, the preliminary inquiry has lasted 10 years, the injured parties have joined in 55 private prosecutions, and there are more than 2,000 injured parties, which have finally been reduced to 1,500. In November 2012 the big trial started, with the participation of 70 lawyers, 27 attorneys, 140 witnesses, 98 pieces of expert evidence, and it is expected to last 7 months. Total compensation: 4.122 billion euros.

³ See *infra*, our conclusions.

⁴ BECK, Risikogesellschaft. Auf dem Weg in eine andere Moderne, 1986.

3. Among its most distinctive aspects, the following three may be highlighted. Firstly, the power of today's dangers has changed in comparison to previous times. They constitute "*new*" risks, they did not exist in the industrial societies of the 19th century, and they are brought about by technological development (risks derived from genetics, new communication technologies, nuclear energy, environmental pollution, the massive consumption of food products, the development of chemical weapons, etc.). Furthermore, they are "*large scale*" risks, i.e., they threaten an uncertain and potentially enormous number of people. Examples such as the nuclear accidents of Chernobyl or Fukushima – not to mention the *Prestige* and *Erika* accidents – prove that these risks affect the global population, going beyond borders and people's economic condition. And they are "*artificial*" risks, inasmuch as they are produced by human activity and are connected to a human decision as "*side effects*", unwanted consequences, often unforeseen but, at any rate, functional to a capitalist economic model based on production and massive consumption.

Secondly, it is difficult to identify the person or persons responsible for such risks, as liability relationships feature a high organizational complexity. The considerable increase in causal interconnections, synergies, accumulations, and the lack of knowledge about them or the difficulties to clarify them have led to the concept of "*organized irresponsibility*"⁵.

And thirdly, indeed as a consequence of the two aspects highlighted above, contemporary risk society is characterized by a "*subjective feeling of security*", which may exist even regardless of the presence of real risks and is linked to a social demand for security specifically through regulations.

4. This new sociological model has enabled criminal doctrine not only to understand, but even to justify a new political-criminal law tendency: the so-called "*risk criminal law*"⁶, which served as a framework for the criminal law reforms of the 80's and 90's to create new offences in the following areas: environmental risks, nuclear risks, computer risks, chemical risks, genetic risks, and food risks.

So, firstly, considering they were "*new*" risks, it was justified to "*expand criminal law*" in order to encompass a set of domains which had been traditionally regulated by administrative or even civil law. Particularly because they are "*artificial*" risks, i.e. caused by humans, it was reasonable to think that the recourse to criminal law and to the threat of punishment could generate some motivating effect.

Furthermore, as they are "*large scale*" risks, the infringement – not even the endangerment – of individual legal rights was not expected and therefore collective legal rights were protected by using legal definition of the word "*dangerous*". And if such risks were "*necessary consequences*" of our economic model, based on production and the massive consumption of goods, lawmakers were compelled to establish in criminal law tolerance

⁵ BECK, Gegengifte. Die organisierte Unverantwortlichkeit, 1988.

⁶ See, for instance, in Spain, MENDOZA, *El derecho penal en la sociedad del riesgo*, 2001.

levels of such risks, as they were functional—even necessary—to our economic model. Such tolerance has become evident in several ways and it indeed explains some of the main effectiveness and enforcement problems faced in environmental offences. Thus, for instance, the punishment systems which have been implemented practically guarantee non-imprisonment⁷; or negligence behaviors have been deemed criminal only when it was considered “serious”⁸; or the ancillary nature of criminal law to administrative law has been invoked by stating that the core of the offence is not to be situated in the act of pollution itself, but in the infringement of the tolerance level to risk laid down by the law or by administrative decisions⁹.

Secondly, also in favor of risk criminal law, it has been said that, as it is difficult to attribute the responsibility for risks, criminal proceedings make it possible to identify and attribute the responsibility to convicted offenders, whom, furthermore, the judgment makes it possible to consider “guilty”.

Lastly, as pointed out above, such new, large-scale risks (regarding which it is difficult to identify someone responsible since there probably are several people responsible for them, either by action or by inaction—in fact, we all probably are responsible for them—) generate a great feeling of insecurity, of fear, which is, all in all, a major feature of postmodern societies. With regard to this aspect, the criminal doctrine has also realized that risk criminal law fulfills a *symbolic function* that tends to deal with such feeling of insecurity. In other words, apart from possible instrumental functions for the protection of legal rights by means of prevention, criminal actions to protect the environment perform essentially—even exclusively—symbolic functions, which are value judgment or even propagandistic.

5. So, as pointed out above, we believe that the analysis of the *Prestige* and *Erika* cases has confirmed the possibilities and the limits of environmental criminal protection and, with it, those of “risk criminal law”. Reasoning as well as on national considerations (revealed by the *Prestige* case) and international ones (revealed by the *Erika* case), we claim there is no way we can efficiently defend environmental issues as long as law keeps on structuring itself on an organized irresponsibility model which benefits major pollutants.

⁷ As regards acts of pollution in Spain, introduced as an offence in 1983, the penalties of imprisonment imposed by the Criminal Code have always been suspended or replaced when the minimum penalty is applied.

⁸ In Spain, section 331 of the Criminal Code establishes that ecological offences shall be punished “when they have been committed because of serious negligence”.

⁹ This is the case of Spain, and Italy, where the requirement for an environmental offence is that the act of pollution has to have “*infringed environment protection laws or general provisions*” (ancillary nature of criminal law to administrative law), as well as other countries, where it depends on whether it has been committed “*without administrative authorization*” (ancillary nature of criminal law to administrative decisions).

2. *The Prestige case*¹⁰: a textbook case on how organized irresponsibility prevails in national proceedings.

6. Levity of the Spanish judicial authorities concerning their indictment decisions. Indeed, the *Prestige* accident was a clear example of “organized irresponsibility”, and it was so in the two moments of the accident that are criminally relevant.

7. The first moment was when one of the ship’s tanks cracked open and about 10.000 tons of oil were spilled. There are a great number of people who could be attributed criminal liability for a negligence pollution offence (section 331 in connection with section 325 of the Spanish Criminal Code).

To begin with, apparently the captain, of Greek nationality. According to the Public Prosecutor’s indictment, apparently: on the last inspection the captain concealed information on the ship’s deficiencies, he concealed information on the ship’s high seas bunkering activity for several months, he had the ‘master valve’ unrepaired for months, which makes several automatic safety devices inoperative, the towing devices were not in good condition, etc. However, he probably was not the only liable person possible.

In fact, the Audiencia Provincial (Provincial Court) of A Coruña requested the examining magistrate (order 96/2003, of September 9) to investigate the criminal liability not only of the captain, but also of the shipowner, the shipping company and the operating company, since they acquiesced in the carriage of a highly polluting cargo in a ship which, despite having all mandatory reports in order, they knew it did not meet the necessary safety conditions. As pointed out above, the *Prestige* had all certificates required by maritime regulations on construction, safety and prevention of pollution in the marine environment, it was correctly loaded according to the corresponding loading manual and it met the MARPOL requirements applying to ships of its class. The liability of all these people in charge of the ship’s operation rather arises from the fact that they were aware of the ship’s bad condition and –despite being the guarantors of the quality of the ship’s components and of the technical legitimacy of its commercial use– they did not prevent it from navigating, nor did they notify the classification society ABS that the ship had carried out high seas bunkering services in the Baltic Sea, which eventually weakened the ship’s hull. This is thus a case of “*accessory negligence perpetration*”, which takes place when two or more negligent acts, carried out separately, without mutual awareness or agreement, objectively co-determine the offence¹¹. However, in spite of everything, as regards this first criminally

¹⁰ At the time of writing this article, no judgment had been given on the *Prestige* case. As a consequence, all our statements on the events have been made based on the Public Prosecutor’s indictment and we are aware that all defendants are protected by the presumption of innocence.

¹¹ This has been expressed by MARTÍNEZ-BUJÁN, *Crónica Penal (Del Prestige y de otros relatos jurídico-penales)*, 2005. The classification society ABS may probably be situated at another level, since it did not have the obligation to check the ship’s state of preservation, nor was it the guarantor of the quality of the ship’s components or of the technical legitimacy of its commercial use. In fact, the Spanish government has only

relevant deed the Public Prosecutor has indicted solely the ship's captain and the chief engineer.

8. But in the *Prestige* accident yet a second criminally relevant episode may be clearly highlighted: the Spanish authorities decided to tow the ship out to sea when it approached the Galician coast to be emptied after one of its tanks cracked. As a matter of fact, this was the most grievous action, as it caused the ship to split in two, thereby polluting the whole Cantabrian coast. All reports coincide in that the ship should have been towed to a sheltered area, as the captain decided, and that the Spanish authorities made the wrong decisions: first, to start the ship's main engine, thus creating a vibration which weakened its structure, and second, to tow the ship out to the northwest, straight to the storm, which was the worst course possible and it definitely worsened greatly the ship's condition, as it had to put up with the pounding of thousands of waves¹².

In this case the offences in question are of two types: an offence of damage to protected natural areas (section 330 of the Spanish Criminal Code) simultaneously with an offence of patrimonial damage (section 263 of the Spanish Criminal Code), attributable also to many other people. As a matter of fact, the Audiencia Provincial asked the examining magistrate (order 95/2003) to investigate the evidence of criminal liability of such decisions.

Apart from the director of the merchant navy, who made the technical decision of towing the ship away from the coast, the Audiencia Provincial of A Coruña might be thinking of the members of the crisis cabinet, such as the chief of the harbor master's office, who in the order is described as "*a qualified executor of the orders given by the maritime authority, without prejudice to that fact that, given his technical knowledge, his task was also to provide data and opinions*". Furthermore, the Audiencia Provincial of A Coruña suggested in the same order that it was necessary "*to know if there had been a crucial approval or ratification by people holding a position hierarchically higher than the maritime authority*". So it was also attributing possible criminal liability to the political decision-makers of the Ministry of Development (Ministerio de Fomento), at the time led by Mr. Álvarez Cascos, who were coordinated by the Deputy Prime Minister, Mr. Mariano Rajoy.

However, despite the great number of possible liable people, in the end the Public Prosecutor's indictment attributed criminal liability solely to the captain. It sought 12 years' imprisonment and a fine to be paid for 60 months in daily installments of 24 euros, as well as a reparation for damage for having committed (a) an intentional offence against the environment as described and punished by section 325.1 in connection with sections 326,

filed a civil action against this classification society in the United States. The chartering company may also be situated at another level, without prejudice to the civil liability it may have.

¹² A great number of expert reports and technical opinions share this view. As for expert reports, see the one written by Felipe Louzán, a prestigious captain of the merchant navy, or the one written by Joan Zamora Terrés, director of the Center for Logistics and Maritime Services of the UPC (Universitat Politècnica de Catalunya). As for technical opinions, the Spanish Association of the Civilian Navy has described the decision to tow out the ship as an "aberration". MARTÍNEZ-BUJÁN, *Crónica Penal (Del Prestige y de otros relatos jurídico-penales)*, 2005, provides full information on these aspects.

subsections b) and e), and 338 of the Criminal Code, with an actual overlapping of offences, (b) an intentional offence of damage on a protected natural area as described and punished by section 330 of the Criminal Code, and (c) an offence of damage as described and punished by sections 266.2 and 266.4 in connection with sections 263 and 264.4 of the Criminal Code, with a technical overlapping of offences among both¹³. So it is easy to conclude that the criminal proceedings are a means to identify a scapegoat, who is to carry the blame in this context of “*organized irresponsibility*”.

9. Inadequacy of the criminal legal requirements with the purpose of environmental offenses. Secondly, also bearing in mind the difficulty to identify the causes of environmental risks, the *Prestige* case is also a good instance of how in environmental offences it is very difficult to determine the cause-effect relationship of dangers, especially because of the presence of accumulation or synergy processes. Indeed, as regards the first act of pollution, some reports included in the proceedings¹⁴ point out that it has not been possible to determine the cause of the breakdown and therefore any explanations are pure speculation. Up to six possible causes for the initial accident are mentioned and they may not be mutually exclusive, they may have combined to provoke the tanker’s structural failure.

Indeed, that has been the motive used by US courts to dismiss the suit brought by Spain vs. ABS, the classification and insurance society. While Spain alleged that ABS’s negligent inspection and certification of the ship had led to the wreck, New York’s courts dismissed the suit arguing that Spain had failed to adduce sufficient evidence of such reckless conduct. Spain based its suit on the surveys carried out by ABS on two sister ships of the *Prestige*: the *Centaur* and the *Alexandros*. In 1996 the structural fatigue in the hull of these two oil tankers was analyzed and it was concluded that within a short period of time – four to five years – they would suffer structural failures in the same area where the hull of the *Prestige* cracked. Following this conclusion, both ships were scrapped. The problem is that according to US courts this crucial information was never communicated to the surveyors examining the *Prestige* and the computer program *SafeHull* was never used on it. However, the court argues that Spain did not introduce sufficient evidence of this “*congenital deficiency*”.

10. Additionally, the *Prestige* case has revealed another limit of risk criminal law: even though risk criminal law intends to manage risks, it admits as a starting point the need to tolerate them, as they are “*necessary consequences*” (“*Nebenfolgen*”, in Beck’s terms) of our economic model, based on production and consumption.

¹³ The full text of the Public Prosecutor’s indictment is available at: http://www.elpais.com/elpaismedia/ultimahora/media/201006/09/espana/20100609elpepunac_1_Pes_PDF.pdf.

¹⁴ For instance the “Zamora report”, written by a group of specialists from the UPC (Universitat Politècnica de Catalunya) and commissioned by one of the prosecutions brought in the name of the people (acciones populares), filed by the political party Izquierda Unida.

In spite of the environmental disaster, in the end in order to construct criminal liability it must be proved that “*environment protection laws or general provisions*” have been infringed, which will be used as a technical argument, so that eventually no criminal liability will be attributed to any of the companies operating the ship. As explained above, according to the reports apparently the tanker’s structure met the normative requirements in force at the moment of its construction, particularly those regarding its resistance to bending and shear stress. The reports also state that the ship had been correctly loaded and it met MARPOL requirements applying to ships of its class. So the *Prestige* had all certificates required by maritime regulations in force at the time on construction, safety and prevention of pollution in the marine environment, and the day it sank it had all due certificates on its safety in order, as it had passed all inspections – public and private – performed on it.

11. Another manifestation of this level of tolerance in environmental offences can be found in the type of negligence of the offence. As it is required that the negligence be “*serious*”, the criminal liability of minor negligence is then dismissed, which would explain that even in the hypothetical case that the rest of agents (shippers, owners, insurance companies, etc.) were prosecuted the deed finally carried out could not be objectively attributed to the negligent action, because the overlapping of negligence would have the effect of downgrading the seriousness of the negligence of some people or even of all of them.

12. Declarations of intent used to lull public opinion. Lastly, the *Prestige* case is also a good example of how criminal law fulfills essentially symbolic functions. Its instrumental functions to prevent offences through the motivation of conducts are pushed to the background and it takes symbolic functions, which are value judgment and propagandistic. Such value-judgment functions can be clearly seen, for instance, in the proposal for a directive on the protection of the environment through criminal law of 2001, which literally recognized that “*the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law*”. As for propagandistic functions, the criminalization of such conducts and the more than likely conviction against the ship’s captain will surely have a tranquilizing effect, as public authorities will appear to have done something about it although they will not provide an effective solution to environmental problems.

In fact, we believe that Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution, which was issued as a response to the *Erika* and *Prestige* accidents, includes a clearly propagandistic declaration of criminal intervention, as it recognizes that “*the required dissuasive effects can only be achieved through the introduction of penalties applying to any person who causes or contributes to marine pollution; penalties should be applicable not only to the shipowner or the master of the ship, but also the owner of the cargo, the classification society or any other person involved*”. The mere public declaration of intent may apparently be enough to achieve such effects, but, as we shall see in the conclusions, the real need is to move forward on legal reforms in other areas.

3. The Erika case: an eye-opener case on how international law establishes an organized irresponsibility system.

13. Putting an end to more than a decade of judicial proceedings, the French Supreme Court's decision in the *Erika* case (Cass. Crim., Sept. 25th, 2012, n°10-82.938) broached many fundamental issues at the forefront of which is the question of identifying coastal States' competences when it comes to repressing maritime oil-pollutions caused beyond their territorial seas. Such stakes are decisive for those who consider that oil companies should be liable on criminal grounds, so much it is true that international conventional rules tend to assert an "organized irresponsibility" for the ships' charterers. Therefore, only a national legislation can possibly try to establish a new order of things, by enacting more severe offenses. In the *Erika* case, this reasoning led to Total's conviction¹⁵. But up to the final decision, the risk that all the proceeding under the French jurisdictions could fall was manifest¹⁶, and quite complex to counter.

14. An uppermost competence granted to the Flag State's jurisdiction. Firstly, it was not obvious that the French jurisdictions were competent to rule the case. Let's keep in mind that article 228 of the Montego Bay Convention assures an uppermost competence to the Flag State's jurisdictions (except if the coastal State prosecutes "major damages")¹⁷, and in a way, French jurisdictions were lucky enough that the 'Erika' ship sailed under the Maltese flag because Malta rarely prosecutes in such similar cases. Therefore its inertia left an opportunity for the coastal State to take over the case. But the legal basis of the coastal State's proceedings can be challenged.

For the French Supreme Court, article 220 § 6 of the Montego Bay Convention authorizes the coastal State to prosecute pollution offenses that occur beyond its territory and that

¹⁵ Total was found guilty of the criminal offense, alongside of the ship owner (Guiseppe Savarese, via his company Tevere Shipping), the ship manager (Antonio Pollara via his company Panship) and the certification company (SpA Rina). Apart from the fines (370.000 euros for Total and Rina, 75.000 euros for MM. Savarese and Pollara), all four were sentenced to pay civil damages (200,6 million euros). In front of the Court of appeal, Total was exempted of paying these damages, but this part of the decision was broken by the Supreme Court.

¹⁶ Indeed, the Supreme Court Public prosecutor pleaded for the cancellation of all the proceedings, considering that the French legislation under which the prosecution had been engaged did not comply with the relevant international law.

¹⁷ Article 228 states : "1 - Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels (...) 3 - the provisions of this article are without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State"

have caused serious damages. Article 221 can also be quoted¹⁸, and to some extent, article 56¹⁹. But it has been objected that in the Montego Bay Convention's approach, articles 220 § 6 and 221 only covers State's police powers²⁰, and not a jurisdictional competence, even if the wording isn't that clear²¹. This keen breach has nevertheless been exploited by the Supreme Court. But we must note that this solution is weakened by some relevant academic challenges. Therefore, even if the coastal damages can be considered as 'major', it is not obvious that the Montego Bay conventions authorize a coastal State to judicially prosecute on the grounds of articles 220 §6 and 228, as the Supreme court states.

Generally speaking, the uppermost competence given to the Flag State disturbs the readability of the environmental aims of the convention. Indeed, if the Flag State's legislation is not very committed on environmental issues, and tries to attract economic interests by enforcing very little constraints weighing on the ship's owner and charterer, it shall prevail if this State decides to rule the case against other State's intentions to do as well (except in the case of major damage caused to the coastal State... which is not always the case). Thus, according to international conventional law, the legal possibility of defending environmental interests over economic ones depends on geopolitical decisions, admitted that these economic interests are granted a theoretical precedence... an obvious paradox, one would say, regarding the goals of the international conventions involved.

15. Lively controversy on how national legislation must comply with international rules. Secondly, it has been constantly argued that the French offense, under which 'Total' had

¹⁸ Article 221 states : *"Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences"*.

¹⁹ Article 56 states : *"1. In the exclusive economic zone, the coastal State has (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to (...) (iii) the protection and preservation of the marine environment;*

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."

²⁰ CUENDET, «Les compétences de l'Etat en matière de répression des rejets polluants dans sa zone économique exclusive : quelles leçons après l'affaire de l'Erika ?», *Environnement et développement durable*, jan. 2013, n°1, p.25

²¹ Article 220 § 6 states : *"Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws."* If one takes in account other paragraphs of article 220 that concern EEZ, and particularly § 3 and 5, these rules only aim police measures, which tends to confirm that article 220 only deals with police measures.

been prosecuted, did not comply with the international rules. According to the Montego Bay Convention, if a coastal State uses its jurisdiction in order to protect maritime environment, it must do so in respect of article 211 § 5 which states that national legislations must comply with international law. And so, the MARPOL Convention. Yet, this agreement states that voluntary or involuntary oil leakages are forbidden for all ships. But in case of an accidental shipwreck, an exemption cause is possible, "*provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge, for the purpose of preventing or minimizing the discharge*", except if "*the owner or the Master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result*"²². Even if it is not that clear, the offense seems to aim exclusively the liability of the ship's captain and owner, and not its charterer.

The French legislation enacts a very different offense, considered as autonomous. Indeed, article 8 of the Law of July 5th, 1983, punishes accidents that were caused by recklessness, negligence, as well as non-observance of the legislation ; it allows no exemption cause and it aims the liability of anyone in charge of the ship's conduct or running (including the charterer); it adds the condition of a pollution affecting the national territory, and does not explicitly state it applies to France's EEZ ; finally, the offense is punished by the use of fines as well as of prison sentences. Obviously, French law is more severe than the MARPOL rules. For all that, can it be considered as complying with them? It all depends on how we understand the word of "complying".

16. The French Supreme Court answered positively to the question, just as the Paris court of appeal did before, arguing that at least, French legislation complied with the *goals and aims* of the MARPOL and Montego Bay conventions. Even if the Parisian judges gave a very convincing argument - the fact that the 1969 Vienna convention states that International agreements are interpreted in the light of their object and goals²³ - and despite that it is true that article 4 of the MARPOL convention invites countries to enforce rigorous legislations in order to dissuade possible offenders, the argumentation followed by the French judges can be challenged.

Indeed, for what concerns EEZs, a coastal State holds specific powers only because the Montego Bay convention allows and enforces them. This convention tries to establish a compromise between States' legitimate rights to protect their interests, and the liberty for anyone to use a maritime zone that is not the territory of a specific State, but in some way belongs to everyone. If a coastal State unilaterally heightens the severity of the common rule, it thus decides of something for which it has little legitimacy to, and threatens the compromise. It therefore seems paradoxical to defend the idea that the goals and aims of both conventions legitimate a conduct that reconsiders the compromise on which both agreements are founded.

²² Rules 9 and 11, Appendix 1 of the MARPOL convention

²³ Article 31 §1 of the Vienna Convention on the Law of Treaties, May 23rd 1969

We can nevertheless object that environmental issues are that important for the interests of all, that they do strengthen the coastal State's legitimacy to act this way. The use of EEZ being essentially for economic reasons, the French Supreme Court's decision ultimately consecrates the pre-eminence of environmental considerations over business interests... a position which complies with European rules, but which is not shared by all the countries in the world. We must nevertheless keep in mind that in the past, some countries, in order to prevent environmental disasters, did enact national legislations that were more severe than the international conventional rules²⁴. In a way, this refers to an international custom²⁵ whose networking with the Montego Bay and MARPOL conventions forbids us to consider that these two fundamental agreements apply strictly, and oppose more harsh national offenses.

17. We can regret that the French Supreme Court did not, on this issue, develop a sufficiently detailed and solid argumentation, contenting itself to raise the French law compliance with the international conventions aims and goals. It seems that what mattered most in this case was to convict Total, more than to find an undisputable legal basis that could change the perception of coastal States' competences. An opportunity to speed up the process of challenging international rules was, unfortunately, missed here.

18. The charterer's conviction: a combination of factors above all. And so it is that the oil group was convicted, because prior to the shipwreck, it had voluntarily undertaken a vetting operation on the 'Erika', and thus, was considered negligent owing to the information it held on the ship's condition before it departed. Total therefore gave the stick with which it has been beaten. But what if the oil group had refrained from undertaking the vetting operation (which, likely, will be the case in the future) ? Clearly, no offense would have been detected under the French law, since negligence entails to prove a prior knowledge that only a vetting operation can assure. One can always try to assert that no matter the conduct and the concrete undertakings of the charterer company, it *should* have a precise knowledge of the ship's condition before its departure²⁶, according to a security performance obligation, but there are no legal grounds in national or international law for such a reasoning. There aren't even any for a duty obligation.

19. If, for the environmental cause defendants, the *Erika* case is presented as a victory, for the legal practitioner, this victory is rather slim: Total was indeed convicted not only because Malta chose not to prosecute in the first place, but also because the oil-company undertook a voluntary decision that put its criminal liability on the line, within the framework of French criminal law ; as for the argumentation that sustains the conviction, we saw that it could be challenged in very relevant ways.

²⁴ For example : the Canadian arctic waters pollution prevention act (June 17, 1970) ; the US oil pollution act (August 1990)

²⁵ MOORADIAN, «Protecting 'Sovereign rights' : the case for increased coastal state jurisdiction over vessel-source pollution in the exclusive economic zone», *Boston University Law Review* (82), 2002, p.798

²⁶ This logic is massively put into practice in French labor law, and more precisely in accident at work law, as well as car accident law.

However, we must welcome a decision which brings up, in a fine way, all the inconsistencies and deficiencies of the international conventional rules when it comes to repressing oil-pollution in the maritime environment.

20. By way of conclusion, and as from the French *Erika* decision's contribution, it seems obvious (for those who defend environmental interests at least) that international rules must change substantially, in order to set up a system where all the different actors take on their responsibilities in case of an accidental maritime pollution. This must lead to a profound cultural revolution in the way law comprehends environmental crimes: no company, whatever it's activity, should have the legal certainty that it can follow its economic interests without taking into consideration its possible impact on environment, and in doing so, its judicial liability for participating, directly or indirectly, intentionnally or not, in a pollution damage. From the moment the activity is potentially dangerous for the environment – because the ship owned is in bad condition, or because the cargo owned is pollutant – there is an evident link with the damage, and it is fair that society requires from these companies demanding precautions behaviors.

These prior considerations speak in favour of a break with the idea of letting the Flag State jurisdictions prevail on the coastal State's in case of an accidental shipwreck in an EEZ. Above the issue of fighting against flags of convenience, international law must now accept its aim to protect victims rather than the troublemakers. This means, more fundamentally, that international law must systematically protect environmental interests above economic ones (above any other, could we say), because environment is of general interest, and damages against it threaten the coastal State's economy and development options. This also means that international law must accept, explicitly, that its rules are only a minimum standard, so much that harsher national rules can be applied if this is the result of the coastal State's choice.

Our conclusions therefore promote the idea of a new conceptualization of EEZs, sliding from the concept of 'exclusive economic zones' to the one of 'economic and ecological protection zones' where the coastal States' competences and sovereign rights would be increased. Indeed, this proposal detracts the principle of *mare liberum*, and in a way reintroduces the claim of State's new appropriation of sea areas, two trends that are in contradiction with the current international rules, aims and goals concerning sea regulation. But firstly, these trends are already in progress. Secondly, the importance of environmental issues today requires we break with a legal system that has been conceived at a time when these major issues were massively ignored. As noted by a French author, Montego Bay and MARPOL conventions "*are not immutable tools. The history of sea law is about States' claims that were, at first, isolated but that ended up, by contagion effect, to the formation of a new set of rules. We can therefore not systematically blame, and in an absolute way, all dissident practices that could foresee a need of change*".

21. Alongside of this major reform proposal, a second one can be mentioned that exceeds criminal law aspects: international conventions must now affirm the compulsory nature of vetting operations for the charterer companies, and state from now on that this obligation

is a performance one. This way, oil companies would be forced to pressure ship owners to provide ships that are in perfect conditions to avoid shipwrecks or leaks. Indeed, this proposal would help national jurisdictions to recognize what really hurts negligent oil companies (and incites them to change their behavior): their civil liability. According to the International convention on civil liability for oil pollution damage (CLC-1969), an oil company's civil liability can be engaged only in case of an intentional or a recklessness fault. Yet, a failure to a performance obligation can easily be assimilated to such a fault. Sure enough, this reform would change considerably the present state of shipwreck litigations.

But to come back to criminal law considerations, this reform could also sustain a substantial change in the offense forbidden by the MARPOL convention. If the charterer is bound by a performance obligation, the conditions of use of Rule 11's exemption cause could logically be modified in order to incorporate the charterer's recklessness fault, alongside those of the ship owner and Master. This too, could change considerably the present state of shipwreck litigations.

22. As regard to national legislation, the *Prestige* case allows us to make two significant considerations. In the first place, we believe that it should be pondered whether examining magistrate's courts such as the one in Corcubión, a town of no more than 2,000 people, are appropriate to examine these types of complex cases, as it is obvious that the Corcubión court does not have the necessary human and material resources to examine a case featuring such a technical complexity and such economic and political implications as the *Prestige* one.

23. Another aspect which has been visible in the *Prestige* case is the significant role of *acciones populares*—prosecutions brought in the name of the people—in Spanish criminal proceedings, although they do not fall into the domain of environmental criminal law. This institution, recognized in Section 125 of the Spanish Constitution, entitles any citizen other than the injured parties having some interest in the case to stand as prosecutor, and it has been called into question by a section of the doctrine. However, the *Prestige* case has shown once again the important role that these prosecutions can have in a political and legal context in which the Public Prosecutor seems to defend more the interests of the Government than the observance of the law.

We would like to recall that the *acciones populares* brought by Izquierda Unida and the Nunca Más movement have made it possible to put the director of the merchant navy on trial. For this reason, we think that national mechanisms such as *acciones populares* or even the establishment of a European public prosecutor's office may prevent these situations.

24. It's all a question of criminal policy choices: either we really want to protect environment because we are convinced that it's the only way to guarantee sustainable development for the future generations, and in this case, law must change substantially, either we continue to consider environment as an accessory issue, less important than economic interests, and in that case, current law will be maintained and political declarations of intentions will keep on being demagogic. Europe has a major responsibility on this issue.

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