

Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC's Penal Approach*

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I. INTRODUCTION

One of the first indications of the intention of the European Community (EC) to extend its legislation over the ship-source pollution regime was implied by the European Commission's proposal to inaugurate a European Pollution Damage Compensation Fund, under the name of COPE.¹ The initiative met serious obstacles to its endorsement by the

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1. *Communication from the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker Erika*, at 59-61, COM(2000) 802 final (June 12, 2000). The COPE would function as a third tier of liability that would not replace the International Oil Pollution Convention Fund. Gotthard M. Gauci, *The European Commission's three-front attack against the special regime for shipowners' pollution liability. Is the international maritime liability regime in danger?* 330 MARIUS SCANDINAVIAN INST. OF MAR. L. 214 (2004). See also Henrik Ringbom, *The Erika Accident and Its Effects on EU Maritime Regulation*, in CURRENT MARINE ENVTL ISSUES AND THE INT'L TRI-

Member States and ultimately did not progress.² However, there have been other developments at the EC level creating synergies with the international regime of ship-source pollution.³ In this context, recent EC developments on ship-source pollution do not fail to raise a number of issues especially with regard to international maritime law. For instance, is EC action that provides for criminal sanctions in the event of ship-source pollution antithetical to international norms? And up to what point does the EC action conform to EC law?

This essay focuses on a number of EC decisions that affect ship-source pollution, such as (1) EC Directive 2005/35/EC of the European Parliament and Council of September 7, 2005 concerning ship-source pollution and the introduction of penalties for infringements;⁴ and (2) EU Council Framework Decision 2005/667/JHA of July 12, 2005 on the strengthening of the criminal Framework Decision for the enforcement of the law against ship-source pollution.⁵ In light of these efforts, the essay examines and evaluates the EC contribution to the existing regime on ship-source pollution.⁶

II. THE EUROPEAN UNION CONTEXT

It is well known that maritime casualties act as catalysts for the creation of international and regional legislation.⁷ For instance, the Titanic

BUNAL FOR THE L.OF THE SEA, 274, *passim* (Myron H. Nordquist & John Norton Moore, eds., Kluwer Law International) (2001).

2. *Special Edition: The Prestige Accident*, ENERGY AND TRANSP IN EUROPE DIG, (2002), http://ec.europa.eu/dgs/energy_transport/newsletter/dg/2002/nISEPrestige-2002-11-20_en.html.

3. *See, e.g.*, International Convention on Civil Liability for Oil Pollution Damage, *adopted* Nov. 29, 1969, International Maritime Organization (IMO), *available at* http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=660 (The international regime on ship-source pollution notably comprises the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969, as amended and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971, as amended); *The International Maritime Organization (IMO): Activities*, ENCYCLOPEDIA OF THE NATIONS, *available at* <http://www.nationsencyclopedia.com/United-Nations-Related-Agencies/The-International-Maritime-Organization-IMO-ACTIVITIES.html> (last visited Aug. 31, 2006); Gerald J. Mangone, *United States Admiralty Law*, 265-273 KLUWER L. INT'N'L (1997).

4. Council Directive 2005/35/EC, 2005 O.J. (L 255) 11 (EC).

5. Council Framework Decision 2005/667/JHA, 2005 O.J. (L 255) 164.

6. Notably, the following articles discuss the measures in question prior to their evolution into applicable law: Guaci, *supra* note 1, at 211; Iliana Christodoulou-Varotsi, *The Sanctions in the Event of Marine Pollution Under the Scope of EC Law*, in MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES, 5TH INT'L CONF. ON MAR. L., 417 (2004) (article in Greek); Polychronis Tsirides, *Penal Protection of Marine Environment in the Frame of the European Union*, in MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES, 5TH INT'L CONF. ON MAR. L., 171 (2004) (article in Greek).

7. J.H. Peachey, *Managing Risk Through Legislation*, in MANAGING RISK IN SHIPPING 92, 101 (1999); Edgar Gold, *Liability and Compensation for Ship-Source Marine Pollution: The International System*, 1999/2000 Y.B. INT'L CO-OPERATION ON ENV'T AND DEV. 31 (2003),

provoked the first International Safety Congress,⁸ which led to the first SOLAS Convention,⁹ and the Amoco Cadiz resulted in the STCW Convention in 1978.¹⁰ The Oil Pollution, Preparedness, Response and Cooperation Convention (OPRC) (1990) and the U.S. Oil Pollution Act (1990)¹¹ were adopted in the aftermath of the Exxon Valdez oil spill, and the Torrey Canyon led to the Convention on Intervention on the High Seas¹² and to the Convention on Civil Liability for Oil Pollution in 1969.¹³ In more recent years, Erika and Prestige¹⁴ had a major impact on the EC legislature and resulted in the so-called “Erika I,”¹⁵ “Erika II,”¹⁶ and “Erika III”¹⁷ packages.

available at http://www.fni.no/YBICED/99_02_gold.pdf#search=%22first%20STCW%20Convention%201978%20Amoco%20Cadiz%22.

8. Phillip Boisson, *The History of Safety at Sea*, http://www.oceansatlas.org/unatlas/issues/safety/transport_telecomm/history_safety/history_safety.htm (last visited Aug. 31, 2006).

9. International Convention for the Safety of Life at Sea (SOLAS), adopted Nov. 1, 1974, available at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (follow “International Convention for the Safety of Life at Sea, 2004” hyperlink).

10. Gold, *supra* note 7, at 32.

11. Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is it Time to Change The Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 100 (2001).

12. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, adopted Nov. 29, 1969, International Maritime Organization (IMO), available at http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=680.

13. International Convention on Civil Liability for Oil Pollution Damage, *supra* note 3.

14. Elizabeth Galiano, *In the Wake of the Prestige Disaster: Is an Earlier Phase-Out of Single-Hulled Oil Tankers the Answer?*, 28 TUL. ENVTL. L.J. 113, 119-21 (2003).

15. *Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade*, COM(2000) 142 final (March 21, 2000) and European Commission, *Maritime Safety: Erika I Package*, Transport, <http://europa.eu/scadplus/leg/en/lvb/l24230.htm> (last visited Sept. 10, 2006). The Erika I legislative package comprises Directive 2001/105/EC, 2002 O.J. (L 19) 9, on the control of performance of national ship inspection and survey organizations (classification societies) which repeals Directive 94/57/EC, 1994 O.J. (L 319) 20. Erika I also includes Council Directive 2001/106/EC, 2002 O.J. (L 19) 17 (explaining port state control), which amends Directive 95/21/EC, 1995 O.J. (L 157) 1, and Regulation 417/2002/EC, 2002 O.J. (L 64) 1 (explaining the “accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers”), which repeals Regulation 2978/94/EC, 1994 O.J. (L 319) 1, on segregated ballast oil tankers and amended by Regulation 1726/2003/EC, 2003 O.J. (L 249) 1-3 (providing for a new final date for single hulled tankers, i.e. 2010 instead of 2015).

16. *Communication from the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker Erika*, *supra* note 1 and European Commission, *Maritime Safety: Erika II Package*, Transport, <http://europa.eu/scadplus/leg/en/lvb/l24242.htm> (last visited Sept. 10, 2006). The Erika II legislative package refers to Council Directive 2002/59/EC, 2002 O.J. (L 208) 10 (establishing a Community vessel traffic monitoring and information system) which repealed Directive 93/75/EEC, 1975 O.J. (L 247) 19, and refers to Regulation 1406/2002/EC, 2002 O.J. (L 208) 1 on the establishment of a European Agency for Maritime Safety (EMSA).

17. *Communication from the Commission: Third Package of Legislative Measures on Maritime Safety in European Union*, at 3, COM(2005) 585 final (Nov. 23, 2005); Vanden Broele, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/59/EC establishing a Community Vessel Traffic Monitoring and Information System*, European

The EC legislator's sphere of interest and competence in the maritime field revolve mainly around maritime safety and competition. The EC followed a long path in order to come up with today's common shipping policies in these areas as well as in the field of marine environmental protection.¹⁸ The very first EC maritime-oriented acts, which incidentally prove how long it took for the EC to develop maritime legislation, were the 1978 Council Recommendation of June 26, 1978 on the ratification of Conventions on Safety in Shipping,¹⁹ the 1993 Communication on Safe Seas²⁰ and the "Erika I" legislative packages of 2001.²¹

From a technical point of view, EC maritime safety law and policy are structured over the supranational competence area which is known as the first pillar²² and more precisely on the basis of Articles 80(2)²³ and

Sea Ports Organisation: Legislative Observer (2005) http://www.espo.be/Legislative_Observer.aspx?TopicID=237. The European Commission published its Third Maritime Safety Package on November 23, 2005 containing 7 proposals of new European legislation and amendments to the existing one. This package included "a proposal for a Directive on the conformity requirement of flag States, an "[a]mendment of the Directive on classification societies," an "[a]mendment on the Port State Control Directive," an "amendment on the Traffic Monitoring Directive," "a proposal for a Directive on accidental investigations, a proposal for "[a] Regulation on liability and compensation for damage of passengers in the event of maritime accidents," and a proposal for "[a] Directive on the extra-contractual liability of ship owners." See Broele.

18. See Gold, *supra* note 7, at 32. See also Vincent Power, *EC Shipping Law* (Lloyd's of London Press Ltd) (1992).

19. See EC Recommendation 78/584/EEC, 1978 O.J. (L 194) 17 (EC)

20. *Communication from the Commission A Common Policy on Safe Seas*, COM (1993) 66 final (Feb. 24, 1993).

21. See *infra* note 15.

22. The Treaty of Maastricht, which established the European Union, divided European policies into three main areas called "pillars". TREATY ON EUROPEAN UNION, Jul. 29, 1992, O.J. (C 191) Preamble (1992) [hereinafter "EU Treaty"]. The first, or "Community" pillar, concerns economic, social, and environmental policies, as well as transportation policy. *Id.* The second, or "Common Foreign and Security Policy" pillar, concerns foreign policy and military matters. *Id.* The third, or "Police and Judicial Cooperation in Criminal Matters" pillar, concerns cooperation in the fight against crime. *Id.* Within each pillar, a different balance is struck between the supranational and intergovernmental principles. *Id.* For an academic analysis of the second pillar, see Panayiotis Ioakimidis, *The Common Foreign Policy and Security Policy of the EU*, in INTRODUCTION TO THE EUR. STUD. 573 (Stephanou, Fatouros, & Christodoulides, eds., Vol. A, 2001) (article in Greek). For an academic analysis of the third pillar see e.g. Stelios Perrakis, *The Space of Freedom, Security and Justice in the EU*, in INTRODUCTION TO THE EUR. STUD. 359 (Stephanou, Fatouros, & Christodoulides, eds., Vol. A, 2001) (article in Greek). For a helpful schematic of the three pillars, see generally Three Pillars of the European Union, WIKIPEDIA, (2006), http://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.

23. Consolidated Version of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2002 O.J. (C 325) 33, 64 (EC) [hereinafter "EC Treaty"] (This provision refers to the exclusion of maritime (and air transport) from Title V of the EC Treaty on Transport). The Council of Ministers of Transport "may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport." See *id.* art. 64.

71(1)(c)²⁴ of the EC Treaty. The so-called third pillar, which basically consists of intergovernmental nature, has been used only once in the maritime sphere—in the case of the above mentioned Framework Decision 2005/667/JHA.²⁵ The dynamic contribution of the European Court of Justice (ECJ) to the elaboration of “common shipping policy” is also to be noted.²⁶

Even though EC competence over maritime issues is growing, the EC is not a member of the International Maritime Organization (IMO).²⁷ Rather, the European Commission has an “observer status” in the IMO.²⁸ In practice, the European Commission confines itself to coordinating the position of the twenty-five EC Member States, whose maritime interests are far from being convergent.

A. UNILATERALISM AND REGIONALISM

The development of EC maritime law in the area of maritime safety is often interpreted as an expression of “unilateralism” or “regionalism,” as opposed to the “universal action,” which is traditionally represented by the IMO.²⁹ However, the interpretation of the term “unilateralism” is not an easy task. The EC does not consider its actions to be unilateral, because they are shaped on the basis of international requirements and tend to anticipate future international action.³⁰ Despite possible controversy about the meaning of “unilateralism,” the EC has not been prevented from developing a substantial legislative policy on maritime safety and marine environmental protection. Some of the EC’s efforts include measures on port state control,³¹ port reception facilities for ship-generated waste and cargo residues,³² vessel traffic monitoring and information

24. *Id.* art. 61-62 (this provision refers to EC competence over safety of transport (in general and not specifically over maritime transport)).

25. Council Framework Decision 2005/667/JHA, *supra* note 5.

26. *See, e.g.*, Case 167/73, E.C. Comm’n v. Fr., 1974 E.C.R. 359.

27. IMO Member States with Year of Joining, <http://www.imo.org/home.asp> (follow “Quick Links: Member States” hyperlink; then follow “IMO Member States with year of joining” hyperlink) (last visited Sept. 5, 2006) *compare with* Inter-Governmental Organizations Which Have Concluded Agreements of Cooperation with the IMO, <http://www.imo.org/home.asp> (follow “Quick Links: Member States” hyperlink; then follow “Inter-Governmental Organizations which have concluded agreements of cooperation with IMO”) (last visited Sept. 5, 2006).

28. European Maritime Safety Agency, Resources/Glossary, <http://www.emsa.europa.eu/end185d002.html>.

29. *See e.g.* Alan Boyle, *EU Unilateralism and the Law of the Sea*, 21 INT’L J. OF MARINE & COASTAL L. 1, 15-31 (2006).

30. *See, e.g.*, Alexandra Bellayer-Roille, *Les Réactions Juridiques de la CE Suite au Naufrage du Prestige: Étude d’Une Politique Ambitieuse de Sécurité Maritime*, ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE [ALMANAC OF MARITIME AND OCEANIC LAW] 166 (University of Nantes 2003) Vol. XXI.

31. *See* Council Directive 98/25, 1998 O.J. (L 133) (EC).

32. *See* Council Directive 2000/59, 2000 O.J. (L 332) 81 (EC).

system,³³ the accelerated phasing-in of double hull or equivalent design standards for single hull tankers,³⁴ and the introduction of penalties in case of ship-source pollution.³⁵

B. CRIMINAL SANCTIONS

The main issues with regard to criminal sanctions for ship-source pollution concern the potential for disharmony among the shipping industry, and the justification for sacrificing public policy alternatives. It is not the intention of this essay to question the appropriateness of EC maritime law in general, which is nowadays accepted by the twenty-five Member States, and largely accepted by the international shipping community.

III. JUSTIFICATIONS FOR CRIMINAL SANCTIONS IMPOSED BY THE EC

Directive 2005/35/EC³⁶ aims at “incorporate[ing] international standards for ship-source pollution into Community law and [at] ensur[ing] that persons responsible for discharges are subject to adequate penalties . . . in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.”³⁷ Framework Decision 2005/667/JHA³⁸ supplements the Directive with detailed rules in criminal matters.³⁹

Significantly, these two distinctive acts reflect two different legal bases. This artificial split is due to institutional rather than substantive reasons. The Directive was adopted by a qualified majority and is now binding in respect to its result while leaving Member States free to choose the form and method of implementing the law.⁴⁰ The Directive is a creature of the first pillar, based on the EC Treaty, and is therefore subject to political and judicial control by the European Parliament and the ECJ under the same Treaty.⁴¹ This means that the European Parliament, as co-legislator,⁴² participates in its adoption, and that the ECJ has full jurisdiction to control the Member States’ implementation of the Directive.⁴³

In contrast, the Framework Decision, which was adopted by unanimity, is subject to the third pillar, which is based on the EU Treaty.⁴⁴ This

33. Council Directive 2002/59, 2002 O.J. (L 208) (EC).

34. Council Regulation 417/2002/EC, 2002 O.J. (L 64) (EC).

35. Council Directive 2005/35, *supra* note 4 and 6.

36. Council Directive 2005/35, *supra* note 4.

37. *Id.* at art. 1.

38. Council Framework Decision 2005/667, *supra* note 5.

39. *See id.* at point 4 of the preamble.

40. EC Treaty, as amended by the TREATY OF NICE, *supra* note 23, at art. 249.

41. *Id.*

42. *See* EC Treaty, as amended by the TREATY OF NICE, *supra* note 23, at art. 251.

43. *See id.* at art. 226.

44. EU Treaty, *supra* note 22, at art. 34.

Treaty, unlike the EC Treaty, is principally of intergovernmental nature and implies limited political and judicial control by the European Parliament and the ECJ.⁴⁵ The European Parliament participates in the adoption of Framework Decisions merely in the role of consultant,⁴⁶ which implies a lesser degree of participation than in the co-decision procedure. Furthermore, there is no infringement procedure in the frame of the third pillar.⁴⁷

It is also of prime importance to note that the criminal competence of the EC as such is in doubt.⁴⁸ Criminal competence is justified by the EC to the extent that it is necessary for the accomplishment of its goals. More precisely, the European Commission believes that criminal penalties are necessary to effectively implement EC laws and policies in EC Member States.⁴⁹ Criminal competence has been explored, for example, in Council Framework Decision 2003/80/JHA of January 27, 2003, on the protection of the environment through criminal law.⁵⁰ However, criminal competence of the EC is not supported by the majority of Member States.⁵¹

Significantly, a recent case before the ECJ (mentioned below) states that “[n]ot only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power [has] been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175

45. *Europa Glossary: Consultation Procedure*, European Communities (2006), http://europa.eu/scadplus/glossary/consultation_procedure_en.htm (last visited Oct. 23, 2006). For an informative overview of European directives and the consultation procedure, see generally *Consultation Procedure*, WIKIPEDIA, (2006), http://en.wikipedia.org/wiki/Consultation_procedure; Wikipedia, (2006) http://en.wikipedia.org/wiki/European_Union_directive (last visited Sept. 26, 2006).

46. European Parliament Fact Sheets, http://www.europarl.europa.edu/factsheets/1_4_2_en.htm (last visited Sept. 26, 2006).

47. See, e.g., GUY ISAAC, *DROIT COMMUNAUTAIRE GENERAL*, (Ariel, S.A., Barcelone ed., Armand Colin 1999) (1983) (discussing the institutional structure of the EC and the EU); See José F. Castillo Garcia, *The Power of the European Community to Impose Criminal Penalties*, 2005/3 *EIPASCOPE* 27 (discussing the impact of this structure on the criminal competence of the EC).

48. See Garcia, *supra* note 47.

49. See *Commission Proposal for a Directive of the European Parliament and of the Council on Ship-Source Pollution and on the Introduction of Sanctions, Including Criminal Sanctions, for Pollution Offenses*, at 5-7, COM (2003) 92 final (May 3, 2003); See also Garcia, *supra* note 47.

50. Council Framework Decision 2003/80, 2003 O.J. (L 29) 55, 58 (JHA).

51. See EUROPEAN COMMISSION, COURT OF JUSTICE STRENGTHENS DEMOCRACY AND EFFICIENCY IN EUROPEAN COMMUNITY LAWMAKING, Reference IP/05/1136 (Sept. 13, 2005) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1136&format=HTML&aged=0&language=EN&guiLanguage=EN>. See also Garcia, *supra* note 47.

[of the EC Treaty on the environment], were conferred on it.”⁵² However, even if some Community instruments have included provisions on criminal sanctions, the freedom of the Member States to choose between administrative or criminal law was never called into question.⁵³

Once the institutional basis is clarified, one may pose the question, why would the EC be interested in criminalizing ship-source pollution? In the context of ship-source pollution, the legal framework related to the imposition of sanctions, including criminal sanctions, is left to the discretion of States - according to the MARPOL 73/78 Convention on discharges of polluting substances which is the fundamental text governing marine environmental issues at the international level.⁵⁴ In the context of the ship-source pollution regime, states are well aware of these criminal sanctions.⁵⁵ The question is, should Member States be obligated by EC law to take action, and is the requirement merely an addition to the existing international regime, or does it go beyond all existing norms? The

52. Case C-176/03, *Comm'n v. Council of the European Union*, 2005 available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-176%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

53. See Garcia, *supra* note 47; See also Directive 2005/35 *supra* note 4, at art. 8 and Council Regulation 2847/93, art. 31, 1993 O.J. (L 261) 1 (EEC) establishing a control system applicable to the common fisheries policy: “Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have not been respected” Council Regulation 2847/93.

54. International Convention for the Prevention of Pollution from Ships art. 4, Nov. 2, 1973, 89 U.S.T. 118 [hereinafter “International Convention”].

- (1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefore under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.
- (2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefore under the law of that Party. Whenever such a violation occurs, that Party shall either:
 - (a) cause proceedings to be taken in accordance with its law; or
 - (b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.
- (3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.
- (4) The penalties specified under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur.

55. See Jane F. Barrett & Jeanne M. Grasso, *Criminal Environmental Prosecutions and the Maritime Industry – a World-wide Trend*, BIMCO REV. 154 (2004).

same question applies to the accompanying requirements of the Directive and the Framework Decision.

Both the Directive and the Framework Decision imply the weak implementation of the MARPOL 73/78 Convention. The EC, especially via the European Commission, considers that there are discrepancies in the implementation of the MARPOL 73/78 Convention among EC Member States, justifying the need for harmonized and enhanced implementation, including the imposition of criminal penalties.⁵⁶ The EC also seems to implicitly justify its action on the need to expand the notion of illegal discharge so as to include accidental spills, which, in principle, is tolerated by the MARPOL 73/78 Convention.⁵⁷

More importantly, the EC texts clearly suggest that there is a need to extend the circle of persons on whom sanctions for ship-source pollution are likely to be imposed.⁵⁸ The EC texts consequently inaugurate a regime, which will operate in parallel with the civil liability regime that stems from CLC and the Fund Convention.⁵⁹ It is not an exaggeration to say that for private persons involved in the shipping industry the sword of Damocles hangs over the oceans!

IV. DETAILS OF THE EC'S SHIP-SOURCE POLLUTION ACTIONS

The Directive applies to discharges of polluting substances, and is meant in the same manner as in the MARPOL 73/78 Convention - release of oil and "noxious liquid substances in bulk".⁶⁰ Discharges fall within the scope of the Directive when they are effected in internal waters, including ports of a Member State, the territorial sea, the straits used for international navigation, the exclusive economic zone, and the high seas.⁶¹ "Ship-source discharges of polluting substances" are considered infringements "if committed with intent, recklessly, or by serious negligence."⁶² As stipulated in Annex I of the Directive, the Directive adopts the exceptions to liability under the MARPOL 73/78 Convention in a selective manner.⁶³ The MARPOL 73/78 Convention provides that a discharge of oil is not illegal if it is necessary "for the purpose of securing the safety of a ship or saving life at sea," if the discharge results from damage to a ship or its equipment (under certain conditions), or if the discharge

56. Council Directive 2005/35, *supra* note 4, at point 3 of the preamble.

57. *See id.* at art. 2.

58. Council Directive 2005/35, *supra* note 4, at art. 5; Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 2.

59. *See generally* 1984 Protocols Amending the Civil Liability and Fund Conventions on Oil Pollution Damage, Nov. 6 1985, 99 U.S.T. 12.

60. Council Directive 2005/35, *supra* note 4, at art. 2.

61. *Id.* at art. 3.

62. *Id.* at art. 4.

63. *Id.* at annex.

was approved by the flag state “for the purpose of combating specific pollution incidents in order to minimize the damage from pollution.”⁶⁴

However, the exception related to the discharge resulting from the damage to a ship or its equipments, which covers accidental spills, is endorsed by the Directive only if the discharge takes place in the straits used for international navigation, in the exclusive economic zone, and in the high seas with regard to the owner, the master, or the crew, when acting under the master’s responsibility.⁶⁵ The Directive does not mention whether such pollution in internal waters, including ports and the territorial sea, falls within this exception. The manner in which the Directive adopts the MARPOL Convention is indicative of its purpose to limit the scope of existing exceptions, and consequently results in more stringent laws.⁶⁶

Within a port of a Member State, if there is suspicion that a ship has been engaged or is engaging in a discharge of polluting substances in all areas described by the Directive, including the high seas, the Member State shall ensure appropriate inspection.⁶⁷

The Directive also refers to coastal Member States.⁶⁸ If the suspected discharge of polluting substance takes place in the territorial sea, the straits used for international navigation, the exclusive economic zone or the high seas, and the ship does not call at a port of the Member State concerned, the latter shall coordinate with the next port of call in another Member State in deciding appropriate measures.⁶⁹ “Member States shall take the necessary measures to ensure that infringements” as described in the Directive “are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.”⁷⁰

The Framework Decision, which supplements the Directive with detailed rules in criminal matters, was adopted prior to the Directive. While the Directive provides for penalties that “*may* include criminal or administrative penalties,”⁷¹ the Framework Decision clarifies that all infringements in the Directive *shall* be regarded as criminal offenses.⁷² This can be explained on the basis of institutional considerations.⁷³

The Directive aims to demonstrate some flexibility with regard to

64. International Convention, *supra* note 54, regulation 11.

65. Council Directive 2005/35, *supra* note 4, at art. 5.

66. *See, e.g.*, International Convention, *supra* note 54, reg. 6.

67. Council Directive 2005/35, *supra* note 4, at art. 6(1).

68. *See generally id.*

69. *Id.* at art. 7.

70. *Id.* at art. 8.

71. *Id.* (emphasis added).

72. Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 2(1).

73. *See* Fabienne Kauf-Gazin, *Répression de la Pollution Causée par les Navires*, REVUE MENSUELLE LEXISNEXIS JURISCLASSEUR EUROPE, Nov. 2005, at 17.

maritime labor. For instance, there is no criminal offense for crew members who cause accidental spills “that occur in the straits used for international navigation”, in the “exclusive economic zones”, “on the high seas”, and “where the conditions set out in the MARPOL 73/78 Convention are satisfied.”⁷⁴

Criminal penalties that Member States might impose as a result of violations of EC law must be “effective, proportionate and dissuasive.”⁷⁵ For offenses referred to in the Framework Decision, criminal penalties of a maximum of 1 to 3 years of imprisonment are provided for, accompanied by other penalties or measures such as fines and disqualification from engaging in an activity requiring official authorization.⁷⁶ Intentionally committed offenses justify criminal penalties of 2 to 5 years imprisonment, when they lead to significant damage to water quality and are committed within the frame of a criminal organization or with serious negligence.⁷⁷ For intentionally committed offenses where there is significant damage to water quality and the death or serious injury of persons, criminal penalties of at least 5 to 10 years imprisonment are required.⁷⁸ In minor cases where there is no deterioration of water quality, the Framework Decision provides for various other types of penalties.⁷⁹

In addition to the above, each Member State must take measures to ensure that legal persons can be held liable for the offenses referred to in the Directive.⁸⁰ Legal persons shall be “punishable by effective, proportionate, and dissuasive penalties.”⁸¹ The penalties may include criminal or non-criminal fines of at least EUR 150,000 to EUR 300,000 and EUR 750,000 to EUR 1,500,000 in the most serious cases.⁸² Penalties other than fines comprise measures such as the “exclusion from entitlement to public benefits or aid,” and the “temporary or permanent disqualification from engaging in commercial activities.”⁸³

The European arrest warrant may be activated under the conditions prescribed by applicable EC law in order to facilitate and render more efficient the Member States’ enforcement of the Directive and Framework Decision⁸⁴

74. Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 2(2).

75. *Id.* at art. 4(1).

76. *Id.* at art. 4(3).

77. *Id.* at art. 4(5), (6).

78. Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 4(4).

79. *Id.* at art. 4(2).

80. See Council Directive 2005/35, *supra* note 4, at art. 4, 8.

81. *Id.* at art. 8. See also Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 6(1).

82. *Id.* at art. 6(1)(a).

83. *Id.* at art. 6(1)(b).

84. See the Council Framework Decision 2002/584/JHA of June 13, 2002 on the European

V. ASSESSMENT OF THE EC APPROACH

The EC approach to criminal sanctions for ship-source pollution is likely to cause significant disharmony at two levels. First, the approach may be inconsistent with a number of international requirements. Second, the approach may cause confusion in regards to the legal order of the EC itself.

It may be argued that there is a risk of conflict or friction with international law in relation to the notion of illegal discharge, which seems to be enlarged by the EC instruments under consideration. While the MARPOL 73/78 Convention covers operational discharges, but excepts certain accidental discharges, the EC Directive and Framework Decisions do not accept accidental spills in a number of areas. For instance, the exception contained in Regulation 11(b) of Annex I of the MARPOL 73/78 Convention is reshaped by EC instruments and the latter do not tolerate accidental spills in internal waters, including ports, and territorial waters.⁸⁵

The risk of an international law conflict with regard to the introduction of criminal sanctions is less obvious. Unlike the criminal sanctions introduced by the EC's actions, the international regime for civil liability for oil pollution and the regime on pollution by other hazardous or noxious substances do not provide for criminal penalties. Rather, they merely require compensation for damages by the ship owner via compulsory insurance coverage.⁸⁶ As mentioned above, the MARPOL 73/78 Convention leaves the issue of sanctions to the discretion of States which are parties to it.⁸⁷ Even if international law is not violated by the criminal

arrest warrant and the surrender procedures between Member States. See Council Framework Decision 2002/584, preamble(5) art. 28, 2002 O.J. (L 190) 1,15 (EU). The European arrest warrant aims to replace the traditional extradition procedure by abolishing the political and administrative phase of the procedure in question and by providing for primarily judicial proceedings, underlying the principle of recognition of court judgments. The European arrest warrant is not only a warrant for search, arrest and detention but also a warrant for surrender to the judicial authority of the issuing State. See Iliana Christodoulou Varotsi, *The European Legal Order Response To Terrorism: Recent Developments*, Paper at 2002 Summer Seminar by Institute of International Relations: "New International Crisis: Implications for International Politics," in Athens, Greece (2002) in *HELLENIC REV. OF EUR. L.* (Int'l Edition 2004).

85. See Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), Nov. 2, 1973, International Maritime Organization 4, available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 (last visited Sept. 6, 2006). See also Council Directive 2005/35, *supra* note 4, at art. 5.

86. Convention on Civil Liability for Oil Pollution Damage (CLC); *supra* note 3; See also The International Regime for Compensation for Oil Pollution Damage: Explanatory Note prepared by the Secretariat of the International Oil Pollution Compensation Funds, (2006), available at <http://www.iopcfund.org/npdf/genE.pdf#search=%22International%20Regime%20for%20civil%20liability%20for%20oil%20pollution%22> (last visited Sept. 6, 2006).

87. See Convention on Civil Liability for Oil Pollution Damage (CLC), *supra* note 3, at 6;

sanctions introduced by EC action, the advisability of this action could still be challenged. In particular, existing similar criminal sanctions in a number of States have not prevented oil pollution incidents from taking place.⁸⁸

As a result, the application of criminal sanctions to persons who cause or contribute to marine pollution, such as ship owners, masters of ships, and owners of cargo may be a deviation from the spirit of the existing regime at the international level. For example, an EU conflict could arise where EC criminal sanctions are sought against persons whom the civil liability regime merely exposes to compensatory sanctions. Moreover, would the EC be able to justify expanding the chain of criminal actors from ship owners to others such as pilots and port owners and operators? In light of the significant differences between State and EC regimes, the answer to this question is still far from certain.

The establishment of jurisdiction by Member States in the event of offenses covered by EC texts may reveal a number of points that must be explored further.⁸⁹ For instance, if several States acquire criminal jurisdiction because they jointly suffer from pollution that occurs in the Mediterranean Sea, courts of EC Treaty Member States will be required to find criminal offenses while courts of non-EC Treaty States may impose mere civil sanctions. Arguably, this difference in adjudication contributes to significant legal uncertainty and may be highly undesirable by the shipping industry.⁹⁰

The shipping industry may also become confused by institutional disharmonies at the EC level, which could weaken the moral weight of the EC's efforts. This was recently suggested in an ECJ judgment on September 13, 2005,⁹¹ which involved an action for annulment against the Framework Decision through criminal law⁹² and which implied by analogy the risk to see the Framework Decision on ship-source pollution being annulled for the same reasons.⁹³ The Court declared that the said Decision

See also International Maritime Organization Conventions, available at <http://www.imo.org/home.asp>.

88. *Europe Unites Against Marine Polluters*, Environment News Service, (2005), available at <http://www.ens-newswire.com/ens/jul2005/2005-07-11-04.asp> (it should be noted that criminal sanctions in Spain, Portugal and France did not prevent the Prestige and Erika oil spills). See also Barrett & Grasso, *supra* note 55.

89. See Council Framework Decision 2005/667/JHA, *supra* note 5, at art. 7.

90. Tsirides, *supra* note 6, at 171-172.

91. See Case C-176/03, *Comm'n of the European Communities v. Council of the European Union*, notes 4,77,83,85 (E.C.J. 2005) available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN>.

92. *Id.*

93. See *Communication from the Commission of the European Communities to the European Parliament and the Council on the Implications of the Court's Judgment of 13 September 2005 (Case C-176/03 Commission v Council)*, at 4, COM (2005) 583 (Nov. 23, 2005).

must be annulled since the Framework Decision 2003/80/JHA aimed at the protection of the environment while it should have been properly adopted *on the basis of the EC Treaty instead of the EU Treaty*. This would result in the incorporation of the criminal sanctions into a Directive. Such evolution, which is of internal nature to the EC, is likely to create some confusion among that section of the shipping industry which is already skeptical about the EC instruments under consideration. The EC's search for the right legal basis for adopting criminal sanctions on ship-source pollution is indicative of the difficulties raised by the question. The pending case, C-440/05, in which the European Commission has instituted an action against the Council of the European Union claiming that the Court should declare the Council Framework Decision 2005/667/JHA unlawful emphasizes the unsettled nature of such criminal sanctions.⁹⁴

VI. CONCLUSION

Despite the questions raised within this essay, the international civil liability regime is not at risk and MARPOL 73/78 has not been rejected by the EC.⁹⁵ Rather, the EC's efforts have selectively shaped MARPOL according to the needs and priorities of Member States. In addition, criminal sanctions for marine pollution are not entirely unknown to the national legislatures.⁹⁶ However, the spirit of the EC measures demonstrates a tendency by the EC legislator for independent action, which is also corroborated by the new EC proposals under "Erika III."⁹⁷

While the contribution of EC maritime law to the enhancement of maritime safety is undeniable, as suggested *inter alia* by the positive influence of the harmonization process on open registries such as Cyprus and Malta before their accession to the EU and the banning of substandard ships from Community waters, some reservations may be raised with regard to the EC's penal approach to the question.⁹⁸

94. Case C-440/05, 2006 O.J. (C 22) 10.

95. See Gauci, *supra* note 1, at 235-43.

96. For an overview of criminal prosecutions for ship-source pollution in a number of States see Barrett & Grasso, *supra* note 55.

97. *Annex to the Communication from the Commission on Third Package of Legislative Measures on Maritime Safety in the European Union*, at 1, COM (2005) 585 final (Nov. 23, 2005).

98. On the harmonization of Cypriot maritime law to EC maritime law: see Iliana Christodoulou-Varotsi, *L'Adaptation Du Droit Maritime Hellenique Et Du Droit Maritime Chypriote Au Droit Communautaire*, HELLENIC INST. OF INT'L AND FOREIGN L. (1999); see Iliana Christodoulou-Varotsi, *L'Évolution du Droit Maritime Chypriote en vue de l'Adhésion à l'Union Européenne*, LE DROIT MARITIME FRANÇAIS 378 (April 2004); see Iliana Christodoulou-Varotsi, *Introduction to the Adjustment of the Cypriot Maritime Law to the Acquis Communautaire*, HELLENIC REV. OF EUR. L. 164, 167 (Dec. 2004); see Iliana Christodoulou-Varotsi, *Ensuring Qualitative Shipping in Cyprus: Recent Developments in Cypriot Maritime Law in Light of the "Acquis*

Additional questions may be posed on the advisability of the EC instruments under examination: Have existing provisions been adequately explored before adopting the measures in question? Directive 95/21/EEC on port state control,⁹⁹ Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues,¹⁰⁰ and Directive 2002/59/EC on a Community vessel traffic monitoring and information system¹⁰¹ are only a few examples of the existing measures that can be explored further in order to deal with the problem of polluting discharges. With the issue of criminal sanctions as such, one may also wonder whether the rule of “*ultimum refugium*” has been respected.¹⁰²

It is legitimate to consider that the orientation of the EC, which aims to become an integrated entity, is such that it utilizes the maritime sphere as a tool for more integration. In other words, despite the functioning of the international regime governing shipping as shaped by the IMO, which may be assessed under different angles, it seems that the EC considers it necessary to have its own strategy and to expand it in a dynamic manner. This policy is the result of divergent perceptions and interests, expressed by its twenty-five members, including three major maritime powers at the international level: Greece, Cyprus, and Malta.¹⁰³

In pragmatic terms, the particular interests of each Member State have a determining influence on the consideration of ship-source pollution and, consequently, on public policy choices. It seems that in the particular case presented above, the experience and interests of EC Member States that have “suffered” from major maritime casualties as well as the situation of port and coastal Member States of the EC have prevailed over the interests of Member States which are mainly countries of registration and which have been less exposed to maritime casualties in recent years. This fluctuating parameter, in combination with the apparent determination of the European Commission for more legislation in the maritime field, seems to be the lever of any future action in this area.

Ultimately, as with any debate considering EU integration and con-

Communautaire”, ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE [ALMANAC OF MARITIME AND OCEANIC LAW] 193 (University of Nantes) 2006 Vol. XXIV.

99. Council Directive 95/21, 1995 O.J. (L 157) 1 (EC).

100. Council Directive 2000/59, *supra* note 32.

101. Council Directive 2002/59, *supra* note 33.

102. Tsirides, *supra* note 6, at 171-172.

103. Alibaba.com. *Import regulations and customs duties-Distribution-Transportation of goods-Shipping-Patents and brands*, http://resources.alibaba.com/country_profiles/marche_21.htm (last visited Sept. 7, 2006); Jean Christou, *EU may force tightening of rules on oil tankers*, HELLENIC RESOURCES NETWORK (2006), available at <http://www.hri.org/news/cyprus/cmnews/2000/00-01-09.cmnews.html>; Mondaq.com, *Department of Merchant Shipping: Cyprus Ship Registry* (2006), <http://www.mondaq.com/article.asp?articleid=38124&latestnews=1>; Maritime Malta Authority, *Maritime Malta*, http://www.mma.gov.mt/ship_registration.htm (last visited Sept. 7, 2006).

ciliation of each Member State's policies, EU and State legislators are faced with near philosophical considerations. In the words of Descartes, "la diversité de nos opinions ne vient pas de ce que les unes sont plus raisonnables que les autres, mais seulement de ce que nous conduisons nos pensées par diverses voies, et ne considérons pas les mêmes choses."¹⁰⁴

104. René Descartes, *Discours De La Methode* 122, available at http://abu.cnam.fr/cgi-bin/donner_html?methode3, translated in <http://www.literture.org/authors/descartes-rene/reason-discourse/chapter-01.html>: "[T]he diversity of our opinions, consequently, does not arise from some being endowed with a larger share of reason than others, but solely from this, that we conduct our thoughts along different ways, and do not fix our attention on the same objects." A translation can be found at: Literature.org, *Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in Sciences*, <http://www.literature.org/authors/descartes-rene/reason-discourse/chapter-01.html> (last visited Sept. 6, 2006).