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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**CRIMINAL PROCEDURES AND SANCTIONS
AGAINST SEAFARERS AFTER LARGE-SCALE
SHIP-SOURCE OIL POLLUTION ACCIDENTS:
A HUMAN RIGHTS PERSPECTIVE**

by

ANETE LOGINA

Latvia

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the award of the degree of

DOCTOR OF PHILOSOPHY

2016

Ph.D. Dissertation Copyright Authorisation

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A Human Rights Perspective**

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The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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Title of Dissertation: **Criminal Procedures and Sanctions Against Seafarers
After Large-Scale Ship-Source Oil Pollution Accidents:
A Human Rights Perspective**

Name of Candidate: **Anete Logina**

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Abstract

Title of Dissertation: **Criminal Procedures and Sanctions Against Seafarers After Large-Scale Ship-Source Oil Pollution Accidents: A Human Rights Perspective**

Degree: **PhD**

The international maritime community is highly concerned about the unfair application of criminal procedures and sanctions against seafarers, particularly after large-scale ship-source oil pollution accidents, because such unfairness may cause severe negative consequences for individual seafarers and the shipping sector in broader terms. A lot of work has already been done towards the elimination of the respective unfairness. Yet, the unfair practice continues. This dissertation attempts to give new ideas as to how to facilitate the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents.

The dissertation starts with the clear definition and comprehensive explanation of the standard of fair criminal procedures and sanctions against seafarers. The offered standard is – relevant human rights.

The dissertation continues with the analysis of whether or not those rules of UNCLOS and MARPOL which can be linked to criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are clear and comply with human rights. As a result, several deficient rules of UNCLOS and MARPOL are identified and corresponding recommendations on how to interpret these rules are given within the dissertation. Many of these recommendations are innovative, particularly, because when addressing the issue of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, the international maritime community, so far, has predominantly focused on criticising particular EU and national laws and practices, instead of looking critically at the relevant rules of UNCLOS and MARPOL as well.

After analysing the relevant legal norms of UNCLOS and MARPOL, the dissertation turns to the long-standing discussion on the qualities of EU Directive 2005/35 on ship-source pollution, particularly to the controversy of whether the Directive conflicts with the MARPOL exceptions from liability, or not. The dissertation, *inter alia*, makes an original conclusion that the root cause of the controversy is the failure of the drafters of MARPOL to agree on the issue as to when, if ever, State Parties to MARPOL may adopt more stringent standards than MARPOL.

Some insight into relevant national laws and practices is provided by the dissertation – through the case study of four large-scale ship-source oil pollution accidents: the *Erika*, *Prestige*, *Tasman Spirit* and *Hebei Spirit* accidents. The case study shows that after all four afore-mentioned accidents seafarers were exposed to unfair criminal procedures and sanctions.

After this unfortunate finding, the dissertation analyses whether IMO/ILO Guidelines on Fair Treatment of Seafarers are capable to bring considerable positive change in practice. Conclusion is made that the Guidelines, *per se*, are not capable to bring such change, however some rules of the Guidelines are good basis for further, more substantial developments.

The dissertation ends with revisiting of all research questions and providing user-friendly lists of main recommendations related to these questions. At the very end, a couple of overall conclusions and recommendations, which, at times, reach even further than only large-scale ship-source oil pollution offences, are given. One of such recommendations is the recommendation to develop three new IMO instruments: one binding (the International Convention for the Unification of Certain Rules Relating to Penal Liability in the Maritime Domain) and two non-binding (the Sanctioning Guidelines for Offences in the Maritime Domain and the Guidelines on Penal Proceedings Which Involve Seafarers).

KEYWORDS: unfair treatment of seafarers, criminal procedures and sanctions, human rights, ship-source oil pollution accidents.

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LIST OF ABBREVIATIONS

AB	able seaman
BIMCO	Baltic and International Maritime Council
CJEU	Court of Justice of the European Union
CLC Convention	International Convention on Civil Liability for Oil Pollution Damage, 1992

CMI	Comité Maritime International
COLREG	International Regulations for Preventing Collisions at Sea, 1972
CROSS Etel	Regional Operational Centre for Monitoring and Rescue (<i>Centres Régionaux Opérationnels de Surveillance et de Sauvetage</i>) in Etel, France
CZCS Finisterre	Regional Centre for the Coordination of Maritime Rescue and the Fight Against Marine Pollution of Finisterre (<i>Centro Zonal de Coordinación de Salvamento Marítimo y Lucha contra la Contaminación Marina de Fisterra</i>)
DNA	deoxyribonucleic acid
dwt	deadweight tonnage
EC	European Commission
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEZ	exclusive economic zone
EMSA	European Maritime Safety Agency
EU	European Union
F	French franc
Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992
GT	gross tonnage
HF	high frequency
IACtHR	Inter-American Court of Human Rights
ICS	International Chamber of Shipping
IFSMA	International Federation of Shipmasters' Associations
ILO	International Labour Organization
IMO	International Maritime Organization
INTERCARGO	International Association of Dry Cargo Shipowners

INTERTANKO	International Association of Independent Tanker Owners
IOPC Funds	International Oil Pollution Compensation Funds
ISF	International Shipping Federation
ITF	International Transport Workers' Federation
ITLOS	International Tribunal for the Law of the Sea
KRW	South Korean won
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978
MLC	Maritime Labour Convention, 2006
MoU	Memorandum of Understanding
MQM	Mattahida Qaumi Movement
NGO	non-governmental organisation
OCHA	Office for the Coordination of Humanitarian Affairs
P&I	Protection and Indemnity
RINA	Registro Italiano Navale
SOLAS	International Convention for the Safety of Life at Sea, 1974
SOPEP	Ship Oil Pollution Emergency Plan
SRI	Seafarers' Rights International
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNEP	United Nations Environment Programme
USD	United States dollar
VHF	very high frequency
VLCC	very large crude carrier
VTS	vessel traffic service

1. Introduction

1.1. Background and Statement of Problem

Since the late 1990s and the early 2000s, the international maritime community has been highly concerned about the unfair application of criminal procedures and sanctions against seafarers, particularly after large-scale ship-source oil pollution accidents – accidents which cause public and media reaction and together with that also heightened political tension.¹ It has been argued that seafarers are detained for prolonged periods, without clear grounds, without access to legal advice and without interpretation services; and that, they are held as “material witnesses”, as hostages pending the resolution of a financial dispute, treated as scapegoats for dubious owners with deficient ships or as inducement for those responsible to come forward and convicted without proving their criminal intent, by applying a lower standard of proof or basing conviction on political motivations.² Through case-study analysis conducted for this dissertation, those fore-mentioned concerns of the international maritime community will be confirmed as well-founded.

¹ See *infra*, pp. 29-30 for explanation of “large-scale” in the context of this dissertation.

² See, for example, Deirdre Fitzpatrick and Michael Anderson, (ed.), *Seafarers’ Rights*, Oxford: Oxford University Press, 2005 at p. 35; Edgar Gold, *Gard Handbook on Protection of the Marine Environment*, 3rd edition, Arendal: Gard, 2006 at pp. 545 and 552; Proshanto K. Mukherjee, “Criminalisation and Unfair Treatment: The Seafarer’s Perspective”, in *Journal of International Maritime Law*, Volume 12, Issue 5, September-October 2006 at p. 329; Anthony G. Olagunju, “Criminalization of Seafarers for Accidental Discharges of Oil: is There Justification in International Law for Criminal Sanctions for Negligent or Accidental Pollution of the Sea?”, in *Journal of Maritime Law and Commerce*, Volume 37, No. 2, April 2006 at pp. 237-238; Edgar Gold, “Fair Treatment of Seafarers in the Event of a Maritime Accident: New International Guidelines”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 406; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at pp. 1074 and 1076; John A.C. Cartner, Richard P. Fiske and Tara L. Leiter, *The International Law of the Shipmaster*, London: Informa, 2009 at pp. 200-201. See also the relevant documents submitted to IMO, for example: Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 95/5, 27 February 2009, submitted by BIMCO; Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 97/6, 29 September 2010, submitted by BIMCO; Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 97/6/1, 1 October 2010, submitted by CMI, P&I Clubs, BIMCO, ICS, ISF, ITF and INTERTANKO.

It is a true and promising fact that large-scale ship-source oil pollution accidents have decreased significantly over the past several years.³ Consequently, there are also less cases of unfair application of criminal procedures and sanctions against seafarers after these accidents. However, it is highly likely that sooner or later a large-scale ship-source oil pollution accident will once again occur, because as Mooradian has stated:

[...] given the inhospitable nature of the marine environment, it is unlikely that mankind will ever completely eliminate marine disasters. One would surmise that it would be practically impossible to completely eliminate, through legislative edict, human error and the incalculable element of misfortune.⁴

Everybody in the maritime community wants to be sure that if and when another such unfortunate oil-pollution accident were to occur, seafarers would not be exposed to unfair criminal procedures and sanctions again, because such unfairness against seafarers brings severe negative consequences.

First of all, such unfairness can damage seafarers' and their family members' psychological and physical health.⁵ Secondly, such unfairness can negatively influence seafarers' professional career, with resultant economic implications for them and their family members. If a seafarer is detained or imprisoned, he is not able to continue to work and may lose his salary and social benefits. If a seafarer is not detained or imprisoned, his career still might be impacted. Criminal conviction, as such, even if only a monetary penalty is imposed, puts a "stigma" on the seafarer and may subject him to debilitating. For example, some states do not give visas to persons who have been criminally punished. In the case of seafarers, the inability to

³ See ITOPF, Oil Tanker Spill Statistics 2015, available at: http://www.itopf.com/fileadmin/data/Documents/Company_Lit/Oil_Spill_Stats_2016.pdf [accessed 7 March 2016].

⁴ Christopher P. Mooradian, "Protecting 'Sovereign Rights': the Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone", in *Boston University Law Review*, Volume 82, Issue 3, June 2002 at p. 769.

⁵ ITF, *Hebei Spirit* fact sheet, available at: <http://www.itfglobal.org/campaigns/hebeifacts.cfm> [accessed 21 March 2013]. See also the case study in this dissertation which indicates that after *Tasman Spirit* accident seafarers who were arbitrary deprived of their liberty by Pakistani authorities suffered severe depression. One of the seafarers even attempted to commit suicide - tried to slit his neck and arm muscles with sharp pieces of broken glass. He was rushed to hospital with extensive bleeding.

obtain a visa can prevent them from carrying out their duties.⁶ Even criminal accusation followed by an acquittal puts “stigma” on a seafarer;⁷ because, typically, any accusation questions seafarers’ respect for the law, and such questioning can cause the perception that a particular person is not reliable. Naturally, employers do not want “unreliable” people to work for them. Thus, they might be reluctant to hire respective seafarers.

Implications for individual seafarers are not the only negative consequences of the unfair application of criminal procedures and sanctions against seafarers. These consequences are much broader. As BIMCO puts it:

[...] the implications for individual seafarers cannot be seen in isolation. Thus, the considerable number of high profile cases of unfair treatment is bound also to have consequences for the shipping sector in broader terms, its image, and the ability to recruit and retain a sufficient number of qualified seafarers to the sector.⁸

Results of several studies show that many seafarers are concerned about a possibility that they will be unfairly criminalised or otherwise unfairly treated after maritime accidents, including large-scale ship-source oil pollution accidents.⁹ This concern pushes seafarers to seek for alternative employment in which they are less exposed to the risk of accusation and conviction – employment ashore or if still on a ship, then at lower rank. In turn, it results in the lack of qualified seafarers, especially officers.¹⁰

⁶ Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the Journal of International Maritime Law, Volume 18, Issue 2, March-April 2012 at p. 156; BIMCO, Unfair Treatment of Seafarers – Serious Implications for the Seafarers Involved, available at: https://www.bimco.org/en/News/2010/03/04_Unfair_treatment_of_seafarers.aspx?RenderSearch=true [accessed 23 December 2014];

BIMCO, IOPC Fund Launches Recourse Action in *Hebei Spirit* Incident, available at: https://www.bimco.org/en/News/2010/03/15_IOPC_Fund_launches_recourse_action.aspx?RenderSearch=true [accessed 23 December 2014].

⁷ MURRAY, *ibid.*

⁸ BIMCO, Unfair Treatment of Seafarers – Serious Implications for the Seafarers Involved, *supra* note 6.

⁹ See Nautilus International, Criminalisation of Seafarers Report, 2011 and SRI Criminal Survey, 2013.

¹⁰ Proshanto K. Mukherjee, “Criminalisation and Unfair Treatment: The Seafarer’s Perspective”, in Journal of International Maritime Law, Volume 12, Issue 5, September-October 2006 at pp. 335-336; Alfred Popp, “The Treaty-Making Work of the Legal Committee of the International Maritime Organization”, in Aldo Chircop et al., (ed.), *The Regulation of International Shipping: International and Comparative Perspectives: Essays in Honor of Edgar Gold*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 222; BIMCO and ICS, Manpower Report: The Global Supply and Demand for Seafarers in 2015, London: Maritime International Secretariat Services Limited, 2016.

This shortage of seafarers brings implications on trade. In the worst-case scenario, hundreds of ships may be retired as a result of having no qualified seafarers to navigate them. Considering the fact that shipping transports over 90% of global trade – for instance, raw materials, consumer goods, essential food stuff and energy – and that a vast majority of these products cannot be transported any other way,¹¹ one can imagine the catastrophe that a shortage of seafarers may cause. For convincing those who lack an imagination, Mukherjee suggests every ship everywhere in the world to come to a halt just for two days. Empty supermarket shelves then will allow the modern consumer society to understand the harsh nightmare of a world without shipping.¹²

Even if the above-described, extreme scenario (the scenario of nobody to navigate ships) never were to materialize, a shortage of seafarers still has the potential to bring severe negative impact on trade. A survey on the shortage of seafarers which was carried out by Moore Stephens and was based on responses from key players in the international shipping industry, concluded: competition for crews is likely to help push up crew wages and other crew costs and, together with it, also the total vessel operating costs.¹³ Perhaps the saddest thing is that more costly crews, in this case, do not mean better crews. Responses to this issue in the above-mentioned survey were like these: “Crew competence and skill is declining” and “A lot of the new crews are of a very low standard.”¹⁴ Such responses are not surprising. General research on the labour market has often concluded that there exists a strong inverse relationship between the number of professionals in a field and the skills shortage in this same field.¹⁵ One might wish to see more research proving this

¹¹ IMO, IMO and the Environment at p. 2, available at: <http://www.imo.org/OurWork/Environment/documents/imo%20and%20the%20environment%202011.pdf> [accessed 2 September 2015].

¹² MUKHERJEE, *supra* note 10 at p. 336.

¹³ Moore Stephens, Future Operating Costs Report, 2012 at pp. 2-4, available at: http://www.moorestephens.co.uk/vessel_operating_costs_expected_to_rise_over_the_next_two_years.aspx [accessed 2 September 2015].

¹⁴ *Ibid.*

¹⁵ See, for example, Mari Lind Frongner, “Skills Shortages”, in Labour Market Trends, January 2002 at p. 23; Antonio Domingos Mateus, Charles Allen-Ile and Chux Gervase Iwu, “Skills Shortage in South Africa: Interrogating the Repertoire of Discussions”, in Mediterranean Journal of Social Science, Volume 5, No. 6, April 2014 at p. 64.

relationship, also, specifically in regards to the shortage of seafarers and their declining skills. However, even without such research, it is clear that there is a high possibility that such a relationship exists; for instance, at the maritime educational institutions, quality might be compromised in the quest for increasing quantity and inexperienced seafarers might be promoted quickly due to a lack of officers. Less-qualified crews, obviously, bring with them a higher risk of accidents.

Another phenomenon caused by the unfair application of criminal procedures and sanctions against seafarers which results in higher risk of accidents is the reluctance of seafarers, due to fear of self-incrimination, to cooperate with institutions which carry out safety investigations of accidents – investigation in accordance with the IMO Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, adopted by IMO Resolution MSC.255(84) (hereinafter – IMO Casualty Investigation Code),¹⁶ or other similar investigations.¹⁷ The objective of a safety investigation, as it is stated in Paragraph 1.1 of the IMO Casualty Investigation Code, is “preventing marine casualties and marine incidents in the future.” This objective is reached by revealing the causes of the casualty or incident and giving relevant recommendations to the whole maritime community. The unwillingness of seafarers to cooperate fully and openly with a safety investigation can hamper the revelation of the true causes of the casualty or incident. Yet, without knowing these causes, it is very hard to take effective response measures and, consequently, to achieve the above mentioned objective of preventing marine casualties and marine incidents in the future.

¹⁶ IMO, Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code), adopted by IMO Resolution MSC.255(84), 16 May 2008.

¹⁷ For example, see SRI Criminal Survey, 2013, in which it is stated that 46% of seafarers who answered the question concerning safety investigations said that they would be reluctant to cooperate fully and openly with such investigations, and among reasons indicated for such unwillingness to cooperate is fear of self-incrimination.

The high probability of the unfair application of criminal procedures and sanctions against seafarers may also have negative impact on the will of masters of ships to seek refuge in particular states.¹⁸ It can lead to accidents which may not have happened at all or may have had less severe consequences if a ship had asked for and was granted a place of refuge.

Arguments discussed above prove that aiming to secure a cleaner environment with the help of criminal law, if this law is developed and enforced in unfair manner, in fact can cause the opposite effect – more pollution due to poorly qualified crew navigating ships, due to inability to find out the true causes of the accident and eliminate them and due to unwillingness of masters of ships to seek refuge in particular states.

A lot of work has been done by the international maritime community towards the elimination of the unfair application of criminal procedures and sanctions against seafarers. In 2004, the Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident was established. According to the terms of reference, the Working Group needed to prepare suitable recommendations for consideration by the IMO Legal Committee and the ILO Governing Body, including draft guidelines on the fair treatment of seafarers in the event of a maritime accident.¹⁹ The Working Group successfully accomplished its task and, consequently, in 2006, the IMO Legal Committee as well as the ILO Governing Body adopted “Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident” (hereinafter – IMO/ILO Guidelines on Fair Treatment of Seafarers).^{20,21}

¹⁸ Marc A. Huybrechts, “Whatever Happened to European Directive 2005/35/EC? Europe’s Ambivalent Approach to the Fight Against Marine Pollution and Its Consequences for Seafarers”, in Baris Soyer and Andrew Tettenborn, (ed.), *Pollution at Sea: Law and Liability*, London: Informa, 2012 at p. 266; “Proposed Criminal Sanctions for Oil Spills Top Legal Agenda”, *Lloyd’s List*, 24 August 2004.

¹⁹ Report of the Joint ILO/IMO Ad Hoc Expert Working Group on Fair Treatment of Seafarers in the Event of a Maritime Accident, ILO, GB.292/STM/6/1, March 2005.

²⁰ IMO, Adoption of Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, Resolution LEG.3(91), adopted on 27 April 2006; ILO, Minutes of the 296th Session of the Governing Body of the International Labour Office, GB.296/PV, adopted on 12 and 16 June 2006.

²¹ For detailed analysis of the IMO/ILO Guidelines on Fair Treatment of Seafarers see Chapter 7 of this dissertation.

Apart from the IMO/ILO Guidelines on Fair Treatment of Seafarers, there has been a significant contribution by the international maritime community towards enhancing the fair application of criminal procedures and sanctions against seafarers via several studies, such as:

- CMI study on fair treatment of seafarers, 2006. During this study the information on laws and practices of specific countries in regards to the criminalisation and deprivation of liberty of seafarers after maritime accidents was compiled. The results of the study indicated that laws and practices of several countries are not in line with the relevant international requirements.²²
- BIMCO Study of the Treatment of Seafarers, 2010. During this study the examples of cases of unfair application of criminal procedures or sanctions against seafarers from 1996 to 2009 were identified and briefly described. The results of the study showed topicality of the issue.²³
- Already fore-mentioned SRI Criminal Survey, 2013. During this survey seafarers were questioned to acquire the data on their personal and their colleagues' experiences of facing criminal charges or being a witness in a criminal prosecution. Amongst the findings of the survey were the following: 8.27% of respondents had faced criminal charges; 90.21% of respondents who had faced criminal charges and who answered the relevant question did not have legal representation; 91.20% of respondents who had faced criminal charges and needed interpretation services were not provided with these services; 88.66% who had faced criminal charges and who answered the relevant question did not have their legal rights explained to them; 80.00% of respondents who had faced criminal charges and who answered the relevant question felt they were intimidated or threatened as an accused; 24.49% of respondents who had been witnesses in a prosecution and who answered the relevant question felt they were intimidated or threatened as a witness. These

²² CMI, Fair Treatment of Seafarers: Summary of Responses of CMI Members to the Questionnaire, 2006.

²³ BIMCO, Study of the Treatment of Seafarers, September 2010.

findings showed that during penal proceedings specific human rights of seafarers are often not respected.²⁴

Unfortunately, all above-mentioned and other efforts of the international maritime community have appeared to be not enough for elimination of the unfair application of criminal procedures and sanctions against seafarers. The evocative proof of the truthfulness of this statement is the recent judgment of the Spanish Supreme Court in the *Prestige* case – the judgment with which, more than 13 years after the accident, the 81 year-old master of *Prestige* was sentenced to two years imprisonment for his role in the large-scale ship-source oil pollution accident; although the guilt of the master in no-way could be considered as being high if it could be considered as existing at all.²⁵ In other words, despite all efforts, the issue of unfair application of criminal procedures and sanctions against seafarers, particularly after large-scale ship-source oil pollution accidents, has remained topical. Consequently, new ways for minimising the respective unfairness must be explored. This dissertation will do so.

1.2. Aim and Objectives of the Dissertation

The aim of this dissertation is to facilitate the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents and, with that, reduce the severity of the negative consequences which arise from the unfair application of such procedures and sanctions.

The objectives of the dissertation are:

- to identify unfair international law, EU law and examples of unfair national law on criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents;
- to identify unfair enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents;
- to make recommendations for eradication of the identified problems.

²⁴ SRI Criminal Survey, 2013.

²⁵ For the full analysis of the *Prestige* case see the case study in this dissertation.

1.3. Research Questions

For achieving the above mentioned aim and objectives the following questions have been analysed in the dissertation:

1. What rights concerning criminal procedures and sanctions are prescribed by international and regional human rights instruments, such as UDHR;²⁶ the International Covenant on Civil and Political Rights;²⁷ the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights);²⁸ the Charter of Fundamental Rights of the European Union;²⁹ the American Convention on Human Rights³⁰ and the African Charter on Human and Peoples' Rights?³¹
2. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by specific international “hard law” instruments and whether relevant legal norms in these instruments are clear and comply with human rights:
 - 2.1. What are the relevant legal norms of UNCLOS,³² are they clear and do they comply with human rights?
 - 2.2. What are the relevant legal norms of MARPOL,³³ are they clear and do they comply with human rights?
 - 2.3. If legal norms are unclear or do not comply with human rights, how they should be interpreted?

²⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

²⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Volume 999, p. 171.

²⁸ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

²⁹ EU, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

³⁰ Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

³¹ Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³² *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, Treaty Series, Volume 1833, p. 3.

³³ IMO, *International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978*.

- 2.4. If legal norms are unclear or do not comply with human rights, what can be done to improve them?
3. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences (as amended by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements) (hereinafter – Directive 2005/35)³⁴ and whether relevant legal norms in this Directive are clear and comply with human rights, UNCLOS and MARPOL? If relevant legal norms of Directive 2005/35 are unclear or do not comply with human rights, UNCLOS or MARPOL, how these legal norms should be interpreted and what can be done to improve them?
 4. What are examples of unfair national laws on criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents?
 5. Does the practical enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents comply with human rights?
 6. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by IMO/ILO Guidelines on Fair Treatment of Seafarers and whether relevant legal norms in these guidelines are capable to bring significant positive change in practice?

³⁴ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences, OV L 255, 30.9.2005, p.11.

1.4. Structure of Dissertation and Target Groups

Structure of this dissertation is highly linked with its research questions:

- Chapter 1 is an introduction.
- Chapter 2 explains the standard of fairness – being human rights.³⁵ Firstly, it discloses the concept of human rights. Secondly, it examines the exact content of individual human rights which can possibly be violated when applying criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents. Thirdly, where exact content of the relevant human right is not clear, recommendations are made regarding how to make this content clearer. Chapter 2 is accompanied by Annex I. This annex contains compliance check-lists for each human right analysed in the dissertation.
- Chapters 3 and 4 are allocated to specific international “hard law” instruments: UNCLOS and MARPOL respectively. First of all, each of these instruments is introduced. Secondly, those rules from each of the instruments, which can be linked to criminal procedures or sanctions applicable against seafarers after large-scale ship-source oil pollution accidents, are identified and analysed in detail. Thirdly, where above-mentioned rules are unclear or inconsistent with human rights, recommendations are made regarding the interpretation of these rules. Chapter 3 is accompanied by Annex II. This annex contains a user-friendly table indicating who, under UNCLOS, has criminal jurisdiction over large-scale ship-source oil pollution accidents.

³⁵ For detailed explanation on why, exactly, human rights are treated as the standard of fairness for the purpose of this dissertation, see Sub-chapter 1.6.1 “Terms “Fair” and “Unfair””.

- Chapter 5 is allocated to Directive 2005/35. Again, first of all, the Directive is introduced. Secondly, those rules of the Directive, which can be linked to criminal procedures or sanctions applicable against seafarers after large-scale ship-source oil pollution accidents, are identified and analysed in detail. Thirdly, where above-mentioned rules are unclear or inconsistent with human rights, UNCLOS or MARPOL, recommendations are made regarding the interpretation of these rules. Differently from analysis of UNCLOS and MARPOL in Chapters 3 and 4, analysis of Directive 2005/35 in Chapter 5 is carried out from the perspective of one single case – highly debated case of *INTERTANKO and others v. Secretary of State for Transport* (hereinafter – *INTERTANKO* case).³⁶
- Chapter 6 is a case study. It examines whether, in the aftermath of specific large-scale ship-source oil pollution accidents, criminal procedures and sanctions applied against seafarers complied with human rights. To some of the conclusions from the case study brief reference is already made in the earlier chapters.
- Chapter 7 is dedicated to the introduction to and critical analysis of the IMO/ILO Guidelines on Fair Treatment of Seafarers.
- Chapter 8 sums up the earlier analysis and discusses the possible ways forward for enhancing the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (and beyond). Chapter 8 is accompanied by Annexes III, IV and V. These annexes list possible legal norms of three new legal instruments proposed by this dissertation.

³⁶ *INTERTANKO and others v. Secretary of State for Transport, Case C-308/06*, Judgment of 3 June 2008, ECJ.

Part of the dissertation contributes to the already on-going widespread discussions, for example, the discussion on the compatibility of Directive 2005/35 with UNCLOS and MARPOL or discussions on the treatment of seafarers after specific large-scale ship-source oil pollution accidents. Yet, another part of the dissertation is more innovative. For instance, despite the fact that the international maritime community often talks about the unfair application of criminal procedures and sanctions against seafarers, it, so far, has not clearly defined and comprehensively explained the standard (or “yardstick”) for fair criminal procedures and sanctions against seafarers. This dissertation does so. Similarly, while the international maritime community has been very active in criticising EU and national laws and practices related to the application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, it has relatively rarely looked critically at the corresponding rules of international maritime conventions, particularly UNCLOS and MARPOL, perhaps hastily assuming that these rules are not the source of the problem. This dissertation does not make such an assumption. It examines in detail relevant rules of UNCLOS and MARPOL.

The main target groups of the dissertation are:

- authorities which make and promulgate legislation in the maritime field (such as IMO, the EU and Ministries of Transport in particular states);
- authorities which make and promulgate legislation in the criminal law field (such as Ministries of Justice and Ministries of Interior in particular states);
- bodies which practically enforce criminal procedures and sanctions (such as police, prosecutor’s offices and courts);
- bodies which monitor fairness of the enforcement of criminal procedures and sanctions (such as human rights NGOs and maritime industry NGOs).

Descriptions, analysis, conclusions and recommendations incorporated into this dissertation strive to provide the above-mentioned groups of people with the legally-informed framework for their decisions in regards to criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, and beyond. The dissertation, *inter alia*, strives to facilitate proactive decision-making, as the dissertation not only identifies unfairness which is already *fait accompli* but also warns about unfairness which may occur in the future. This “warning” is expressed:

- 1) by analysing relevant law, as such, and identifying where this law deviates from human rights – even if, so far, this law has not caused unfairness against seafarers in practice;
- 2) by analysing cases outside the maritime field, for example, general human rights cases which illustrate different violations of the right to liberty or the right to fair trial – even if, so far, similar violations have not occurred in regards to seafarers.

1.5. Legal Theory and Methodology

This research is legal research. It examines qualities of law: the clearness of meaning of particular rules and the coherence between different rules. Consequently, this research predominantly uses legal research method, namely, the analysis of written materials. Such analysed written materials include: legislative acts, case law, reports, books and articles from journals.

For identifying the true meaning of particular legal norms, apart from looking into already available interpretations (for example, interpretations in court judgements or scholarly literature), methods (or rules) of interpretation incorporated in Art. 31 and 32 of the Vienna Convention on the Law of the Treaties are applied. Thus, any legal norm is interpreted by establishing the ordinary meaning of the terms used in it. Yet, this ordinary meaning is determined not in the abstract but in the context and in light of the object and purpose of the legal instrument in which the

legal norm is situated.³⁷ In other words, literal (philological), systemic and teleological methods of interpretation are applied simultaneously. However, the teleological method of interpretation (the method which examines the object and purpose of a legal instrument) is used cautiously, because a majority of scholars treat this method as extrinsic; they emphasize the primacy of the text as the basis for the interpretation.³⁸ If, after application of the above-mentioned methods of interpretation, meaning of a legal norm remains ambiguous or obscure, or if these methods of interpretation lead to a result which is manifestly absurd or unreasonable, recourse is made to the preparatory materials (or *travaux préparatoires*) of the legal instrument in question.³⁹

For resolving conflicts of law, conflicts of law principles are applied, such as: *lex superior derogate legi inferiori* meaning where two laws govern the same factual situation, a law higher in the hierarchy overrides a law lower in the hierarchy, and *lex specialis derogate legi generali* meaning where two laws govern the same factual situation, a law governing a specific subject matter overrides a law which only governs general matters.⁴⁰

The case study began by gathering as much factual information as possible about the cases, *inter alia*, by approaching institutions and persons directly involved in respective cases. Then, the gathered information was analysed. It was analysed on the basis of human-rights compliance check-lists incorporated into Annex I of this dissertation.

³⁷ See Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Volume 1155, p. 331.

³⁸ UN, Document A/6309/ Rev.1: Report of the International Law Commission on the Second Part of Its Seventeenth Session and Its Eighteenth Session, in *Yearbook of the International Law Commission, 1966*, Volume II, New York: United Nations Publications, 1967 at p. 218.

³⁹ See Article 32 of the Vienna Convention on the Law of Treaties, *supra* note 37.

⁴⁰ Daiga Iljanova, "Tiesību normu un principu kolīzija", in Edgars Melķis, (ed.), *Juridiskās metodes pamati*, Riga: University of Latvia, 2003 at pp. 101-109; Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN International Law Commission, A/CN.4/L.682, 13 April 2006.

The information given above (starting with the aim of this dissertation) shows that the research is concerned with qualities of law and practice. It is not concerned with quantifying anything. In other words, this research is qualitative. As any qualitative research, or in fact as any interpretive activity, this research is subjective. However, all efforts are made to enhance the credibility of the findings, for example, by taking into account the multiple perspectives and multiple interests and by testing rival explanations, as well as by comparing and cross-checking the consistency of information derived by different means. Therefore, it is hoped that all target groups will perceive this dissertation, not as propaganda, nor mere critique, but as a balanced material which can serve as a basis for constructive discussions and improvements.

1.6. Clarification of the Scope of Dissertation and Use of Terms

1.6.1. Terms “Fair” and “Unfair”

It was stated above that the aim of this dissertation is to facilitate *fair* application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents and, with that, reduce the severity of the negative consequences which arise from the *unfair* application of such procedures and sanctions. The terms “fair” and “unfair” are also used in other places of this paper. Similarly, IMO documents, different reports and scholarly literature utilises the terms “fair” and “unfair” when talking about the treatment of seafarers. However, the terms “fair” and “unfair” are vague. The dictionary meaning of the term “fair” is: “just or appropriate in the circumstances”.⁴¹ Consequently, “unfair” means – unjust or inappropriate in the circumstances. Yet, such terms as “just”, “unjust”, “appropriate” and “inappropriate” are not any more instructive than the terms “fair” and “unfair” themselves. In other words, dictionary definitions of the terms “fair” and “unfair” are of little help for revealing the exact notion of fairness.

⁴¹ Judy Pearsall, (ed.), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 2001 at p. 657.

If the dictionary definitions of the terms “fair” and “unfair” are of little help for revealing the exact notion of fairness, it must be revealed with the help of “tools”, other than dictionaries. One might see legal norms as such a “tool” and say: “What is lawful is fair.” and “What is unlawful is unfair.” Others might see moral norms as such a “tool” and say: “What is morally right is fair.” and “What is morally wrong is unfair.” However, neither the law, alone, nor morality, alone, can serve as a standard of fairness, at least not for the purpose of this dissertation. The law, alone, cannot serve as a standard of fairness because the law, itself, can be unfair. Morality, alone, can, possibly, serve as the standard of fairness in a specific community, but it cannot serve as a standard of “global fairness” because actual moralities differ from culture to culture. This dissertation is concerned with the fairness of criminal procedures and sanctions applied against seafarers after large-scale ship-source oil pollution accidents *globally*, irrespectively in which country seafarers find themselves in the aftermath of the accident. Therefore, some instrument incorporating the standard of “global fairness” would be the best “tool” for revealing the exact notion of fairness for the purpose of this dissertation. Such an instrument exists; it is human rights. First of all, human rights are law; but not simply law, they are morally justified law. This justification gives strong belief that human rights is “fair law” and, as such, can serve as a standard of fairness for any other law, as well as for enforcement practices. Secondly, human rights are morality but not simply a compilation of existing divergent morality. They are compromise “global morality”, established with the help of law. It makes human rights almost synonymous to “global fairness”.⁴² Consequently, human rights are adopted as the standard of fairness for the purpose of this dissertation and, thus, within the dissertation: “fair” means – in compliance with human rights; “unfair” means – not in compliance with human rights.

⁴² Dual nature of human rights (law and morality), is analysed in more detail in Sub-chapter 2.1, “Concept of Human Rights”.

It can be argued that the concept of human rights is still vague (similar to the concepts of “justice” and “appropriateness”), that human rights are just general principles, which in different states may be enforced in different manners, and, consequently, that they cannot help draw an exact boundary between “fair” and “unfair” actions. Sub-chapter 2.1 “Concept of Human Rights” will show that the reality is that human rights are different – they range from abstract to specific (or from general to precise). For example, social rights, such as rights related to health care, education and labour, indeed, are still vague.⁴³ Also, some human rights associated with criminal procedures and sanctions are rather general; for example, despite the fact that there exists the human right to be free from disproportionate punishment, few guidelines can be found which help to understand whether specific punishment is proportional or disproportionate in the circumstances in question. However, the majority of human rights associated with criminal procedures and sanctions are relatively precise, their exact content can be revealed in a relatively detailed manner, particularly it can be done with the help of case law from human rights tribunals. The whole of Chapter 2 “Human Rights” of this dissertation, which introduces relevant rules from human rights instruments and which extensively analyses relevant case law of human rights tribunals, proves that the above-mentioned statements are true. Obviously, one might wish to have an even more precise standard than human rights on his hands when assessing the fairness of criminal procedures and sanctions. However, it is hard to find such a more precise standard (if possible at all).

⁴³ Charles R. Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press, 2009 at pp. 3-4.

1.6.2. Focus on Law

The aim of this dissertation – to facilitate fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents and, with that, reduce the severity of the negative consequences which arise from the unfair application of such procedures and sanctions – can be achieved only by eliminating the causes of respective unfairness. However, causes of respective unfairness might be quite diverse, for instance:

- social interests – such as the interest to diminish outcry of the general public;
- political interests – such as the interest to preserve a state’s image, when in fact action or inaction of authorities of this state caused the accident, or at least facilitated it;
- economic interests – such as the interest to find, as quickly as possible, somebody (preferably not the state itself) guilty of the accident so that losses caused by the accident could be recovered (in the jurisdictions where civil remedies result from finding the criminal offence and offender);
- poor education of law enforcement officials – such as poor education of police officers on human rights or law of the sea what ultimately leads to the application of criminal procedures and sanctions against seafarers not in conformity with existing law.

It can be said that all the above listed potential causes of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents are outside the scope of this dissertation, yet they are not completely outside its sight. The dissertation sketches some conclusions and recommendations related to social, political, economic and educational aspects. However, these “sketches” are not expanded upon. For that, wider knowledge than this author has in sociology, politics, economics and other fields is necessary. It is hoped that other scholars (scholars with relevant background) will take the above-mentioned “sketches” incorporated in this dissertation and develop them, so that all

causes of the unfair application of criminal procedures and sanctions against seafarers disappear.

This author does indeed have a legal background. Therefore, focus of this dissertation is on law. The author believes that one of the possible causes of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (parallel to causes related to social, political, economic and education aspects, as well as others) is simply inappropriate law – law which is not clear and law which does not take into consideration all relevant aspects, for example, human rights. Consequently, the fairness of the application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, *inter alia*, can be improved by simply explaining and improving relevant law. Exactly this explanation and improvement of relevant law is what this dissertation predominantly strives to provide – by developing recommendations how to interpret law and by developing recommendations how to adjust law, where necessary.

1.6.3. Focus on Human Rights and Specific International and EU Legal Instruments

The vision of this dissertation can be described in the following way: this dissertation strives to change the situation whereby human rights instruments secure more human rights than specific international and EU legal instruments, as well as national law and practice, to the situation whereby specific international and EU legal instruments, as well as national law and practice, follow human rights.

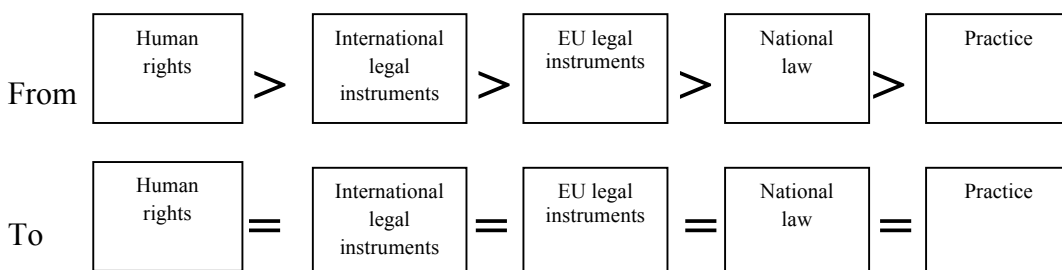


Figure 1 – Vision of the dissertation.

However, due to the limited amount of time allocated to carry out this research, the dissertation focuses only on the first three blocks (human rights, specific international legal instruments and specific EU instruments) of the vision. Into the following blocks (national law and practice) only insight is given – through the case study at the end of the work.

Rules on criminal procedures and sanctions can predominantly be found in national law. Also, the enforcement of criminal procedures and sanctions takes place at national level. Consequently, it is very important to carry out a comprehensive analysis of criminal laws and corresponding practices of different countries, to assess whether respective laws and practices comply with human rights and specific international and EU legal instruments. Ground-breaking research in this regard has already been carried out – by CMI.⁴⁴ Yet, the work of CMI should be continued to cover more countries and wider subject matters. This author hopes that it will be done. At the same time, this author thinks that it is important not to jump into criticising national laws and practices for being unfair before setting the clear standard of fairness and before making sure that relevant international and EU law (law based on which national law and practice should be developed) is clear and fair itself. In other words, this author sees the analysis of human rights and specific international and EU legal instruments as an absolutely necessary precondition for further, though not less important, research.

1.6.4. Only Criminal Procedure Law and Criminal Law Perspective

In very broad terms, this dissertation is concerned with the unfair treatment of seafarers. However, the topic of the unfair treatment of seafarers, even within the domain of law, exclusively, can be approached from different perspectives, for example:

⁴⁴ See CMI, Fair Treatment of Seafarers: Summary of Responses of CMI Members to the Questionnaire, 2006.

- administrative law perspective – the issue of unfair denial of shore leave;
- labour law perspective – the issue of unfair conditions of employment (for example, unfair terms regarding wages, hours of work, failure to provide decent accommodations on-board, failure to serve good-quality food on-board and failure to provide medical care).

This dissertation examines whether criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are fair. Thus, it analyses treatment of seafarers only from the perspective of criminal procedure law and criminal law. Criminal procedure law is a body of law which determines the process of instituting, investigating and adjudicating criminal case.⁴⁵ Criminal law is a body of law which determines what should be treated as crime and what punishment should be imposed for specific crimes.⁴⁶ For the sake of convenience, further on in the paper, term “criminal law” is used to refer to both “criminal procedure law” and “criminal law.”

1.6.5. Terms “Criminal Offence”, “Criminal Procedures” and “Criminal Sanctions”

As the scope of this dissertation is limited to criminal law perspective, then only *criminal* offences (or crimes) and, consequently, only *criminal* procedures and sanctions are addressed in it. Usually national law defines which offences and, consequently, which procedures and sanctions are criminal. Serious offences are usually termed “criminal offences”, and those of comparatively less seriousness are termed otherwise, for example, “regulatory offences” or “administrative offences.”⁴⁷ However, this dissertation is not national law based; it is human rights based. Therefore, in this dissertation, the term “criminal offence” and, consequently, the

⁴⁵ Г.И. Загорский, *Уголовно-процессуальное право: Уголовный процесс*, Москва: Волтерс Клувер, 2010, с. 21.

⁴⁶ В.С. Комиссарова и А.Н. Павлухина, *Уголовное право: Общая часть*, Санктпетербург: Питер, 2003, с. 9.

⁴⁷ Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 479.

terms “criminal procedures” and “criminal sanctions” must be understood similarly as it is understood by human rights tribunals.

Human rights tribunals treat as “criminal offence” and, consequently, “criminal procedure” and “criminal sanction”, not only any offence, procedure or sanction which is defined as criminal under particular national law; they may treat as “criminal offence” and, consequently, “criminal procedure” and “criminal sanction”, also any offence, procedure or sanction which under particular national law is defined as “regulatory”, “administrative” or otherwise. What matters is not the name given to the offence, procedure or sanction under national law, but the nature of the offence, procedure or sanction itself, particularly the nature and degree of the severity of the consequences that the person risks to incur.⁴⁸ For example, even if six month pre-trial detention or ten year imprisonment are treated as administrative measures (or otherwise) in a specific country, they still will be treated as criminal measures by human rights tribunals, because these measures bring severe negative consequences to the person against whom they are applied.

1.6.6. Term “Criminalisation”

Instead of talking about “unfair criminal procedures and sanctions against seafarers” (what this dissertation does) the international maritime community often talks about the “criminalisation” of seafarers – either using this term parallel to the term “unfair treatment” or as a part of the term “unfair treatment”, or as a synonym to the term “unfair treatment”. For example, BIMCO, ICS, ISF, INTERCARGO, INTERTANKO, ITF, P&I Club, and the Hong Kong Shipowners’ Association in their joint protest at the detention of the two officers of *Hebei Spirit* stated that they “cannot and will not support the criminalisation of seafarers, nor unjust, unreasonable and unfair treatment.”⁴⁹

⁴⁸ See, for example, *Lutz v. Germany*, Judgment of 25 August 1987, ECtHR, paragraph 54; *Engel and others v. the Netherlands*, Judgment of 8 June 1976, ECtHR, paragraph 82.

⁴⁹ BIMCO, Shipping World Protests at Unfair Detention of Seafarers in Korea, available at: https://www.bimco.org/en/About/Press/Press_Releases/2008/2008_07_22_Shipping_World_Protests.aspx [accessed 1 April 2013].

The author of this dissertation finds such use of the term “criminalisation” misleading. The word “criminalisation”, as such, does not carry any negative meaning. Criminalisation is an ordinary concept of the theory of punishment and it simply means “turning an activity into a criminal offence.”⁵⁰ It is quite obvious that some activities should be criminalised to maintain order in society, including activities carried out by seafarers. For example, there should be no doubt, and actually there is no doubt, that a ship master who intentionally causes a collision and, with that, the deaths of people should face severe criminal charges. Similarly, it is appropriate to criminalise deliberate pollution from ships. Consequently, criminalisation, as such, is not an issue. Only *unfair* criminalisation is an issue.

Unfair criminalisation of seafarers is within the scope of this dissertation.⁵¹ However, within the scope of this dissertation are also cases when criminalisation, as such, was, perhaps, fair (a seafarer deserved to be criminally punished), but applied criminal procedures or sanctions still were not fair; for example, detention was applied as preventive measure when it was not necessary or imprisonment was applied when it was disproportionate to do so. Therefore, this dissertation talks not just about “unfair criminalisation of seafarers” but more generally about “unfair criminal procedures and sanctions against seafarers.”

⁵⁰ Judy Pearsall, (ed.), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 2001 at p. 434.

⁵¹ Criminalisation of an individual as distinguished from criminalisation of an activity means treating the individual such as a seafarer as a criminal regardless of whether the act committed by the individual has been proven to be a criminal act.

1.6.7. Only Seafarers Perspective

After large-scale ship-source oil pollution accidents, criminal procedures and sanctions can be applied unfairly against different groups of people, for example, ship owners, insurers and classification societies. However, this dissertation analyses fairness of criminal procedures and sanctions only in respect to seafarers. With the term “seafarer” this dissertation understands any person who is employed or engaged or works in any capacity on board a ship. This meaning is consistent with Art. 2(1)(f) of MLC.⁵²

1.6.8. Only Ship-Source Oil Pollution Offences

Criminal procedures and sanctions against seafarers can be applied unfairly after different kinds of alleged offences, for instance, manslaughter and illicit trafficking. This dissertation focuses only on one type of alleged offence: ship-source oil pollution offences.

With ship-source oil pollution this dissertation understands the introduction of oil from a ship into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities. Such definition of ship-source oil pollution is in line with the general definition of “pollution of the marine environment” given in Art. 1(1)(4) of UNCLOS.

Despite the fact that the focus of this dissertation is on ship-source oil pollution offences, at times, it also addresses other types of offences. As the dissertation itself will show, such expansion is natural, because ship-source oil pollution offences are inseparably linked with the wider penal system.

⁵² ILO, *Maritime Labour Convention*, 2006.

1.6.9. Only “Accidental” Ship-Source Oil Pollution

The scope of this dissertation is narrowed even further – not all types of ship-source oil pollution are covered by the dissertation, only *accidental* ship-source oil pollution is covered. What is “accidental” and consequently what is “accidental pollution” can be understood differently by people who look at these terms from the perspective of law of the sea and from the perspective of criminal law.

The meaning of the term “accidental pollution” within the domain of law of the sea, in fact, is not absolutely clear. The Preamble of MARPOL, in one place, distinguishes between just two types of pollution – deliberate and accidental – suggesting that any reckless, negligent or purely accidental pollution should be treated as “accidental pollution”. In another place, the same Preamble distinguishes among three types of pollution – deliberate, negligent and accidental – suggesting that negligent pollution (and therefore, most probably, also reckless pollution) should not be treated as “accidental pollution”. Yet, scholarly literature addressing different types of pollution shows that the first understanding (the understanding which treats as accidental pollution any pollution which is not intentional) is more preferred within the maritime community.⁵³ Thus, it can be said that from the law of the sea perspective, two broad groups of pollution exist – deliberate pollution and accidental pollution.

Types of specifically ship-source oil pollution can be further classified as follows:

⁵³ See, for example, John A.C. Cartner, Richard P. Fiske and Tara L. Leiter, *The International Law of the Shipmaster*, London: Informa, 2009 at p. 199; Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 468; Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 19.

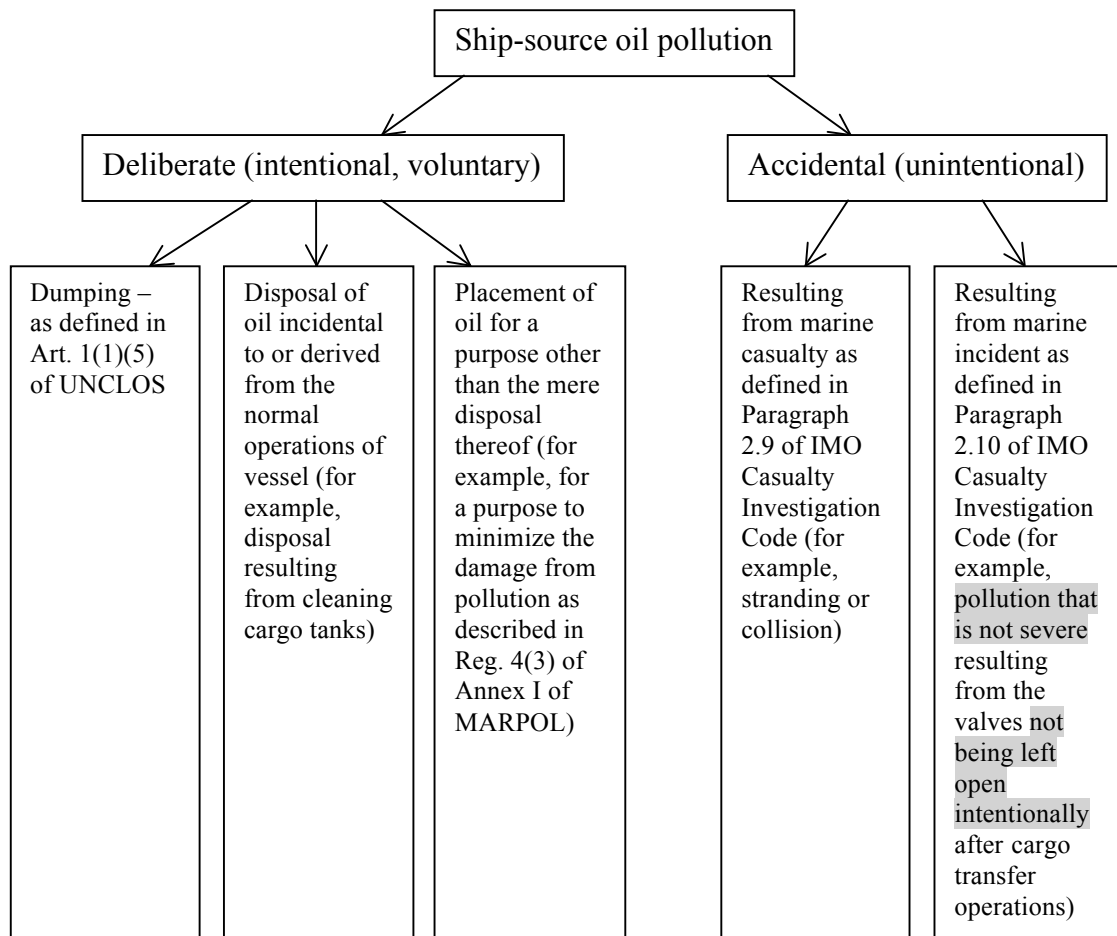


Figure 2 – Types of ship-source oil pollution.

Slightly different classification of the types of ship-source oil pollution can be found in scholarly literature. For example, Mukherjee distinguishes accidental spills and two types of voluntary pollution – deliberate (dumping) and operational (discharges).⁵⁴ Molenaar distinguishes accidental (unintentional) and operational (intentional) pollution.⁵⁵ However, according to the rules of logic, the first step in the

⁵⁴ MUKHERJEE, *ibid.*

⁵⁵ MOLENAAR, *supra* note 53. For similar classification see also CARTNER, FISKE and LEITER, *supra* note 53 at p. 199; Liu Nengye and Frank Maes, “Criminal Liability and Vessel-Source Pollution in the European Union and the United States: Inspiration for the Prevention of Vessel-Source Pollution in China?”, in Michael G. Faure, Han Lixin and Shan Hongjun, (ed.), *Maritime Pollution Liability and Policy: China, Europe and the US*, Alphen aan den Rijn: Kluwer Law International, 2010 at p. 195; Marc A. Huybrechts, “Criminal Liability of Master and Crew in Oil Pollution Cases: A Possible Conflict Between the Law of the Sea Convention (UNCLOS), MARPOL and the European Directive 2005/35/EC”, in Michael G. Faure, Han Lixin and Shan Hongjun, (ed.), *Maritime Pollution*

process of classification is the determination of criteria based-on which objects will be grouped. To mix different criteria into one grouping means to make a serious mistake in logic and create muddled classification, or *divisio confusa*.⁵⁶ Mukherjee and Molenaar in their classifications mix different criteria (a polluter's inner mental state towards pollution and a pollution's linkage to normal operations of a ship) in one grouping, and thus they make serious logical mistake. In line with the rules of logic is to say that ship-source oil pollution can be classified: in respect to a polluter's inner mental state towards pollution – into intentional pollution and unintentional (accidental) pollution; in respect to the linkage to normal operations of a ship – into operational pollution and non-operational pollution; and alike. There are many other possible criteria under which grouping can be made (for example, lawfulness of the discharge, necessity of the discharge and scale of the discharge), and there are plenty of possible combinations of features under different criteria, *inter alia*, intentional operational, accidental operational, intentional non-operational and accidental non-operational ship-source oil pollution exists. Figure 2 above does not aim to show the full spectrum of the classification of different types of ship-source oil pollution, it simply aims to show what exactly *accidental* ship-source oil pollution is – with the mere purpose to identify the scope of this dissertation.

From the perspective of criminal law, it is more relevant to talk about “accidental pollution” only in the case of an occurrence of an accident a person did not foresee, did not have to foresee and could not foresee – *casus fortuitus* or an unavoidable accident. All other acts or omissions are seen as blameworthy conduct and can potentially be defined as offences. More detailed analysis, in this regard, is provided later in this dissertation – in Sub-chapter 2.4.2 “General Principles for Determining Criminal Liability”. However, Figure 3 below helps to get the general idea about the variation in the understanding of the term “accidental pollution” from the criminal law perspective and law of the sea perspective.

Liability and Policy: China, Europe and the US, Alphen aan den Rijn: Kluwer Law International, 2010 at p. 218.

⁵⁶ Ivans Vedins, *Loģika*, Riga: Avots, 1998 at pp. 77-78.

Criminal law perspective		Law of the sea perspective	
Intent	Offence	Deliberate pollution	Intent
Recklessness		Accident	Recklessness
Negligence			Negligence
No intent, no recklessness, no negligence	No intent, no recklessness, no negligence		

Figure 3 – Comparison of the meaning of the term “accidental pollution” from the perspective of criminal law and from the perspective of law of the sea.

This dissertation, if not expressly stated otherwise, adopts the law of the sea meaning of the term “accidental pollution”.

1.6.10. Only “Large-Scale” Ship-Source Oil Pollution Accidents

Another aspect which should be noted regarding the scope of this dissertation is that this dissertation focuses only on *large-scale* ship-source oil pollution accidents. What type and amount of pollution constitutes large-scale pollution cannot be stated in absolute numbers. Experts say: “the precise extent of the damage to the environment can only be determined by a methodical scientific investigation covering major components of the ecosystem.”⁵⁷ It is so because each pollution case is unique in many respects – type of pollutant, surrounding environment in general (from tropical to arctic), weather conditions at the time of the accident and other factors. Furthermore, it is not only damage to the environment which might determine the scale of pollution; there is also socio-economic damage. A relatively

⁵⁷ Joint UNEP/OCHA Environment Unit, Rapid Environmental Assessment: ‘Hebei Spirit’ Oil Spill – Republic of Korea December 2007, Switzerland: Joint UNEP/OCHA Environment Unit, 2008 at p. 9.

small oil spill in an economically-active coastal area may cause greater socio-economic damage than a huge spill in the middle of the ocean. Consequently, the first spill can perhaps be treated as “large scale”, and the second spill – as “small scale”.

As it was stated in the fourth and the fifth column of Figure 2, two sub-types of ship-source oil pollution accidents can be distinguished: marine casualties and marine incidents. Paragraph 2.9 of IMO Casualty Investigation Code defines “marine casualty” as follows:

2.9 A marine casualty means an event, or a sequence of events, that has resulted in any of the following which has occurred directly in connection with the operations of a ship:

- .1 the death of, or serious injury to, a person;
- .2 the loss of a person from a ship;
- .3 the loss, presumed loss or abandonment of a ship;
- .4 material damage to a ship;
- .5 the stranding or disabling of a ship, or the involvement of a ship in a collision;
- .6 material damage to marine infrastructure external to a ship, that could seriously endanger the safety of the ship, another ship or an individual; or
- .7 severe damage to the environment, or the potential for severe damage to the environment, brought about by the damage of a ship or ships.

However, a marine casualty does not include a deliberate act or omission, with the intention to cause harm to the safety of a ship, an individual or the environment.

Paragraph 2.10 of IMO Casualty Investigation Code defines “marine incident” as follows:

2.10 A marine incident means an event, or sequence of events, other than a marine casualty, which has occurred directly in connection with the operations of a ship that endangered, or, if not corrected, would endanger the safety of the ship, its occupants or any other person or the environment.

However, a marine incident does not include a deliberate act or omission, with the intention to cause harm to the safety of a ship, an individual or the environment.

Paragraphs 2.9 and 2.10 of IMO Casualty Investigation Code indicate that a marine casualty is a relatively major accident which involves either serious events *per se* (Paragraph 2.9.5) or specific serious consequences (Paragraphs 2.9.1-2.9.4 and 2.9.6-2.9.7), while marine incident is a relatively minor accident, which does not involve such events or consequences. It is unlikely that ship-source oil pollution resulting from a marine incident (for example, pollution that is not severe resulting from the valves not being left open intentionally after cargo transfer operations) will ever be considered as large-scale pollution. Consequently, marine incidents are not within

the scope of this dissertation, only marine casualties (such as, stranding or collision) are.

1.6.11. Choice of Cases for Chapter 2 “Human Rights”

Cases from the practice of human rights tribunals chosen for referencing in Chapter 2 of this dissertation are simply random cases which can serve as a helping hand for understanding the standard of fairness (human rights themselves). Factual details of these cases are of little importance for the purpose of this dissertation, and, therefore, they did not determine the choice. These factual details are not even displayed in the dissertation – cases are introduced very superficially, just in the amount necessary for understanding the standard.

Naturally, more references are made to the cases of ECtHR, because, as scholar de Wet has put it, ECtHR is the most advanced international system for the protection of human rights; it has developed relatively broad case law and, therefore, exactly this system is a valuable point of departure.⁵⁸ Nevertheless, references are also made to the cases of IACtHR. Regarding the African Court on Human and Peoples’ Rights, the author did not find any case in the practice of this court which would be relevant for the purpose of this dissertation.

1.6.12. Choice of Cases for Chapter 6 “Case Study”

Cases chosen for the case study are: the sinking of *Erika* (France, 1999), the sinking of *Prestige* (Spain, 2002), the grounding of *Tasman Spirit* (Pakistan, 2003) and the collision of *Hebei Spirit* and *Samsung No.1* (South Korea, 2007). Factors which determined the choice are following:

⁵⁸ Erika de Wet, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, in *Leiden Journal of International Law*, Volume 19, Issue 3, October 2006 at p. 613.

- 1) *Year in which an accident happened.* Only such accidents which happened during the time period from year 1996 to year 2015 (from the time since which the international maritime community has been highly concerned about the unfair application of criminal procedures and sanctions against seafarers to the time of finishing this research) were considered for the case study. This time period provided a rather long list of cases from which to choose.
- 2) *Scope of the dissertation.* Only large-scale ship-source oil pollution accidents were considered. It allowed the author to narrow the list down to 6 cases.
- 3) *Likelihood to identify unfairness against seafarers.* Only such accidents, whose preliminary analysis suggested that in the aftermath of them seafarers were exposed to unfair application of criminal procedures or sanctions, were considered. This consideration excluded the grounding of *Sea Empress* (United Kingdom, 1996) from the list.
- 4) *Availability of relevant materials.* Only such accidents regarding which considerable amount of relevant materials, such as judgments, reports and scholarly articles, were available were considered. This consideration excluded the collision of *Evoikos* and *Orapin Global* (Singapore, 1997) from the list.

2. Human Rights

2.1. Concept of Human Rights

Beitz states: “Human rights have become ‘a fact of the world’ with the reach and influence that would astonish the framers of the international human rights project.”⁵⁹ Indeed, today the notion of human rights is well-recognised, and language related to human rights is widely-used. However, despite this, the concept of human rights is far from straightforward.

One way of defining human rights is: human rights are rights under international, regional and national human rights instruments. However, such a definition reveals human rights from just one perspective – a purely legal one. To develop a more exhaustive definition of human rights, it is necessary to look at these rights not only from a legal perspective, but also from a philosophical perspective. That makes the task of developing the definition much more complicated, because even today there are different opinions regarding philosophical questions associated with human rights (such as the existence, nature, universality and the justification of human rights). Due to existing disputes on the above-mentioned philosophical questions, it is possible to find many, often contradictory, definitions of human rights in scholarly literature. For example, human rights have been defined as “fundamental rights that humans have by the fact of being humans, and that are neither created nor can be abrogated by any government”⁶⁰, as “rights which are believed to belong justifiably to every person”⁶¹, as “God-given natural rights”⁶² and as “source of hope”⁶³. Many of these definitions are based on very strong claims, for example, that human rights exist independently of legal enactments as justified moral norms or that

⁵⁹ Charles R. Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press, 2009 at p. 1.

⁶⁰ *Business Dictionary*, available at: <http://www.businessdictionary.com/definition/human-rights.html> [accessed 7 September 2015].

⁶¹ Judy Pearsall, (ed.), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 2001 at p. 893.

⁶² James Nickel, "Human Rights", in Edward N. Zalta, (ed.), *The Stanford Encyclopedia of Philosophy (Fall 2010 Edition)*, available at: <http://plato.stanford.edu/archives/fall2010/entries/rights-human/> [accessed 7 September 2015].

⁶³ BEITZ, *supra* note 59 at p. 2.

human rights are universal. When viewed along with existing practices, these claims seem more like overstatements. Therefore, it seems more appropriate to define human rights in a more modest manner, for example, as morally justified rights, superior to all other rights, which are believed to be vitally important for human well-being, and, therefore, should be universally recognized, promoted and protected. To analyse this definition appropriately, it is better to look at its parts separately.

First, human rights are rights. Such a statement might seem obvious and, therefore, not worth mentioning. However, some human rights are goal-like rights, for example, social rights. They cannot be associated with very specific, instantly enforceable duties. Instead, they just declare high-priority goals and assign general responsibility for their progressive realisation. Some scholars argue that these goal-like rights are not real rights.⁶⁴ Nevertheless, it seems more appropriate to recognize as real rights also goal-like rights, because, although they are very abstract, they still comprise all elements of the notion of a right: right holder (person), addressee (primarily, government) and assigned particular mandatory duty (duty to progressively realize established goals). It is simply necessary to come to terms with the fact that rights range from abstract to specific (or from general to precise).⁶⁵

Second, human rights are morally justified rights. It is not to say, however, that human rights are justified by moral norms actually shared by all humans; first of all, because practice proves that there is hardly any moral norm on which actual consensus among all humans exists and, secondly, because a description of an existing moral consensus is not the aim of human rights. The aim of human rights is “to serve as potent critic of existing practice” and “to help to transform reality”.⁶⁶ To resolve possible ambiguity, it should be noted here that although human rights are justified by morality they are not pure moral rights. First of all, it is hard to imagine how agreement on human rights (agreement on “global morality” in a world where

⁶⁴ See, for example, BEITZ, *ibid.* at pp. 3-4.

⁶⁵ James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, Berkeley: University of California Press, 1987 at p. 15.

⁶⁶ Zehra F. Kabasakal Arat, „Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights”, in *Human Rights Quarterly*, Volume 28, No. 2, May 2006 at p. 424.

diverse actual moralities exist) could be reached without the help of legal norms. Secondly, for full realisation of human rights, it is necessary to secure their enjoyment. In such complex societies as there are today, morality alone cannot meet this demand, for example, morality cannot create institutions (such as courts and educational institutions) which are, in fact, required for fulfilment of many positive duties associated with human rights. So, morality alone is relatively weak and ineffective. Law is functionally necessary to make up for the weaknesses of morality. Therefore, human rights are better thought of as “Janus-faced”, with one part related to morality and the other to law.⁶⁷

Third, human rights are superior to all other rights. They are meant to take precedence over alternative social and political considerations. This does not mean, however, that human rights are absolute. Human rights strive not only for individual well-being but also for collective well-being. Therefore, in particular circumstances, human rights of an individual can be limited for securing collective aims, or in other words “rights of the few” can be limited for the “good of the many”. The point is that these limitations should be kept to an irreducible minimum. As scholars Mann, Gostin, Gruskin and others have stated:

[...] the permissible restriction of rights is bound in several ways. First, certain rights (e.g., right to life, right to be free from torture) are considered inviolable under any circumstances. Restriction of other rights must be: in the interest of a legitimate objective; determined by law; imposed in the least intrusive means possible; not imposed arbitrarily; and strictly necessary in a “democratic society” to achieve its purposes.⁶⁸

Human rights are often described as “fundamental rights”; for example, the EU in the Charter of Fundamental Rights of the European Union uses this term in relation to all human rights. However, there are well-grounded arguments that lead to the conclusion that not all human rights are fundamental rights. Fundamental rights should be very general (for example, life and liberty) so that they can apply to thousands of years of human history, not just recent centuries. But today human

⁶⁷ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Massachusetts: MIT Press, 1996 at p. 114.

⁶⁸ Jonathan M. Mann, Lawrence Gostin, Sofia Gruskin, et al., “Health and Human Rights”, in Jonathan M. Mann, Michael A. Grodin, Sofia Gruskin, et al., (ed.), *Health and Human Rights*, New York: Routledge, 1999 at p. 15.

rights are numerous and specific.⁶⁹ Such specificity stretches “beyond what might plausibly be accepted as a legacy of philosophically respectable thought about fundamental rights”.⁷⁰ Perhaps it is possible to give theoretical explanation as to how to get from those specific rights found in contemporary human-rights instruments to the fundamental rights. However, the more pragmatic way seems to be to treat human rights simply as high-priority rights. The term “high-priority rights” undoubtedly encompasses all human rights.

Fourth, human rights strive for universal recognition, promotion and protection. It is often said that human rights are universal. This world view is also directly incorporated into international human rights documents, for example, Art. 5 of the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁷¹

The most straightforward explanation of the idea that human rights are universal is that human rights belong to persons “as such” (regardless of their contingent relationships or social setting), that they are derived from human nature and therefore apply to everyone and are claimable by everyone.⁷² However, not everybody agrees with these statements and consequently with the idea that human rights are universal. For example, Nelson argues that hardly anything called human rights can be derived from human nature, because the behavioural dispositions we actually observe in human beings are too diverse and conflicting to allow for any coherent generalizations.⁷³ Moreover, for full realization of the idea of human rights as a universal standard, universal recognition and implementation of human rights is necessary. Today human rights are recognised almost globally. First of all, an

⁶⁹ James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, Berkeley: University of California Press, 1987 at p. 4.

⁷⁰ Charles R. Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press, 2009 at p. xi.

⁷¹ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

⁷² BEITZ, *supra* note 70 at p. 4.

⁷³ John O. Nelson, “Against Human Rights”, in *Philosophy*, Volume 65, No. 253, July 1990 at p. 345.

absolute majority of states are UN Member States,⁷⁴ and, thus, have made themselves bound by Art. 1 of the Charter of the United Nations, which identifies promoting and encouraging respect for human rights as one of the principal purposes of the UN.⁷⁵ Secondly, an absolute majority of states have also made themselves bound by main international and regional human rights instruments.⁷⁶ However, human rights still often go unobserved in terms of practice (due to simple ignorance, due to unwillingness to give up long standing traditions or due to other reasons). In other words, human rights are universal under the human rights doctrine and they are almost universally recognised, but their universal implementation and consequent enjoyment remains merely an aim and not a reality in practice; therefore, it is more appropriate to treat human rights as rights which strive for universal recognition, promotion and protection, not as rights which are universal already.

2.2. Right to Liberty

2.2.1. Introduction

Art. 3 of UDHR states: “Everybody has the right to [...] liberty [...]”. Art. 9(1) of the International Covenant on Civil and Political Rights, Art. 5(1) of the European Convention on Human Rights, Art. 6 of the Charter of Fundamental Rights of the European Union, Art. 7(1) of the American Convention on Human Rights and Art. 6 of the African Charter on Human and Peoples’ Rights repeat the statement in Art. 3 of UDHR. Thus, the right to liberty is firmly established in international and regional human rights instruments.

⁷⁴ See the list of UN Member States at UN website: <http://www.un.org/en/members/index.shtml>.

⁷⁵ *Charter of the United Nations*, 26 June 1945.

⁷⁶ For State Parties of the International Covenant on Civil and Political Rights see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; European Convention on Human Rights – <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=13/07/2014&CL=ENG>; American Convention on Human Rights – http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm; African Charter on Human and Peoples’ Rights – <http://www.achpr.org/instruments/achpr/ratification/>.

In a broad sense, liberty is “the power to do as one pleases”.⁷⁷ In this sense, the notion of liberty embraces various civil, political, social and economic rights, for example, freedom of thought, freedom of religion, freedom of expression, freedom of association and freedom to choose an occupation. IACtHR interprets the right to liberty as including the notion of liberty in this above-mentioned broad sense.⁷⁸ However, the majority of IACtHR case law in respect to the right to liberty addresses only physical liberty of a person.

ECtHR has narrowed the notion of the right to liberty itself. It has explicitly stated that this notion encompasses only physical liberty of a person.⁷⁹ It means that in Europe, the right to liberty is concerned only with a person’s right to move wherever he wants. ECtHR has limited the right to liberty even further – by stating that this right does not secure against all restrictions on movement of a person but only against such restrictions which amount to a deprivation of liberty.⁸⁰

In a number of its judgements, ECtHR has stated that the difference between mere restrictions on movement and restrictions on movement serious enough to fall within the ambit of a deprivation of liberty is one of degree or intensity, and not one of nature or substance. Therefore, in order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.⁸¹ For example, in the case of *Medvedyev and others v. France*, ECtHR declared that the crew members of the Cambodian ship *Winner*, who was boarded on the high seas and afterwards taken to France by French authorities on suspicion of carrying large quantities of drugs, were deprived of their liberty. After boarding the *Winner*, French authorities confined her crew members to their cabins. Later restrictions were relaxed – crew members were

⁷⁷ *Webster’s Third New International Dictionary of the English Language*, Chicago: Encyclopaedia Britannica, 1981 at p. 1303.

⁷⁸ See, for example, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Judgment of 28 November 2012, IACtHR, paragraph 142.

⁷⁹ See, for example, *Guzzardi v. Italy*, Judgment of 6 November 1980, ECtHR, paragraph 92.

⁸⁰ See, for example, *Guzzardi v. Italy, ibid.*, *Creanga v. Romania*, Judgment of 23 February 2012, ECtHR, paragraph 91, *Medvedyev and others v. France*, Judgment of 29 March 2010, ECtHR, paragraph 73.

⁸¹ *Ibid.*

allowed to move about the ship under the supervision of the French Special Forces. However, in the Court's view, this relaxed approach did not alter the fact that the crew members were deprived of their liberty throughout the voyage – as the ship's course was imposed upon by the French authorities.⁸²

This dissertation, similarly as the right to liberty under the European Convention on Human Rights, is also concerned only with the deprivation of liberty. The dissertation is even more focused. It is not concerned about all types of deprivation of liberty; what are many, including placement of a person in psychiatric or social care institution, confinement of a person in airport transit zone and subjecting a person to crowd control measures adopted by the police on public order grounds. This dissertation is concerned only with those types of deprivation of liberty which form criminal procedure or sanction, such as arrest, detention, house arrest and imprisonment.

Not any deprivation of liberty constitutes the violation of the right to liberty. Only arbitrary deprivation of liberty does. Apart from explicit prohibition of arbitrary deprivation of liberty, human rights instruments set a number of guarantees for persons deprived of liberty – to give additional safeguards against arbitrariness. Failure to provide these guarantees also constitutes the violation of the right to liberty. The next sub-chapters analyse in detail, respectively, what constitutes arbitrary deprivation of liberty and what are the guarantees for persons deprived of liberty.

2.2.2. Violation of the Right to Liberty: Arbitrary Deprivation of Liberty

Art. 9 of UDHR states: “No one shall be subjected to arbitrary arrest, detention [...]”. Art. 9(1) of the International Covenant on Civil and Political Rights, Art. 7(3) of the American Convention on Human Rights and Art. 6 of the African Charter on Human and Peoples' Rights reflect Art. 9 of UDHR. The European Convention on Human Rights does not refer to arbitrary deprivation of liberty explicitly. However, it can be concluded from the case law of ECtHR that the

⁸² *Medvedyev and others v. France*, *supra* note 80, paragraphs 9, 15, 74 and 75.

European Convention on Human Rights, just like other human rights instruments, is also concerned with arbitrary deprivation of liberty. For example, in the case of *Rantsev v. Cyprus and Russia* ECtHR stated:

The Court reiterates that in proclaiming the “right to liberty”, Article 5 § 1 aims to ensure that no-one should be dispossessed of his physical liberty in an arbitrary fashion.⁸³

For deprivation of liberty not to be arbitrary, four conditions should be met. First of all, there must be sufficiently precise law regulating respective deprivation of liberty. Secondly, this law must be complied with. Thirdly, there must be recognised ground for respective deprivation of liberty. Fourthly, existence of this recognised ground must be convincingly demonstrated.

2.2.2.1. Deprivation of Liberty Without Existence of Sufficiently Precise Law

Before a person can be deprived of liberty, there must be the law regulating this deprivation of liberty. Furthermore, this law must follow the principle of legal certainty, meaning that it must be sufficiently precise to avoid the risk of arbitrariness and to allow the person to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. For example, in the case *Medvedyev and others v. France*, ECtHR found that the French authorities had no jurisdiction to intercept Cambodian ship *Winner* on high seas. France argued that it acted on basis of a diplomatic note from Cambodia, authorising French authorities “to intercept, inspect and take legal actions against the ship”. However, the court held that this diplomatic note:

- 1) was not sufficiently clear – court found that the text of the diplomatic note did not allow to determine whether Cambodia authorised the deprivation of liberty of the crew members of *Winner* and their transfer to France;

⁸³ *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, ECtHR, paragraph 314.

- 2) did not meet requirement of foreseeability – court found that it is unreasonable to contend that the crew of a ship on the high seas flying the Cambodian flag could have foreseen that they might fall under French jurisdiction because of the *ad hoc* agreement reached by France and Cambodia through the exchange of diplomatic notes.⁸⁴

Similarly, in the case of *Baranowski v. Poland*, ECtHR found the lack of legal basis of the requisite quality for the deprivation of liberty of Mr. Baranowski – the person charged with fraud. In this case, the Court established that Polish law had no precise provisions in place that the detention order for a limited period at the investigation stage can be prolonged at the stage of the court proceedings. Despite that, Mr. Baranowski was kept in detention based on such an order at the stage of the court proceedings.⁸⁵

2.2.2.2. Deprivation of Liberty not in Conformity with Existing Law

Examples in the previous sub-chapter illustrate that there are two broad groups of law which are of utmost importance in regards to deprivation of liberty: laws which set the jurisdiction to carry out deprivation of liberty (jurisdictional rules) and laws which set the procedure how deprivation of liberty should be carried out (procedural rules). Where there is relevant law, it should be complied with.

The requirement to act in accordance with jurisdictional rules is rather straightforward: no jurisdiction – no action. Consequently, if deprivation of liberty of a person is carried out by the state which does not have jurisdiction to do so or by the official who does not have jurisdiction to do so, this deprivation of liberty is arbitrary. Case law reaffirms such a position.⁸⁶ However, due to the complexity of rules on jurisdiction, it may prove difficult to identify whether, in a particular situation, a state or an official acted within the limits of their jurisdiction and, consequently, whether there was, or was not, arbitrary deprivation of liberty.

⁸⁴ *Medvedyev and others v. France*, Judgment of 29 March 2010, ECtHR, paragraphs 80, 90, 92, 93, 99, 199, 102 and 103.

⁸⁵ *Baranowski v. Poland*, Judgment of 28 March 2000, ECtHR, paragraphs 52, 55 and 56.

⁸⁶ See, for example, *Benham v. the United Kingdom*, Judgment of 10 June 1996, ECtHR, paragraphs 9 and 36.

The requirement to act in accordance with procedural rules is less straightforward, because case law indicates that not all procedural deficiencies render a deprivation of liberty arbitrary, only serious deficiencies do. For example, in the case of *Voskuil v. the Netherlands*, ECtHR found the violation of a right to liberty on basis of procedural deficiency. In this case, it was established that national law of the Netherlands did, in fact, provide for notification in writing of the detention order within twenty-four hours, but Mr. Voskuil – a journalist detained on the ground of refusing to give evidence – was provided with a written copy of the detention order only some three days later.⁸⁷

2.2.2.3. Deprivation of Liberty Without Existence of Recognised Ground

Art. 9(1) of the International Covenant on Civil and Political Rights, Art. 5(1) of the European Convention on Human Rights, Art. 7(2) of the American Convention on Human Rights and Art. 6 of the African Charter on Human and Peoples' Rights establish that a person may be deprived of liberty only on specific recognised grounds. Types of allowed deprivation of liberty most relevant to be observed for the purposes of this dissertation are:

- 1) deprivation of liberty after conviction;
- 2) deprivation of liberty for non-compliance with a legal obligation;
- 3) preventive deprivation of liberty.

2.2.2.3.1. Deprivation of Liberty After Conviction

Art. 5(1)(a) of the European Convention on Human Rights states that no one shall be deprived of his liberty save in the case of “the lawful detention of a person after conviction by a competent court”. Cases recognizing deprivation of liberty after conviction as an exception to the right to liberty are, for example, *Solmaz v. Turkey*⁸⁸ and *Eriksen v. Norway*⁸⁹. This exception applies not only to final convictions but also convictions which still can be appealed. For instance, in the case of *Solmaz v. Turkey*

⁸⁷ *Voskuil v. the Netherlands*, Judgment of 22 February 2008, ECtHR, paragraph 83.

⁸⁸ *Solmaz v. Turkey*, Judgment of 16 January 2007, ECtHR.

⁸⁹ *Eriksen v. Norway*, Judgment of 27 May 1997, ECtHR.

ECtHR stated that a detention of a person convicted at first instance, whether or not he has been detained up to this moment, falls under exception “deprivation of liberty after conviction”.⁹⁰ Although deprivation of liberty after conviction, in principle, is recognised as non-arbitrary, to avoid being branded as arbitrary, deprivation of liberty after conviction, still, should satisfy two important conditions.

First, deprivation of liberty on pure basis of conviction is acceptable only when a punishment imposed by this conviction also involves a deprivation of liberty.⁹¹ Secondly, the conviction may not be the result of flagrant denial of justice.⁹² This condition is very closely linked with the right to fair trial, which will be analysed later. If the trial has not been fair, there is a greater possibility that also conviction is not fair, and subsequent deprivation of liberty on basis of this conviction is arbitrary. However, it must be kept in mind that when judging fairness of the deprivation of liberty after conviction, human rights tribunals will not analyse, in detail, all proceedings resulting in the conviction. They will look only for proceedings which are manifestly contrary to the principles embodied in the right to fair trial, or, in other words, for “flagrant” denial of justice. Whether or not there has been “flagrant” denial of justice, the courts will evaluate on a case by case basis. As an example of flagrant denial of justice can be mentioned conviction based on criminal proceedings held *in absentia*, without any indication that the accused has waived the right to be present during the trial.⁹³

2.2.2.3.2. *Deprivation of Liberty for Non-Compliance with a Legal Obligation*

Art. 5(1)(b) of the European Convention on Human Rights states that no one shall be deprived of his liberty save in the case of “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law”. In short, this exception to the right to liberty can be named “deprivation of liberty for non-compliance with a legal

⁹⁰ *Solmaz v. Turkey*, *supra* note 88, paragraph 23.

⁹¹ *Solmaz v. Turkey*, *ibid.*

⁹² See, for example, *Ilascu and others v. Moldova and Russia*, Judgment of 8 July 2004, ECtHR, paragraph 461 and *Stoichkov v. Bulgaria*, Judgment of 24 March 2005, ECtHR, paragraph 51.

⁹³ *Stoichkov v. Bulgaria*, *ibid.*, paragraph 56.

obligation". Cases recognizing this exception to the right to liberty are, for example, *Ciulla v. Italy*⁹⁴ and *Beiere v. Latvia*⁹⁵.

It is obvious from the mere text of the above-mentioned rule that there is basis for the deprivation of liberty for non-compliance with a legal obligation only when there exists particular unfulfilled legal obligation, for instance, obligation to undergo a blood test ordered by a court or obligation to observe residence restrictions. However, similarly as the exception "deprivation of liberty after conviction", the exception "deprivation of liberty for non-compliance with a legal obligation" is not unconditional.

First, the legal obligation for fulfilment of which a person is deprived of liberty should be of a specific and concrete nature.⁹⁶ Secondly, prior to the deprivation of liberty for non-compliance with a legal obligation, a person must have had an opportunity to comply with respective obligation and failed to do so.⁹⁷ Thirdly, deprivation of liberty for non-compliance with a legal obligation should be necessary. In other words, the deprivation of liberty will be non-arbitrary (justified) only if fulfilment of an obligation in question cannot be achieved by milder means.⁹⁸ Fourthly, deprivation of liberty for non-compliance with a legal obligation should be proportional *stricto sensu*. It means that for determining whether deprivation of liberty in a particular situation was not arbitrary, it is necessary to assess whether the balance between the public interest in complying with the obligation and the private interest in staying free has been met.⁹⁹ Fifthly, deprivation of liberty for non-compliance with a legal obligation must be carried out merely for the purpose of securing fulfilment of this particular legal obligation. It means that the deprivation of

⁹⁴ *Ciulla v. Italy*, Judgment of 22 February, 1989, ECtHR.

⁹⁵ *Beiere v. Latvia*, Judgment of 29 November 2011, ECtHR.

⁹⁶ See, for example, *Ciulla v. Italy*, *supra* note 94, paragraphs 16, 35 and 36.

⁹⁷ See, for example, *Beiere v. Latvia*, *supra* note 95, paragraphs 10-12, 49 and 50.

⁹⁸ See, for example, *Khodorkovskiy v. Russia*, Judgment of 31 May 2011, ECtHR, paragraphs 17, 136 and 139.

⁹⁹ See, for example, *Khodorkovskiy v. Russia*, *ibid.*, paragraphs 136; *Saadi v. the United Kingdom*, Judgment of 29 January 2008, ECtHR, paragraph 70; *Vasileva v. Denmark*, Judgment of 25 September 2003, ECtHR, paragraphs 37, 38 and 41.

liberty in this case cannot be punitive in character and, if it is relevant, a person should be released as soon as the respective legal obligation is fulfilled.¹⁰⁰

2.2.2.3.3. *Preventive Deprivation of Liberty*

Art. 5(1)(c) of the European Convention on Human Rights states that no one shall be deprived of his liberty save in the case of “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”. In short, this exception to the right to liberty can be named “preventive deprivation of liberty”. Types of acceptable reasons for the preventive deprivation of liberty most relevant to be observed for the purposes of this dissertation are:

- 1) the risk that the accused will fail to appear for trial (danger of absconding);
- 2) the risk that the accused will take action to obstruct the proceedings.

Risk that the accused will fail to appear for trial (danger of absconding)

The purpose of the deprivation of liberty on grounds of the danger of absconding is obvious – to secure appearance of a person for trial. However, this is a distant purpose. The more operational purpose of this type of deprivation of liberty is simply to further the investigation, for example, by questioning a suspect. Consequently, arbitrariness or non-arbitrariness of particular deprivation of liberty is not dependant on whether a person ultimately is tried or not. Even if a person, ultimately, is not tried, *inter alia*, when later, as a result of investigation, it turns out that the person is not guilty, particular preventive deprivation of liberty still might had been justified. It is not, however, justified under the conditions described below.

First, preventive deprivation of liberty on grounds of the danger of absconding will be arbitrary if it is applied without existence of reasonable suspicion that a person has committed a particular offence. Whether the suspicion is “reasonable” will depend upon all the circumstances of the case in question. Case

¹⁰⁰ See, for example, *Vasileva v. Denmark*, *ibid.*, paragraph 36.

law gives general guidelines in this respect. For example, in the case of *Erdagoz v. Turkey* ECtHR stated:

[...] facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation [...] However, for there to be reasonable suspicion there must be facts or information which would satisfy an objective observer that the person concerned may have committed an offence.¹⁰¹

Secondly, preventive deprivation of liberty on grounds of the danger of absconding will be arbitrary if it is not necessary under the circumstances in question. It means that the authorities, when deciding on the respective deprivation of liberty, are obliged to consider alternative measures. If another, less stringent, measure (for example, conditional bail) is sufficient for furthering the investigation and, ultimately, bringing the person before trial and this less stringent measure is not applied, particular deprivation of liberty has strong potential to be recognised as arbitrary. For instance, in the case of *Jarzynski v. Poland* ECtHR established that Mr. Jarzynski – suspect on several counts of armed robbery – was held in preventive deprivation of liberty for over 6 years and 3 months. Yet, relevant decisions did not contain any information on why the authorities considered that other preventive measures would not have ensured the appearance of Mr. Jarzynski before the court. Nor did they mention any factor indicating that there was a real risk of absconding. Consequently, ECtHR held that the right to liberty of Mr. Jarzynski had been violated.¹⁰²

¹⁰¹ *Erdagoz v. Turkey*, Judgment of 22 October 1997, ECtHR, paragraph 51. See also the case study in this dissertation which indicates that after *Tasman Spirit* accident seafarers were deprived of their liberty, presumably on a formal ground of a danger of absconding, without existence of reasonable suspicion that they have committed an offence.

¹⁰² *Jarzynski v. Poland*, Judgment of 4 October 2005, ECtHR, paragraphs 5 and 44-46. See also the case study in this dissertation which indicates that after *Erika* accident French investigating judge decided to detain the master of *Erika* – Captain Mathur – despite the fact that the public prosecutor investigating the case was of the opinion that there is no need to apply such severe measure as detention against the Captain (what gives strong belief that the detention was not necessary in the circumstances in question).

Always, when the necessity of the deprivation of liberty on grounds of the danger of absconding is assessed, it is important to take into consideration factors related to the individual person in question, such as his character, morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted. These and other more formal factors (like severity of the offence and level of suspicion that the person has indeed committed the offence) should be assessed in their entirety. For example, in the case of *Becciev v. Moldova* ECtHR found that Moldavian domestic courts when deciding on deprivation of liberty of Mr. Becciev – suspect on charges of embezzlement – did not take into consideration good character of Mr. Becciev, his lack of criminal record, the fact that he had not obstructed the investigation in any way, the fact that many reputable persons were prepared to offer guarantees to secure his release and the fact that he, himself, was ready to give up his passport as an assurance that he would not leave the country. Under such circumstances, ECtHR concluded that there had been violation of the right to liberty of Mr. Becciev.¹⁰³ The fact that authorities should assess all relevant factors in their entirety, *inter alia*, means that the mere severity of charges does not give rise to the danger of absconding.¹⁰⁴ Also, serious indication of guilt, by itself, does not justify preventive deprivation of liberty.¹⁰⁵

Thirdly, preventive deprivation of liberty on grounds of the danger of absconding will be arbitrary if it is not *stricto sensu* proportional measure under the circumstances in question. This idea is clearly expressed, for instance, in the judgment of the case of *Lopez-Alvarez v. Honduras*:

¹⁰³ *Becciev v. Moldova*, Judgment of 4 October 2005, ECtHR, paragraphs 9, 58 and 61-64. See also the case study in this dissertation which indicates that after the *Prestige* accident Spanish authorities did not assess all relevant factors in their entirety before deciding to detain the master of *Prestige* – Captain Mangouras. Basically, none of the factors militating against the detention of the Captain was considered.

¹⁰⁴ See, for example, *Idalov v. Russia*, Judgment of 22 May 2012, ECtHR, paragraphs 145-147; *Garycki v. Poland*, Judgment of 7 February 2007, ECtHR, paragraph 47; *Lopez-Alvarez v. Honduras*, Judgment of 1 February 2006, IACtHR, paragraph 69.

¹⁰⁵ See, for example, *Dereci v. Turkey*, Judgment of 24 May 2005, ECtHR, paragraph 38.

The legitimacy of the preventive detention does not arise only from the fact that the law allows its application under certain general hypotheses. The adoption of this precautionary measure requires a judgment of proportionality between said measure, the evidence to issue it, and the facts under investigation. If the proportionality does not exist, the measure will be arbitrary.¹⁰⁶

Deprivation of liberty may be a disproportionate measure in different aspects. Two important aspects worthy of mention are: severity of an offence in question and length of the deprivation of liberty. Regarding severity of an offence in question, case law has stated that it is disproportionate to apply preventive deprivation of liberty on grounds of the danger of absconding in relation to relatively minor offences.¹⁰⁷ It has also explicitly stated that respective measure may not be applied in any other context as criminal proceedings.¹⁰⁸ Regarding the length of the deprivation of liberty, case law has stated that, in principle, any deprivation of liberty on grounds of the danger of absconding, no matter how long, is presumed to be non-arbitrary if it is carried out pursuant to a court order.¹⁰⁹ However, there always comes a point in time when deprivation of liberty becomes unreasonably long. When this point in time is reached, a person must be released.¹¹⁰ Whether or not the period of deprivation of liberty is reasonable must be assessed in each case separately.¹¹¹ An important factor to be assessed in this regard is who can be considered to be responsible for delays in investigation. If a state can show that delays in investigation were caused by the person deprived of liberty himself or by any other factors that do not engage the state's responsibility, even a relatively long period of deprivation of liberty might be recognised as reasonable.¹¹²

¹⁰⁶ *Lopez-Alvarez v. Honduras*, *supra* note 104, paragraph 68.

¹⁰⁷ See, for example, *Ladent v. Poland*, Judgment of 18 March 2008, ECtHR, paragraph 56.

¹⁰⁸ See, for example, *Jecius v. Lithuania*, Judgment of 31 July 2000, ECtHR, paragraph 50.

¹⁰⁹ See, for example, *Benham v. the United Kingdom*, Judgment of 10 June 1996, ECtHR, paragraph 42.

¹¹⁰ See, for example, *Lopez-Alvarez v. Honduras*, *supra* note 104, paragraph 69.

¹¹¹ See, for example, *Idalov v. Russia*, *supra* note 104, paragraph 139; *Bykov v. Russia*, Judgment of 10 March 2009, ECtHR, paragraph 61.

¹¹² See, for example, *Shabani v. Switzerland*, Judgment of 5 November 2009, ECtHR, paragraph 65; *Sadegul Ozdemir v. Turkey*, Judgment of 2 August 2005, ECtHR, paragraph 44.

Due care must be taken not only in deciding whether the deprivation of liberty on grounds of the danger of absconding is a necessary and proportional measure in the circumstances in question. In cases when it is decided to release the person on bail, due care must be taken, also, in fixing an appropriate amount for bail. Bail must be fixed by reference to the assets of a person deprived of liberty and his relationship with the persons who are to provide security, in other words to a degree of confidence that is possible that the prospect of loss of security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond.¹¹³

Risk that the accused will take action to obstruct the proceedings

General tests of necessity and proportionality are applicable, also, in regards to the preventive deprivation of liberty based on the risk of obstruction of the proceedings. Furthermore, authorities cannot rely upon this basis *in abstracto*; it has to be supported by factual evidence.¹¹⁴

2.2.2.3.4. *Civil Claim – Unjustified Ground for a Deprivation of Liberty*

Human rights instruments do not contain a list of all specific cases in which deprivation of liberty is prohibited. It is not necessary (and perhaps not even possible) to give such a list. As it is evident from previous sub-chapters, instead, human rights instruments approach the issue from the other end – they name only exceptional cases in which deprivation of liberty is allowed. Any deprivation of liberty which does not fall under recognised exceptions is not allowed.

¹¹³ See, for example, *Piotr Osuch v. Poland*, Judgment of 3 November 2009, ECtHR, paragraphs 6, 39, 40 and 47. See also the case study in this dissertation which indicates that after *Prestige* accident Spanish authorities did not take due care in fixing appropriate amount of bail for the release of master of *Prestige* – Captain Mangouras. Neither his assets, nor his relationship with the persons who are to provide security was assessed. Despite that, very high amount of bail – EUR 3,000,000 – was fixed.

¹¹⁴ See, for example, *Trzaska v. Poland*, Judgment of 11 July 2000, ECtHR, paragraphs 7 and 65. See also the case study in this dissertation which indicates that after *Prestige* accident one of the grounds given by Spanish authorities to justify detention of master of *Prestige* – Captain Mangouras – was risk that, if released, the Captain will obstruct the proceedings. Yet, this allegation was not supported by factual evidence.

However, some of the human rights instruments contain rules which identify one specific case from this “unwritten list” of cases in which deprivation of liberty is prohibited. Thus, Art. 11 of the International Covenant on Civil and Political Rights states: “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”. Art. 7(7) of the American Convention on Human Rights states: “No one shall be detained for debt. [...]”. These rules clearly indicate that it is not proportional to deprive person from liberty in relation to civil claims. Inclusion of the above mentioned rules in human rights instruments points to the fact that drafters of these instruments considered that, in practice, there is a rather high risk of deprivation of liberty in relation to civil claims and drafters wanted to make it absolutely clear that such practice violates human rights.¹¹⁵

2.2.2.4. Deprivation of Liberty Without Convincingly Demonstrating Its Justification

For deprivation of liberty not to be arbitrary, it is not enough that this deprivation of liberty is, in principle, justified (based on recognised grounds). In addition, respective justification must be convincingly demonstrated by the authorities, because only by giving reasoned decision there can be public scrutiny of the administration of justice.¹¹⁶ Such cases as *Idalov v. Russia*¹¹⁷ *Tase v. Romania*¹¹⁸ and *Gudiel Alvarez et al. v. Guatemala*¹¹⁹ show that, unfortunately, authorities very often fail to follow this obligation – reasons for deprivation of liberty in their

¹¹⁵ Also case study in this dissertation indicates that in practice the risk to be deprived of liberty due to civil claims is rather high. In *Prestige* case, Spanish authorities considered civil claims as one of the factors justifying deprivation of liberty of master of *Prestige* – Captain Mangouras. In *Tasman Spirit* case, civil claims apparently were even the main reason of deprivation of liberty of the “Karachi Eight”.

¹¹⁶ See, for example, *Idalov v. Russia*, Judgment of 22 May 2012, ECtHR, paragraph 140; *Tase v. Romania*, Judgment of 10 June 2008, ECtHR, paragraphs 40 and 41; *Gudiel Alvarez et al. v. Guatemala*, Judgment of 20 November 2012, IACtHR, paragraph 197.

¹¹⁷ *Idalov v. Russia*, *ibid.*, paragraphs 140 and 142-149.

¹¹⁸ *Tase v. Romania*, *supra* note 116.

¹¹⁹ *Gudiel Alvarez et al. v. Guatemala*, *supra* note 116, paragraphs 197-202.

decisions are limited to standard phrases from national law on criminal procedures, without explaining how they apply in the case in question.¹²⁰

2.2.3. Violation of the Right to Liberty: Failure to Provide Required Guarantees for Persons Deprived of Liberty

As it was already stated above, human rights instruments not only forbid arbitrary deprivation of liberty but also set a number of guarantees for persons deprived of liberty – to give additional safeguards against arbitrariness. These guarantees are:

- 1) right to be informed on the reasons for deprivation of liberty and charges;
- 2) right to automatic judicial review of deprivation of liberty;
- 3) right to actively seek a judicial review of deprivation of liberty.

2.2.3.1. Right to Be Informed on the Reasons for Deprivation of Liberty and Charges

Art. 9(2) of the International Covenant on Civil and Political Rights states: “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” Art. 5(2) of the European Convention on Human Rights and Art. 7(4) of the American Convention on Human Rights, in essence, repeat Art. 9(2) of the International Covenant on Civil and Political Rights.

There have been some cases when human rights tribunals have found that the authorities have failed to give to the person deprived of liberty any information about the reasons for his deprivation of liberty and charges against him.¹²¹ More often, however, authorities provide some information but not properly. For “proper informing”, the below introduced conditions should be met.

¹²⁰ See also the case study in this dissertation which indicates that after *Prestige* accident and *Tasman Spirit* accident respectively Spanish and Pakistani authorities deprived seafarers of their liberty without convincingly demonstrating justification for such measure.

¹²¹ See, for example, *Lopez-Alvarez v. Honduras*, Judgment of 1 February 2006, IACtHR, paragraph 86; *Tibi v. Ecuador*, Judgment of 7 September 2004, IACtHR, paragraph 111.

First, information on the reasons for the deprivation of liberty of a particular person and any charges against him must be provided to this person himself or his representative. In other words, presumption of receipt of the information is not sufficient.¹²²

Secondly, a person deprived of liberty should be informed of the reasons of his deprivation of liberty and any charges against him “promptly”. Requirement of promptness will be satisfied where the person deprived of liberty is informed about the reasons of his deprivation of liberty within a few hours after the fact of deprivation of liberty.¹²³ Information on charges must be given to the person as soon as this person has been formally charged.¹²⁴

Thirdly, information on the reasons for the deprivation of liberty shall include essential legal and factual grounds for the deprivation of liberty of a particular person.¹²⁵ Concerning the charges, a person must be informed in detail.¹²⁶

Fourthly, a person deprived of liberty should be provided with the information on reasons for his deprivation of liberty and charges against him in a language which this person understands. It means not only that the information should be provided in English, Spanish, French or any other language which the person understands, but also that the information should be told in simple, non-technical language.¹²⁷

¹²² See, for example, *Saadi v. the United Kingdom*, Judgment of 29 January 2008, ECtHR, paragraph 53.

¹²³ See, for example, *Fox, Campbell and Hartley v. the United Kingdom*, Judgment of 30 August 1990, ECtHR, paragraphs 40-42; *Zuyev v. Russia*, Judgment of 19 February 2013, ECtHR, paragraph 83.

¹²⁴ See, for example, *Pelissier and Sassi v. France*, Judgment of 25 March 1999, ECtHR, paragraph 51; *Kamasinski v. Austria*, Judgment of 19 December 1989, ECtHR, paragraph 79.

¹²⁵ See, for example, *Fox, Campbell and Hartley v. the United Kingdom*, *supra* note 123, paragraph 41; *Nowak v. Ukraine*, Judgment of 31 March 2011, ECtHR, paragraph 64.

¹²⁶ See Art. 14(3)(a) of the International Covenant on Civil and Political Rights, Art. 6(3)(a) of the European Convention on Human Rights, Art. 8(2)(b) of the American Convention on Human Rights as well as relevant case law, for example, *Pelissier and Sassi v. France*, *supra* note 124, paragraph 51.

¹²⁷ See, for example, *Fox, Campbell and Hartley v. the United Kingdom*, *supra* note 123, paragraph 40.

2.2.3.2. Right to Automatic Judicial Review of Deprivation of Liberty

Art. 9(3) of the International Covenant on Civil and Political Rights states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power [...]”. Art. 5(3) of the European Convention on Human Rights and Art. 7(5) of the American Convention on Human Rights, in essence, repeat Art. 9(3) of the International Covenant on Civil and Political Rights.

The first thing to note in regards to the above-mentioned legal norms is that they require *automatic* bringing of a person deprived of liberty before a competent legal authority for judicial review of his deprivation of liberty. *Automatic* judicial review means that this review cannot be made dependant on a previous application of a person deprived of liberty.¹²⁸

Competent legal authority, before which a person deprived of liberty is brought for an automatic judicial review of his deprivation of liberty, must satisfy certain conditions. First, it must have power to make a binding order for the release of the person deprived of liberty.¹²⁹ Secondly, it must be independent of the executive and of the parties.¹³⁰

A person deprived of his liberty must be brought before a competent legal authority for judicial review of his deprivation of liberty promptly. Case law has defined the limits of promptness rather strictly – any period in excess of 4 days is *prima facie* too long.¹³¹ Also shorter periods might be recognised as not satisfying the requirement of promptness if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the person deprived of liberty before a competent legal authority sooner.¹³² Some exceptional circumstances may

¹²⁸ See, for example, *McKay v. the United Kingdom*, Judgment of 3 October 2006, ECtHR, paragraph 34.

¹²⁹ See, for example, *McKay v. the United Kingdom*, *ibid.*, paragraph 40; *Assenov and others v. Bulgaria*, Judgment of 28 October 1998, ECtHR, paragraph 146.

¹³⁰ See, for example, *Niedbala v. Poland*, Judgment of 4 July 2000, ECtHR, paragraph 49; *Schiesser v. Switzerland*, Judgment of 4 December 1979, ECtHR, paragraph 31.

¹³¹ See, for example, *McKay v. the United Kingdom*, *supra* note 128, paragraph 33.

¹³² See, for example, *Ipek and others v. Turkey*, Judgment of 3 February 2009, ECtHR, paragraph 37; *Kandzhov v. Bulgaria*, Judgment of 6 November 2008, ECtHR, paragraph 66.

justify bringing of a person for automatic judicial review of his deprivation of liberty more than four days after the deprivation of liberty. One of such “exceptional circumstances” which justifies delay is directly linked to the maritime domain, namely, deprivation of liberty at sea, far away from coast, which makes it materially impossible to bring the crew “physically” before competent legal authority within the required four-day period.¹³³ At the same time, authorities must keep in mind that in cases when deprivation of liberty takes place at sea, far away from coast, and therefore a person is not brought before competent legal authority for judicial review of his deprivation of liberty within the required four-day period, nothing justifies any further delays once the person finally is transferred ashore.¹³⁴

Competent legal authority before which a person deprived of liberty is brought must review merits of the particular deprivation of liberty: whether it is lawful and whether it falls within the permitted exceptions from the right to liberty. In other words, the competent legal authority must examine circumstances militating for or against deprivation of liberty.¹³⁵

Before taking the decision on whether the deprivation of liberty in a particular case has been justified, competent legal authority must hear the individual deprived of liberty in person.¹³⁶ There is no positive duty during this hearing to secure legal assistance to a person deprived of liberty. However, there is negative obligation not to hinder effective assistance from lawyers, because such hindrance can adversely affect the ability of a person deprived of liberty to present his case and with that violate the principle of “equality of arms”.¹³⁷

¹³³ See, for example, *Medvedyev and others v. France*, Judgment of 29 March 2010, ECtHR, paragraphs 127 and 131-133.

¹³⁴ See, for example, *Vassis and others v. France*, Judgment of 27 June 2013, ECtHR, paragraphs 6-16, 58 and 60; European Court of Human Rights, Press Release ECHR 361 (2014), 4 December 2014, Suspects of piracy against French vessels apprehended in Somalia by the French authorities should have been brought before a legal authority as soon as they arrived in France.

¹³⁵ See, for example, *Schiesser v. Switzerland*, *supra* note 130, paragraph 31; *Aquilina v. Malta*, Judgment of 29 April 1999, ECtHR, paragraph 47; *Pantea v. Romania*, Judgment of 3 June 2003, ECtHR, paragraphs 23, 233 and 234.

¹³⁶ See, for example, *Schiesser v. Switzerland*, *ibid.*; *Tibi v. Ecuador*, Judgment of 7 September 2004, IACtHR, paragraph 118; *Lopez-Alvarez v. Honduras*, Judgment of 1 February 2006, IACtHR, paragraph 87.

¹³⁷ See, for example, *Lebedev v. Russia*, Judgment of 25 October 2007, ECtHR, paragraphs 83-91.

2.2.3.3. Right to Actively Seek a Judicial Review of Deprivation of Liberty

Art. 9(4) of the International Covenant on Civil and Political Rights states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Art. 5(4) of the European Convention on Human Rights and Art. 7(6) of the American Convention on Human Rights, in essence, repeat Art. 9(4) of the International Covenant on Civil and Political Rights. In simpler language, it can be said that the above-mentioned rules secure the right of the person deprived of liberty to actively seek a judicial review of his deprivation of liberty. In a number of legal systems this action is known as *habeas corpus*.

Right to actively seek judicial review of deprivation of liberty has many similarities to the right to automatic judicial review of deprivation of liberty. However, there are also important differences between these two types of judicial review. The first difference is rather obvious: one judicial review is automatic, but the other judicial review follows after an active action of a person deprived of liberty (after his relevant application).

Secondly, automatic judicial review should be carried out “promptly”, but review after the application must be carried out “speedily”/“without delay”. Case law has stated that the notions of “speedily” and “without delay” indicate a lesser urgency than that of “promptly”.¹³⁸ While courts have set a rather strict baseline for the “promptness” requirement (four days are considered *prima facie* too long), there is no such strict baseline for a “speediness” and “without delay” requirements. However, case law points to some specific time limits also in relation to these requirements. For example, in the case of *Mamedova v. Russia* ECtHR found a period of 26 days incompatible with the notion of speediness¹³⁹, in the case of *Tibi v.*

¹³⁸ See, for example, *E. v. Norway*, Judgment of 29 August 1990, ECtHR, paragraph 64; *Brogan and others v. the United Kingdom*, Judgment of 29 November 1988, ECtHR, paragraph 59.

¹³⁹ *Mamedova v. Russia*, Judgment of 1 June 2006, ECtHR, paragraph 96.

Ecuador – 21 days¹⁴⁰, in the case of *Kadem v. Malta* – 17 days¹⁴¹. In any case, administrative difficulties (such as excessive workload or vocation period) on the side of the state may not serve as an excuse for not following the “speediness” and “without delay” requirements.¹⁴²

Thirdly, although matters which should be reviewed in the case of the review after an application, in general, are the same as in the case of automatic review (whether particular deprivation of liberty is lawful and whether it falls within the permitted exceptions from the right to liberty), it must be kept in mind that factual circumstances which determine whether deprivation of liberty is justified are subject to change with the passing of time. Thus, deprivation of liberty which was justified at the initial stages of investigation may become unjustified later:

- grounds for deprivation of liberty may disappear altogether (asking for unconditional release);
- risks associated with the release may decrease (asking for replacement of deprivation of liberty with less stringent measures);
- period of deprivation of liberty may become unreasonable (also asking for replacement of deprivation of liberty with less stringent measures).

Because of all these above-mentioned possible changes to the circumstances in question, states are under obligation to give an opportunity to a person deprived of liberty his deprivation of liberty to be reviewed not only once, but regularly, at reasonable intervals. There is no strict answer to the question of what length of such intervals between reviews is “reasonable”. However, case law has noted that these intervals must be short.¹⁴³ Moreover, this regular review of deprivation of liberty cannot be only formal. With the passing of time, the courts’ reasoning must evolve to reflect the developing situation and to verify whether the earlier-given grounds for the deprivation of liberty remain valid at the advanced stage of the proceedings.¹⁴⁴

¹⁴⁰ *Tibi v. Ecuador*, *supra* note 136, paragraph 134.

¹⁴¹ *Kadem v. Malta*, Judgment of 9 January 2003, ECtHR, paragraphs 44-45.

¹⁴² See, for example, *E. v. Norway*, *supra* note 138, paragraph 66; *Bezicheri v. Italy*, Judgment of 26 September 1989, ECtHR, paragraph 25.

¹⁴³ See, for example, *Bezicheri v. Italy*, *ibid.*, paragraph 21.

¹⁴⁴ See, for example, *Bykov v. Russia*, Judgment of 10 March 2009, ECtHR, paragraphs 11 and 65.

2.3. Right to Be Free from Torture and Other Cruel, Inhuman or Degrading Treatment

Art. 5 of UDHR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment [...]”. Art. 7 of the International Covenant on Civil and Political Rights, Art. 3 of the European Convention on Human Rights, Art. 4 of the Charter of Fundamental Rights of the European Union, Art. 5(2) of the American Convention on Human Rights and Art. 5 of the African Charter on Human and Peoples’ Rights, in essence, repeat Art. 5 of UDHR.

Although all main human rights instruments establish the right to be free from torture and other cruel, inhuman or degrading treatment, none of these instruments defines “torture”, “cruel treatment”, “inhuman treatment” or “degrading treatment”. A conventional explanation is that human rights instruments use these different terms just to distinguish the severity of suffering caused by particular treatment.¹⁴⁵ Yet, there are also scholars, institutions and judges who disagree with this explanation.¹⁴⁶ Consequently, it can be concluded that the question, actually, is not decided and, therefore, no one can be absolutely sure exactly what form of forbidden treatment has taken place in any given situation.

Nevertheless, as Evans has stated, it is possibly a mistake to focus too much on the issue of where, exactly, borders lie between torture and other cruel, inhuman or degrading treatment, because all of the above-mentioned treatment is simply ill-treatment or mistreatment which constitutes the violation of human rights.¹⁴⁷ More importantly is to establish the “entry threshold” – the point at which ill-treatment can be considered at least degrading, because ill-treatment which is not at least degrading does not constitute the violation of human rights.

¹⁴⁵ Malcolm D. Evans, “Getting to Grips with Torture”, in *International and Comparative Law Quarterly*, Volume 51, Issue 2, April 2002 at p. 370. See also relevant case law, for example, *Ireland v. the United Kingdom*, Judgment of 18 January 1978, ECtHR, paragraph 196; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997, IACtHR, paragraph 57.

¹⁴⁶ EVANS, *ibid.* at p. 374. See also relevant case law, for example, *Bamaca-Valasquez v. Guatemala*, Judgment of 25 November 2000, IACtHR, paragraphs 156-158; *Kalashnikov v. Russia*, Judgment of 15 October 2002, ECtHR, paragraph 95.

¹⁴⁷ EVANS, *ibid.* at p. 371.

Unfortunately, there are basically no binding international or regional standards which would outlaw any particular practice of treatment of persons. Consequently, for determining whether specific treatment of a person has been at least degrading, courts simply assess the cumulative effect of the conditions on the particular person. In the case of *Ireland v. the United Kingdom* ECtHR stated:

[...] ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, etc.¹⁴⁸

In other words, courts have broad scope of discretion in determination which treatment is at least degrading and which is not. Obviously, such discretion of courts leads to uncertainty; in fact, it allows courts to shape the boundaries of lawful and unlawful treatment.

For the purposes of this dissertation, the treatment of persons deprived of their liberty (in one word “prisoners”, both untried and convicted) is of particular interest. Also in regards to the treatment of this group of people there are basically no binding international or regional standards which would outlaw any particular practice. Yet, there are legal instruments which can help to identify the treatment which most probably will be recognized by human rights tribunals as a violation of the human rights of a prisoner. These instruments are relevant case law of ECtHR and IACtHR as well as relevant “soft law”, for example, UN Standard Minimum Rules for the Treatment of Prisoners (hereinafter – Rules for the Treatment of Prisoners)¹⁴⁹. Rules for the Treatment of Prisoners, although not a binding instrument, are highly recognized as “reliable benchmarks as to minimal international standards for the humane treatment of prisoners”.¹⁵⁰ These rules cover

¹⁴⁸ *Ireland v. the United Kingdom*, *supra* note 145, paragraph 162.

¹⁴⁹ UN Economic and Social Council, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Standard Minimum Rules for the Treatment of Prisoners, Res. 663 (XXIV) (July 31, 1957), Res. 2076 (LXII) (May 13, 1977).

¹⁵⁰ See, for example, *Joseph Thomas v. Jamaica*, Judgment of 22 June 1999, IACtHR, paragraph 133.

such areas as: accommodation¹⁵¹; personal hygiene, bedding and clothing¹⁵²; food¹⁵³; exercise and work¹⁵⁴; medical care¹⁵⁵; discipline and punishment¹⁵⁶; contact with the outside world¹⁵⁷; religion¹⁵⁸ and removal of a prisoner to or from an institution¹⁵⁹.¹⁶⁰

The above-mentioned rules, and examples of their violation, clarify what exactly constitutes unlawful ill-treatment of prisoners. However, these rules, and examples of their violation, cover just one aspect of the right to be free from torture and other cruel, inhuman or degrading treatment – a substantial aspect of this right. The right also has a procedural aspect. Even if unlawful ill-treatment, as such, has not occurred, in particular circumstances (if a state fails to carry out effective investigation of the allegation of ill-treatment), it may still be concluded that the human right to be free from torture and other cruel, inhuman or degrading treatment

¹⁵¹ Rules for the Treatment of Prisoners, *supra* note 149, paragraphs 10-14. See also relevant case law, for example, *Suarez-Rosero v. Ecuador*, Judgment of 12 November 1997, IACtHR, paragraph 91; *Titarenko v. Ukraine*, Judgment of 20 December 2012, ECtHR, paragraph 52.

¹⁵² Rules for the Treatment of Prisoners, *ibid.*, paragraphs 15-17, 19 and 88. See also relevant case law, for example, *De La Cruz-Flores v. Peru*, Judgment of 18 November 2004, IACtHR, paragraph 130; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997, IACtHR, paragraph 46.

¹⁵³ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 20 and 87. See also relevant case law, for example, *Lori Berenson-Mejia v. Peru*, Judgment of 25 November 2004, IACtHR, paragraph 88(74)(iv).

¹⁵⁴ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 21 and 89. See also relevant case law, for example, *Garcia-Asto and Ramirez-Rojas v. Peru*, Judgment of 25 November 2005, IACtHR, paragraph 220; *S.D. v. Greece*, Judgment of 11 June 2009, ECtHR, paragraph 51.

¹⁵⁵ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 22, 24 and 91. See also relevant case law, for example, *Tibi v. Ecuador*, Judgment of 7 September 2004, IACtHR, paragraph 153; *Ivantoc and others v. Moldova and Russia*, Judgment of 15 November 2011, ECtHR, paragraph 44.

¹⁵⁶ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 27, 29-31 and 33-34. See also relevant case law, for example, *Ramishvili and Kokhreidze v. Georgia*, Judgment of 27 January 2009, ECtHR, paragraphs 99-101; *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, IACtHR, paragraph 192.

¹⁵⁷ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 37 and 39. See also relevant case law, for example, *De La Cruz-Flores v. Peru*, *supra* note 152, paragraph 73(55); *S.D. v. Greece*, *supra* note 154.

¹⁵⁸ Rules for the Treatment of Prisoners, *ibid.*, paragraphs 6, 41 and 42.

¹⁵⁹ Rules for the Treatment of Prisoners, *ibid.*, paragraph 45.

¹⁶⁰ See also the case study in this dissertation which indicates possibly unlawful ill-treatment of seafarers after *Prestige* accident (lengthy questioning during the night hours just after the rescue, without providing proper rest, food and facilities) and *Hebei Spirit* accident (parading of seafarers as a common criminals to the public; detention in tiny, filthy, freezing individual cells with a hole in the floor for a toilet; minimal exercise; minimal visits; disrespect towards religious beliefs).

has been violated.¹⁶¹ Effective investigation is investigation which is independent, impartial, thorough and prompt. For example, in the case of *Ahmed Duran v. Turkey* ECtHR noted that the investigation cannot be considered as effective in the case when the first steps to pursue investigation are taken just seven months after receiving the complaint, and, ultimately, the prosecutor refuses to prosecute ill-treatment relying completely on the validity of deficient medical reports.¹⁶²

2.4. Right to Be Free from Cruel, Inhuman or Degrading Punishment

2.4.1. Introduction

Art. 5 of UDHR, Art. 7 of the International Covenant on Civil and Political Rights, Art. 3 of the European Convention on Human Rights, Art. 4 of the Charter of Fundamental Rights of the European Union, Art. 5(2) of the American Convention on Human Rights and Art. 5 of the African Charter on Human and Peoples' Rights safeguard not only against cruel, inhuman or degrading treatment (as described in Sub-chapter 2.3 above) but also against cruel, inhuman or degrading punishment. Despite the fact that human rights instruments talk about treatment and punishment parallel to each other, punishment actually forms part of the broader concept of treatment.¹⁶³ It means, *inter alia*, that, similarly as in regards to treatment, in regards to punishment, the most important thing to do for identification of human rights violations is to establish the “entry threshold” – the point at which punishment can be considered at least degrading.

¹⁶¹ See, for example, *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, IACtHR, paragraph 176; *Assenov and others v. Bulgaria*, Judgment of 28 October 1998, ECtHR, paragraph 102; *Virobyan v. Armenia*, Judgment of 2 October 2012, ECtHR, paragraphs 161 and 162.

¹⁶² *Ahmed Duran v. Turkey*, Judgment of 28 August 2012, ECtHR, paragraphs 34 and 36.

¹⁶³ See, for example, *Vinter and others v. the United Kingdom*, Judgment of 17 January 2012, ECtHR, paragraph 89, where court talks about disproportionate punishment as a part of treatment; UN Economic and Social Council, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Standard Minimum Rules for the Treatment of Prisoners, Res. 663 (XXIV) (July 31, 1957), Res. 2076 (LXII) (May 13, 1977), paragraphs 29-33, which talk about discipline and punishment of prisoners as a part of their treatment.

Unfortunately, establishment of this “entry threshold” in very large extent is left to the discretion of individual states. There is no “International Criminal Code”. Also, relevant case law of human rights tribunals is very limited. There is some case law outlawing extremely harsh forms of punishment, for example, irreducible life imprisonment¹⁶⁴ and imprisonment under continuous solitary confinement¹⁶⁵. However, apart from these extremes, human rights tribunals stick to the position that specific penal systems of particular states are outside the scope of their supervision, because issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement.¹⁶⁶

Such a very passive position of human rights tribunals regarding punishment-related issues is understandable. Disagreements on respective issues, indeed, are rather wide – it is evident from different national laws and practices, as well as from scholarly literature. Nevertheless, in the opinion of this author, the position of human rights tribunals is not fully justified, because, despite the above-mentioned disagreements, there are still punishment-related rules regarding which a sufficient degree of consensus exists. These “rules” are general principles of punishment.¹⁶⁷ Consequently, general principles of punishment can be utilised for determining punishment which is at least degrading. In other words, these principles can be treated as extended hands of the right to be free from cruel, inhuman or degrading punishment.

General principles of punishment can be organised around two significant questions: the question of liability (to whom punishment can be applied) and the question of amount (how severe punishment can be imposed). Also this sub-chapter is further organised around these two significant questions.

¹⁶⁴ See, for example, *Kafkaris v. Cyprus*, Judgment of 12 February 2008, ECtHR, paragraphs 97-99.

¹⁶⁵ See, for example, *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, IACtHR, paragraphs 193-194 and 198-199.

¹⁶⁶ See, for example, *Vinter and others v. the United Kingdom*, *supra* note 163, paragraphs 104-105; *Mohamed v. Argentina*, Judgment of 23 November 2012, IACtHR, paragraph 82.

¹⁶⁷ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p. 113.

2.4.2. General Principles for Determining Criminal Liability

2.4.2.1. Introduction

Criminal liability is the most severe form of liability which brings with it a high degree of suffering, like infringements to liberty and reputation. Therefore, it is worth noting already at the very beginning that the good old and very important principle which must be kept in mind by those who make decisions on criminalisation of particular conducts is that application of criminal liability should be kept to an irreducible minimum. It should be imposed only for serious offences, for which other, milder forms of intervention, such as administrative or civil liability, are not sufficient.¹⁶⁸ Criminal liability should be kept to an irreducible minimum not only to save people from a high degree of suffering, but also to maintain the high authority of criminal law and, consequently, high respect towards it. If too many offences are made criminal, the value or moral force of criminal law diminishes.¹⁶⁹ Also the effectiveness or physical force of criminal law might suffer in such a case because, if too many offences are made criminal, resources of police, prosecution and courts are wastefully diverted from the central insecurities of our life, like robbery, burglary, rape, assault, and governmental corruption.¹⁷⁰ Even human rights tribunals have indirectly referred to the principle that criminal liability should be kept to an irreducible minimum. For example, in the case *Calvelli and Ciglio v. Italy* – a case in which the liability of doctors for the death of a new-born child was considered – ECtHR noted: “[...] if the infringement [...] is not caused intentionally, the positive obligation [...] to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case.”¹⁷¹

¹⁶⁸ See, for example, Erik Luna, “Overextending the Criminal Law”, in Gene Healy, (ed.), *Go Directly to Jail: the Criminalization of Almost Everything*, Washington, DC, USA: Cato Institute, 2005 at pp. 1-2; Francoise Tulkens, “The Paradoxical Relationship Between Criminal Law and Human Rights”, in *Journal of International Criminal Justice*, Volume 9, Issue 3, 2011 at p. 580.

¹⁶⁹ LUNA, *ibid.* at p. 7.

¹⁷⁰ LUNA, *ibid.* at pp. 6-7.

¹⁷¹ *Calvelli and Ciglio v. Italy*, Judgment of 17 January 2002, ECtHR, paragraph 51. See also *Vo v. France*, Judgment of 8 July 2004, ECtHR, paragraph 90.

Another very important principle is the principle of legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) (hereinafter – principle of legality). Principle of legality is firmly established also in the international and regional human rights instruments.¹⁷² This principle dictates that only the law can define a crime and prescribe a penalty. Thus, a person may not be accused and convicted under law which is not yet in force at the time of a conduct or law which is no longer in force at the time of a conduct. Similarly, a person may not be accused and convicted under “general principles” or insufficiently clear law. The standard is not that concrete facts giving rise to criminal liability should be set out in detail in the law. What are required are the same qualities of law as in regards to other human rights: that the law is accessible and foreseeable.¹⁷³ In case of ambiguity the rule of lenity must be applied, what means where two reasonable interpretations of a law exist, one inculcating and the other exculpating a person, a less harsh reading must be employed. In other words, the law shall be interpreted in favour of the person accused or convicted. Likewise, a person may not be accused and convicted by applying law by analogy.¹⁷⁴

¹⁷² See Art. 11(2) of UDHR, Art. 15 of the International Covenant on Civil and Political Rights, Art. 7 of the European Convention on Human Rights, Art. 49(1) of the Charter of Fundamental Rights of the European Union, Art. 9 of the American Convention on Human Rights and Art. 7(2) of the African Charter on Human and Peoples’ Rights.

¹⁷³ See, for example, *S.W. v. the United Kingdom*, Judgment of 22 November 1995, ECtHR, paragraphs 35 and 36; *Tolstoy Miloslavsky v. the United Kingdom*, Judgment of 13 July 1995, ECtHR, paragraph 37. See also the case study in this dissertation which indicates that after *Prestige* accident the Spanish Supreme Court found the master of *Prestige* – Captain Mangouras – guilty of the crime against natural resources and the environment (the crime under Art. 325 of the Spanish Criminal Code). The Captain was found guilty on the basis of mere endangerment to the environment, despite the fact that from the wording of Art. 325 of the Code it was not clear whether the mere endangerment is punishable under this article.

¹⁷⁴ Daniel E. Hall, *Criminal Law and Procedure*, 6th edition, Clifton Park, NY, USA: Delmar, Cengage Learning, 2011 at p. 64. See also Articles 22 and 23 of the Rome Statute of the International Criminal Court.

Apart from the above-described principle that criminal liability should be kept to an irreducible minimum and the principle of legality, another important principle is that criminal liability should not be applied if *corpus delicti* of a particular crime is not present. *Corpus delicti* is the totality of the required elements of the crime. If any of the required elements of the crime is lacking, there is no *corpus delicti* and there is no crime. Elements of a crime are objective (physical, external) and subjective (mental, fault). Objective elements characterise the outer display of a crime (conduct itself and state of affairs). Subjective elements characterise the inner mental state (state of mind) of a person at the time of the conduct. In a number of jurisdictions, the Latin term *actus reus* (guilty act) is used to describe objective elements of a crime and the Latin term *mens rea* (guilty mind) is used to describe subjective elements of a crime. Furthermore, criminal liability can be applied only when *actus reus* and *mens rea* are contemporaneous. This sub-chapter further analyses, in detail, different objective and subjective elements of a crime. At the end of the sub-chapter, strict liability and defence of necessity are addressed separately.

Before moving on to the analysis of the different objective and subjective elements of a crime, one more very important note should be made here. Standard of proof for criminal liability is a proof beyond a reasonable doubt.¹⁷⁵ It means that a person may not be held liable for a particular crime if all elements of this crime are not proven to the extent that there could be no “reasonable doubt” in the mind of a “reasonable person” that the accused person is guilty. As Gardner and Anderson have put it:

Proof beyond a reasonable doubt means that it is not enough to prove that it was more likely than not that an element of the crime was true. The proof must be such that a reasonable person could not conclude the element was not true.¹⁷⁶

¹⁷⁵ Richard Eggleston, *Evidence, Proof and Probability*, London: Weidenfeld and Nicolson, 1978 at p. 89.

¹⁷⁶ Thomas J. Gardner and Terry M. Anderson, *Criminal Law*, 11th edition, Belmont, CA, USA: Wadsworth, Cengage Learning, 2010 at p. 52.

It is difficult to put a valid numerical value on the probability that a person really committed the crime, but scholars who do assign a numerical value generally say that “beyond a reasonable doubt” means at least 91% certainty of guilt.¹⁷⁷

2.4.2.2. Objective Element “Act”

An “act” is the objective element of any crime. Term “act” in relation to criminal liability must be understood in a wide sense, embracing not only acts strictly speaking, but also omissions. An act strictly speaking is the active conduct of a person: physical action (bodily movement), such as beating, shooting or steering, as well as verbal action such as threatening, insulting or inviting. An omission is the passive conduct of a person by not fulfilling his obligations.¹⁷⁸ To embrace both terms – “act” and “omission” – this dissertation uses the term “conduct” from here-on.

2.4.2.3. Objective Element “Harm”

A crime from its objective side can be defined by the conduct alone (such crimes are known as “conduct crimes”¹⁷⁹). However, very often, crimes are defined by harm – negative consequences caused by a conduct (such crimes are known as “result crimes”¹⁸⁰). Harm might be of a different kind, for example, death, bodily injury, economic loss or environmental damage. If a particular crime is defined by some kind of harm, then also this harm is an objective element of the crime. Consequently, if a conduct has not resulted in the prerequisite harm, a person may not be held liable for committing a particular crime.

¹⁷⁷ See, for example, Anne W. Martin and David A. Schum, “Quantifying Burdens of Proof: A Likelihood Ratio Approach”, in *Jurimetrics Journal*, Volume 27, Issue 4, Summer 1987 at p. 397. See also the case study in this dissertation which indicates both negative and positive practices in regards to holding seafarers criminally liable without proving their guilt beyond a reasonable doubt.

¹⁷⁸ Dainis Mežulis, *Krimināltiesības shēmās: Vispārīgā daļa*, Rīga: Zvaigzne ABC, 1999 at p. 43.

¹⁷⁹ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 20.

¹⁸⁰ ALLEN, *ibid.*

Philosophical discussion exists whether it is right to make criminal liability dependant on harm caused by a conduct. On the one hand, many agree that harm is only of marginal importance. They say that in principle the same antisocial conduct (sin) of different persons may or may not result in particular harm merely due to bad or good luck, but to make criminal liability dependent upon sheer luck is absurd and shocks the common sense of justice.¹⁸¹ On the other hand, it is recognised: if to make criminal liability dependent on a sin alone, then too many people will be exposed to severe sanctions, and it will make more evil than good to society. Therefore some compromise is necessary. The long standing compromise is to choose out for severe sanctions (and, *inter alia*, for deterrence to others) those who actually have caused great harm.¹⁸²

2.4.2.4. Objective Element “Causation”

When the crime is defined by particular harm, criminal liability may not be applied simply because there exists this harm and there exists the conduct which potentially might have caused this harm. It must be proven that the conduct in question, indeed, is the cause of the harm in question.¹⁸³

¹⁸¹ Herbert Wechsler, William Kenneth Jones and Harold L. Korn, “The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy”, in *Columbia Law Review*, Volume 61, No. 4, April 1961 at pp. 572-573. See also, for example, Andrew Ashworth, *Sentencing and Criminal Justice*, 4th edition, Cambridge: Cambridge University Press, 2005 at p. 122; Stephen J. Schulhofer, “Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law”, in *University of Pennsylvania Law Review*, Volume 122, No. 6, January 1974 at pp. 1497-1607.

¹⁸² James Fitzjames Stephen, *A History of the Criminal Law of England*, Volume III, London: Macmillan and Co., 1883 at p. 311. See also ASHWORTH, *ibid.* at p. 108.

¹⁸³ ALLEN, *supra* note 179 at p. 34.

Criminal law distinguished between two forms of causation in regards to conduct and harm: factual causation and legal causation. First of all, factual causation must be established. For establishing this causation the so called “but for” test is used, which means that “but for” the conduct, the harm would not have occurred. The following question should be asked: had the person not carried out the conduct, would the harm have happened? If the answer is “yes”, then the conduct is not the factual cause of the harm. If the answer is “no”, then the conduct is the factual cause of the harm. If by applying the “but for” test it is established that the conduct is not the factual cause of the harm, examination of the causation can be terminated here. If by applying the “but for” test it is established that the conduct is the factual cause of the harm, legal causation must still be established.¹⁸⁴ For establishing legal causation, one must determine whether the conduct in question was the *proximate* cause of the harm in question. It does not mean that the conduct of an alleged offender should be the sole cause or the main cause of the harm in question. However, it does mean that the conduct of an alleged offender should be more than the minimum cause of the harm in question.¹⁸⁵ Determination of legal causation, in fact, is value judgment. Williams has stated:

When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant. [...] If the term ‘cause’ must be used, it can best be distinguished in this meaning as the ‘imputable’ or ‘responsible’ or ‘blamable’ cause, to indicate the value-judgment involved.¹⁸⁶

As a general rule, an intervening cause (a happening that occurs after the initial conduct and changes what would have been the outcome if it had flowed freely from the initial conduct) breaks the chain of causation. It blocks the connection between the initial conduct and the harm.¹⁸⁷ In such case, it is almost impossible to prove that it was exactly the initial conduct which caused the particular harm. However, the

¹⁸⁴ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 35.

¹⁸⁵ ALLEN, *ibid.* at pp. 36-37.

¹⁸⁶ Glanville Williams, *Textbook of Criminal Law*, 2nd edition, London: Stevens and Sons, 1983 at p. 381.

¹⁸⁷ Daniel E. Hall, *Criminal Law and Procedure*, 6th edition, Clifton Park, NY, USA: Delmar, Cengage Learning, 2011 at p. 78; ALLEN, *supra* note 184 at p. 40.

approach has never been so strict as to recognise absolutely any intervening event as breaking the chain of causation. There have been cases when courts have said: if a persons' conduct mainly or substantially caused the accident it matters not that it might have been avoided if the others had not been negligent. In other words, only if the second (intervening) cause is so overwhelming as to make the original cause merely part of the history can it be said that the harm does not flow from the original cause.¹⁸⁸ A typical example in this regard is where person A injures person B, who then requires medical treatment, but the medical treatment provided is negligent, what causes even greater harm to person B. It is recognised that in such a situation medical negligence rarely will supervene to become an independent cause of the harm rendering the act of person A “insignificant”.¹⁸⁹ This example can be easily associated with the situation when person A causes ship-source oil pollution, which requires the response to this pollution from the side of coastal authorities, but the response provided is improper, what causes even greater damage.

2.4.2.5. Other Objective Elements of a Crime

In addition to “act” and “harm”, a crime may be defined by other objective elements, for instance, a particular territory where the conduct was carried out or where the harm occurred, a particular period of time when it happened, particular circumstances in which it happened or particular methods and tools used to carry out the conduct. As Allen has stated:

The term *actus reus* has a much wider meaning than the ‘act’ prohibited by the law which it implies. A useful working definition is that it comprises all the elements of the definition of the offence except those which relate to the mental element (*mens rea*) required on the part of the accused.¹⁹⁰

If these other specific objective elements are included in the definition of a crime, elements other than simply “act” or “harm”, they must, also, be proven before a person can be held liable for committing a particular crime.

¹⁸⁸ ALLEN, *ibid.* at pp. 37 and 41.

¹⁸⁹ ALLEN, *ibid.* at pp. 40 and 42.

¹⁹⁰ ALLEN, *ibid.* at p. 20

2.4.2.6. Subjective Element “Intent”

Three broad groups of mental state which potentially can form the basis for criminal liability can be distinguished: intent, recklessness and gross negligence. From the perspective of culpability, these mental states stand in hierarchical relationships: intent is associated with the most serious level of culpability; gross negligence – with the least serious level of culpability. Intent, as the mental state associated with the most serious level of culpability, is unanimously admitted as the basis for criminal liability.

In ordinary language, the word “intent” is used when somebody sets out to achieve something. In criminal law as well “intent” is used in this sense; however, it is also used to describe cases when a person, strictly speaking, does not set out to achieve something, but merely foresees, though unwanted, the outcome.¹⁹¹ In other words, in criminal law two types of intent exist: direct intent and indirect intent. Direct intent, known also as “specific intent” or “desire-intent”, is present when a person foresees negative consequences of his conduct and wants these consequences. Indirect intent, known also as “oblique intent” or “general intent”, is present when a person foreseeing the negative consequences of his conduct, does not want these consequences as an end yet knowingly allows them.¹⁹²

If only intent, and no other form of mental state, is required by law as a precondition for criminal liability in relation to a particular conduct, then without proving intent on his side a person cannot be held criminally liable for the particular conduct. If the law also recognises other forms of mental state as the basis for criminal liability for a particular conduct, the presence of these other forms of mental state must be examined in addition.

¹⁹¹ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p. 120.

¹⁹² Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 57.

2.4.2.7. Subjective Element “Recklessness”

Recklessness is present when a person foresees the possibility of negative consequences of his conduct, yet thoughtlessly trusts that it will be possible to avert these consequences. In other words, recklessness can be described as acting with unjustified confidence or as wittingly flying in the face of an unjustified risk.¹⁹³

In this description of recklessness special attention should be paid to the word “unjustified”. It points to the fact that, if the risk one takes is justified (reasonable), conduct is not reckless even if actual consequences of this conduct ultimately are negative. Whether taking a risk is justifiable depends on a balancing of the social utility, or value, of the activity involved against the probability and gravity of harm which might be caused. For example, dangerous surgical operations are inevitably accompanied by risks, yet social interests – interests of the life and health of the patient – justify taking these risks.¹⁹⁴ Similarly, particular response measures applied after ship-source oil pollution accidents are inevitably accompanied by risks, yet social interests – interests of the safety of a crew as well as the clean environment – justify taking these risks, particularly if these risks are taken by professionals, such as seafarers themselves, relevant coastal authorities or reputable salvage companies. As Sistare puts it:

Physicians perform risky surgical operations, police officers engage in risky car chases, pilots make risky crash landings. In such cases risks taken are justifiable, and this is a crucial consideration, as only risks which are unjustifiable warrant the attention of the law.¹⁹⁵

There are different views on where, exactly, the border between indirect intent and recklessness should be drawn. Some say that the term “intent” must be used only in those situations when a person believes that negative consequences will certainly occur, and that where their occurrence is merely thought likely to occur the appropriate term to use is “recklessness”.¹⁹⁶ Others say that the term “intent” must also cover the situations when a person believes that the occurrence of negative

¹⁹³ HART, *supra* note 191 at p. 137; ALLEN, *ibid.* at pp. 79 and 81.

¹⁹⁴ ALLEN, *ibid.* at p. 80.

¹⁹⁵ Christine T. Sistare, *Responsibility and Criminal Liability*, Dordrecht: Kluwer Academic Publishers, 1989 at p. 127.

¹⁹⁶ ALLEN, *supra* note 192 at pp. 59-61.

consequences is likely, and that the term “recklessness” must be reserved only for those situations when a person believes that the occurrence of negative consequences is unlikely.¹⁹⁷

Irrespective of which understanding of the terms “intent” and “recklessness” one follows, in general, recklessness, similarly to intent, is a mental state of a person which is highly recognised as the basis for criminal liability. Justification for such recognition lays in the fact that in both cases the negative consequences of the conduct are foreseen by the person.¹⁹⁸

However, general recognition of recklessness as the basis for criminal liability does not mean that it is always enough to prove recklessness for justifying application of criminal liability. Law, in relation to a particular conduct, may explicitly state that only intentional conduct is criminally punishable. Then, in relation to this particular conduct recklessness lies outside the scope of criminal liability. When for intentional conduct criminal liability may be applied but for reckless conduct it may not be applied, the above-mentioned discussion on different understandings of the terms “intent” and “recklessness” may become of vital importance. Therefore, each national legal system, as well as international law, when using the terms “intent” and “recklessness” in relation to particular offences, must make clear what meaning, exactly, it gives to each of these terms.

2.4.2.8. Subjective Element “Gross Negligence”

Negligence is the failure to take reasonable precautions against harm, unaccompanied either by intention to do harm or an appreciation of the risk of harm.¹⁹⁹ In other words, if the person had to foresee the potential harm of his conduct and take precautions against such harm, if this person in principle had capacity to do it, but due to carelessness did not do it – he acted negligently.

¹⁹⁷ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p. 117.

¹⁹⁸ HART, *ibid.* at p. 119.

¹⁹⁹ HART, *ibid.* at pp. 132 and 137.

Two broad degrees of negligence are distinguished: gross negligence and something less (“ordinary”, “simple” or “civil” negligence).²⁰⁰ Negligence can be said to be gross in two cases:

- 1) if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take²⁰¹;
- 2) if a person does something which is obviously likely to cause harm in most circumstances, even if precautions to be taken against harm are not simple or are even non-existent²⁰².

Traditional common law system did not impose liability for negligence (with the exception of manslaughter).²⁰³ However, today, even in common law countries, many agree that liability for negligent conducts should not be excluded completely – that civil or administrative liability may be applied for such conducts.²⁰⁴ Regarding criminal liability views differ. Some argue that criminal liability should never be applied for negligent conducts.²⁰⁵ Others argue that only minor forms of negligence (“ordinary”, “simple” or “civil” negligence) must be excluded from criminal liability, but for gross negligence criminal liability in principle can be applied.²⁰⁶ The author agrees with this last opinion.

²⁰⁰ HART, *ibid.* at p. 137.

²⁰¹ HART, *ibid.* at pp. 147 and 149.

²⁰² HART, *ibid.* at p. 261.

²⁰³ HART, *ibid.* at p. 104.

²⁰⁴ J.W.C. Turner, “The Mental Element in Crimes at Common Law”, in *Cambridge Law Journal*, Volume 6, Issue 1, 1936 at p. 39.

²⁰⁵ TURNER, *ibid.* at p. 32; Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 482; HART, *supra* note 197 at p. 133.

²⁰⁶ HART, *ibid.* at pp. 136 and 147.

However, again, similar to the case of recklessness, general recognition of gross negligence as the basis for criminal liability does not mean that it is always enough to prove gross negligence for justifying application of criminal liability. Law, in relation to a particular conduct, may explicitly state that only intentional conduct or reckless conduct is criminally punishable. Then, in relation to this particular conduct, gross negligence lies outside the scope of criminal liability.

2.4.2.9. Other Subjective Elements of a Crime

Similarly to the fact that the objective side of a particular crime may be defined not only by “act” and “harm” but also by other objective elements, from the subjective side a particular crime may be defined not only by intent, recklessness or gross negligence but also by other subjective elements, for instance, specific aim, specific motive or specific emotional condition. If these or other specific subjective elements are included in the definition of a crime, they must also be proven before a person can be held liable for committing a particular crime.

2.4.2.10. Strict Liability

The principle that criminal liability is dependent not only on particular objective elements (*actus reus* or guilty act) but also on particular subjective elements (*mens rea* or guilty mind), as encapsulated in the Latin maxim *actus non facit reum, nisi mens sit rea* (the act itself does not constitute guilt unless done with a guilty mind), is treated as a hall-mark of a civilised legal system.²⁰⁷ Nevertheless, law sometimes deviates from this principle. One such deviation is the concept of strict liability.

²⁰⁷ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at pp. 6, 139, 174, 187 and 188; Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 18; Thomas J. Gardner and Terry M. Anderson, *Criminal Law*, 11th edition, Belmont, CA, USA: Wadsworth, Cengage Learning, 2010 at p. 52.

Strict liability is liability irrespective of guilt.²⁰⁸ In other words, when, by law, a particular conduct is turned into a strict liability offence, for punishing a person for this offence, it is not necessary to prove his guilty mind any more; it is enough to prove only objective elements of the particular offence. Logically, if the mental state of an alleged offender is not evaluated, there is a risk that punishment will be imposed to persons not only for intentional, reckless or negligent conducts, but also for reasonable mistakes and pure accidents.²⁰⁹

A number of arguments in favour of the application of strict liability can be found. For instance, it has been argued that, as the mental state is something inside a man, it is impossible, or at least very hard, to prove it.²¹⁰ Indeed, despite the developments in the forensic sciences – from fingerprinting to DNA sampling – the ability to prove mental state remains as limited as it has always been. Short of confessions, it is still dependant on inferences from the perpetrator’s outward behaviour.²¹¹ By introducing strict liability, prosecution is simplified and evidential problems allayed.²¹² Together with that, the risk that a guilty person will escape justice diminishes.²¹³

²⁰⁸ HART, *ibid.* at pp. 20, 132 and 176; ALLEN, *ibid.* at p. 107; GARDNER and ANDERSON, *ibid.* at p. 63.

²⁰⁹ HART, *ibid.* at pp. 20, 36, 93, 132, 176 and 188; GARDNER and ANDERSON, *ibid.* at p. 63.

²¹⁰ HART, *ibid.* at pp. 20, 33, 153, 175, 179 and 188; Ronald Roesch, Jodi L. Viljoen and Irene Hui, “Assessing Intent and Criminal Responsibility”, in William T. O’Donohue and Eric R. Levensky, (ed.), *Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals*, Salt Lake City, UT, USA: Academic Press, 2004 at p. 157.

²¹¹ Shaul Avinor, “The Fallacy of the Conventional Theory on the Historical Development of the Concept of Criminal Liability”, in *Criminal Law Forum*, Volume 15, Issue 4, December 2004 at pp. 434-435.

²¹² ALLEN, *supra* note 207 at p. 117; Richard Eggleston, *Evidence, Proof and Probability*, London: Weidenfeld and Nicolson, 1978 at p. 95; Julie Adshead, “Doing Justice to the Environment”, in *Journal of Criminal Law*, Volume 77, Issue 3, 2013 at p. 218.

²¹³ ALLEN, *ibid.*

However, there are strong arguments suggesting that there is more to lose than to gain by the application of strict liability. What can be gained are some utilitarian benefits. What can be lost are spiritual values of profound importance, including compassion. Moreover, arguments in favour of strict liability, although in principle are valid, at the same time, are not very persuasive. For instance, difficulties of proof of mental state of a person indeed exist, but these difficulties are possible to overcome. Legal theory and practice has developed relevant techniques.²¹⁴ After all, as Allen has stated, it is impossible to set proportional sanction for the offence without knowing whether the offence was committed intentionally, recklessly, negligently or without the presence of any of these mental states. Thus, evaluation of subjective elements is necessary, anyway, if not at the stage of setting liability then at the stage of setting specific punishment. And, if so,

[i]f penalties which truly reflect the offender's culpability can only be determined by thorough investigation and proof to the same standard required for conviction, there would seem to be little reason for having strict liability offences.²¹⁵

It is relatively highly recognised that strict liability can be applied for minor offences.²¹⁶ Minor offences might carry different names, for instance, “regulatory offences”, “administrative offences” or “technical offences”. They also are often labelled by jurists as “quasi-criminal” or “not criminal in any real sense”.²¹⁷ Yet, irrespective of the term used, what truly distinguishes minor offences from serious offences is their comparatively little blameworthiness.

²¹⁴ See, for example, Thomas J. Gardner and Terry M. Anderson, *Criminal Law*, 11th edition, Belmont, CA, USA: Wadsworth, Cengage Learning, 2010 at p. 57.

²¹⁵ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p.120.

²¹⁶ See, for example, Francis Bowes Sayre, “Public Welfare Offenses”, in *Columbia Law Review*, Volume 33, Issue 1, January 1933 at p. 78; Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at pp. 479-480.

²¹⁷ ALLEN, *supra* note 215 at pp. 32; ADSHEAD, *supra* note 212 at p. 217.

Recognition of the application of strict liability for minor offences is in line with the historical roots of the institution of strict liability. The institution of strict liability is said to be the fruit of scientific and technological revolution which took place at the end of the 19th and the beginning of the 20th century. At that time manufacturing grew rapidly. Together with this growth grew relative legal relationships. One of the chosen mechanisms for controlling these relationships was the creation of a separate group of offences for which persons could be convicted irrespectively of their guilt (on a basis of strict liability). Such deviation from the general principles of liability was justified by the aim to secure public health and safety (public welfare). However, the argument of “public welfare” alone was not seen as enough for applying strict liability. In addition, the offence for which strict liability is to be applied needed to carry small penalty and little or no stigma (blameworthiness). In other words, the offence needed to be a minor offence.²¹⁸

Today, strict liability is applied not only for minor offences (quasi-criminal offences), but also for some serious offences (truly criminal offences), for example, dangerous driving or pollution.²¹⁹ This proliferation of strict liability in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of scholars in law.²²⁰ For example, Sayre in this regard has stated:

To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.²²¹

This author agrees with the respective criticism. Moreover, this author is of the opinion that the application of strict liability is unacceptable not only for serious offences, but also for minor offences. Those who support the application of strict liability for minor offences justify their position by saying that what is lost by applying strict liability for minor offences is insignificant as compared to what is lost

²¹⁸ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at pp. 31, 32 and 176; Michael Allen, *ibid.* at pp. 108-109; William Wilson, *Criminal Law: Doctrine and Theory*, 2nd edition, Harlow: Pearson Education, 2003 at p. 170.

²¹⁹ HART, *ibid.* at p. 176.

²²⁰ Richard A. Wasserstrom, “Strict Liability in the Criminal Law”, in *Stanford Law Review*, Volume 12, Number 4, July 1960 at p. 731.

²²¹ SAYRE, *supra* note 216 at p. 56.

by applying strict liability for serious offences.²²² However, the true loss in both cases is the same – those are already above-mentioned “spiritual values of profound importance”. Just because an offence is minor does not nullify the moral protest not to punish innocent people. Most probably because of this reason, there have always been states which do not recognise the institution of strict liability, at all, for example, Russia²²³ and Latvia²²⁴.

If one is still not convinced that application of strict liability is not fair measure (neither in regards to serious offences, nor in regards to minor offences), no less authority than ECtHR can be called upon to increase the confidence in the rightness of this conclusion. Sub-chapter 2.5.4 below will show that ECtHR does not recognise the institution of strict liability (neither for serious offences, nor for minor offences), because this institution is in conflict with the human right to be presumed innocent until proved guilty in accordance with the law (presumption of innocence).

2.4.2.11. Defence of Necessity

Even when all elements of *corpus delicti* of a particular crime are formally present, it might be true that there is no crime. For example, it is so when the conduct is carried out in a specific situation – a situation of necessity. With necessity in criminal law one must understand the situation in which a person causes harm to some interests safeguarded by criminal law (carries out *in abstracto* forbidden conduct) with the aim to prevent greater harm.²²⁵ This explanation clearly shows why defence of necessity is also sometimes called a lesser evil defence.

²²² See, for example, Francis Bowes Sayre, “Public Welfare Offenses”, in *Columbia Law Review*, Volume 33, Issue 1, January 1933 at pp. 78-79.

²²³ See F. Reshetnikov, “Criminal Liability of Corporations – Russia”, in Hans de Doelder and Klaus Tiedemann, (ed.), *Criminal Liability of Corporations*, Kluwer Law International, 1996 at p. 344.

²²⁴ See Agnese Beļska, “Stingri noteiktās atbildības institūts krimināltiesībās”, in *Jurista Vārds*, No. 24 (619), 15 June 2010 at p. 17.

²²⁵ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 192.

2.4.3. General Principles for Determining Sanction to Be Imposed for an Offence

Broadly speaking, there is only one principle which should be taken into account when determining what specific sanction should be imposed for a particular offence. This principle is proportionality. In regards to criminal sanctions, the principle of proportionality is even directly incorporated into one of the regional human rights instruments. Art. 49(3) of the Charter of Fundamental Rights of the European Union states: “The severity of penalties must not be disproportionate to the criminal offence”.

The problem is that the word “proportionate” is “more oracular than instructive”.²²⁶ It is relatively easy to give a general theoretical definition of proportionality. However, in practice, proportionality requires the balancing of complicated quantitative and qualitative factors, including conflicting rights, values and interests.²²⁷ Consequently, the simple reference to proportionality is not enough for understanding, exactly, what sanction is appropriate to impose for a particular offence; more detailed guidelines are necessary.

There have been suggestions to use a tripartite test for assessing proportionality of a particular sanction. This test requires making three relatively distinct types of comparison:

- 1) comparison of the single offence with the sanction for this offence;
- 2) comparison of the single offence and its sanction with other offences and their sanctions in the same jurisdiction;
- 3) comparison of the single offence and its sanctions with the sanctions for the same offence in other jurisdictions.²²⁸

²²⁶ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p.161.

²²⁷ ALLEN, *supra* note 225 at pp. 102-103; Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate Sentences as Human Rights Violations”, in the *Modern Law Review*, Volume 67, No. 4, July 2004 at p. 549.

²²⁸ VAN ZYL SMIT and ASHWORTH, *ibid.* at p. 552.

The test can be illustrated as follows:

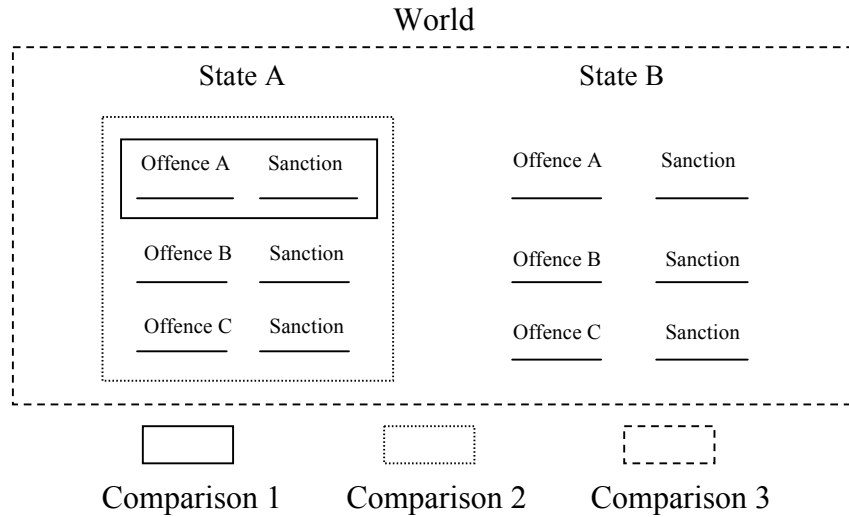


Figure 4 – Tripartite test of proportionality of sanctions.

Yet, all of the above-mentioned three types of comparison involve difficulties.

Comparison of the single offence with the sanction for this offence can be easily associated with the ancient concept of “an eye for an eye”, meaning what the person has done should be done to this person.²²⁹ Although at the first glance this concept sounds straightforward, in fact, it is not so straightforward. First of all, the “eye for an eye” maxim is simply inapplicable to most offences.²³⁰ For example, if offender causes harm in the form of oil pollution along 100 km of shoreline, the same harm cannot be imposed on the offender as punishment. Secondly, the “eye for an eye” maxim ignores the question of culpability of an alleged offender – consideration of which characterises a civilised legal system. Consequently, it can be said that, today, legal systems should safeguard against “an eye for an eye” thinking, rather than promote it. In short, within the civilised society, sanction for a particular

²²⁹ HART, *supra* note 226 at p. 161.

²³⁰ HART, *ibid.* at p. 233.

offence must correspond not only to the offence as such (the harm done or risked), but also to the offender (his level of culpability).²³¹

However, there is no natural relationship between harm and culpability from one side and punishment from the other side. In other words, the seriousness of an offence forms one scale and severity of punishment another.²³² Assessment of their mutual proportionality would be like comparing apples with oranges. Consequently, it has been argued that proportionality of a particular sanction can only be assessed within a system of sanctions for different offences:

[...] what is required is not some ideally appropriate relationship between a single crime and its punishment, but that on a scale of tariff of punishments and offences, punishments for different crimes should be ‘proportionate’ to the relative wickedness or seriousness of the crime. For though we cannot say *how* wicked any given offence is, perhaps we can say that one is *more* wicked than another and we should express this ordinal relation in a corresponding scale of penalties.²³³

Thus, for setting proportional sanctions, what becomes extremely important is the existence of a unified scale of the relative seriousness of different offences. Yet, development of such a scale meets with its own challenges.

The relative seriousness of an offence is determined by the same above-mentioned two main elements: the degree of harmfulness of an offence and the degree of culpability of an offender.²³⁴ Just in this case, these elements are compared not with the sanction of a particular offence (“apple - orange” comparison) but with the harmfulness and culpability involved in other offences (seemingly “apple - apple” comparison). However, it is not always easy to say what is more harmful and what is less harmful or in what circumstances a person is more guilty and in what circumstances a person is less guilty.

²³¹ Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate Sentences as Human Rights Violations”, in the *Modern Law Review*, Volume 67, No. 4, July 2004 at pp. 548-549; Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at pp. 102-103.

²³² VAN ZYL SMIT and ASHWORTH, *ibid.* at pp. 548-549; ALLEN, *ibid.* at pp. 102-103.

²³³ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p. 162. See also pp. 25 and 234, ALLEN, *ibid.* at p. 116 and Andrew von Hirsch, “Penal Theories”, in Michael Tonry, (ed.), *The Handbook of Crime and Punishment*, Oxford: Oxford University Press, 1998 at p. 669.

²³⁴ VON HIRSCH, *ibid.* at p.670

Regarding the degree of harmfulness of an offence, it is relatively easy to put into scale of seriousness one type of harm, for example, different bodily injuries or different amounts of money stolen. Only some types of harm might be problematic to put into such a scale, for example, only highly competent experts on a case by case basis can assess how “serious” is harm to the environment. The task becomes much harder when one must put into a unified scale of seriousness different types of harm, for example, bodily injury and harm to the environment. It, again, requires comparing apples with oranges. The only broad agreement is that a person’s life stands above everything. Regarding other types of harm, there is no broad agreement on what is more harmful and what is less harmful.

Regarding degree of culpability of an offender, there exists a clear scale of seriousness – from highest degree of culpability to lowest: direct intent, indirect intent, recklessness, gross negligence, simple negligence. However, it must be kept in mind that also within each of these broad concepts of culpability exist further degrees of culpability.²³⁵ Moreover, concepts of intention, recklessness and negligence do not exhaust the factors which do, and should, influence judgments of culpability. In addition, these judgments should take into consideration the wide range of volitional and situational factors, known also as aggravating and mitigating factors.²³⁶

Even if one successfully develops the scale of relative harmfulness of offences and the scale of relative culpability of offenders, the question still remains of how to put together these scales and thus determine the ultimate relative seriousness of a specific offence. In other words, it is not clear as to what is the measure of seriousness between the objective harm and subjective culpability, for instance, is negligent destroying of a city worth than intentional wounding of a single person?²³⁷

²³⁵ In this regard see, for example, Andrew Ashworth, *Sentencing and Criminal Justice*, 4th edition, Cambridge: Cambridge University Press, 2005 at pp. 143-144.

²³⁶ ASHWORTH, *ibid.* at pp. 103 and 143-144.

²³⁷ HART, *supra* note 233 at p. 162.

As a result of such uncertainties as introduced above, there is lack of agreement on the seriousness of different offences. This lack of agreement on the seriousness of different offences, *inter alia*, has been proven by several opinion surveys.²³⁸ In other words, as Hart has put it:

It is true that for all social moralities certain major evaluations hold good. [...] But it is sociologically very naive to think that there is [...] a single homogeneous social morality whose mouthpiece the judge can be in fixing sentence. [...] Our society, whether we like it or not, is morally a plural society [...].²³⁹

Our society is morally a plural society already within the borders of one state. It is even more naive to think that there is a single homogeneous social morality worldwide.²⁴⁰

All above-mentioned forces ask the question – is it possible to assess proportionality of sanctions at all? Scholars have argued that grossly disproportionate sanctions can be identified relatively easily. For example, Ashworth has stated:

[...] loose notions of equivalence [...] are unspecific in their central zones but [...] contain outer limits. It is not *lex talionis*, which assumes a ‘natural’ equivalence between crime and punishment, but a looser formula which excludes punishments which impose far greater hardship on the offender than does the crime on victims and society in general.²⁴¹

Also, human rights tribunals show readiness to identify those sanctions which are grossly disproportionate. For example, in the case of *Weeks v. the United Kingdom*, ECtHR commented that one could have serious doubts as to the compatibility with the ‘right to be free from inhuman punishment’ the sentencing of a boy of 17 to life imprisonment for robbery, having threatened the owner of a pet shop with an unloaded starting pistol and stolen 35 pence.²⁴² However, in general (beyond such extremes as in the case of *Weeks v. the United Kingdom*), to identify disproportionate sanctions, indeed, is very problematic. To identify such sanctions would be much

²³⁸ In this regard see ASHWORTH, *supra* note 235 at pp. 104-106.

²³⁹ H.L.A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968 at p. 171.

²⁴⁰ See, for example, Andrew von Hirsch, “Penal Theories”, in Michael Tonry, (ed.), *The Handbook of Crime and Punishment*, Oxford: Oxford University Press, 1998 at p. 675 stating that harmfulness or communal injury among other things depends on how robust the community’s social and moral bonds are in the first place.

²⁴¹ ASHWORTH, *supra* note 235 at p. 112.

²⁴² *Weeks v. the United Kingdom*, Judgment of 2 March 1987, ECtHR, paragraphs 11, 12 and 47. See also the case study in this dissertation which indicates that after *Prestige* accident master of *Prestige* – Captain Mangouras – was subjected to possibly disproportionate punishment: two-year imprisonment for minor, if any, role in causing the accident.

easier if a common international standard of a fair penal liability and sanctioning system existed.

2.5. Right to Fair Trial

2.5.1. Introduction

Art. 10 of UDHR states: “Everyone is entitled [...] to a fair [...] hearing [...]”. Art. 14(1) of the International Covenant on Civil and Political Rights, Art. 6(1) of the European Convention on Human Rights, Art. 8 of the American Convention on Human Rights and Art. 7 of the African Charter on Human and Peoples’ Rights, in essence, repeat Art. 10 of UDHR. Human rights instruments also list a number of specific trial-related rights. However, it is important to remember that respective lists are not exhaustive; they contain just “minimum rights”, the observance of which is not always sufficient to ensure the fairness of a trial.²⁴³ For example, despite the fact that none of the human rights instruments explicitly refers to the right to duly reasoned judgment, this right forms part of the general right to fair trial.²⁴⁴

Further on in this sub-chapter, specific rights under the fair trial umbrella which are explicitly mentioned in human rights instruments are analysed in more detail. Before that, one more clarification should be made. Despite the fact that the right refers only to “hearing” or “trial”, where relevant, it is applicable also to pre-trial proceedings, because this stage is of crucial importance for the preparation of trial, as the evidence obtained during this stage determines the framework in which the offence charged will be considered.²⁴⁵

²⁴³ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge: Cambridge University Press, 2002 at p. 501.

²⁴⁴ See, for example, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, ECtHR, paragraph 26; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, ECtHR, paragraph 61.

²⁴⁵ See, for example, *Saman v. Turkey*, Judgment of 5 July 2011, ECtHR, paragraph 30; *Imbrioscia v. Switzerland*, Judgment of 24 November 1993, ECtHR, paragraph 36.

2.5.2. Right to a Public Hearing

Art. 10 of UDHR establishes that everyone is entitled to a public hearing. Right to a public hearing is incorporated also in Art. 14(1) of the International Covenant on Civil and Political Rights, Art. 6(1) of the European Convention on Human Rights, Art. 47(2) of the Charter of Fundamental Rights of the European Union and Art. 8(5) of the American Convention on Human Rights.

Right to a public hearing obliges courts to hold an oral hearing of the case without excluding the public (including the press) from this hearing. This obligation also encompasses affiliated duties, such as to provide information on time and venue of the oral hearing to the public and to provide adequate facilities for the attendance of interested members of the public, within reasonable limits.²⁴⁶

Right to a public hearing is not absolute. Exceptions are permitted. However, they are permitted only under particular circumstances which, themselves, are defined in human rights instruments. In accordance with Art. 14(1) of the International Covenant on Civil and Political Rights, Art. 6(1) of the European Convention on Human Rights, Art. 8(5) of the American Convention on Human Rights, as well as relevant case law, the public may be excluded from all or part of a trial for the following reasons:

- 1) necessity to protect morals;
- 2) necessity to protect public order;
- 3) necessity to protect national security;
- 4) necessity to protect interests of the private life.

Even if there is a basis for closed proceedings and, consequently, proceedings are not held in the presence of the public, any judgement shall still be made public. There are also some exceptions to this rule. However, these exceptions are very unlikely to be invoked in relation to the trial of a seafarer after a large-scale ship-

²⁴⁶ JAYAWICKRAMA, *supra* note 243 at p. 509.

source oil pollution accident, because they are related to the protection of juvenile persons.²⁴⁷

2.5.3. Right to Be Tried by Competent, Independent and Impartial Tribunal Established by Law

2.5.3.1. General Introduction to the Right to Be Tried by Competent, Independent and Impartial Tribunal Established by Law

All international and regional human rights instruments require any case to be heard by a tribunal. “Tribunal”, here, must be understood in a wide sense, similarly as “judge or other officer authorised by law to exercise judicial power” in relation to the right to liberty.²⁴⁸ However, different instruments embrace slightly different requirements related to the qualities of the tribunal which may adjudicate the case:

- UDHR – independent and impartial tribunal (Art. 10);
- International Covenant on Civil and Political Rights – competent, independent and impartial tribunal established by law (Art. 14(1));
- European Convention on Human Rights – independent and impartial tribunal established by law (Art. 6(1));
- Charter of Fundamental Rights of the European Union – independent and impartial tribunal previously established by law (Art.47(2));
- American Convention on Human Rights – competent, independent and impartial tribunal previously established by law (Art. 8(1));
- African Charter on Human and Peoples’ Rights – impartial tribunal (Art. 7(1)(d).

²⁴⁷ See Art. 14(1) of the International Covenant on Civil and Political Rights and Art. 6(1) of the European Convention on Human Rights.

²⁴⁸ See Sub-chapter 2.2.3.2, “Right to Automatic Judicial Review of Deprivation of Liberty”.

2.5.3.2. Requirement for a Tribunal to Be Established by Law

Requirement for a tribunal to be established by law means that, at least to a certain degree, this tribunal is regulated by an act of parliament, which satisfies the general requirements of precision and foreseeability.²⁴⁹ Case law has also clarified that the phrase “established by law” covers not only the legislation concerning the establishment and jurisdiction of a tribunal but, also, the composition of the bench in each case.²⁵⁰

2.5.3.3. Requirement for a Tribunal to Be Competent

Only very few judgements of human rights tribunals have referred to the requirement for a tribunal to be competent. These few judgments which do refer to this requirement talk about “having competency” as – “having jurisdiction”.²⁵¹ In other words, under human rights instruments, the requirement for a tribunal to be competent is not related to the ability of a judge, it is related only to the jurisdiction of a tribunal.²⁵²

As stated above, the requirement for a tribunal to be competent is incorporated only in the International Covenant on Civil and Political Rights and the American Convention on Human Rights. However, it does not mean that, under other human rights instruments, it is acceptable to try persons by tribunals who have no jurisdiction to do so. Simply, under these other human rights instruments, the requirement for a tribunal to be competent is observed as an integrated part of the requirement for a tribunal to be established by law.

²⁴⁹ Stefan Lorenzmeier, “The Right to a Fair Trial in Europe? – Procedural Guarantees Under the European Convention on Human Rights”, address to the Miscarriages of Justice Conference: Current Perspectives, University of Central Missouri, 20 February 2007 at p. 44.

²⁵⁰ See, for example, *Kociu and Kotorri v. Albania*, Judgment of 25 June 2013, ECtHR, paragraph 139; *Lavents v. Latvia*, Judgment of 28 November 2002, ECtHR, paragraph 114.

²⁵¹ See, for example, *Cesti-Hurtadi v. Peru*, Judgment of 29 September 2009, IACtHR, paragraphs 65 and 151.

²⁵² David Harris, “The Right to a Fair Trial in Criminal Proceedings as a Human Rights”, in *The International and Comparative Law Quarterly*, Volume 16, Number 2, April 1967 at p. 357.

2.5.3.4. Requirement for a Tribunal to Be Independent

Case law has established that, when deciding whether a tribunal can be considered “independent”, regard must be given, *inter alia*, to the manner of appointment and dismissal of its members and to their terms of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.²⁵³ One of the aspects of the requirement for a tribunal to be independent is a lack of subordination of this tribunal to any other organ of the state, in the sense of the doctrine of the separation of powers. It is recognised that such factors as, for example, composition of the tribunal of judges: whose tenure is for a limited period, whose salary may be reduced or who can be dismissed without good cause, may infringe on the independence of the tribunal.²⁵⁴ Another aspect of the requirement for a tribunal to be independent is independence from private pressure groups.²⁵⁵

2.5.3.5. Requirement for a Tribunal to Be Impartial

Impartiality of a tribunal means the lack of prejudice or bias of this tribunal.²⁵⁶ There are two tests for assessing whether a tribunal is impartial. The first, a subjective test, seeks to determine whether the judge is not, in fact, a party to the litigation and has not a financial interest in its outcome. The second, an objective test, seeks to determine whether, when a judge is not, in fact, a party to the litigation and does not have a financial interest in its outcome, his conduct or behaviour does not raise suspicion that he is not impartial in some other way.²⁵⁷ According to case

²⁵³ See, for example, *Langborger v. Sweden*, Judgment of 22 June 1989, ECtHR, paragraph 32; *Bryan v. the United Kingdom*, Judgment of 22 November 1995, ECtHR, paragraph 37.

²⁵⁴ HARRIS, *supra* note 252 at p. 354. See also the case study in this dissertation which indicates that after *Tasman Spirit* accident right of the “Karachi Eight” to be tried by independent tribunal was violated, as basically all decisions in regards to their deprivation of liberty first and foremost were made politically.

²⁵⁵ HARRIS, *ibid.* at p. 355.

²⁵⁶ See, for example, *Khodorkovskiy and Lebedev v. Russia*, Judgment of 25 July 2013, ECtHR, paragraph 537; *Rudnichenko v. Ukraine*, Judgment of 11 July 2013, ECtHR, paragraph 113.

²⁵⁷ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge: Cambridge University Press, 2002 at pp. 519-520. See also case law, for example, *Khodorkovskiy and Lebedev v. Russia*, *ibid.*, paragraph 537; *Rudnichenko v. Ukraine*, *ibid.*, paragraphs 113 and 115.

law, in order to satisfy the requirement for a tribunal to be impartial, the tribunal must comply with both subjective and objective test.²⁵⁸ In applying the first test, impartiality of a judge must be presumed until there is proof to the contrary. In applying the second test, even appearances may be of a certain importance.²⁵⁹ Violations of the requirement for a tribunal to be impartial have been found in such cases as *Piersack v. Belgium*²⁶⁰, *Hauschildt v. Denmark*²⁶¹ and *Rudnichenko v. Ukraine*²⁶².

Human rights tribunals have addressed the requirement for a tribunal to be impartial much more than the requirement for a tribunal to be independent. Perhaps it is so because these two requirements actually overlap. If tribunal is not independent, it is also not impartial, at least under objective test of impartiality. Consequently, it is enough to talk only about impartiality of a tribunal.

2.5.4. Presumption of Innocence

Art. 11(1) of UDHR states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law [...]”. Art. 14(2) of the International Covenant on Civil and Political Rights, Art. 6(2) of the European Convention on Human Rights, Art. 48 of the Charter of Fundamental Rights of the European Union, Art. 8(2) of the American Convention on Human Rights and Art. 7(1)(b) of the African Charter on Human and Peoples’ Rights, in principle, repeat Art. 11(1) of UDHR.

²⁵⁸ See, for example, *Khodorkovskiy and Lebedev v. Russia*, *ibid.*, paragraph 537; *Hauschildt v. Denmark*, Judgment of 24 May 1989, ECtHR, paragraphs 46.

²⁵⁹ See, for example, *Khodorkovskiy and Lebedev v. Russia*, *ibid.*, paragraph 538. See also the case study in this dissertation which indicates that after *Prestige* accident the decisions of Spanish authorities to detain the master of *Prestige* – captain Mangouras – apparently were influenced by public opinion.

²⁶⁰ *Piersack v. Belgium*, Judgment of 1 October 1982, ECtHR, paragraphs 30-32.

²⁶¹ *Hauschildt v. Denmark*, *supra* note 258, paragraphs 50-53.

²⁶² *Rudnichenko v. Ukraine*, *supra* note 256, paragraphs 116-120.

It means that public officials must refrain from saying or doing anything what indicates that they believe a person is guilty of a criminal offence, unless guilt has been proven. Whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made.²⁶³ For example, in the case of *Alenet de Ribemont v. France* ECtHR found the violation of the presumption of innocence, where shortly after the arrest of Mr. de Ribemont – suspect for murder of Mr. De Broglie, a Member of French Parliament – a high-ranking police officer, addressing a press conference, referred to Mr. de Ribemont, without any qualification or reservation, as one of the instigators of the murder.²⁶⁴

Presumption of innocence is highly linked to the issue of burden of proof. Eggleston has even stated:

‘Every person is presumed to be innocent until he is proved to be guilty’ is only another way of saying that the burden of proof in a criminal case is on the prosecution.²⁶⁵

Observed together with the standard of proof for criminal liability – the standard “beyond a reasonable doubt” – the statement of Eggleston means: if there is a reasonable doubt, created by the evidence given by either the prosecution or defence, as to whether the alleged offender is guilty, it must be concluded that prosecution has not made out the case and the alleged offender is entitled to an acquittal.²⁶⁶ In other words, in principle, all situations when prosecution is fully or partly relieved of its burden of proof in a criminal case are in breach of presumption of innocence. *Inter alia*, it means that also framing criminal offences as strict liability offences (when prosecution is relieved from its burden to prove subjective elements of an offence) or half-way house offences (when burden of proof of subjective elements of an offence is shifted from prosecution to defence) is in breach of presumption of innocence.

²⁶³ See, for example, *Maksim Petrov v. Russia*, Judgment of 6 February 2013, ECtHR, paragraphs 102-103; *Shuvalov v. Estonia*, Judgment of 22 October 2012, ECtHR, paragraph 75.

²⁶⁴ *Alenet de Ribemont v. France*, Judgment of 10 February 1995, ECtHR, paragraphs 8 and 41. See also similar cases, for example, *Maksim Petrov v. Russia*, *ibid.*, paragraphs 104-107.

²⁶⁵ Richard Eggleston, *Evidence, Proof and Probability*, London: Weidenfeld and Nicolson, 1978 at p. 92.

²⁶⁶ EGGLESTON, *ibid.* at pp. 89-90; Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at pp. 14-15.

However, it must be kept in mind that presumption of innocence is not among human rights from which derogation is never allowed. Thus, in some amount, presumption of innocence may be sacrificed in favour of other legitimate objectives, presumably also objectives which states pursue by introducing strict liability or half-way house offences in their penal systems.

Human rights tribunals have observed the issue of the interaction of presumption of innocence with strict liability offences²⁶⁷ from the perspective of presumptions of fact or of law. Indeed, strict liability can be easily associated with the presumption of a fact that an alleged offender acted with a guilty mind. In the case of *Salabiaku v. France* ECtHR noted:

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. [...]

Article 6 para. 2 [...] does not therefore regard presumptions of fact or of law provided for in criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain right of the defence.

Requirement “to take into account the importance of what is at stake” basically means that presumption of innocence cannot be sacrificed in regards to serious offences, because a lot is at stake in such cases. Requirement “to maintain right of the defence” basically means that, even when relatively little is at stake (as in cases of minor offences), only the half-way house approach is acceptable.²⁶⁸

2.5.5. Right to Defence

Art. 11(1) of UDHR states that everyone charged with a penal offence must be provided with the guarantees necessary for his defence. Similar very general statements can be found in Art. 48(2) of the Charter of Fundamental Rights of the European Union and Art. 7(1)(c) of the African Charter on Human and Peoples’ Rights.

²⁶⁷ Human rights tribunals do not distinguish half-way house offences. They treat half-way house offences simply as a sub-type of strict liability offences.

²⁶⁸ See, *Salabiaku v. France*, Judgment of 7 October 1988, ECtHR, paragraphs 12, 13, 14, 26, 28, 29 and 30.

Art. 14(3) of the International Covenant on Civil and Political Rights lists specific procedural rights. The same is done in Art. 6(3) of the European Convention on Human Rights and Art. 8(2) of the American Convention on Human Rights. All of these listed procedural rights are necessary for effective defence. Consequently, all these procedural rights can be observed as a part of the wider concept of the right to defence. Alternatively, they can be observed as separate rights themselves, what is also done further on in this dissertation.

2.5.6. Right to Be Informed of Charges

Art. 14(3)(a) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] to be informed of the [...] charge against him.” Art. 6(3)(a) of the European Convention on Human Rights and Art. 8(2)(b) of the American Convention on Human Rights basically state the same. This right was already analysed earlier (under the right to liberty), because, when a person is deprived of his liberty within the proceedings, the right to be informed of charges is guaranteed not only under the right to fair trial, but also under the right to liberty.

2.5.7. Right to Have Adequate Time and Facilities for the Preparation of Defence

Art. 14(3)(b) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] to have adequate time and facilities for the preparation of his defence [...]”. Art. 6(3)(b) of the European Convention on Human Rights and Art. 8(2)(c) of the American Convention on Human Rights basically state the same.

Right to have adequate time and facilities for the preparation of defence means that the person charged of a criminal offence must be given the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings. The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of

each particular case.²⁶⁹ For example, in the case of *Moiseyev v. Russia* ECtHR found that Mr. Moiseyev – person charged of having disclosed classified information to a South Korean intelligence agency – was detained in extremely cramped conditions, without adequate access to natural light and air or appropriate catering arrangements. Consequently, he could not read or write. The suffering and frustration which Mr. Moiseyev must have felt on account of the inhuman conditions of confinement, undoubtedly, impaired his faculty of concentration. It excluded any possibility for the advance preparation of defence.²⁷⁰

Right to have adequate time and facilities for the preparation of defence, *inter alia*, includes the right to have adequate time and facilities to communicate with the legal counsel. Art. 14(3)(b) of the International Covenant on Civil and Political Rights even makes special reference to this aspect of the right.

2.5.8. Right to Be Tried Without Undue Delay

Art. 14(3)(c) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] to be tried without undue delay”. The corresponding right is incorporated, also, in Art. 6(1) of the European Convention on Human Rights, Art. 47 of the Charter of Fundamental Rights of the European Union, Art. 8(1) of the American Convention on Human Rights and Art. 7(1)(d) of the African Charter on Human and Peoples’ Rights.

The time frame which must be considered in relation to the right to be tried without undue delay starts from the moment a person is charged and lasts until the rendering of a judgment. “Until rendering of a judgment” indicates that the right to be tried without undue delay relates, not only to the time by which a trial should commence, but also the time by which it should end. Furthermore, “until rendering of a judgment” means “until the final determination of the case”. Thus, appeal or

²⁶⁹ See, for example, *Malofeyeva v. Russia*, Judgment of 30 August 2013, ECtHR, paragraph 112; *Galstyan v. Armenia*, Judgment of 15 February 2008, ECtHR, paragraph 84.

²⁷⁰ *Moiseyev v. Russia*, Judgment of 6 April 2009, ECtHR, paragraphs 12 and 222.

cassation proceedings are also covered by the safeguard and, consequently, must be carried out without undue delay.²⁷¹

Another important question to be asked in relation to the right to be tried without undue delay is the question – What constitutes “undue delay”? In other words – How long is too long? ECtHR and IACtHR construct the answer to this question slightly differently. Case law of ECtHR does not set any strictly-defined quantitative standard saying that after a particular period (“reasonable time”), for example, 3 years, undue delay starts. “Undue delay” is linked, not simply to a particular lapse of time, but to a lapse of time which in the circumstances in question is longer than it should have been (because it is recognised that the delay may be as well justified). Whether the proceedings lasted longer than they should have is assessed in the light of all the circumstances of the case, having regard in particular to the complexity of the issue, the conduct of the parties and what was at stake for the accused person.²⁷² For example, the following reasons have been recognised as speaking for the argument that the state acted within reasonable time limits:

- attempts to ensure the attendance of a witness²⁷³;
- complexity of the proceedings due to the number of participants²⁷⁴;
- complexity of the proceedings due to the international aspect²⁷⁵.

On the other hand, the following reasons have been recognised as speaking against the argument that the state acted within reasonable time limits:

²⁷¹ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge: Cambridge University Press, 2002 at p. 556. See also relevant case law, for example, *Eckle v. Germany*, Judgment of 15 July 1982, ECtHR, paragraphs 73 and 76.

²⁷² JAYAWICKRAMA, *ibid.* at p. 557. See also relevant case law, for example, *Kuvikas v. Lithuania*, Judgment of 23 October 2006, ECtHR, paragraph 49.

²⁷³ See, for example, *Mitkus v. Latvia*, Judgment of 2 January 2013, ECtHR, paragraph 88.

²⁷⁴ See, for example, *Kuvikas v. Lithuania*, *supra* note 272, paragraph 50.

²⁷⁵ See, for example, *Kuvikas v. Lithuania*, *ibid.*, paragraph 50; *Kaciu and Kotorri v. Albania*, Judgment of 25 June 2013, ECtHR, paragraph 152.

- belated decision to decide the case without hearing particular witnesses²⁷⁶;
- frequent remittals of the case from higher courts to lower courts for fresh examination²⁷⁷;
- lengthy periods of inactivity²⁷⁸;
- “chronic overload” of a court or other institution^{279, 280}.

Also under the case law of IACtHR above-mentioned reasons are taken into consideration when assessing the reasonableness of the period of criminal proceedings. However, in addition, case law of IACtHR sets a rather strict quantitative standard as a starting point of the assessment. It says that the period which exceeds 5 years is *prima facie* unreasonable.²⁸¹ Such a “starting point” makes assessment simpler.

2.5.9. Right to Be Tried in Presence

Art. 14(3)(d) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] to be tried in his presence [...]”. Violations of the right to be tried in presence may expose itself in two broad forms: first, when a hearing is held in the absence of a person; second, when a hearing is held with the presence of a person, but the person is not, indeed, “heard”.

²⁷⁶ See, for example, *Kuvikas v. Lithuania, ibid.*, paragraph 50.

²⁷⁷ See, for example, *Kaciu and Kotorri v. Albania, supra* note 275, paragraph 154.

²⁷⁸ See, for example, *Mitap and Muftuoglu v. Turkey*, Judgment of 21 February 1996, ECtHR, paragraph 35.

²⁷⁹ See, for example, *Pammel v. Germany*, Judgment of 29 May 1997, ECtHR, paragraph 69.

²⁸⁰ See also the case study in this dissertation which indicates that after *Prestige* accident master, chief engineer and chief officer of *Prestige* possibly were not tried within reasonable time limits.

²⁸¹ See, for example, *Las Palmeras v. Colombia*, Judgment of 6 December 2001, IACtHR, paragraph 63; *Genie-Lacayo v. Nicaragua*, Judgment of 29 January 1997, IACtHR, paragraph 81.

Right to be tried in presence does not carry the same significance at the first instance trial or at the appeal or cassation. While the accused should always be entitled to be present at the first instance hearing of his case²⁸², during appeal or cassation it might be justified not to hear the accused, in person. In order to assess whether it was justified not to hear the accused, in person, during appeal or cassation, regard must be given, among other considerations, to the specific features of the proceedings in question and to the manner in which the interests of the accused were actually presented and protected before the court, particularly in the light of the nature of the issues to be decided by it.²⁸³ Most probably, not hearing the accused, in person, will be recognised as justified if proceedings in front of an appeal or cassation court involve only questions of law. Most probably it will not be recognised as justified if the proceedings involve not only questions of law, but also questions of fact.²⁸⁴

2.5.10. Right to Defend Oneself in Person or Through Legal Assistance

Art. 14(3)(d) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] to defend himself in person or through legal assistance [...]”. Similar legal norm can be found in Art. 6(3)(c) of the European Convention on Human Rights, Art. 47 of the Charter of Fundamental Rights of the European Union, Art. 8(2)(d) of the American Convention on Human Rights and Art. 7(1)(c) of the African Charter on Human and Peoples’ Rights.

²⁸² See, for example, *Zahirovic v. Croatia*, Judgment of 25 July 2013, ECtHR, paragraph 54.

²⁸³ See, for example, *Zahirovic v. Croatia, ibid.*, paragraphs 55-57; *Hermi v. Italy*, Judgment of 18 October 2006, ECtHR, paragraphs 60-61.

²⁸⁴ See, for example, *Ekbatani v. Sweden*, Judgment of 26 May 1988, ECtHR, paragraphs 13 and 31-33; *Hermi v. Italy, ibid.*, paragraph 64. See also the case study in this dissertation which indicates that in the *Prestige* case master of *Prestige* – Captain Mangouras – was not heard in person by the cassation court, although the proceedings in front of this court involved not only strictly legal questions.

The above-mentioned international and regional human rights instruments only set the general right to defend oneself in person or through legal assistance. They do not specify the manner of exercising this right. Thus, states have wide discretion in deciding upon the exact means of how to secure the right, for instance, at what stage to allow engagement of a legal assistant and how often to allow for a legal assistant to visit the accused, who is under detention. In practice, human rights tribunals in this regard in each case will assess whether the restrictions of legal assistance imposed by the state, in the light of the entirety of the proceedings, have deprived the accused of a fair hearing.²⁸⁵ For example, in the case of *Chaparro Alvarez and Lapo Iniguez v. Ecuador* IACtHR found the violation of the right to defend oneself through legal assistance under conditions when Mr. Chaparro, in the pre-trial statement, was required to justify his action for juridical protection, himself, despite the fact that he would have preferred his lawyer to do so.²⁸⁶

International and regional human rights instruments secure not only, simply, the right to legal assistance. They also secure the right to legal assistance of one's own choosing.²⁸⁷ It means that a state may not force the person charged of a criminal offence to be assisted by the lawyer provided by the state, if the charged person wants to be assisted by a particular lawyer of his own choosing.²⁸⁸

If a person charged of a criminal offence does not defend himself personally or engage legal assistance of his own choosing, he has a right to be assisted by the legal assistant provided by the state.²⁸⁹ Legal assistance provided by the state must be effective. If an appointed lawyer does not provide effective assistance, he must be

²⁸⁵ See, for example, *Ocalan v. Turkey*, Judgment of 12 May 2005, ECtHR, paragraphs 13, 18 and 131; *John Murray v. The United Kingdom*, Judgment of 8 February 1996, ECtHR, paragraph 63.

²⁸⁶ *Chaparro Alvarez and Lapo Iniguez v. Ecuador*, Judgment of 21 November 2007, IACtHR, paragraph 158.

²⁸⁷ See Art. 14(3)(d) of the International Covenant on Civil and Political Rights, Art. 6(3)(c) of the European Convention on Human Rights, Art. 8(2)(d) of the American Convention on Human Rights and Art. 7(1)(c) of the African Charter on Human and Peoples' Rights.

²⁸⁸ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge: Cambridge University Press, 2002 at p. 564.

²⁸⁹ See Art. 14(3)(d) of the International Covenant on Civil and Political Rights, Art. 6(3)(c) of the European Convention on Human Rights and Art. 8(2)(e) of the American Convention on Human Rights.

either replaced or caused to fulfil his obligations. In other words, what is guaranteed is, indeed, “assistance” and not mere “nomination” of a representative.²⁹⁰ Furthermore, public legal assistance must be provided without payment if a person does not have sufficient means to pay for it.²⁹¹

The general right to legal assistance also incorporates the more specific right to communicate with a legal assistant freely and privately.²⁹² Under the right, the term “freely” can be linked to the number and length of the visits of a legal assistant. Usually, communication with a legal assistant is not interfered when a person charged of a criminal offence is not deprived of his liberty while awaiting trial. When the person is deprived of his liberty while awaiting trial, visits of a legal assistant may be limited. However, they can be limited only as far as limitations do not deprive the person of a fair hearing. For example, in the case of *Ocalan v. Turkey* ECtHR found a rhythm of two one-hour meetings per week as inadequate for preparing for a trial of a case of high magnitude – a case with highly complex charges which generated an exceptionally voluminous case file.²⁹³ The term “privately”, under the right, means that the person charged of a criminal offence must be allowed to communicate with his legal assistant outside the hearing of third parties.²⁹⁴ For instance, in the case of *Khodorkovskiy and Lebedev v. Russia* ECtHR found the violation of the right to fair trial when written communications (working papers) between accused persons and their lawyers were regularly seized and checked by prison administration.²⁹⁵

²⁹⁰ See, for example, *Chaparro Alvarez and Lapo Iniguez v. Ecuador*, *supra* note 286, paragraphs 156 and 159; *Artico v. Italy*, Judgment of 13 May 1980, ECtHR, paragraphs 8 and 33.

²⁹¹ See Art. 14(3)(c) of the International Covenant on Civil and Political Rights, Art. 6(3)(c) of the European Convention on Human Rights, Art. 47 of the Charter of Fundamental Rights of the European Union and Art. 8(2)(e) of the American Convention on Human Rights.

²⁹² See Art. 8(2)(d) of the American Convention on Human Rights as well as relevant case law, for example, *S. v. Switzerland*, Judgment of 28 November 1991, ECtHR, paragraph 48.

²⁹³ *Ocalan v. Turkey*, *supra* note 285, paragraph 135.

²⁹⁴ Stefan Lorenzmeier, “The Right to a Fair Trial in Europe? – Procedural Guarantees Under the European Convention on Human Rights”, address to the Miscarriages of Justice Conference: Current Perspectives, University of Central Missouri, 20 February 2007 at p. 43. See also relevant case law, for example, *S. v. Switzerland*, *supra* note 292, paragraph 48.

²⁹⁵ *Khodorkovskiy and Lebedev v. Russia*, Judgment of 25 July 2013, ECtHR, paragraphs 635-641.

2.5.11. Right of a Charged Person to Examine Witnesses Against Him and to Obtain the Examination of Witnesses on His Behalf

Art. 14(3)(e) of the International Covenant on Civil and Political Rights states:

In the determination of any criminal charge against him, everyone shall be entitled [...] to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Art. 6(3)(d) of the European Convention on Human Rights and Art. 8(2)(f) of the American Convention on Human Rights contain similar rule.

In relation to human rights, “witness” means any statement produced at the pre-trial stage or during the trial and taken account of.²⁹⁶ Such statements can be made not only by witnesses, strictly speaking, but also, for example, by the co-accused, victims or experts, either orally or in written form. Taking into consideration this explanation of the meaning of the word “witness” in the human rights context, hereinafter the author will talk about “statements” instead of “witnesses” – as the term “statement” reflects the content of the right in the question more precisely than the term “witness”.

A general principle is: before a person charged of a criminal offence can be convicted, all evidence against him must be produced in his presence at a public hearing with a view to adversarial argument.²⁹⁷ Consequently, human rights tribunals may find the violation of the right to fair trial based on the mere failure of a state to show good reason for not examining, at public hearing, a person who has previously made statements against the person charged of a criminal offence.²⁹⁸ However, more often, human rights tribunals will look a little bit further – they will assess whether these untested statements, indeed, negatively affected the person charged of a criminal offence. In other words, they will assess the significance of the untested

²⁹⁶ See, for example, *Pullar v. United Kingdom*, Judgment of 20 May 1996, ECtHR, paragraph 45; *Kuvikas v. Lithuania*, Judgment of 23 October 2006, ECtHR, paragraph 53.

²⁹⁷ See, for example, *Rudnichenko v. Ukraine*, Judgment of 11 July 2013, ECtHR, paragraph 101.

²⁹⁸ See, for example, *Rudnichenko v. Ukraine*, *ibid.*, paragraph 104; *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2011, ECtHR, paragraph 120.

statements.²⁹⁹ For example, in the case of *Khodorkovskiy and Lebedev v. Russia* ECtHR found the violation of the right under such circumstances:

- Russian national court refused the plea of the defence to hear at the trial experts who had prepared several reports at the request of the prosecution. In this regard ECtHR noted that there is an extensive case law which guarantees to the defence a right to study and challenge not only an expert report, as such, but also the credibility of those who have prepared it, through their direct questioning;
- Russian national court refused the plea of the defence to admit as evidence the audit reports relevant to the case prepared by Ernst and Young, and Price Waterhouse Coopers. In this regard, ECtHR noted that it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the defence must have opportunity to introduce their own “expert evidence”.³⁰⁰

2.5.12. Right to Have the Assistance of an Interpreter

Art. 14(3)(f) of the International Covenant on Civil and Political Rights states:

In the determination of any criminal charge against him, everyone shall be entitled [...] to have the [...] assistance of an interpreter if he cannot understand or speak the language used in court.

Similar legal norm is incorporated in Art. 6(3)(e) of the European Convention on Human Rights and Art. 8(2)(a) of the American Convention on Human Rights.

²⁹⁹ *Al-Khawaja and Tahery v. the United Kingdom*, *ibid.*, paragraph 143.

³⁰⁰ *Khodorkovskiy and Lebedev v. Russia*, Judgment of 25 July 2013, ECtHR, paragraphs 709, 711, 716, 725 and 731.

The right to have the assistance of an interpreter applies not only to oral statements but also to documentary materials.³⁰¹ However, it must be noted that the International Covenant on Civil and Political Rights and the European Convention on Human Rights refer to an “interpreter”, not a “translator”. It means that these human rights instruments do not go so far as to require a written translation of all documents in the case file. Oral linguistic assistance may be recognised as sufficient.³⁰² The American Convention on Human Rights refers not only to the “assistance of an interpreter” but also to the “assistance of a translator”. However, the author has not found any case of IACtHR addressing issues related to the assistance of an interpreter or translator. Consequently, it is hard to determine the exact scope of the American Convention on Human Rights in this regard.

The quality of the interpretation provided need not be perfect. However, interpretation must be: continuous, precise, impartial, competent and contemporaneous.³⁰³ Moreover, competent authorities are always obliged to provide the assistance of an interpreter free of charge.³⁰⁴

2.5.13. Right Not to Incriminate Oneself

Art. 14(3)(g) of the International Covenant on Civil and Political Rights states: “In the determination of any criminal charge against him, everyone shall be entitled [...] not to be compelled to testify against himself or to confess guilt”. Art. 8(2)(g) of the American Convention on Human Rights contains similar rule. The European Convention on Human Rights does not explicitly refer to the right not to incriminate oneself. However, ECtHR has stated: although not specifically mentioned in the European Convention on Human Rights, the right not to incriminate

³⁰¹ See, for example, *Hermi v. Italy*, Judgment of 18 October 2006, ECtHR, paragraph 69; *Saman v. Turkey*, Judgment of 5 July 2011, ECtHR, paragraph 30.

³⁰² See, for example, *Hermi v. Italy*, *ibid.*, paragraph 70; *Kuvikas v. Lithuania*, Judgment of 23 October 2006, ECtHR, paragraphs 6, 52 and 54.

³⁰³ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge: Cambridge University Press, 2002 at p. 574. See also relevant case law, for example, *Hermi v. Italy*, *ibid.*

³⁰⁴ See Art. 14(3)(f) of the International Covenant on Civil and Political Rights, Art. 6(2)(e) of the European Convention on Human Rights and Art. 8(2)(a) of the American Convention on Human Rights.

oneself is generally recognised international standard which lies at the heart of the notion of a fair procedure.³⁰⁵

The right not to incriminate oneself safeguards against the practice that the prosecution in a criminal case seeks to prove the case against the person by resorting to evidence obtained through methods of compulsion.³⁰⁶ The right implies absence of any direct or indirect physical or psychological pressure from the investigating authorities on the person charged of criminal offence, with a view to obtain a confession of guilt.³⁰⁷

However, not every compulsion applied against an accused with the aim to collect evidence automatically constitutes the violation of the right to incriminate oneself. Whether there, indeed, has been violation must be determined by looking not only into the fact of compulsion, as such, but also into other relevant factors, such as the nature and degree of the compulsion and the use to which any material obtained through the compulsion is put.³⁰⁸ Furthermore, the right not to incriminate oneself does not safeguard against the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples or bodily tissue for the purpose of DNA testing.³⁰⁹

The right not to incriminate oneself is not confined to statements of admission of wrongdoing or to remarks which are directly incriminating. It is applicable also to any other evidence – even the evidence which appears on their face to be of a non-incriminating nature. What is of the essence, in this context, is the use to which evidence obtained under compulsion is put in the course of the criminal trial. For example, exculpatory remarks, or mere information on questions of fact, may also be later deployed in criminal proceedings in support of the prosecution case

³⁰⁵ See, *Saunders v. United Kingdom*, Judgment of 17 December 1996, ECtHR, paragraph 68.

³⁰⁶ See, for example, *Niculescu v. Romania*, Judgment of 25 June 2013, ECtHR, paragraph 111.

³⁰⁷ JAYAWICKRAMA, *supra* note 303 at p. 576.

³⁰⁸ See, for example, *Niculescu v. Romania*, *supra* note 306, paragraph 111.

³⁰⁹ See, *Saunders v. United Kingdom*, *supra* note 305, paragraph 69.

to contradict or cast doubt upon other statements of the accused or to otherwise undermine his credibility.³¹⁰

2.5.14. Right to the Review of Conviction and Sentence

Art. 14(5) of the International Covenant on Civil and Political Rights states: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. Art. 8(2)(h) of the American Convention on Human Rights contains similar legal norm. In Europe the right to the review of conviction and sentence is guaranteed by the case law as well as Art. 2(1) of Protocol No. 7 to the European Convention on Human Rights.

According to Art. 2(2) of Protocol No. 7 to the European Convention on Human Rights, in Europe some exceptions to the right to the review of conviction and sentence are allowed. Exceptions are allowed:

[...] in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

In regards to the exceptions to the right to the review of conviction and sentence, IACtHR does not walk hand in hand with its European colleagues. IACtHR does not recognise above-mentioned exceptions. The issue was addressed, for example, in the case of *Mohamed v. Argentina*. In this case, Mr. Mohamed – person accused of manslaughter – was acquitted by the court of the first instance, convicted by the court of the second instance, and, after that, not given the appropriate opportunity to appeal his conviction (such opportunity was not secured under Argentinian national law). IACtHR found that such a system violates the right to the review of conviction and sentence. The court stated that it is contrary to the purpose of that particular right that it should not be guaranteed to someone who is convicted in judgment that overturns an acquittal. To interpret it otherwise would leave the convicted person without the right to an appeal against the conviction.³¹¹

³¹⁰ See, *Saunders v. United Kingdom*, *ibid.*, paragraph 71.

³¹¹ *Mohamed v. Argentina*, Judgment of 23 November 2012, IACtHR, paragraphs 87, 93, 95, 103, 105 and 118.

In addition, case law of IACtHR has clearly stated that the right to review of conviction and sentence must be, not only always existing, but also easily accessible, that is, it should not involve great complexities that render this right illusory. Formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle to the remedy fulfilling its purpose of examining and resolving grievances argued by the appellant.³¹² Review, itself, may not be carried out superficially, in a merely formal manner. It must be effective, comprehensive review which allows extensive control of the contested aspects of the particular conviction and sentence.³¹³

2.5.15. Right Not to Be Tried or Punished Twice for the Same Offence

Art. 14(7) of the International Covenant on Civil and Political Rights states:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

In some jurisdictions this right is known as *ne bis in idem* or as guarantee against double jeopardy.

Art. 50 of the Charter of Fundamental Rights of the European Union contains similar rule as in Art. 14(7) of the International Covenant on Civil and Political Rights, with the one difference – while the Covenant safeguards against double jeopardy only within the limits of one particular country, the Charter safeguards against double jeopardy within the limits of the whole EU. Art. 8(4) of the American Convention on Human Rights states: “An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause”. Thus, differently from the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights does not set any geographical limitations in relation to the right not to be tried or punished twice for the same offence.

³¹² See, for example, *Mohamed v. Argentina, ibid.*, paragraphs 100.

³¹³ See, for example, *Asadbeyli and others v. Azerbaijan*, Judgment of 11 May 2013, ECtHR, paragraphs 137 and 139; *Mohamed v. Argentina, ibid.*, paragraphs 98, 100 and 101.

The American Convention on Human Rights differs from the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union in other aspects, also. First of all, the American Convention on Human Rights refers only to “acquittals” and not to both “acquittals and convictions”. It means that the person may be tried again after conviction. Such a system is beneficiary to the convicted person. It gives possibility for the negative judgement to be overturned in favour of the convicted person. Despite the fact that it is not mentioned directly in the Charter of Fundamental Rights of the European Union or the European Convention on Human Rights, in fact, reopening of cases is also permitted under the European system. It is evident from Art. 4 of Protocol No. 7 to the European Convention on Human Rights. This article states:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State.
2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

Another difference between the American Convention on Human Rights and the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union is that the American Convention on Human Rights refers to the “same cause”, not to the “same offence”. It precludes possibility to try a person again for, in principle, the same activities simply by formally changing the qualification of these activities.³¹⁴ Yet, again, despite the fact that the European human rights instruments do not refer to “the same cause” as the American Convention on Human Rights does, in fact, the systems in this respect do not differ. Case law of ECtHR has evened the systems. For example, in the case of *Asadbeyli and others v. Azerbaijan* ECtHR stated:

³¹⁴ See, for example, *Mohamed v. Argentina*, Judgment of 23 November 2012, IACtHR, paragraph 122.

The Court notes that its case-law in respect of the *ne bis in idem* principle has developed since the *Oliveira* judgment [...] Whereas there had been several approaches to this issue in the earlier case-law [...], the Court attempted to harmonise those approaches in the *Sergey Zolotukhin* judgment [...] and took the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.³¹⁵

2.6. Right to Non-Discrimination

Art. 2 of UDHR states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar legal norm is incorporated in Art. 2 of the International Covenant on Civil and Political Rights, Art. 14 of the European Convention on Human Rights, Art. 21(1) of the Charter of Fundamental Rights of the European Union, Art. 1(1) of the American Convention on Human Rights and Art. 2 of the African Charter on Human and Peoples’ Rights.

All the above-mentioned rules safeguard that the rights incorporated in respective human rights instruments (so, only human rights themselves) can be enjoyed without discrimination. The only exception in this regard is Art. 21(1) of the Charter of Fundamental Rights of the European Union which safeguards against any discrimination. It states:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

However, the limited scope of the other above-mentioned rules does not mean that the human rights instruments within which these rules are situated do not safeguard against all forms of discrimination. They do – through the right to equity before the law.

³¹⁵ *Asadbeyli and others v. Azerbaijan*, Judgment of 11 May 2013, ECtHR, paragraph 158. See also paragraphs 17, 21, 160, 162 and 163.

Art. 7 of UDHR states: “All are equal before the law and are entitled without any discrimination to equal protection of the law”. Art. 26 of the International Covenant on Civil and Political Rights, Art. 20 of the Charter of Fundamental Rights of the European Union, Art. 24 of the American Convention on Human Rights and Art. 3 of the African Charter on Human and Peoples’ Rights basically repeat Art. 7 of UDHR. Only the European Convention on Human Rights does not contain the legal norm on the right to equity before the law. Consequently, ECtHR has addressed the right to non-discrimination only in conjunction with particular other human rights (as Art. 14 of the European Convention on Human Rights prescribes).³¹⁶

Differently from ECtHR, IACtHR has looked at the right to non-discrimination both ways – in conjunction with particular human rights (as Art. 1(1) of the American Convention on Human Rights prescribes) and separately from particular human rights (as Art. 24 of the American Convention on Human Rights prescribes). IACtHR, *inter alia*, has clearly explained the difference between these two Articles of the Convention. In the judgment of the case *Barbani Duarte et al. v. Uruguay* it stated:

The Court recalls that, while the general obligation under Article 1(1) refers to the State’s obligation to respect and guarantee “without discrimination” the rights contained in the American Convention, Article 24 protects the right to “equal protection of the law.” If it is alleged that a State discriminates in the respect or guarantee of a convention-based right, the fact must be analyzed under Article 1(1) and the material right in question. If, to the contrary, the alleged discrimination refers to unequal protection by domestic law, the fact must be examined under Article 24 of the Convention.³¹⁷

Importantly, IACtHR has also concluded that:

At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. [...] This principle is fundamental for the safeguard of human rights in both international and national law; it is a principle of peremptory law. Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory.³¹⁸

³¹⁶ See, for example, *I.B. v. Greece*, Judgment of 3 October 2013, ECtHR; *E.B. and others v. Austria*, Judgment of 7 November 2013, ECtHR.

³¹⁷ *Barbani Duarte et al. v. Uruguay*, Judgment of 13 October 2011, IACtHR, paragraph 174.

³¹⁸ *YATAMA v. Nicaragua*, Judgment of 23 June 2005, IACtHR, paragraphs 184-185. See also *Atala Riffo and daughters v. Chile*, Judgment of 24 February 2012, IACtHR, paragraph 79; *Girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005, IACtHR, paragraph 141.

The above citation shows how high the right to non-discrimination is valued. At the same time, it is clear from the end of this citation that not any distinction is discriminatory. Discriminatory is only such a distinction that “lacks objective and reasonable justification”. Also ECtHR has stressed this point in a number of judgments. For example, in the case of *Petrovic v. Austria* ECtHR stated:

Under the Court’s case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.³¹⁹

Thus, under certain circumstances distinct treatment is allowed. However, justification for such treatment must be very strong. ECtHR in this regard has noted:

States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment [...] as compatible with the Convention.³²⁰

³¹⁹ *Petrovic v. Austria*, Judgment of 27 March 1998, ECtHR, paragraph 30. See also *Wessels-Bergervoet v. the Netherlands*, Judgment of 4 June 2002, ECtHR, paragraph 46.

³²⁰ *Willis v. the United Kingdom*, Judgment of 11 June 2002, ECtHR, paragraph 39.

3. UNCLOS

3.1. Introduction

UNCLOS was adopted by the Third UN Conference on the Law of the Sea on 30 April 1982 by 130 votes to four, with 17 abstentions.³²¹ It entered into force on 16 November 1994. As of August 2016, 167 states as well as the EU had become Parties to this convention.³²²

Apart from Annexes, UNCLOS is divided into 17 parts. Part I is the introduction. Parts II to XI provide legal regimes governing different geographical areas: territorial sea and contiguous zone, straits used for international navigation, archipelagic states, EEZ, continental shelf, high seas, islands, enclosed or semi-enclosed seas, land-locked states and the Area. Parts XII to XV provide legal regimes governing specific issues: protection and preservation of the marine environment, marine scientific research, development and transfer of marine technology and settlement of disputes. Parts XVI and XVII are devoted to general and final provisions.

The majority of rules of UNCLOS govern only general matters. In other words, UNCLOS is a framework (or, an “umbrella”) convention.³²³ However, this “framework” is extremely comprehensive. Therefore, UNCLOS is often called “a constitution for the oceans”.³²⁴

³²¹ Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at pp. 16-18; Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012 at p. 29.

³²² See actual information on the status of UNCLOS at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#1.

³²³ See, for example, Agustin Blanco-Bazan, “IMO Interference with the Law of the Sea Convention”, paper presented at the Twenty-Third Annual Seminar of the Center for Ocean Law and Policy, University of Virginia School of Law, 6-9 January 2000, available at:

http://www.imo.org/blast/mainframe.asp?topic_id=406&doc_id=1077 [accessed 22 September 2015].

³²⁴ TANAKA, *supra* note 321 at p. 31. See also, “A Constitution for the Oceans”, remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at: http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf [accessed 22 September 2015].

Further on in this chapter, those legal norms of UNCLOS, which can be linked to criminal procedures or sanctions applicable against seafarers after large-scale ship-source oil pollution accidents, are identified and analysed in detail. It is done from a human rights perspective. Where above-mentioned legal norms of UNCLOS are unclear or inconsistent with human rights, recommendations are made regarding the interpretation of these legal norms.

3.2. Right to Liberty and UNCLOS

3.2.1. Introduction

Only some articles of UNCLOS address deprivation of liberty directly, for example, Art. 27, which talks about arrest of persons on board a foreign ship passing through territorial sea. However, UNCLOS rather often refers to such things as “proceedings” or “powers of enforcement”, for example, Art. 217, 218 and 220 talk about enforcement by flag States³²⁵, port States³²⁶ and coastal States³²⁷ in relation to prevention, reduction and control of ship-source pollution. Deprivation of liberty fits within such broader terms as “proceedings” or “powers of enforcement”. Thus, actually, UNCLOS also addresses deprivation of liberty rather extensively.

Some rules of UNCLOS can be labelled “procedural rules of deprivation of liberty”. Deprivation of liberty without following “procedural rules of deprivation of liberty” is arbitrary, and thus constitutes violation of the right to liberty (if in the circumstances in question respective procedural flaw can be considered as serious).³²⁸ Consequently, deprivation of liberty of a seafarer after large-scale ship-source oil pollution accident without following “procedural rules of deprivation of liberty” incorporated in UNCLOS is, also, arbitrary, and thus constitutes violation of the right to liberty of this seafarer (if in the circumstances in question respective

³²⁵ Flag State is the state whose nationality a particular ship has. Nationality is conferred to the ship by her registration in particular country and displayed by rising on board the ship flag of this country.

³²⁶ Port State is the state in one of whose ports a particular ship lies.

³²⁷ Coastal State is the state in one of whose maritime zones a particular ship lies.

³²⁸ This conclusion stems from Sub-chapter 2.2.2.2, “Deprivation of Liberty not in Conformity with Existing Law”.

procedural flaw can be considered as serious). Sub-chapter 3.2.2 below will introduce relevant procedural rules of UNCLOS. It will, *inter alia*, analyse whether failure to comply with respective rules can be considered as serious flaw.

There is some basis for the opinion that, apart from “procedural rules of deprivation of liberty” incorporated in UNCLOS, also Art. 220(7) and 226(1)(b), together with Art. 292 of UNCLOS (legal norms of UNCLOS which set prompt release obligations in regards to ship-source pollution violations) are linked to the right to liberty. Whether such link indeed exists will be analysed in Sub-chapter 3.2.3.

3.2.2. Procedural Rules of UNCLOS Related to Deprivation of Liberty

3.2.2.1. Requirement to Facilitate Involvement of Others into Proceedings

Art. 27(3) of UNCLOS requires in the case when in accordance with Paragraphs 1 and 2 of this article coastal State wants to apply criminal jurisdiction on board a foreign ship passing through its territorial sea, if the master so requests:

- to notify a diplomatic agent or consular officer of the flag State before taking any steps or, in case of emergency, while the measures are being taken;
- to facilitate contact between a diplomatic agent or consular officer of the flag State and the ship’s crew.

Art. 223 of UNCLOS requires states to facilitate the attendance at any proceedings instituted in relation to ship-source pollution violation of official representatives of the competent international organisation, the flag State and any State affected by pollution arising out of the violation. Art. 231 of UNCLOS contains specific notification requirements regarding cases when a coastal State or port State applies enforcement measures on board a foreign ship in relation to ship-source pollution violations. Art. 231 of UNCLOS reads as follows:

States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

“Section 6” mentioned in the article is the section on enforcement measures in case of ship-source pollution violations.

The first sentence of Art. 231 of UNCLOS is clear – it requires coastal States and port States, irrespectively where enforcement measures are taken:

- to notify promptly the flag State and any other State concerned of any measures taken;
- to submit to the flag State all official reports concerning measures taken.

Yet, the purpose of the second and the third sentence of Art. 231 of UNCLOS is not clear.

The general idea of the second sentence must have been to lessen the burden of notification obligations of a coastal State in case of ship-source pollution violation in its territorial sea. However, as all enforcement measures are taken within some kind of “proceedings” (criminal or administrative), legal norm which requires to perform notification obligation only in case of such measures “as are taken in proceedings”, without giving some specific (more narrow) meaning to the word “proceedings”, is useless – it is not capable to exclude any case from the notification obligation. It seems that the second sentence of Art. 231 of UNCLOS is simply an unfortunate result of poor debate on particular rule during the drafting process of UNCLOS. This rule was introduced by Japan. After its introduction, it was stated that respective proposal is one which requires further study. However, nothing indicates that such study was ever carried out.³²⁹

³²⁹ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at pp. 374-375.

Wording of the third sentence of Art. 231 of UNCLOS suggests that, parallel to the “prompt” notification to “the flag State and any other State concerned” (in accordance with the first sentence of the article), “immediate” notification to “diplomatic agents or consular officers and where possible the maritime authority of the flag State” must be carried out. However, diplomatic agents, consular officers and maritime authorities of the flag State also fall within the broader concept of “a flag State”. Does it mean that the third sentence of the article, in fact, does not set new obligation, but simply specifies the one in the first sentence of the same article? The Drafting Committee of the Conference preparing UNCLOS also expressed its concerns regarding the issue. Nordquist indicates that:

[...] the Drafting Committee noted that there was a lack of uniformity with regard to the recipient of the notification; article 231 requires notification to “the flag State or any other State concerned” of measures taken, and in the case of violations in the territorial sea notification is to be made to “the consular officers or diplomatic agents, and where possible the maritime authority of the flag state”.³³⁰

It is worth noting here that, as it is evident from the citation above, the Drafting Committee of the Conference preparing UNCLOS interpreted the third sentence of Art. 231 of UNCLOS as linked only to its second sentence – the one addressing violations in territorial sea. Such an interpretation is questionable, because initial drafts of the article contained only legal norms which later became respectively the first and the third sentence of Art. 231 of UNCLOS (so, they were directly linked). The legal norm which later became the second sentence of Art. 231 of UNCLOS was introduced just afterwards.³³¹ However, the above-mentioned interpretation of the Drafting Committee one more time proves that the whole article is poorly drafted and, consequently, may trigger different interpretations.

Furthermore, the question may arise how the whole Art. 231 of UNCLOS correlates with Art. 27(3) and Art. 223 of UNCLOS, which were introduced earlier. These articles are not in full harmony, for example:

³³⁰ NORDQUIST, *ibid.* at p. 374.

³³¹ NORDQUIST, *ibid.* at pp. 373-374.

- Art. 231 does not require to notify diplomatic agent or consular officer of the flag State “before taking any steps”, Art. 27(3) does;
- Art. 231 requires to notify “maritime authority of the flag State”, Art. 27(3) does not contain such obligation.

As if Part XII of UNCLOS, in which also Art. 223 and 231 are located, governs specific subject matter (protection and preservation of the marine environment). Therefore, by applying conflict of law principle *lex specialis derogate legi generali*, it can be concluded that Art. 223 and 231 override general rule in Art. 27(3). However, Art. 223 and 231 incorporate notification and attendance facilitation requirements regarding any enforcement measures, while Art. 27(3) incorporates respective requirements regarding only those enforcement measures which are applied as a part of criminal proceedings. From this perspective, Art. 27(3) becomes one which regulates specific subject matter as compared to Art. 223 and 231.

Taking into consideration all the above mentioned, this author suggests to interpret Art. 231 of UNCLOS in system with Art. 27 and 223 of UNCLOS as follows: when a coastal State or port State in regards to ship-source pollution violation as a part of criminal proceedings applies enforcement measures against a foreign ship or persons on board this ship, respective coastal State or port State must:

- 1) if master of the ship so requests:
 - notify a diplomatic agent or consular officer of the flag State of a ship in question before taking any steps or, in case of emergency, while the measures are being taken;
 - facilitate contact between a diplomatic agent or consular officer of the flag State of a ship in question and the ship’s crew;
- 2) if master of the ship has not expressed request as mentioned above, immediately notify a diplomatic agent or consular officer of the flag State of a ship in question about any measures taken (the “immediately” requirement can be easily associated with the “while the measures are being taken” requirement);

- 3) where possible, immediately notify the maritime authority of the flag State of a ship in question about any measures taken;
- 4) in any case:
 - promptly notify any State other than the flag State of a ship in question, which can possibly be concerned about measures taken, for example, other affected coastal State or the state, which national a seafarer against whom measures have been applied is (the “promptly” requirement is less stringent than the “immediately” requirement; consequently, notification should not be made while the measures are being taken, however, the “promptly” requirement does not allow for notifications to be made long after measures have been taken);
 - submit to the flag State of a ship in question all official reports concerning measures taken;
 - facilitate the attendance at proceedings of official representatives of the competent international organization, the flag State and any State affected by pollution.

Research of this author did not reveal any case in the practice of human rights tribunals where it would be assessed whether the failure to comply with the requirement to notify a diplomatic agent or consular officer, or anybody else, about the deprivation of liberty of a particular person or the requirement to facilitate contact between a diplomatic agent or consular officer, or anybody else, and the person deprived of liberty amounts to arbitrary deprivation of liberty. Nevertheless, in the opinion of this author, failure to exercise notification and contact facilitation requirements with respect to the flag State and the state, of which a seafarer deprived of liberty is a national, has high potential to be recognised as constituting arbitrary deprivation of liberty, because such notification and contact facilitation, *inter alia*, secures full defence of a person deprived of liberty, but right to defence is one of the most important human rights under the right to a fair trial umbrella.³³²

³³² See Sub-chapter 2.5.5, “Right to Defence”.

3.2.2.2. Requirement to Pay Due Regard to Other Interests when Exercising Powers of Enforcement

Art. 225 of UNCLOS states:

In the exercise under this Convention of their powers of enforcement [...] States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

Although Art. 225 is situated in Part XII of UNCLOS (the Part on the protection and preservation of the marine environment), case law of ITLOS indicates that the respective article actually has general application.³³³

In regards to safety (safety of navigation, safety of ship) Art. 225 of UNCLOS sets the obligation in a categorical way – establishes that “States *shall not* endanger [...]”. It does not provide any exceptions to this obligation. However, application of enforcement measures is never absolutely free from the risk of endangering safety, for example, just like risk exists when police chase a car on a high-way, it will also exist when a warship chases a ship at sea. Consequently, Art. 225 of UNCLOS should be read subject to general principles of necessity and proportionality, and not as a blanket prohibition. In other words, it is more appropriate to read Art. 225 of UNCLOS as one of its earlier drafts stated. This earlier draft, instead of being categorical, required states to exercise their enforcement powers “to the extent that there is no excessive danger to the vessel in question and that no unreasonable risks are created for navigation or the marine environment”.³³⁴

Does the failure to pay due regards to such interests as safety of navigation and clean environment when depriving of liberty a person on board a ship constitute arbitrary deprivation of liberty of this person? In the opinion of this author it will constitute arbitrary deprivation of liberty only in one specific case – when together with endangering such interests as safety of navigation and clean environment, without justified reason, also the life or health of a person who is deprived of liberty

³³³ See *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraph 373.

³³⁴ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 332.

is directly endangered; for example, when after deprivation of liberty of a seafarer a ship is left without duly qualified people navigating her and the seafarer who has been deprived of liberty remains on this now unsafe ship. In other cases, for example, when after deprivation of liberty of a seafarer a ship is left without duly qualified people navigating her, but the seafarer who has been deprived of liberty does not stay on this now unsafe ship, deprivation of liberty of a person will not be arbitrary. Not because in these cases failure to pay due regard to such interests as safety of navigation and clean environment becomes insignificant (it is always significant and can be considered as such in separate processes against officials), but because in these cases respective failure does not negatively affect a person deprived of liberty. It only negatively affects safety of other persons, property rights of other persons and the marine environment.

3.2.3. Legal Norms of UNCLOS on Prompt Release from Detention

Art. 218 and 220 of UNCLOS under certain circumstances permit a port State and a coastal State to detain a foreign ship alleged of committing ship-source pollution violation. Yet, under Art. 220(7) and 226(1)(b) of UNCLOS, a state should release the detained ship if bond or other appropriate financial security has been assured. Both Art. 220(7) and 226(1)(b) talk only about prompt release of ships (property), not crew (people). The conclusion emerging from this statement is that Art. 220(7) and 226(1)(b) of UNCLOS are not linked to the right to liberty, because holders of the right to liberty (just like any other human right) are humans, not property.

However, it is not absolutely clear whether, indeed, the crew is not covered by Art. 220(7) and 226(1)(b) of UNCLOS, particularly because a majority of scholars have treated respective rules as encompassing not only prompt release of ships, but also prompt release of crew. For example, Lindpere has done so. For

justification of such a position, he has referred to Art. 292 of UNCLOS.³³⁵ Similarly, Pozdnakova has stated:

Article 226 does not refer expressly to the crew and only mentions that the “vessel” shall be promptly released. However, the wording of other provisions in UNCLOS implies that the crew is covered by the prompt release requirement (see Article 292).³³⁶

Art. 292 of UNCLOS is procedural counterpart of Art. 220(7) and 226(1)(b) of UNCLOS. It establishes the right of a flag State, in cases when other states do not follow substantive prompt release provisions of UNCLOS, to seek respective release through the relevant tribunal. Differently from Art. 220(7) and 226(1)(b), Art. 292 explicitly addresses, not only prompt release of ships, but also prompt release of crew. It, indeed, points towards the conclusion that also Art. 220(7) and 226(1)(b) cover, not only prompt release of ships, but also prompt release of crew.

However, correctness of such a conclusion can be questioned. It must be kept in mind that Art. 292 of UNCLOS sets the prompt release safeguard not only in regards to Art. 220(7) and 226(1)(b) of UNCLOS (ship-source pollution violations), but also in regards to Art. 73(2) of UNCLOS (violations of fisheries regulations). Differently from Art. 220(7) and 226(1)(b), Art. 73(2) explicitly addresses, not only prompt release of ships, but also prompt release of crew. Consequently, it might be the case that the reference to crew in Art. 292 is linked only to Art. 73(2). In practice, Art. 292 of UNCLOS, so far, has been invoked only in relation to alleged violations of fisheries regulations. Thus, there is no case law which addresses the issue whether Art. 292 of UNCLOS can be invoked, at all, in regards to prompt release of crew members deprived of their liberty after alleged ship-source pollution violation. Consequently, this issue remains, to a very large extent, unclear.

³³⁵ Heiki Lindpere, “Prompt Release of Detained Foreign Vessels and Crew in Matters of Marine Environment Protection”, in *International Journal of Legal Information*, Volume 33, Issue 2, Summer 2005 at p. 243.

³³⁶ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 165. See also pp. 174-175 as well as Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012 at pp. 418; Proshanto K. Mukhetjee and Mark Brownrik, *Farthing on International Shipping*, Berlin: Springer, 2013 at p. 188 and Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 489, where the authors link Art. 220(7) and Art. 226(1)(b) of UNCLOS, not only to prompt release of ships, but also to prompt release of crew.

This author leans towards the position that Art. 220(7) and 226(1)(b) of UNCLOS may not be interpreted as addressing prompt release of crew, because:

- 1) Literal (philological) interpretation of respective legal norms gives a clear result – that crew is not covered.
- 2) Systemic interpretation (such as invoked by Lindpere and Pozdnakova) is not capable to “disprove” the result of literal (philological) interpretation. Rather the opposite, the fact that Art. 73(2) of UNCLOS (violations of fisheries regulations) explicitly refers to both ships and crew, but Art. 220(7) and 226(1)(b) of UNCLOS (ship-source pollution violations) refer only to ships, leads one to believe that, in regards to prompt release, drafters of UNCLOS did not treat a ship as also, naturally, encompassing persons on board this ship. Otherwise, reference to crew would have been omitted in regards to both types of violations.³³⁷
- 3) Also recourse to *travaux préparatoires* of UNCLOS is not capable to “disprove” the result of literal (philological) interpretation. In this regard it can be noted that drafters of UNCLOS initially suggested that UNCLOS should protect against prolonged detention of not only ships but also crew, and even passengers.³³⁸ Yet, it is not clear why, exactly, the reference to crew and passengers was ultimately not included in Art. 220(7) and 226(1)(b) of UNCLOS – was it simply a drafting mistake, was it assumed that reference to a ship naturally encompasses also persons on board this ship, or was it, as a result of discussions on the balance of powers between a flag State, coastal State and port State, ultimately decided that persons on board a ship should

³³⁷ In general, though, the word “ship” in UNCLOS must be understood as also encompassing her crew. See *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS, paragraph 106 and *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraphs 125-127, where it is stated that in relation to flag State jurisdiction word “ship” must be understood as encompassing not only ship itself, but also every thing on it, and every person involved or interested in its operations. This interpretation of the word “ship”, by analogy, can be followed also in relation to coastal State and port State jurisdiction, except where specific circumstances (such as those described here in regards to prompt release) suggest otherwise.

³³⁸ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 67.

not be covered by the UNCLOS prompt release safeguard in cases of alleged ship-source pollution violations.³³⁹

After all, it seems illogical simply to read the word “crew” into the word “ship” when talking about detention and prompt release, because detention of a ship and detention of a crew are two rather distinct things (one is predominantly linked to civil proceedings, another to criminal proceedings). Detention of a ship is allowed for such purposes for which detention of a crew is not allowed (for example, for securing civil claims). Detention of a crew is allowed for such purposes for which detention of a ship is not allowed, or even is irrelevant (for example, for securing person’s presence at trial). Also conditions under which, respectively, ship and crew can be released consequently differ. For example, for securing civil claim it will always be enough simply to “replace” the ship with some other appropriate financial security, yet for securing a person’s presence at trial it will not always be enough simply to “replace” the person with the financial security. Other measures might still be necessary. It is evident from case law of ITLOS that some states also prefer to treat prompt release of ships and prompt release of crew as two, possibly linked, but still distinct things. For example, in the *Volga* case, Australia clearly distinguished between release of the ship on bond and release of the crew on bail.³⁴⁰

Some scholars argue that Art. 292 of UNCLOS can be invoked not only in relation to Art. 73, 220 and 226 of UNCLOS, as described above, but in any case when ship or crew is detained contrary to UNCLOS, for example, Treves has stated:

[...] if a vessel or its crew has been detained in contravention of a provision of the Convention which prohibits detention, it seems reasonable to hold that the most expeditious procedure available should be resorted to in order to ensure the release of the vessel or crew, independently of the question of international responsibility for the violation of the Convention. It would seem absurd to me that the prompt release procedure should be available in cases in which detention is permitted by the Convention, such as those of Article 73, 220 and 226, and not available in cases in which it is not permitted by it.³⁴¹

³³⁹ NORDQUIST, *ibid.* at pp. 67-71.

³⁴⁰ *The “VOLGA” (No. 11) Case (Russian Federation v. Australia)*, Judgment of 23 December 2002, ITLOS, paragraph 28.

³⁴¹ Tullio Treves, “The Proceedings Concerning Prompt Release of Vessels and Crews Before the International Tribunal of the Law of the Sea”, in *International Journal of Marine and Coastal Law*, Volume 11, Issue 2, 1996 at p. 186. For similar opinion see *The M/V “SAIGA” (No. 1) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 4 December 1997, ITLOS, paragraph 53.

If to follow this understanding, then Art. 292 of UNCLOS still might come into play also in regards to crew members deprived of their liberty in relation to alleged ship-source pollution violation, for example, in cases when crew members are deprived of their liberty by the state which does not have jurisdiction to do it. This author agrees with Treves in the sense that, since UNCLOS has established prompt release procedure, it would be reasonable to utilise this procedure fully, allowing invoking it in any case when detention of ship or crew is believed to be contrary to UNCLOS. However, it is quite clear from the mere text of Art. 292 itself as well as from *travaux préparatoires* of UNCLOS that this “reasonable variant” was not the intention of drafters of UNCLOS.³⁴² In other words, on this particular issue the author agrees with the conclusion of Lindpere, who has stated that such application of prompt release procedure as suggested by Treves “will definitely undermine the whole concept of Article 292 and compromises reached in it”.³⁴³

Taking into consideration all the above-mentioned arguments, this author maintains the conclusion which was made at the very beginning of this sub-chapter, namely, that rules of UNCLOS which set prompt release obligations in regards to ship-source pollution violations do not cover crew, and consequently are not linked to the right to liberty. Thus, they are also of no interest for the purpose of this dissertation.

At the same time, this author sees the topic of prompt release of ships and crews under UNCLOS as a topic on which, in general, further research is highly necessary. There are still many unanswered or poorly answered important questions in this area, starting from very theoretical questions, such as whether the existence of the regime is justified at all, whether the regime is well balanced with other relevant systems (for example, human rights and general principles of criminal procedures), and ending with very practical questions, such as how to execute the prompt release

³⁴² See Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V*, Dordrecht: Martinus Nijhoff Publishers, 1991 at pp. 67-69.

³⁴³ Heiki Lindpere, “Prompt Release of Detained Foreign Vessels and Crew in Matters of Marine Environment Protection”, in *International Journal of Legal Information*, Volume 33, Issue 2, Summer 2005 at p. 251.

order of an international court or tribunal when national procedures do not envisage such execution.

3.3. Right to Be Free from Cruel, Inhuman or Degrading Punishment and UNCLOS

When introducing the right to be free from cruel, inhuman or degrading punishment, ultimately, all issues were organised around two broad questions, namely, what conduct can be criminalised (question of criminal liability) and how severe imposed sanctions can be (question of amount). The same can be done here – in the sub-chapter addressing interaction of UNCLOS with the right to be free from cruel, inhuman or degrading punishment.

Regarding the question of criminal liability Pozdnakova has rightly pointed out:

[...] States that [...] decide to enact criminal penalties for pollution will not find any guidance in UNCLOS concerning the substantive scope of their criminal liability provisions. The treaty does not specify what pollution should be considered unlawful (a “violation”) and, as such, potentially criminally punishable.³⁴⁴

Consequently, one may also not find in UNCLOS the answer to the question, when a large-scale ship-source oil pollution accident should be criminalised, if ever. The only legal norms in UNCLOS which can be discussed in relation to criminal liability in the light of large-scale ship-source oil pollution accidents are those legal norms which prescribe specific duties on the side of the state or other actors, not observance of which potentially can be the true cause of the large-scale ship-source oil pollution accident (instead of the conduct on the side of the seafarer). Such duties are, for instance:

- duty of a coastal State to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea (Art. 24(2));
- duty of a coastal State to give due notice of the artificial islands, installations or structures in EEZ (Art. 60(3));

³⁴⁴ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 8.

- duty of a coastal State to maintain permanent means for giving warning of the presence of artificial islands, installations or structures in EEZ (Art. 60(3));
- duty of those who carry out activities in the Area to give due notice of the erection, emplacement and removal of installations used for carrying out activities in the Area (Art. 147(2)(a));
- duty of those who carry out activities in the Area to maintain permanent means for giving warning of presence of installations used for carrying out activities in the Area (Art. 147(2)(a));
- duty of those who carry out activities in the Area to establish around installations used for carrying out activities in the Area safety zones with appropriate markings to ensure the safety of navigation (Art. 147(2)(c));
- duty of those who carry out scientific research to secure that scientific research installations or equipment in the marine environment have adequate internationally agreed warning signals to ensure safety at sea (Art. 262);
- duty of States to develop and promote contingency plans for responding to pollution incidents in the marine environment (Art. 199).

All these duties should be kept in mind when assessing the objective element of the crime “causation”, because, if the true cause of the large-scale ship-source oil pollution accident is the conduct of a particular state authority or some other actor, as described above, a seafarer cannot be held criminally liable for causing pollution. However, all above-mentioned legal norms of UNCLOS are linked to the right to be free from cruel, inhuman or degrading punishment only indirectly.

Directly linked to the right to be free from cruel, inhuman or degrading punishment (specifically, right not to be exposed to disproportionate sanctions) are those rules of UNCLOS which address severity of sanctions (question of amount). There are several such rules. Those which are linked to ship-source pollution violations are analysed in detail below.

Before moving into respective analysis, one more note should be made. Although rules of UNCLOS on severity of sanctions are primarily linked to the right to be free from cruel, inhuman or degrading punishment, at the same time, indirectly, they are also linked to the right to liberty. It becomes clear if one recalls that persons can be deprived of liberty only on specific recognised grounds. Even if, in principle, a recognised ground for deprivation of liberty exists, particular deprivation of liberty can still be arbitrary – in case one or more additional conditions are not met. Among these conditions is also the requirement to deprive a person of liberty only if such measure is proportional under the circumstances in question. Among factors to be taken into consideration when assessing whether it is proportional to deprive a person of liberty under the circumstances in question is severity of an alleged offence. Severity of an alleged offence in its turn can be determined by severity of applicable sanction for this offence. Thus, severity of applicable sanction for a particular offence is one of the factors which determine whether deprivation of liberty of a person in relation to this offence has been arbitrary or not. This conclusion also accords with what was stated by ITLOS in the *M/V “VIRGINIA G”* case, namely that “[...] in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation.”³⁴⁵

Art. 217(8) of UNCLOS contains very generally formulated obligation of flag States in regards to severity of sanctions for ship-source pollution violations. This legal norm states: “Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.” It can be disputed whether this particular legal norm strives for general proportionality of penalties (stresses the need to adopt such penalties which are neither too mild, nor too severe), or it simply strives for utilitarian benefit (stresses the need to adopt such penalties which “discourage violations”, but does not say that these penalties may not be disproportionately severe). However, this dispute has little practical importance, because, anyway, Art. 217(8) of UNCLOS should be

³⁴⁵ *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraph 270.

read subject to human rights³⁴⁶ thus also subject to principle of proportionality of sanctions.

Apart from Art. 217(8) of UNCLOS, other legal norms in UNCLOS which talk about severity of sanctions for ship-source pollution violations are Art. 230(1) and (2), which state:

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

Basically, these two paragraphs, if read in system with each other as well as Section 3 “Innocent passage in the territorial sea” of Part II “Territorial sea and contiguous zone” of UNCLOS, say that different kinds of punishment other than monetary (for example, imprisonment) may be applied by a coastal State only for such ship-source pollution violations in its territorial sea which render passage of a foreign ship through this territorial sea non-innocent. Later it will be explained that none of the ship-source pollution *accidents* renders passage of a foreign ship which caused the pollution non-innocent. Thus, in principle, under Art. 230(1) and (2) of UNCLOS, a ship-source pollution *accident* can never result in any sanctions other than monetary.

Art. 230(1) and (2) of UNCLOS provide a very strong safeguard for seafarers on board foreign ships. It may trigger, and indeed has triggered, the conclusion that these rules were drafted with the purpose, *inter alia*, to secure human rights of respective seafarers, particularly their right not to be exposed to disproportionate sanctions. For example, Murray has concluded that Art. 230 of UNCLOS constitutes an internationally agreed balance between public concerns about pollution on the one hand, and the recognised rights of the accused on the other.³⁴⁷ Mukherjee has concluded that Art. 230 of UNCLOS “is consistent with the fundamental tenet of

³⁴⁶ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 38.

³⁴⁷ Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 154.

penal law that the punishment must be commensurate with the offence”.³⁴⁸ This author is of the opinion that Art. 230(1) and (2) of UNCLOS safeguard the right not to be exposed to disproportionate sanctions only accidentally. *Travaux préparatoires* of UNCLOS show that the primary, if not only, balance for which drafters of UNCLOS were striving was balance between powers of flag States, coastal States and port States. Art. 230(1) and (2) of UNCLOS were not exceptions in this regard – also they were drafted primarily to secure balance between powers of flag States, coastal States and port States, not the balance of sanctions as it is understood under general principles of punishment.³⁴⁹ As a result, this second type of balance has not been fully met by respective rules.

First of all, at least in regards to one specific offence, it can be seriously questioned whether Art. 230(1) and (2) of UNCLOS secure balance between the offence and sanction for this offence (Comparison 1 within the tripartite test of proportionality of sanctions as it was depicted in Figure 4 of this dissertation). From systemic interpretation of Art. 230(1) and (2) it must be concluded that a coastal State cannot punish serious pollution in its EEZ by any penalties other than monetary even if this pollution is caused intentionally. It is hard to see the balance between offence and sanction in this situation. Today, society is highly concerned about environmental protection, therefore monetary penalty only for intentional and serious pollution is not a proportional sanction (it is too mild a sanction). Intentional and serious pollution should be strongly discouraged by applying harsh punishment, irrespective of where this pollution occurs and who causes it. As if the flag State of a ship in question may apply relatively harsh punishment for intentional and serious pollution in EEZ of another state. However, exercise of such right would mean that seafarers who have, in fact, committed the same offence are exposed to different

³⁴⁸ Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at pp. 491-492.

³⁴⁹ See Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at pp. 364-370; David M. Dzidzornu, “Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis”, in *Colorado Journal of International Environmental Law and Policy*, Volume 8, Issue 2, Summer 1997 at p. 284.

sanctions just because an investigation is carried out by different states (either a coastal State, or flag State). It again may raise doubts about proportionality of sanctions imposed, because, ideally, sanctions must be proportional across countries. In addition, it may raise doubts about observance of the right to non-discrimination, because, as it was explained earlier, for any divergent treatment under, in fact, similar circumstances very strong justification is required.

Secondly, Art. 230(1) and (2) of UNCLOS do not secure balance of sanctions for different offences (Comparison 2 within the tripartite test of proportionality of sanctions as it was depicted in Figure 4 of this dissertation). Art. 230(1) and (2) safeguard against penalties other than monetary only in the cases of “violations of law for the prevention, reduction and control of pollution of the marine environment” (“marine pollution violations”). They do not safeguard against penalties other than monetary in the cases of a “maritime safety violations” or other types of violations, for example, non-observance of rules of navigation, causing danger to a ship or persons on board a ship, failure to comply with directions given by coastal State authorities, taking charge of a ship whilst under the influence of alcohol or overloading a ship.³⁵⁰ Yet, after a ship-source pollution accident a seafarer may also be charged with these violations. Pollution is only the end – harm. Harm always results from some conduct. Also this conduct, as such, might be defined in national law as an offence. Similarly, pollution might not be the only harm caused by the conduct. Also causing of this other harm might be defined in national law as an offence. In principle, nothing forbids states to do so. Consequently, if after a ship-source pollution accident a seafarer is charged with a “maritime safety violation” or another type of violation, not a “marine pollution violation”, he still may face penalties other than monetary,³⁵¹ even if this “maritime safety violation” or another type of violation, *per se*, is relatively petty. Thus, severity of sanctions to which

³⁵⁰ Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the Journal of International Maritime Law, Volume 18, Issue 2, March-April 2012 at p. 159.

³⁵¹ MURRAY, *ibid.*; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1098-1099; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 51 and 189.

seafarers can be exposed for, in fact, one and the same conduct becomes dependent on such technicality as the actual framing of offences in national law.³⁵² Is there any “cure” for this anomaly? Theoretically – yes. Practically – no (apart from such radical methods as amendments to UNCLOS or development of relevant new legal instruments).

Similarly as Art. 217(8) of UNCLOS, also Art. 230(1) and (2) of UNCLOS must be read subject to general human rights considerations thus also subject to the principle of proportionality of sanctions, which, *inter alia*, strives to secure proportionality between sanctions for different offences. So, proportionality between sanctions for “marine pollution offences”, “maritime safety offences” and other types of offences should also be secured. If a state fails to follow this requirement when developing and enforcing its national penal law, theoretically, it can be claimed that this state violates the human right not to be exposed to disproportionate sanctions. Possibly, exactly the above-mentioned considerations are those based on which Gold has concluded:

[...] states, which only have monetary penalties for pollution offences provided in their maritime legislation, use other legislation, such as marine resource, fisheries, environmental and coastal protection regulations, to impose criminal sanctions that may include imprisonment. It is quite clear that such procedures are all in breach of UNCLOS.³⁵³

Yet, actually, the issue is not as straightforward as Gold poses, because to succeed with the claim that the sanction for a particular “maritime safety offence” or other type of offence is not proportional to the sanction for a particular “marine pollution offence” is almost impossible. Why “almost impossible”? Because, as we know already, there is no international standard which allows to put all offences in an unquestionable hierarchy of seriousness and to apportion sanctions for them accordingly. Only extremely disproportionate sanctions can be detected and proven

³⁵² In this regard, see, also, the case study in this dissertation which indicates that after the *Erika* accident and *Hebei Spirit* accident seafarers still faced imprisonment sanctions due to the fact that they were charged not only of marine pollution violations, but also of “exposing persons to an immediate risk of death or injury” (*Erika* case) and “destruction of property” (*Hebei Spirit* case).

³⁵³ Edgar Gold, *Gard Handbook on Protection of the Marine Environment*, 3rd edition, Arendal: Gard, 2006 at p. 503.

relatively easily. Proportionality of other sanctions is, as ECtHR puts it, “the subject of rational debate and civilised disagreement”.

Furthermore, it is impossible, and even absurd, to subordinate all national penal law systems to two very specific sectoral international penal law provisions (what Art. 230(1) and (2) of UNCLOS are). While such subordination, perhaps, is still possible (although, doubtfully) in regards to all violations in the maritime domain, it is absolutely impossible in regards to violations in other domains, because UNCLOS cannot dictate for these other fields. Yet, balance between sanctions for violations in different fields is also essential for securing a truly proportional sanctioning system. In other words, Art. 230(1) and (2) of UNCLOS are pulled out of a broader penal law system, and, as a result, destroy this system. Any very specific sectoral international penal law provision does so.³⁵⁴ Consequently, such provisions are very rare. Usually, development of specific sanctions is left to the national level. As de la Rue and Anderson have put it:

Generally the international community has been slow to adopt laws which encroach on the sovereignty of states in respect of criminal proceedings, and this is particularly so in relation to penalties.³⁵⁵

Due to the above-mentioned reasons, this author is of the opinion that the very existence of Art. 230(1) and (2) of UNCLOS is an unfortunate fact.

All the above criticisms addressing Art. 230(1) and (2) of UNCLOS does not mean that this author does not support the general idea for necessity to safeguard seafarers against too severe sanctions (what Art. 230(1) and (2) of UNCLOS among other things, intentionally or unintentionally, nevertheless do). This author simply does not support such safeguarding with the methods which are detrimental to other important interests, such as a balanced overall penal law system. One may argue that the balanced overall penal law system is not of direct importance for people within the maritime sector; consequently, the maritime industry should not care about the

³⁵⁴ For the similar opinion, just in regards to setting very specific criminal penalties in EU law, see Anthony Dawes and Orla Lynskey, “The Ever-Longer Arm of EC Law: the Extension of Community Competence into the Field of Criminal Law”, in *Common Market Law Review*, Volume 45, Issue 1, February 2008 at p. 139.

³⁵⁵ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1096.

respective system. However, this is not true. The maritime industry, as a responsible player of a global society, must look to its sector in context, it must have a cross-sectoral (wider) view in mind when developing its own rules.

All the above criticisms of Art. 230(1) and (2) of UNCLOS also does not mean that respective legal norms can be ignored. For State Parties to UNCLOS they are binding international law, but under the general principle *pacta sunt servanda* (“agreements must be observed”) binding international law should be followed, until it is changed. Results of relevant studies suggest, though, that many states do ignore Art. 230(1) and (2) of UNCLOS. For example, after analysis of the results of the CMI study on fair treatment of seafarers,³⁵⁶ Mukherjee has concluded: “What becomes clear when the various responses are reviewed is that the strictures of Article 230 of UNCLOS are often ignored”.³⁵⁷ Presumably, this is attributable to the drawbacks of that Article.

3.4. Right to Fair Trial and UNCLOS

3.4.1. Introduction

There are not many rules in UNCLOS which are directly linked to specific rights under the fair trial umbrella. However, there are some, also such which relate to ship-source pollution accidents. Thus, Art. 228(2) is linked to the right not to be tried without undue delay. This linkage is analysed in Sub-chapter 3.4.2. Art. 223 is linked to the right of a charged person to examine witnesses against him and to obtain the examination of witnesses on his behalf. This linkage is analysed in Sub-chapter 3.4.3. Finally, Art. 218(4) and 228 are linked to the right not to be tried or punished twice for the same offence. This linkage is analysed in Sub-chapter 3.4.4.

³⁵⁶ See CMI, *Fair Treatment of Seafarers: Summary of Responses of CMI Members to the Questionnaire*, 2006.

³⁵⁷ Proshanto K. Mukherjee, “Criminalisation and Unfair Treatment: The Seafarer’s Perspective”, in *Journal of International Maritime Law*, Volume 12, Issue 5, September-October 2006 at p. 355. See also the case study in this dissertation which indicates that after the *Prestige* accident, seafarers faced pollution charges with not only fine, but also imprisonment and disqualification from the profession as potential punishment.

3.4.2. Right to Be Tried Without Undue Delay

Sub-chapter 2.5.8 above explained the general content of the right to be tried without undue delay. One of the instruments which helps to secure this right is negative prescription. Negative prescription is “the extinction of a title or right by failure to claim or exercise it over a long period”.³⁵⁸ UNCLOS sets one such negative prescription in regards to ship-source pollution violations. Art. 228(2) of UNCLOS states: “Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of three years from the date on which the violation was committed [...]”. Consequently, if this negative prescription is not followed in national law and practices of the State Party to UNCLOS, this state violates not only UNCLOS, but also the human right to fair trial.

3.4.3. Right of a Charged Person to Examine Witnesses Against Him and to Obtain the Examination of Witnesses on His Behalf

Sub-chapter 2.5.11 above explained the general content of the right of a charged person to examine witnesses against him and to obtain the examination of witnesses on his behalf. It, *inter alia*, explained that the term “witness” in relation to human rights means any statement produced at the pre-trial stage or during the trial and taken account of.

Art. 223 of UNCLOS sets the obligation on states instituting proceedings against the person for pollution violation to take measures to facilitate the hearing of witnesses and the admission of evidence submitted by authorities of another state, or by the competent international organization. These witness statements and other evidence submitted by authorities of another state or by the competent international organization may as well be favourable to the seafarer accused for the violation. If so, their non-admission violates not only UNCLOS but also the human right to fair trial.

³⁵⁸ Bryan A. Garner, (ed.), *Black's Law Dictionary*, 8th edition, St. Paul, MN: West, a Thomson business, 2004 at p. 1220.

3.4.4. Right Not to Be Tried or Punished Twice for the Same Offence

Sub-chapter 2.5.15 above explained the general content of the right not to be tried or punished twice for the same offence. It, *inter alia*, explained that under the majority of human rights instruments the right not to be tried or punished twice is limited to a particular geographical area – either one country, or all EU countries. Only the American Convention on Human Rights does not set any geographical limitations. Therefore, it can be assumed that in the Americas it is not permissible for a state to try a person already sentenced for the same offence by a court in this particular country as well as any other country.

Art. 218(4) and 228 of UNCLOS establish when a coastal State or port State should suspend or terminate proceedings in regards to pollution violation upon taking of these proceedings by another state. On the one hand, respective legal norms strive to preclude double jeopardy across all countries in the world. Under specific circumstances described by these legal norms: if a flag State (wherever in the world it is located) pre-empts proceedings initiated by a coastal State or port State, this coastal State or port State should suspend and later terminate its proceedings; if a coastal State (wherever in the world it is located) pre-empts proceedings initiated by a port State, this port State must terminate its proceedings. In this regard, UNCLOS is beneficial to seafarers – it safeguards seafarers against double jeopardy similar to the American Convention on Human Rights (without geographical limitations).

On the other hand, Art. 228(1) of UNCLOS allows not to follow the general obligation to suspend proceedings on request of the flag State:

- 1) if proceedings relate to a case of major damage to the coastal State;
- 2) if the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect to violations committed by its ships.

What constitutes “major damage to the coastal State” or “flag State which has repeatedly disregarded its obligations” must be assessed on a case-by-case basis. Unfortunately, there are no clear-cut standards. Non-existence of the clear-cut standard of “major damage to the coastal State” is understandable – as what is small damage in regards to a wealthy state might be major damage in regards to a poor state. Thus, the concept of “major damage to the coastal State”, indeed, is relative. Yet, the concept of “flag State which has repeatedly disregarded its obligations” is not so relative. Nevertheless, there is also no relevant standard in this regard. As Dzidzornu has put it:

It is not clear what may constitute a standard of ineffective enforcement by a flag state. Nor is it clear how many times or under what circumstances the failure of a flag state to punish its offending vessels would come within the criterion of repeated disregard by the flag state of “its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels” so as to constitute a bar to its right to pre-empt further enforcement actions taken by coastal states against its vessels.

[...] it appears that a claim that a flag state should lose its right of pre-emption regarding any future violations involving its vessels cannot be sustained.³⁵⁹

Pozdnakova is not so pessimistic in her conclusions. She argues that, in principle, it is possible to identify “a flag State which has repeatedly disregarded its obligations”, for example, by finding out that a particular state is on “blacklists” prepared under different MoUs on Port State Control (such as Paris MoU and Tokyo MoU).³⁶⁰ The above-mentioned “blacklists”, indeed, indicate bad performance of particular flag States. However, these lists are not created directly for the purpose of Art. 228 of UNCLOS. Consequently, their utilisation for the respective purpose still risks to be considered by others as “self-serving and insufficient to sustain enforcement”.³⁶¹ In the opinion of this author, a helping hand for determining “flag States which have repeatedly disregarded their obligations” could be provided by IMO – by clearly identifying such states after carrying out audits in accordance with the IMO Member

³⁵⁹ David M. Dzidzornu, “Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis”, in *Colorado Journal of International Environmental Law and Policy*, Volume 8, Issue 2, Summer 1997 at pp. 311-312.

³⁶⁰ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 318 and 183-184.

³⁶¹ DZIDZORNU, *supra* note 359 at p. 313.

State Audit Scheme. Anyway, both exceptions from the general obligation to suspend proceedings on request of the flag State – the exception of “major damage to the coastal State” and the exception of “flag State which has repeatedly disregarded its obligations” – if applied in practice, may lead to parallel proceedings in different states. Furthermore, Art. 228(3) states that nothing can preclude a flag State to take any measures, including proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State. Also this rule, if applied in practice, may lead to double jeopardy.

However, Art. 228(3) of UNCLOS states that a flag State may take any measures, including proceedings to impose penalties, irrespective of prior proceedings by another State only “according to its laws”, but for the State Party to the American Convention on Human Rights this convention is “its law” and for the State Party to the Charter of Fundamental Rights of the European Union this charter is “its law”. Furthermore, as it will be explained later, Art. 300 of UNCLOS requires State Parties to exercise any rights, jurisdiction and freedoms recognized in the Convention subject to human rights (thus, also the right not to be tried or punished twice for the same offence). Consequently, despite the fact that Art. 228(1) of UNCLOS contains exceptions to the general rule to suspend proceedings and Art. 228(3) of UNCLOS contains an exception to the general rule not to initiate proceedings, if the state is bound by the American Convention on Human Rights, it must, anyway, suspend or not initiate proceedings once another state has delivered final judgment in the case, and if the state is bound by the Charter of Fundamental Rights of the European Union, it must, anyway, suspend or not initiate proceedings once another EU Member State has delivered final judgment in the case.³⁶²

³⁶² For similar view see POZDNAKOVA, *supra* note 360 at p. 182.

3.5. *Right to Non-Discrimination and UNCLOS*

In some of its legal norms UNCLOS directly requires observance of the right to non-discrimination; for example, in Art. 227 and 234. Yet, respective requirements have little added value – predominantly they serve just as reminders of the right which should be observed anyway, because it is a general human right. Consequently, there is not much to discuss in regards to respective requirements. The only thing, perhaps, which can be stressed in this regard is that, to some extent, discrimination within the maritime domain, indeed, exists. It is evident, for example, from the *M/V “VIRGINIA G”* case, in which ITLOS noted that Guinea-Bissau arrested and confiscated *Virginia G* – the ship alleged of illegal bunkering – while other ships which had basically committed the same violation were just fined or were not punished at all.³⁶³

Separate discussion deserves the fact that by some of its rules UNCLOS itself triggers discrimination. For instance, it triggers discrimination on the basis of nationality (nationality of a ship). Many articles in Section 7 “Safeguards” of Part XII “Protection and preservation of the marine environment” of UNCLOS provide safeguards only to foreign ships. For example:

- Art. 224 states that the powers of enforcement *against foreign vessels* may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect;
- Art. 225 states that in the exercise of their powers of enforcement *against foreign vessels*, States shall not endanger the safety of navigation;
- Art. 227 states that in exercising their rights and performing their duties, States shall not discriminate in form or in fact *against vessels of any other State*;

³⁶³ *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraph 268.

- Art. 228(2) states that proceedings to impose penalties *on foreign vessels* shall not be instituted after the expiry of three years from the date on which the violation was committed;
- Art. 230(1) and (2) state that monetary penalties only may be imposed with respect to particular pollution violations *committed by foreign vessels*;
- Art. 230(3) states that in the conduct of proceedings in respect to particular pollution violations *committed by a foreign vessel* which may result in the imposition of penalties, recognised rights of the accused shall be observed.

It is rather clear why the above-mentioned rules refer only to foreign ships – because the general purpose of these rules is to minimize extensive enforcement against foreign ships.³⁶⁴ This purpose is understandable and valid. However, linking of respective rules only to foreign ships can trigger the conclusion that it is allowed to not provide the given safeguards to non-foreign ships and persons on board these ships. In other words, that in relation to non-foreign ships it is allowed:

- to exercise powers of enforcement by officials who are not authorized to that effect;
- to exercise powers of enforcement by endangering the safety of navigation;
- to exercise rights and duties by discriminating in form or in fact against non-foreign ships;
- to impose penalties other than monetary for the same offences for which persons on board foreign ships cannot be exposed to penalties other than monetary;
- not to observe recognised rights of the accused.

³⁶⁴ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 158 and 186. See also Bernard H. Oxman, “Human Rights and the United Nations Convention on the Law of the Sea”, in *Columbia Journal of Transnational Law*, Volume 36, No. 1-2, 1997 at p. 427.

Rather obviously, such interpretation, triggered by mere wording of legal norms in Section 7 of Part XII of UNCLOS, is unacceptable. It can lead to the situation when in relation to an, in fact, one and the same alleged violation one group of seafarers is left without relevant safeguards compared to another group of seafarers solely on the basis of the nationality of the ship they are serving on.³⁶⁵

However, again, it must be kept in mind that the rights, jurisdiction and freedoms recognized in UNCLOS should be exercised subject to human rights (so, also the right to non-discrimination). Consequently, the above-mentioned legal norms from Section 7 of Part XII of UNCLOS must be interpreted as providing the safeguards incorporated in these legal norms to all ships, not only to foreign ships.³⁶⁶ It was possible for drafters of UNCLOS not to cause any doubt that respective legal norms, indeed, apply to all ships, not only to foreign ships. It could be done by supporting relevant proposals expressed during the drafting process, for example, the proposal by the Soviet Union to incorporate in UNCLOS a new Part XIV *bis* titled “General Safeguards”, or the proposal by Kenya to include in UNCLOS following general rule: “States shall ensure that marine pollution control measures shall not discriminate in form or fact between States or persons”. Unfortunately, these proposals were not supported.³⁶⁷

³⁶⁵ In this regard see also the case study in this dissertation which, within the analysis of *Erika* accident, indicates that, at the time when *Erika* accident was investigated and adjudicated, French law left the possibility to impose different sanctions upon masters of foreign ships (only fine) and masters of French ships (also imprisonment) for in principle the same MARPOL violations.

³⁶⁶ For similar opinion see, for example, Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 466.

³⁶⁷ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at pp. 333 and 346.

3.6. Human Rights and Legal Norms of UNCLOS on Jurisdiction

3.6.1. Introduction

Application of any criminal procedure or sanction against a seafarer after a large-scale ship-source oil pollution accident by the state which does not have jurisdiction to do it or by the official who does not have jurisdiction to do it constitutes violation of human rights of this seafarer – the right to fair trial and, where applicable, also the right to liberty.³⁶⁸ UNCLOS indicates which states have criminal jurisdiction over large-scale ship-source oil pollution accidents (see Sub-chapter 3.6.2 below). To some extent, it also indicates officials who have jurisdiction over respective accidents (see Sub-chapter 3.6.3 below).

3.6.2. Criminal Jurisdiction of States

Before starting to examine, in detail, rules of UNCLOS which indicate which states have criminal jurisdiction over large-scale ship-source oil pollution accidents, it is necessary to have a brief look into the classification of this jurisdiction.

First of all, on the basis of specific competencies what particular jurisdiction entails, any jurisdiction can be divided into two broad groups: legislative (or prescriptive) jurisdiction, that which gives competence to prescribe law, and enforcement jurisdiction, that which gives competence to enforce law. Competence to enforce law can be further divided into several sub-competencies, such as competence to arrest (arrest jurisdiction) and competence of the court to deal with alleged breaches of the law (judicial jurisdiction).³⁶⁹ Legislative jurisdiction and enforcement jurisdiction are inseparably linked. As Brownlie puts it: “The one is a

³⁶⁸ This conclusion stems from Sub-chapter 2.5.3, “Right to Be Tried by Competent, Independent and Impartial Tribunal Established by Law” and Sub-chapter 2.2.2.2, “Deprivation of Liberty not in Conformity with Existing Law”.

³⁶⁹ Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 344. See also Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 2-3, where competence to enforce law is divided in such sub-competences as competence to detain, competence to prosecute and competence to punish.

function of the other.”³⁷⁰ Indeed, law without corresponding enforcement is useless, consequently, enactment of any law carries with it a presumption of future enforcement,³⁷¹ but enforcement without corresponding law is impossible (or rather – physically still possible, but unlawful), because enforcement is determined by law.

Secondly, on the basis of the status of the state exercising jurisdiction, jurisdiction in maritime domain can be divided into three broad groups: flag State jurisdiction, coastal State jurisdiction and port State jurisdiction.

Thirdly, jurisdiction in maritime domain can be divided on the basis of the maritime zone in regards to which jurisdiction is exercised. Maritime zones are several: internal waters, territorial sea, contiguous zone, archipelagic waters, EEZ, high seas, continental shelf and the Area. Internal waters comprise those parts of the sea that lie on the landward side of the baselines from which a state’s territorial sea is measured.³⁷² Territorial sea is a belt of sea adjacent to internal waters of a state. In accordance with Art. 3 of UNCLOS the breadth of territorial sea may not exceed 12 nautical miles. In addition, Art. 12 explains:

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

Contiguous zone is a belt of sea adjacent to territorial sea of a state. In accordance with Art. 33(2) of UNCLOS the breadth of contiguous zone may not exceed 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. In this zone state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory (including, territorial sea).³⁷³ Ship-source oil pollution accidents are not infringement of customs, fiscal, immigration or sanitary laws. Therefore, jurisdiction of states in regards to activities in their contiguous zones will not be addressed further in this

³⁷⁰ Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford: Oxford University Press, 1998 at p. 313.

³⁷¹ Harold G. Maier, “Jurisdictional Rules in Customary International Law”, in Karl M. Meessen, (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London: Kluwer Law International, 1996 at p. 78.

³⁷² See Art. 8 of UNCLOS.

³⁷³ See Art. 33(1) of UNCLOS.

sub-chapter. Archipelagic waters are waters of an archipelagic state enclosed by the archipelagic baselines.³⁷⁴ Although some uncertainties exist in this regard, this author agrees with the opinion of Shearer who has concluded that regarding jurisdiction over ship-source pollution violations regime of archipelagic waters should be equated with the regime of territorial sea.³⁷⁵ Consequently, further in this sub-chapter archipelagic waters will not be addressed separately, but, simply, anything what will be said regarding jurisdiction in territorial sea should also be associated with jurisdiction in archipelagic waters. Similarly as is a contiguous zone, EEZ is an area adjacent to territorial sea of a state. However, EEZ exists for other purposes than a contiguous zone. In accordance with Art. 56(1) of UNCLOS, in its EEZ a 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:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

In accordance with Art. 57 of UNCLOS, the breadth of EEZ may not exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. High seas are all parts of the sea that are not included in EEZ, territorial sea, archipelagic waters or internal waters of a state.³⁷⁶ A continental shelf is the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of the land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.³⁷⁷ The Area is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.³⁷⁸

³⁷⁴ See Art. 49(1) of UNCLOS.

³⁷⁵ I.A. Shearer, "Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels", in *International and Comparative Law Quarterly*, Volume 35, Issue 2, April 1986 at p. 333.

³⁷⁶ See Art. 86 of UNCLOS.

³⁷⁷ See Art. 76 of UNCLOS.

³⁷⁸ See Art. 1(1) of UNCLOS.

Jurisdiction of states in regards to activities in their continental shelf and the Area will not be addressed further in this sub-chapter, because respective jurisdiction does not embody rights directly related to ship-source pollution.

In practice there might be situations when a maritime accident, itself, occurs in one maritime zone, but afterwards a ship involved in this accident proceeds to another maritime zone (outwards or inwards). This practicality is taken into consideration when further in this sub-chapter enforcement jurisdiction is addressed, because in some instances enforcement jurisdiction of a state changes from this mere fact that after the accident a ship in question proceed outwards or inwards.

3.6.2.1. Legislative Jurisdiction of a Flag State

Under customary international law, a flag State has legislative jurisdiction over ships of its nationality,³⁷⁹ irrespectively of where these ships are located at a particular point of time.³⁸⁰ UNCLOS obliges a flag State to exercise this jurisdiction. In regards to ship-source pollution, relevant obligation is incorporated in Art. 211(2) of UNCLOS, which reads as follows:

States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

Art. 211(2) of UNCLOS does not specify exactly what measures flag States may prescribe for the prevention, reduction and control of pollution of the marine environment from their ships. Consequently, in principle, these measures may as well be criminal procedures and sanctions applicable against seafarers after a large-scale ship-source oil pollution accident.

³⁷⁹ As it was explained already earlier, in regards to flag State jurisdiction word “ship” must be understood as encompassing not only ship itself, but also every thing on it, and every person involved or interested in its operations.

³⁸⁰ Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at pp. 344 and 346.

3.6.2.2. Enforcement Jurisdiction of a Flag State

Pozdnakova asserts: “Flag States have unlimited jurisdiction to enforce their laws vis-a-vis their own ships.”³⁸¹ Even if one disagrees with Pozdnakova that enforcement jurisdiction of flag States vis-a-vis their ships is *unlimited*, he still must agree that this jurisdiction is very wide. It is evident from the flag State enforcement obligations incorporated in UNCLOS. In regards to ship-source pollution, relevant obligations are incorporated in Art. 217(1) of UNCLOS, which reads as follows:

States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

Similarly as Art. 211(2) of UNCLOS does not specify exactly what measures flag States may prescribe for the prevention, reduction and control of pollution of the marine environment from their ships, Art. 217(1) of UNCLOS does not specify exactly what enforcement measures flag States may apply to ensure that their ships comply with relevant rules, standards, laws and regulations. Consequently, again, in principle, these measures may as well be criminal procedures and sanctions applicable against seafarers after a large-scale ship-source oil pollution accident.

Yet, an important aspect to note is that enforcement jurisdiction of the flag State is geographically limited to its land territory, internal waters, territorial sea, EEZ, high seas and EEZs of other states, because exercise of enforcement measures in the territorial sea or internal waters, or land territory of another state would mean infringement of the sovereignty of this state.³⁸²

³⁸¹ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 317.

³⁸² Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford: Oxford University Press, 1998 at p. 310; CHURCHILL and LOWE, *supra* note 380 at pp. 345 and 348-349; Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 100; POZDNAKOVA, *ibid.* at p. 111.

3.6.2.3. Legislative Jurisdiction of a Coastal State over Violations in Its Internal Waters

UNCLOS does not address the issue of legislative jurisdiction of a coastal State over violations in its internal waters. Yet, customary international law grants to a coastal State, in principle, unrestricted legislative jurisdiction over foreign ships³⁸³ in its internal waters. As Pozdnakova has put it: “[...] a coastal State generally has unrestricted sovereignty under international law to adopt [...] rules concerning foreign vessels in its internal waters [...]”³⁸⁴ It means that, generally, a coastal State may also adopt rules on criminal procedures and sanctions applicable against seafarers on board foreign ships alleged of causing a large-scale ship-source oil pollution accident in internal waters of a respective coastal State.

3.6.2.4. Enforcement Jurisdiction of a Coastal State over Violations in Its Internal Waters

Scenario “internal waters – internal waters”

A foreign ship is alleged to have carried out in the internal waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the internal waters of this state (in addition, possibly also other areas) and the ship in question is still in the internal waters of the state.

Similarly as a coastal State has, in principle, unrestricted legislative jurisdiction over foreign ships in its internal waters, it also has, in principle, unrestricted enforcement jurisdiction over foreign ships in its internal waters. As Pozdnakova has put it: “[...] a coastal State generally has unrestricted sovereignty under international law to [...] apply rules concerning foreign vessels in its internal waters [...]”³⁸⁵ Thus, also under the Scenario “internal waters – internal waters”, generally, a coastal State may apply different kinds of enforcement measures against

³⁸³ As it was explained already earlier, also in regards to coastal State jurisdiction word “ship” generally must be understood as encompassing not only ship itself, but also every thing on it, and every person involved or interested in its operations.

³⁸⁴ POZDNAKOVA, *supra* note 381 at p. 240. See also MOLENAAR, *supra* note 382 at p. 186.

³⁸⁵ POZDNAKOVA, *ibid.* at p. 240. See also Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 65.

a foreign ship in question, including criminal procedures and sanctions against seafarers on board this ship.

As a matter of comity, coastal States exercise their enforcement jurisdiction against foreign ships in their internal waters only in cases where the interests of a particular coastal State are engaged. Matters relating solely to “internal economy” (internal matters) of the ship tend, in practice, to be left to the authorities of the flag State.³⁸⁶ Yet, large-scale oil pollution in internal waters of a particular state undoubtedly affects the interests of that state. Consequently, it cannot be reasonably expected that under the Scenario “internal waters – internal waters” a coastal State will refrain from exercising its enforcement jurisdiction.

Scenario “internal waters – territorial sea”

A foreign ship is alleged to have carried out in the internal waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the internal waters of this state (in addition, possibly also other areas), but the ship in question has already left the internal waters and is now in the territorial sea of the state (is outward-bound).

Art. 27(2) of UNCLOS states that the limitations of criminal jurisdiction on foreign ships in territorial sea mentioned in Paragraph 1 of this article

[...] do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

The above-mentioned legal norm, *inter alia*, indicates that the coastal State in its territorial sea may exercise criminal jurisdiction over a foreign ship alleged of committing crime in its internal waters just like this ship would still have been present in internal waters – as limitations of criminal jurisdiction over foreign ships otherwise applicable in territorial sea are not applicable in a situation when a ship is passing through the territorial sea after leaving internal waters (is outward-bound).

³⁸⁶ CHURCHILL and LOWE, *ibid.* at pp. 65-66; Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012 at pp. 78-79; Peter D. Clark, “Criminal Jurisdiction over Merchant Vessels Engaged in International Trade”, in *Journal of Maritime Law and Commerce*, Volume 11, No. 2, January 1980 at pp. 231-234.

O’Connel has referred to such a situation as prolongation of the sojourn in internal waters.³⁸⁷ In other words, it is recognised that there is a certain persistence of the rights of a coastal State in its internal waters, even when the ship alleged to commit a crime in these waters ceases to be within them.³⁸⁸ Thus, also under the Scenario “internal waters – territorial sea” a coastal State may apply enforcement measures against the foreign ship in question, just like this ship would still have been present in internal waters.

3.6.2.5. Legislative Jurisdiction of a Coastal State over Violations in Its Territorial Sea

In accordance with Art. 2 of UNCLOS, a coastal State has sovereignty over its territorial sea. However, this sovereignty should be exercised subject to UNCLOS and other rules of international law.³⁸⁹

Art. 17 of UNCLOS states that foreign ships have the right of innocent passage through the territorial sea. In accordance with Art. 19(1) of UNCLOS, passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Art. 19(2)(h) explicitly indicates what acts of pollution are prejudicial to the peace, good order or security of the coastal State – acts of wilful and serious pollution contrary to UNCLOS. Large-scale ship-source oil pollution accidents cause “serious pollution”. However, they are still just accidents, so not “wilful” conducts. Consequently, none of the large-scale ship-source oil pollution accidents will render passage of a ship which caused pollution non-innocent. Yet, it does not automatically mean that a coastal State has no legislative jurisdiction over large-scale ship-source oil pollution accidents in its territorial sea.

³⁸⁷ Daniel Patrick O’Connel, *The International Law of the Sea, Volume II*, Oxford: Clarendon Press, 1984 at p. 955.

³⁸⁸ O’CONNEL, *ibid.*

³⁸⁹ See Art. 2 of UNCLOS as well as *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award dated 18 March 2015, Permanent Court of Arbitration, paragraphs 499-500, 502-504 and 514.

Art. 21(1) as well as Art. 211(4) of UNCLOS give to a coastal State right to adopt laws and regulations in respect of the prevention, reduction and control of pollution in its territorial sea, including pollution from foreign ships exercising their right of innocent passage. Art. 21(4) imposes on foreign ships exercising the right of innocent passage obligation to comply with all such laws and regulations. Similarly as Art. 211(2) of UNCLOS does not specify exactly what measures flag States may prescribe for the prevention, reduction and control of pollution from their ships, Art. 21(1) and 211(4) of UNCLOS do not specify exactly what measures coastal States may prescribe for the prevention, reduction and control of pollution from foreign ships in their territorial seas. Consequently, again, in principle, coastal States may adopt different kinds of laws and regulations, including ones on criminal procedures and sanctions applicable against seafarers on board a foreign ship alleged of causing a large-scale ship-source oil pollution accident.

Yet, it must be kept in mind that there exist some specific limitations of legislative jurisdiction of a coastal State over foreign ships in its territorial seas. One of such limitations is incorporated in Art. 21(2) of UNCLOS, which provides that laws which a coastal State adopts in regards to innocent passage through its territorial sea shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards (what should be understood by “generally accepted international rules or standards” will be explained later). Another specific limitation of legislative jurisdiction of a coastal State over foreign ships in its territorial sea is incorporated in Art. 42(1)(b) of UNCLOS, which provides that, where the territorial sea consists of a strait subject to the regime of transit passage, pollution regulations may be adopted only if they give effect to applicable international regulations (what should be understood by “applicable international regulations” also will be explained later).

3.6.2.6. Enforcement Jurisdiction of a Coastal State over Violations in Its Territorial Sea

Scenario “territorial sea – territorial sea”

A foreign ship is alleged to have carried out in the territorial sea of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the territorial sea of this state (in addition, possibly also other areas) and the ship in question is still in the territorial sea of the state.

As it was already stated above, Art. 211(4) of UNCLOS gives a coastal State the right to adopt laws and regulations in respect to the prevention, reduction and control of pollution in its territorial sea, including pollution from foreign ships exercising their right of innocent passage. Nevertheless, the same legal norm notes that these laws and regulations shall not hamper innocent passage. Similarly, Art. 220(2) of UNCLOS, on the one hand, gives a coastal State right to undertake physical inspection of the foreign ship navigating in its territorial sea (when there are clear grounds for believing that during its passage the ship has violated laws and regulations in respect to prevention, reduction and control of pollution) and, where the evidence so warrants, to institute relevant proceedings, including detention of the ship.³⁹⁰ On the other hand, the same legal norm retains general limitation of not hampering innocent passage (by stating that all above-mentioned enforcement measures should be carried out “without prejudice to the application of the relevant provisions of Part II, section 3”, that is, provisions on innocent passage through the territorial sea). Yet, such enforcement measures like physical inspection and detention of the ship or arrest of crew always hampers innocent passage (or rather – any passage, innocent or non-innocent). Pozdnakova thinks alike. She has stated: “Clearly, the exercise of an enforcement measure such as the physical inspection of a ship in transit would (at least temporarily) interrupt the vessel’s passage for the

³⁹⁰ Reference simply to “relevant proceedings” in Art. 220(2) of UNCLOS leaves to a coastal State very broad discretion to decide exactly what measures to apply for prevention, reduction and control of pollution of its territorial sea from foreign ships. Thus, in principle, also such measures as criminal procedures and sanctions against seafarers on board these ships may be applied.

duration of the inspection.”³⁹¹ If so, do Art. 211(4) and Art. 220(2) of UNCLOS, in fact, say that a coastal State has the right to apply such enforcement measures like physical inspection and detention of the ship, or arrest of crew only against those foreign ships whose passage through the territorial sea of a respective coastal State is non-innocent?

The question becomes even more complicated after reading Art. 24(1) of UNCLOS. Art. 24(1) contains what seems to be a cross-reference to Art. 211(4) and Art. 220(2) – it obliges a coastal State not to hamper innocent passage of foreign ships through the territorial sea, yet, allows to do so “in accordance with the Convention” (presumably also Art. 211(4) and Art. 220(2) of the Convention). In other words, there are mutual saving clauses at both sides of the units to be interpreted, what just sends the interpreter of these units back and forth, without giving clear answers. “Saving clause” is a provision in a legal document containing an exemption from one or more of its conditions or obligations.³⁹²

Despite the above-described “tangle” of Art. 24, 211 and 220 of UNCLOS, in the opinion of this author, it is still possible to conclude that, at least in cases when particular ship-source pollution in territorial sea is defined as a crime under national law of the coastal State, this coastal State has the right to apply against the foreign ship in its territorial sea alleged of causing respective pollution also such enforcement measures which hamper the passage (like physical inspection and detention of a ship or arrest of crew), regardless of whether the pollution in question was caused wilfully and is serious (what renders the passage non-innocent), or was caused unintentionally and is not serious (what does not render the passage non-innocent). The article that allows making such a conclusion is Art. 27 of UNCLOS, which deals specifically with criminal jurisdiction on board foreign ships. This article first of all sets the general rule of non-applicability of criminal jurisdiction of

³⁹¹ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 101.

³⁹² Judy Pearsall, (ed.), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 2001 at p. 1654.

the coastal State on board a foreign ship passing through the territorial sea. Art. 27(1) states:

The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage [...]

However afterwards, the same article lists exceptions to this general rule. Among these exceptions are the following cases:

- cases when consequences of the crime extend to the coastal State;
- cases when the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- cases when the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State.

At least one of the above-mentioned exceptions from the general rule of non-applicability of criminal jurisdiction of the coastal State on board a foreign ship passing through the territorial sea will always be present in case of ship-source pollution – consequences of the crime (pollution) will extend to the coastal State (at least its territorial sea). Consequently, in case of ship-source pollution the above-mentioned general rule of non-applicability of criminal jurisdiction does not work.

Art. 27(1) of UNCLOS is comparatively clear. Also, its underlying idea is clear – from the commentary of the International Law Commission on its draft article on arrest on board a foreign ship. This draft article, with only minor additions, later became Art. 27 of UNCLOS. The commentary states:

This article enumerates the cases in which the coastal State may stop a foreign ship passing through its territorial sea for the purpose of arresting persons or conducting an investigation in connexion with a criminal offence committed on board the ship during the said passage. In such a case a conflict of interests occurs; on the one hand, there are the interests of shipping, which should suffer as little interference as possible; on the other hand, there are the interests of the coastal State, which wishes to enforce its criminal law throughout its territory. The coastal State's authority to bring the offenders before its courts (if it can arrest them) remains undiminished, but its power to arrest persons on board ships which are merely passing through the territorial sea is limited to the cases enumerated in the article.³⁹³

³⁹³ UN, Document A/3159: Report of the International Law Commission Covering the Work of Its Eight Session, 23 April-4 July 1956, in *Yearbook of the International Law Commission, 1956*, Volume II, New York: United Nations Publications, 1957 at p. 275.

It can be assumed that in regards to criminal jurisdiction also the limitations on the application of specific enforcement measures due to the need not to hamper innocent passage (as incorporated in Art. 211(4) and Art. 220(2) of UNCLOS) as well as the exception from the general rule of not hampering innocent passage (as incorporated in Art. 24(1) of UNCLOS), in fact, predominantly refer to Art. 27 of UNCLOS – former to its general rule of non-applicability of criminal jurisdiction, later to its exceptions from this general rule. This link can be depicted as follows:

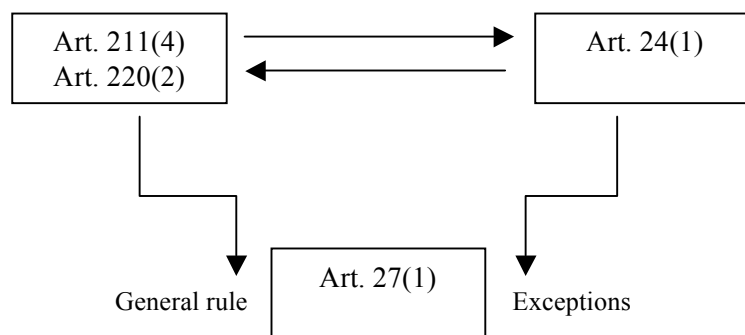


Figure 5 – Flow of references in UNCLOS establishing the competence of a coastal State to apply such criminal enforcement measures which hamper innocent passage through territorial sea.

Many authors have drawn similar conclusions. For example, Shearer has stated:

[...] negligent or less serious acts of pollution, which the coastal State may proscribe under Articles 21(1)(f) and 211(4), may not make passage non-innocent but may justify the exercise of criminal jurisdiction, including stopping, boarding, arrest and prosecution.³⁹⁴

It means that also under the above-given Scenario “territorial sea – territorial sea” a coastal State, in principle, may exercise its criminal jurisdiction over the foreign ship in question; *inter alia*, it may apply such criminal procedures against the ship and her crew which hamper innocent passage.

³⁹⁴ I.A. Shearer, “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels”, in *International and Comparative Law Quarterly*, Volume 35, Issue 2, April 1986 at p. 326. See also Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 38, 58-64, 101, 134 and 135; Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at pp. 249-250.

At the end, a separate note should be made about enforcement jurisdiction of a coastal State in its territorial sea, where this territorial sea consists of a strait used for international navigation. Art. 34(1) of UNCLOS states:

The regime of passage through straits used for international navigation [...] shall not in other respect affect the legal status of the waters forming such straits or the exercise by the States bordering the strait of their sovereignty or jurisdiction over such waters [...]

This rule suggests that everything that was said previously regarding enforcement jurisdiction of a coastal State in the territorial sea is applicable also when territorial sea forms the strait used for international navigation. There exists discussion on how, exactly, Art. 233 of UNCLOS “Safeguards with respect to straits used for international navigation” shall be interpreted – either as limiting jurisdiction of states bordering the strait over ships in transit passage only to cases when major damage or the threat of major damage to the marine environment of the strait is caused, or as not setting such a limitation.³⁹⁵ However, this discussion is irrelevant for the purposes of this dissertation, because a large-scale ship-source oil pollution accident during transit passage through the strait will probably always cause major damage or the threat of major damage to the marine environment of the strait. Consequently, in case of such accidents, anyway, the general system of jurisdiction will apply.

Scenario “territorial sea – internal waters”

A foreign ship is alleged to have carried out in the territorial sea of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the territorial sea of this state (in addition, possibly also other areas), but the ship in question has already left the territorial sea and is now in the internal waters of the state (is inward-bound).

³⁹⁵ For this discussion see, for example, David W. Abecassis, (ed.), *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice*, 2nd edition, London: Stevens and Sons, 1985 at p. 107.

Art. 220(1) of UNCLOS states:

When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may [...] institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea [...] of that State.

Literal (philological) interpretation of Art. 220(1) of UNCLOS suggests that in cases when after alleged ship-source pollution violation in territorial sea of the state foreign ship proceeds into internal waters of this state (is inward-bound) a coastal State may exercise its enforcement jurisdiction against this ship only if she is “within a port or at an off-shore terminal” and only if she is within this port or at this off-shore terminal “voluntarily”. It means that a coastal State may not exercise its enforcement jurisdiction when the ship is in some other place in its internal waters other than a port or an off-shore terminal and, even if the ship is within a port or at an off-shore terminal, a coastal State still may not exercise its enforcement jurisdiction if the ship is there because of *force majeure* or distress (for what any maritime accident most probably will qualify).³⁹⁶ Some scholars and judges prefer to adopt the above-mentioned literal (philological) interpretation of Art. 220(1) of UNCLOS.³⁹⁷

However, the above-given purely literal (philological) interpretation of Art. 220(1) of UNCLOS makes enforcement jurisdiction of a coastal State over ship-source pollution violations in its territorial sea extremely restrictive and illogical. Under respective interpretation, a coastal State is basically forbidden to enforce its laws and regulations if after an alleged violation a ship has proceeded into the maritime zone of wider jurisdiction of this state (internal waters), while it could enforce its laws and regulations if after an alleged violation a ship stayed in the maritime zone of narrower jurisdiction of this state (territorial sea). From the

³⁹⁶ For more detailed explanation of the requirement of “voluntariness” see, for example, Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 68; Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 272; Ho-Sam Bang, “Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea”, in *Journal of Maritime Law and Commerce*, Volume 40, No. 2, April 2009 at p. 300.

³⁹⁷ See, for example, CHURCHILL and LOWE, *ibid.* at p. 68; Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012 at p. 81; Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 187.

perspective of a ship, it means that a foreign ship can escape liability for ship-source pollution violation in territorial sea of the state just by proceeding into internal waters of this state after the violation has been committed which appears to be absurd. Furthermore, enforcement powers given to a coastal State by Art. 220(2) of UNCLOS, such as power to conduct physical inspection of a ship alleged of ship-source pollution violation in the territorial sea and power to detain this ship and her crew, if evidence so warrants, at least in some instances, can be realized only by bringing the ship into a port of the coastal State. Yet, if a coastal State is allowed to exercise its enforcement jurisdiction only when the ship in question is “voluntarily” within a port, then any activity of a coastal State related to bringing the ship into a port as well as any further enforcement measures will become illegal once the ship crosses the territorial sea - internal waters borderline, which again is plainly absurd. In the opinion of this author, these “arguments of absurdity”, alone, are enough to prove that under the Scenario “territorial sea – internal waters” a coastal State may exercise its enforcement jurisdiction just like under the Scenario “territorial sea – territorial sea”. Yet, for those who do not see “argument of absurdity” as a strong enough argument to prove something, systemic interpretation of relevant rules of UNCLOS can be provided in addition.

In similar cases to the Scenario “territorial sea – internal waters”, when after an alleged ship-source pollution violation a ship is inward-bound (thus, proceeds into the maritime zone of wider jurisdiction of a coastal State), UNCLOS recognizes the right of a coastal State to exercise its enforcement jurisdiction over the ship just as if this ship was still present in the maritime zone where alleged violation took place, for example, when after the violation in EEZ a ship is now in territorial sea (see Scenario “EEZ – EEZ or territorial sea” below). Even in cases when after an alleged ship-source pollution violation a ship is outward-bound (thus, proceeds into the maritime zones of narrower jurisdiction of a coastal State) UNCLOS recognises the right of a coastal State to exercise its enforcement jurisdiction over the ship just as if this ship was still present in the maritime zone where alleged violation took place, for example, when after the violation in internal waters ship is now in territorial sea (see

Scenario “internal waters – territorial sea” above) or when after the violation in internal waters, territorial sea or EEZ ship is now in EEZ, on high seas or in EEZ of another state, and a coastal State is exercising hot pursuit (see Sub-chapter 3.6.2.9, “Enforcement Jurisdiction of a Coastal State in Case of Hot Pursuit” below). If so, it would be logical also in cases when after an alleged ship-source pollution violation in the territorial sea of the state a ship is now in internal waters of this state to allow said coastal State to exercise its enforcement jurisdiction over the ship just as if this ship was still present in the territorial sea.

Travaux préparatoires of UNCLOS are of little help for understanding whether the above-mentioned power of a coastal State, existence of which is suggested by common sense and systemic interpretation of UNCLOS, indeed, exists. Initial drafts of UNCLOS parallel to legal norm which later became Art. 220(1) in the same article contained legal norm which stated: “Nothing in this Article shall be construed as affecting the right of States to apply their laws and regulations for vessels within their internal waters.”³⁹⁸ This legal norm is not present in later drafts. It suggests that the ultimate intention of the drafters was to “affect the right of states to apply their laws and regulations for vessels within their internal waters”. Existence of such intention can be proven also by reference to the fact that during the drafting of UNCLOS, at informal negotiations, states expressed the view that rule which later became Art. 220(1) constitutes “an undue interference with the rights of the coastal State”.³⁹⁹ If it would not be intended by Art. 220(1) to put strong limits on coastal State jurisdiction in its internal waters, states most probably would not have expressed the above-mentioned concern. However, it is not clear as to exactly why initial drafts were changed – it might have been because of deliberate will to limit coastal State jurisdiction in its internal waters, but it might have, also, well been because of the belief that nothing can affect coastal State jurisdiction in its internal waters, where it exercises full sovereignty, and, therefore, it is simply not necessary to construct additional rules about it. In such case, Art. 220(1) of UNCLOS should

³⁹⁸ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at pp. 289-290.

³⁹⁹ NORDQUIST, *ibid.* at p. 299.

not be seen as a restriction of general regime of coastal State jurisdiction in its internal waters, but as an “addition” to it. This author supports this conclusion, because common sense and systemic interpretation of UNCLOS, as described above, points towards it. At the same time, this author wishes that UNCLOS was clearer on the issue in question, because, without that, different interpretations are still possible.

What “addition” may Art. 220(1) of UNCLOS possibly bring to the general regime of coastal State jurisdiction in its internal waters? It must be assumed that such “addition” indeed exists, because, otherwise, Art. 220(1) of UNCLOS would be “empty” rule. This author can imagine only one scenario for accommodation of which Art. 220(1) of UNCLOS exists – the scenario when just after committing an alleged ship-source pollution violation in the territorial sea a foreign ship proceeds outwards (not inwards), without hot pursuit being exercised, leaving respective waters, and, then, after a shorter or longer period returns. It is hard to find strong evidence, either in UNCLOS, itself, or in other sources, proving that, indeed, Art. 220(1) of UNCLOS exists for accommodation of the above-mentioned scenario. Consequently, authoritative clarification in this respect is desirable. However, there is at least one legal norm in UNCLOS – Art. 27(2) – which points towards a respective conclusion.

Art. 27(2) of UNCLOS prescribes that a coastal State may carry out an arrest or investigation on board a foreign ship passing through the territorial sea “after leaving internal waters”. Such wording of Art. 27(2) suggests that:

- on the one hand, this legal norm extends coastal State jurisdiction over violations in its internal waters, as it was described under Scenario “internal waters – territorial sea” above, but
- on the other hand, this legal norm limits coastal State jurisdiction over violations in its internal waters – it forbids a coastal State to carry out an arrest or investigation on board a foreign ship passing through the territorial sea if this ship, just after the alleged violation in internal waters, left these waters as well as territorial sea of the particular state and has now come back

(is passing through the territorial sea “after leaving EEZ” or other area, except internal waters of particular state).

Such construction of Art. 27(2) of UNCLOS, in turn, suggests that the intention of drafters of UNCLOS was to allow a coastal State to apply on-board a foreign ship enjoying the right of innocent passage such enforcement measures as arrest or investigation (measures which clearly hamper innocent passage) only when the state reacts to the alleged violation quickly, but when the state fails to react quickly (when a ship just after an alleged violation leaves jurisdiction of the particular state, without hot pursuit being exercised) – to reduce enforcement jurisdiction of a coastal State, presumably, to the limits established by Art. 220(1) of UNCLOS (basically, port State jurisdiction).

3.6.2.7. Legislative Jurisdiction of a Coastal State over Violations in Its EEZ

As was earlier stated, in accordance with Art. 56(1) of UNCLOS, in its EEZ, a coastal State has jurisdiction with regard to, among other things, the protection and preservation of the marine environment. However, this jurisdiction is limited: in accordance with Paragraph 2 of the same article, in exercising its rights and performing its duties in EEZ 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 UNCLOS.

Limitation of legislative jurisdiction of a coastal State over ship-source pollution violations in its EEZ can be found in Art. 211(5) of UNCLOS. This rule prescribes that a coastal State may, in respect of its EEZ, adopt only such laws for the prevention, reduction and control of pollution from ships which conform to and give effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference (hereinafter – “generally accepted international rules and standards”, or GAIRAS).

Unfortunately, the concept of GAIRAS is so vague that views on its exact content differ. Some scholars simply associate GAIRAS with IMO standards.⁴⁰⁰ Others limit GAIRAS to only those IMO standards which are widely ratified.⁴⁰¹ This author, however, tends to follow the explanation of GAIRAS given by the International Law Association, specifically its Committee on Coastal State Jurisdiction Relating to Marine Pollution, because the final report of this Committee seems to be the document which, at least so far, has analysed the concept of GAIRAS in the most comprehensive manner. In accordance with this report, GAIRAS are rules and standards supported by sufficient state practice.⁴⁰² Exactly the practice of states is the central element for determining whether a particular rule or standard may be considered as generally accepted.⁴⁰³ Consequently, there might be rules and standards which formally are not binding law (for example, rules of particular IMO resolution), but are still GAIRAS, because, in practice, states widely apply this soft law. Also the opposite is true – there might be rules and standards which formally are binding law for a particular state (for example, rules of particular IMO convention), but, nevertheless, are not GAIRAS, because either the legal instrument in question is poorly ratified or it has not been implemented wide enough, despite being widely ratified. A case might also be that some parts of the single instrument are implemented wide enough (and consequently constitute GAIRAS), but other parts of the same instrument are not implemented wide enough (and consequently do not constitute GAIRAS).⁴⁰⁴

⁴⁰⁰ See, for example, Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 67; Doris Konig, “The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 781.

⁴⁰¹ See, for example, Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 346.

⁴⁰² International Law Association, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report, 2000 at p. 38.

⁴⁰³ Report of International Law Association, *ibid.* at p. 37.

⁴⁰⁴ Report of International Law Association, *ibid.* at pp. 38-39.

The main problem in regards to GAIRAS is non-existence of clear-cut criteria for determining whether a particular degree of acceptance of a rule or standard is high enough to reach the threshold of “generally accepted”. The Committee on Coastal State Jurisdiction Relating to Marine Pollution, in its report, concluded that the concept of GAIRAS was intentionally kept vague to allow flexibility to changing practices and that this vagueness should not be considered as impediment. Despite this conclusion, this author agrees with those members of the Committee who urged for more precision, through the establishment of the internationally agreed minimum requirements to be met for a rule or standard to be considered as “generally accepted”.⁴⁰⁵ Without such internationally agreed criteria, it is almost impossible for a coastal State to legislate upon activities of foreign ships in its EEZ, without fearing to overstep limits of its legislative jurisdiction established by UNCLOS.

The concept of GAIRAS stands very close to the concept of customary international law. Just like GAIRAS, customary international law is generally accepted practice.⁴⁰⁶ Yet, GAIRAS may be less generally accepted than customary international law.⁴⁰⁷ Thus, customary international law, in fact, is one of the sub-types of GAIRAS – those GAIRAS which have reached a very high level of acceptance. Presumably, it is relatively easy to identify such a high level of acceptance. Consequently, a coastal State can legislate upon those GAIRAS which have reached the level of customary international law more safely.

It can be argued that the general prohibition of ship-source oil pollution (as it is incorporated in Reg. 15 and 34 of Annex I of MARPOL) has reached the level of customary international law, or at least “ordinary” GAIRAS. Similar argument can be made in regards to those legal norms in IMO “safety conventions” (such as SOLAS, COLREG, STCW) non-observance of which can potentially lead to ship-source oil pollution. Consequently, if national law on criminal procedures and sanctions applicable against seafarers on-board a foreign ship alleged of causing a

⁴⁰⁵ Report of International Law Association, *ibid.* at p. 38.

⁴⁰⁶ See UN, *Statute of the International Court of Justice*, 18 April 1946, Art. 38(1)(b).

⁴⁰⁷ Tullio Treves, “Navigation”, in Rene Jean Dupuy and Daniel Vignes, (ed.), *A Handbook on the New Law of the Sea*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 875.

large-scale ship-source oil pollution accident in EEZ of the state conforms to and gives effect to the above-mentioned legal norms of MARPOL and IMO “safety conventions”, the respective state most probably has not overstepped the limits of its legislative jurisdiction under UNCLOS.

At the end of this sub-chapter, a separate note should be made about ice-covered areas within the limits of EEZ, because UNCLOS contains special rule – Art. 234 – on such areas. Art. 234 states:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

The exact content of Art. 234, particularly its correlation with the general regime of coastal State jurisdiction, is not fully clear, and, consequently, requires further research.⁴⁰⁸ However, the mere existence of Art. 234 suggests that in regards to ship-source pollution in specific ice-covered areas within the limits of its EEZ (ice-covered areas, “where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance”) a coastal State has wider jurisdiction compared to other areas within the same maritime zone. Thus, it should be concluded that in regards to ship-source pollution in respective ice-covered areas a state may legislate beyond GAIAS as long as the adopted law is “non-discriminatory” and pays due regard to “navigation and the protection and preservation of the marine environment based on the best available scientific evidence”.

⁴⁰⁸ For relevant discussion see, for example, Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at pp. 420-421 and 468; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 191; Bernard H. Oxman, “Observations on Vessel Release Under the United Nations Convention on the Law of the Sea”, in *International Journal of Marine and Coastal Law*, Volume 11, Issue 2, May 1996 at p. 204.

3.6.2.8. Enforcement Jurisdiction of a Coastal State over Violations in Its EEZ

Scenario “EEZ – EEZ or territorial sea”

A foreign ship is alleged to have carried out in the EEZ of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the EEZ of this state (in addition, possibly also other areas) and the ship in question is either still in the EEZ of the state or has left the EEZ and is now in the territorial sea of the state (is inward-bound).

Similar to the legislative jurisdiction of a coastal State over ship-source pollution violations in its EEZ, enforcement jurisdiction of a coastal State over ship-source pollution violations in its EEZ is also limited. Limitations of respective enforcement jurisdiction can be found in Art. 220(3), (5) and (6) as well as Art. 228(1) of UNCLOS. Limitations in Art. 220(3) and Art. 228(1) are not applicable to situations which involve large-scale pollution. Thus, in relation to the Scenario “EEZ – EEZ or territorial sea” only Art. 220(5) and (6) of UNCLOS should be considered.

Art. 220(5) states:

Where there are clear grounds for believing 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 substantial discharge causing or threatening significant pollution of the marine environment, the State may undertake physical inspection of the vessel for matters related to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

Art. 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 [...], provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

The difference between Paragraph 5 and Paragraph 6 is that Paragraph 5 talks about situations when discharge causes or threatens “significant pollution of the marine environment”, but Paragraph 6 talks about situations when discharge causes or threatens “major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone”. Unfortunately, UNCLOS does not give any guidelines on how to distinguish the “situation of significant pollution” from the “situation of major damage”. Many commentators have acknowledged this fact.⁴⁰⁹ As a result, Churchill and Lowe concluded that, in practice, states simply will tend to assume that any significant discharge falls into “situation of major damage” category.⁴¹⁰ If so, only Art. 220(6) of UNCLOS retains practical importance in relation to the Scenario “EEZ – EEZ or territorial sea”.

Differently from Paragraphs 3 and 5, Paragraph 6 of Art. 220 does not contain specific limitations of enforcement jurisdiction of a coastal State; under Paragraph 6 of Art. 220 a coastal State may institute any proceedings.⁴¹¹ However, Paragraph 6 retains one general limitation. It, just like Paragraphs 3 and 5, covers only “violations of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that state conforming and giving effect to such rules and standards”. Thus, what a coastal State may enforce under Art. 220(6) of UNCLOS are only “applicable international rules and standards”.

⁴⁰⁹ See, for example, Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Hague: Kluwer Law International, 1998 at p. 387; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 109-110; Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 349.

⁴¹⁰ CHURCHILL and LOWE, *ibid.* at p. 346.

⁴¹¹ Reference simply to “proceedings” leaves to a coastal State very broad discretion to decide exactly what measures to apply for prevention, reduction and control of major pollution from a foreign ship in its EEZ. Thus, in principle, also such measures as criminal procedures and sanctions against seafarers on board these ships may be applied.

“Applicable international rules and standards” are international rules and standards which, at the time of the violation, are operational in the direct relationship between the flag State on the one hand, and the coastal State on the other. In other words, “applicable international rules and standards” is a relative term: which rules and standards are “applicable” depends on the various rights and obligations accepted by the states involved in the enforcement situation. Consequently, before exercising enforcement jurisdiction under Art. 220(6) of UNCLOS, a coastal State must determine whether the flag State of a ship involved in the enforcement situation has accepted certain rights or obligations (in other words, whether rights and obligations under flag State jurisdiction “match” with rights and obligations under coastal State jurisdiction). Acceptance of rights and obligations can occur through various processes, including formal adherence to the legal instrument.⁴¹²

If both states involved in the enforcement situation are State Parties to UNCLOS, “applicable international rules and standards” can be nothing else but GAIRAS, as far as by national law of the coastal State they are required to be observed in EEZ of this state. It is so because if both states involved in the enforcement situation are State Parties to UNCLOS:

- on the one hand, in accordance with Art. 94(5) and Art. 211(2) of UNCLOS, a flag State is required to observe all GAIRAS. It is obliged to do so even if it has not formally adhered to the legal instruments containing these GAIRAS – as the very purpose of introducing the concept of GAIRAS in UNCLOS is to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned but which are, nevertheless, respected by most states.⁴¹³
- on the other hand, a coastal State is permitted to adopt only such laws for the prevention, reduction and control of pollution from ships in its EEZ, which conform to GAIRAS. So, nothing more, but possibly less, than GAIRAS may be adopted.

⁴¹² International Law Association, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report, 2000 at p. 40-42. See also POZDIAKOVA, *supra* note 409 at p. 134.

⁴¹³ Report of International Law Association, *ibid.* at p. 33. See also POZDIAKOVA, *ibid.*

Here, near the end of this section, again, a separate note should be made about ice-covered areas. According to Art. 234 of UNCLOS, similarly as legislative jurisdiction, also enforcement jurisdiction of a coastal State in regards to ship-source pollution in specific ice-covered areas within the limits of its EEZ is wider than compared to other areas within the same maritime zone. Consequently, it should be concluded that in regards to ship-source pollution in respective ice-covered areas a state may enforce not only “applicable international rules and standards” but also other rules and standards as long as respective enforcement is “non-discriminatory” and pays due regard to “navigation and the protection and preservation of the marine environment based on the best available scientific evidence”.

Scenario “EEZ – internal waters”

A foreign ship is alleged to have carried out in the EEZ of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the EEZ of this state (in addition, possibly also other areas), but the ship in question has left the EEZ as well as the territorial sea and is now in the internal waters of the state (is inward-bound).

Scenario “EEZ – internal waters” is very similar to Scenario “territorial sea – internal waters”, already analysed above. Everything that was said regarding Scenario “territorial sea – internal waters”, by analogy, is true in regards to Scenario “EEZ – internal waters”. The difference between the scenarios is only one: coastal State jurisdiction over ship-source pollution violations in its territorial sea is not limited by the requirement of “applicable international rules and standards” as described under Scenario “EEZ – EEZ or territorial sea” (consequently, this limitation, also, does not apply when a ship enters internal waters after committing an alleged violation in the territorial sea), while coastal State jurisdiction over ship-source pollution violations in its EEZ is limited by the requirements of “applicable international rules and standards” as described under Scenario “EEZ – EEZ or territorial sea” (consequently, this limitation also applies when a ship enters internal waters after committing an alleged violation in the EEZ; just like in accordance with

Art. 220(6) of UNCLOS, it applies when a ship enters the territorial sea after committing an alleged violation in the EEZ).

3.6.2.9. Enforcement Jurisdiction of a Coastal State in Case of Hot Pursuit

Art. 111(1) of UNCLOS states:

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.

Consequently, if competent authority of the coastal State has good reason to believe that by causing large-scale ship-source oil pollution in its internal waters or territorial sea a foreign ship has violated laws and regulations of the state, for example, its Criminal Code, that state may commence hot pursuit of the ship in question. Art. 111(2) states: “The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone [...]”. Consequently, hot pursuit can be commenced also after an alleged ship-source pollution violation in EEZ. Hot pursuit can be exercised as far as EEZ of another state. Such conclusion can be derived from Art. 111(3) which reads as follows: “The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State”.

However, it must be kept in mind that who may carry out hot pursuit and how, is strictly regulated by Art. 111 of UNCLOS. If a state does not follow these rules, it loses its right to hot pursuit. Rules of hot pursuit under Art. 111 are as follows:

- pursuit must be commenced when the foreign ship or one of its boats is respectively within internal waters, territorial sea or EEZ of the pursuing state;
- outside the territorial sea, pursuit may be continued only if it has not been interrupted;
- pursuit may be commenced only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the ship to be pursued;

- pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being in government service and authorised to that effect.

For example, in the *M/V “SAIGA” (No. 2)* case, ITLOS found that in stopping and arresting Saint Vincent and the Grenadine’s ship *Saiga* on high seas, Guinea acted in contravention of Art. 111 of UNCLOS, *inter alia*, because no visual or auditory signals were given to *Saiga* before the alleged pursuit began and because the alleged pursuit was interrupted.⁴¹⁴

Art. 111 of UNCLOS does not explicitly talk about specific enforcement measures that can be applied against a foreign ship after hot pursuit of that ship. However, the right of hot pursuit would be an “empty” right if not to assume that after “catching” the ship as a result of hot pursuit a coastal State has jurisdiction over this ship *mutatis mutandis* as in the maritime zone in which an alleged violation took place.

3.6.2.10. Enforcement Jurisdiction of a Port State

Scenario “high seas – port or off-shore terminal”

A foreign ship is alleged to have carried out on the high seas conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is high seas (in addition, possibly also other areas) and now the ship in question is within a port or at an off-shore terminal of the state.

Art. 218(1) of UNCLOS states:

When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may [...] undertake investigations and, where the evidence so warrant, institute proceedings in respect of any discharge from the vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference.

⁴¹⁴ *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS, paragraphs 146-150.

The jurisdictional regime incorporated into Art. 218 of UNCLOS is innovative extraterritorial jurisdiction, which even has some similarities to universal jurisdiction.⁴¹⁵ Based on this article, the state, in principle, may “undertake investigations” and “institute proceedings”⁴¹⁶ also in case of the above-given Scenario “high seas – port or off-shore terminal”.

However, port State jurisdiction under Art. 218 of UNCLOS is still strongly limited by a number of conditions. First, this jurisdiction may not be exercised if the ship in question is not “voluntarily within a port or at an off-shore terminal of a State”.⁴¹⁷ Secondly, this jurisdiction may not be exercised if the ship in question has not violated “applicable international rules and standards”.⁴¹⁸ Thirdly, upon request, the records of the investigation carried out under port State jurisdiction in accordance with Art. 218 of UNCLOS shall be transmitted to the flag State of a ship in question.⁴¹⁹ Fourthly, if within six months of the date on which proceedings to impose penalties for ship-source pollution violation were first instituted the flag State of a ship in question takes the proceedings in respect to corresponding charges, proceedings applied under port State jurisdiction in accordance with Art. 218 of UNCLOS shall be suspended. In other words, the flag State may pre-empt respective proceedings. When proceedings instituted by the flag State have been brought to a conclusion, the suspended proceedings shall be terminated. Any bond posted or other

⁴¹⁵ Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edition, Manchester: Manchester University Press, 1999 at p. 350; David Anderson, “The Role of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships Under the UN Convention on the Law of the Sea and Other International Agreements”, in *Singapore Journal of International and Comparative Law*, Volume 2, Issue 2, 1998 at pp. 568-569; Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 515.

⁴¹⁶ Reference simply to “investigations” and “proceedings” in Art. 218 of UNCLOS, again, leaves to a state very broad discretion to decide exactly what measures to apply for prevention, reduction and control of pollution from foreign ships. Thus, in principle, also such measures as criminal procedures and sanctions against seafarers on board these ships may be applied.

⁴¹⁷ Art. 218(1) of UNCLOS. Notion of “voluntariness” was already explained above, when Scenario “territorial sea – internal waters” was analysed.

⁴¹⁸ Art. 218(1) of UNCLOS. Notion of “applicable international rules and standards” was already explained above, when Scenario “EEZ – EEZ or territorial sea” was analysed.

⁴¹⁹ Art. 218(4) of UNCLOS.

financial security provided in connection with the suspended proceedings shall be released.⁴²⁰

Scenario “EEZ, territorial sea or internal waters of other state – port or off-shore terminal”

A foreign ship is now within a port or at an off-shore terminal of the state, but conduct of this ship which resulted in large-scale ship-source oil pollution took place in EEZ, territorial sea or internal waters of another state. The area affected by the pollution is also respectively EEZ, territorial sea or internal waters of this other state (in addition, possibly also other areas).

Art. 218(1) of UNCLOS does not talk only about ship-source pollution violations on high seas. It talks about ship-source pollution violations “outside the internal waters, territorial sea or exclusive economic zone” of a particular state, consequently, also about ship-source pollution violations in EEZ, territorial sea or internal waters of other state.

All limitations of port State jurisdiction in respect to ship-source pollution violations on high seas, introduced above, under Scenario “high seas – port or off-shore terminal” are applicable also in respect to ship-source pollution violations in EEZ, territorial sea or internal waters of other state. However, regarding violations in EEZ, territorial sea or internal waters of another state port State jurisdiction is limited even further. First, in this case port State jurisdiction cannot be exercised if it is not requested either by flag State of the ship in question, or by state in EEZ, territorial sea or internal waters of which the violation took place, or by the state damaged or threatened by the violation. Without such request, port State jurisdiction can be exercised only if the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the state instituting the proceedings.⁴²¹ Secondly, upon request of the coastal State, records of the investigation carried out under port State jurisdiction shall be transmitted to the coastal State.⁴²² Thirdly, upon request of

⁴²⁰ Art. 228(1) of UNCLOS.

⁴²¹ Art. 218(2) of UNCLOS.

⁴²² Art. 218(4) of UNCLOS.

the coastal State, proceedings applied under port State jurisdiction shall be suspended. The evidence and records of the case, together with any bond or other financial security posted with the authorities of port State shall be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.⁴²³ It must be stressed here that suspension arrangements are slightly different in cases when a flag State pre-empts proceedings and in cases when a coastal State pre-empts proceedings. In case when a flag State pre-empts proceedings, any bond or other financial security which has been already applied can be kept and lifted only when a flag State has finalised investigation. Such construction suggests that a port State may re-establish proceedings if a flag State fails to execute its investigation (although it is not clear under what conditions, exactly, proceedings in port State may be re-established). In cases when a coastal State pre-empts proceedings, a port State does not maintain parallel control over the case – bond or other financial security together with the evidence and records of the case must be transferred to the coastal State and, after this transfer, proceedings in the port State must be terminated. In other words, a port State is allowed to control performance of a flag State, but not a coastal State.⁴²⁴

3.6.2.11. Legislative Jurisdiction of a Port State

The title of Art. 218 of UNCLOS refers only to enforcement. It does not refer to legislation. There are no other articles in UNCLOS addressing specifically legislative jurisdiction of a port State in regards to ship-source pollution violations on high seas or in EEZ, territorial sea or internal waters of other state. It may lead to the conclusion that, in regards to respective violations, a port State has only enforcement jurisdiction.

⁴²³ Art. 218(4) of UNCLOS.

⁴²⁴ Ho-Sam Bang, “Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea”, in *Journal of Maritime Law and Commerce*, Volume 40, No. 2, April 2009 at pp. 297-298; Ted L. McDorman, “Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention”, in *Journal of Maritime Law and Commerce*, Volume 28, No. 2, April 1997 at p. 318.

However, Art. 218 of UNCLOS allows a port State to “undertake investigations” and “institute proceedings” against an alleged offender. Consequently, a port State needs national law which accommodates these rights. Furthermore, not in every case is a port State required, after “undertaking investigation” and “instituting proceedings”, to pass proceedings on to other state (flag State or coastal State in question). Consequently, it must be assumed that in those cases, a port State can bring an alleged offender before its own court. Yet, it is impossible to do so without existence of national law which defines ship-source pollution violation on high seas and in EEZ, territorial sea or internal waters of another state as an offence and determines punishment for this offence. Because of the above-mentioned reasons this author agrees with the position of McDorman, who has stated:

[...] port State enforcement presupposes that the port State may enact domestic law to deal with discharges on the high seas or in the waters of another State. Thus, the port State provision necessarily involves a prescriptive authority.⁴²⁵

3.6.2.12. UNCLOS and General Principles of Criminal Jurisdiction of States

Under general public international law there are several distinct principles based on which a state may exercise its criminal jurisdiction, such as territorial principle, nationality principle, protective principle, passive personality principle and universality principle. Territorial principle allows the state to exercise jurisdiction over any crime committed within the state’s territory. This principle is universally recognised. There are two extended forms of territorial principle – subjective territorial principle and objective territorial principle. Subjective territorial principle allows the state to exercise jurisdiction over a crime commenced within the state’s territory but completed or consummated outside the state’s territory. Objective territorial principle allows the state to exercise jurisdiction over a crime, when effects of this crime are felt within the state’s territory, even though the crime, itself, (or at least its initiation or substantial elements) is committed outside the state’s

⁴²⁵ McDORMAN, *ibid.* at p. 315.

territory.⁴²⁶ Nationality principle allows the state to exercise jurisdiction over any crime committed by its national, irrespectively of whether it is committed within or outside the state's territory. Nationality principle, just like territorial principle, is generally recognised. Yet, some states are more likely than others to exercise their jurisdiction based on the nationality principle in cases where a crime is committed outside the state's territory.⁴²⁷ Protective principle allows the state to exercise jurisdiction over a crime committed by an alien outside the state's territory yet affecting security of the state. Also this principle is rather widely recognised. However, interpretation of the concept of security may vary from state to state. Usually, the protective principle is invoked in regards to such offences as political, national security, currency, immigration and economic offences.⁴²⁸ Passive personality principle allows the state to exercise jurisdiction over a crime committed by an alien outside the state's territory, yet harmful to nationals of the state. This principle has been accepted by different states at different times. However, it is not widely recognised. Scholars have described the respective principle as controversial and least justifiable.⁴²⁹ The universality principle allows a state with no territorial, nationality or other connection with a crime assert jurisdiction over that crime. Crimes attracting universal jurisdiction are those considered to be offensive to the international community as a whole. Within the maritime domain a classical example of crimes giving rise to universal jurisdiction are crimes encompassed by the term "piracy".⁴³⁰

⁴²⁶ Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford: Oxford University Press, 1998 at pp. 303-304; Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Cheltenham: Edward Elgar Publishing, 2012 at pp. 251-252.

⁴²⁷ BROWNLIE, *ibid.* at p. 306; BOAS, *ibid.* at pp. 255-256.

⁴²⁸ BROWNLIE, *ibid.* at p. 307; BOAS, *ibid.* at pp. 256-257.

⁴²⁹ BROWNLIE, *ibid.* at pp. 306-307; BOAS, *ibid.* at pp. 257-258.

⁴³⁰ BROWNLIE, *ibid.* at pp. 307-308; BOAS, *ibid.* at pp. 258-259.

National laws usually do not directly refer to different general principles of jurisdiction as they are introduced above. These principles serve only as evidence of the reasonableness of the particular national jurisdictional regime. Furthermore, in practice various principles interweave.⁴³¹ Similarly, rules of UNCLOS related to criminal jurisdiction over large-scale ship-source oil pollution accidents do not directly refer to the general principles of jurisdiction. Nevertheless, these rules are based on respective principles, at times on several of them simultaneously. For example, jurisdiction over pollution violations in internal waters or territorial sea of a state is clearly linked to the territorial principle. Jurisdiction over pollution violations in EEZ of a state can be labelled “quasi-territorial”, but, at the same time, it can be linked to the protective principle. Similarly, port State jurisdiction over pollution violations on high seas can be labelled “universal”, or at least “quasi-universal”, but, at the same time, it can be linked to the passive personality principle. Flag State jurisdiction may be associated with the territorial principle by those who still treat ships as “floating islands” of a state in which they are registered, but, most probably, it will be associated with the nationality principle by those who know that ships, just like people, have nationality.

Attempts to find linkages between specific legal norms of UNCLOS and general principles of jurisdiction, as it is done above, obviously, can be good exercise for the mind. However, such “exercise” has little practical importance. States have agreed on rules of UNCLOS, consequently, they should follow them, regardless of what underlying principles they are based on. Yet, interaction of UNCLOS with the general principles of jurisdiction may still cause practical problems – in situations when the general principles of jurisdiction allow but UNCLOS is silent. For example, general principles of jurisdiction (specifically, the nationality principle) allow the state to exercise jurisdiction over any crime committed by its national. UNCLOS is largely silent on jurisdictional competence of the state of nationality of an alleged offender. Similarly, UNCLOS is largely silent on situations covered by the subjective territorial principle and objective territorial principle, although such

⁴³¹ BROWNLEE, *ibid.* at p. 309.

situations are rather likely to happen also in the maritime domain. For instance, there might be the situation when cargo is loaded on board a ship within the state in such a manner as to cause a ship-source pollution accident, but the accident, itself, happens when the ship is abroad (situation covered by the subjective territorial principle). There might also be the situation when a ship-source pollution accident, itself, happens on high seas, but pollution affects the state's territory (situation covered by the objective territorial principle). This situation is covered by Art. 221 of UNCLOS and related to this article is the International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, 1969 (hereinafter – Intervention Convention). However, it is highly questionable whether Art. 221 of UNCLOS and the Intervention Convention cover criminal jurisdiction. Art. I(1) of the Intervention Convention states:

1. Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

Reference to “imminent danger” in this provision indicates that the Intervention Convention covers only the right of a coastal State to take operational (self-defence-type) measures; it does not cover application of criminal liability, which is a relatively complex, long-term measure. Tanaka is of a similar opinion. He has stated that measures taken in accordance with Art. I of the Intervention Convention “must not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as the end has been achieved”⁴³².

⁴³² Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2012 at p. 288. For a different opinion see, for example, the case study in this dissertation which indicates that under French national law criminal liability for ship-source oil pollution, *inter alia*, can be applied on the basis of the Intervention Convention.

The essential question which arises is – should the “silence” of UNCLOS, as introduced above, be understood as restricting application of the general principles of jurisdiction or not? Unfortunately, there is no clear answer to this essential question, neither in UNCLOS itself, nor in its *travaux préparatoires*. Also scholars are not absolutely united on the issue. There are those who say that UNCLOS limits application of the general principles of jurisdiction, at least the objective territorial principle in regards to ship-source pollution violations. For example, McDorman has argued that respective limits are established implicitly through Art. 218 (article on port State jurisdiction).⁴³³ However, there are also those who say that UNCLOS does not set such limitations.⁴³⁴ This author does not see strong arguments allowing to take one or another position – either to treat UNCLOS as restricting the application of the general principles of jurisdiction or not. Both positions can be justified. It, *inter alia*, means that states are largely free to choose which one of the two passes to follow. Obviously, it can trigger disputes among the states.

3.6.3. Criminal Jurisdiction of Officials

Art. 224 of UNCLOS states:

The powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

“This Part” mentioned in the article is Part XII of UNCLOS, which addresses protection and preservation of the marine environment including protection and preservation of the marine environment from ship-source oil pollution. Thus, Art. 224 of UNCLOS indicates that not everybody can apply enforcement measures against a foreign ship alleged to commit ship-source pollution violation. In fact, it

⁴³³ See, Ted L. McDorman, “Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention”, in *Journal of Maritime Law and Commerce*, Volume 28, No. 2, April 1997 at pp. 320-321.

⁴³⁴ See, for example, Peter Malanzcuk, *Akehurst’s Modern Introduction to International Law*, 7th revised edition, London: Routledge, 1997 at pp. 190-191; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 190.

goes without saying. What is less clear is to which officials, exactly, Art. 224 of UNCLOS gives the powers of enforcement.

Art. 224 of UNCLOS gives the powers of enforcement to “officials” or “warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect”. Under the rules of logic, the conjunction “or” (the conjunction which in Art. 224 is used to link officials with specific transport units) indicates logical summing: A or B means A+B.⁴³⁵ It indicates, *inter alia*, that both requirements should not be present in a particular enforcement situation, it is enough for one to be present. Thus, if an enforcement measure is applied by an “official”, it is not absolutely necessary that this official acts from the “warship, military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service and authorized to that effect”. Similarly, if enforcement measures are applied from the “warship, military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service and authorized to that effect”, it is not absolutely necessary that they are applied by an “official”.

To establish the system of enforcement jurisdiction as described above could not have been the intention of the drafters of Art. 224 of UNCLOS. The purpose of the article is clearly to give some amount of confidence to the persons against whom enforcement measures are applied that those who apply these measures are authorised to do so. For reaching this purpose:

- 1) interception of a ship at sea can be done only by “warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect”, otherwise persons on board the ship which is intercepted can easily assume that those who try to intercept the ship are not authorised to do it, but are actually, for example, robbers, hijackers or murderers;

⁴³⁵ Ivans Vedins, *Loģika*, Riga: Avots, 1998 at p. 62.

- 2) enforcement measures can be applied only by “officials”, enforcement measures cannot be applied by anybody on a “warship, military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service”, for example, a cook on a warship most probably will not be authorized to apply enforcement measures against alleged violators.

Whether a particular ship or aircraft is authorised to intercept ships at sea in case of an alleged ship-source pollution violation will be determined in the national law of the state intercepting the ship. It cannot be excluded that in practice on an *ad hoc* basis there might be the need for one authority (which is authorised to enforce measures against alleged ship-source pollution violators at sea) to use transport units of another authority (which strictly speaking is not authorised to enforce measures against alleged ship-source pollution violators at sea). People on a ship which is intercepted cannot know, in detail, these national, at times *ad hoc*, arrangements. And existence of them cannot be displayed on an intercepting transport unit. What can be displayed is only affiliation to a certain authority – by type of ship or aircraft as such (military) or by distinctive markings, such as flags and ensigns. Therefore, in direct relation between the ship which is being intercepted and the transport unit which is intercepting the ship in a specific enforcement situation, exact existence of relevant marking of transport unit which is intercepting the ship is essential element. Anything in regards to authorisation can be assured only once the ship has already been intercepted and officials have come on board.

In regards to officials, the situation is rather opposite. In direct relation between persons on board against whom enforcement measures are applied and the official who applies these measures, exactly the ability of the official to show his authorisation to act is essential and his “marking” is less important. Although “marking”, such as uniform, can add confidence that the person has relevant power of enforcement, “marking” alone does not say anything about scope of authorisation. Furthermore, officials of some authorities might not even be required to wear uniforms, for example, some police units. The instrument which is usually used for showing the scope of authorisation of the official, at least in broad terms, is his

service card. Consequently, also before applying enforcement measures against persons on board an official can be asked to show his service card and, if necessary, to give further explanations regarding his authorisation.

Taking into consideration the above-mentioned arguments regarding the purpose of Art. 224 of UNCLOS as well as specific practicalities regarding marking and authorisation of officials and transport units, this author suggests that Art. 224 of UNCLOS be read as follows:

- 1) that enforcement measures against persons on board a foreign ship alleged of committing ship-source pollution violation can be applied only by officials duly authorised to that effect and capable to prove this authorisation by showing the relevant service card;
- 2) that enforcement measures at sea against persons on board a foreign ship alleged of committing ship-source pollution violation can be applied only from warship, military aircraft, or other ship or aircraft on government service duly authorised to that effect and with the help of its marking clearly identifiable as indeed being warship, military aircraft, or other ship or aircraft on government service.

It is worth noting that issues surrounding Art. 224 of UNCLOS have also been indirectly addressed in one of the ITLOS cases – the *M/V “VIRGINIA G”* case. In this case, Panama alleged that the officials of Guinea-Bissau who boarded the *Virginia G* bore no identification. Yet, ITLOS concluded that this allegation was unfounded, as the boats used by the Guinea-Bissau National Fisheries Inspection and Control Service (FISCAP) inspectors were clearly marked, inspectors who boarded the *Virginia G* were dressed in a way identifying them as FISCAP officials and the Navy infantry were wearing military uniform.⁴³⁶

⁴³⁶ *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraphs 335 and 361.

3.7. *Human Rights and Articles 230(3) and 300 of UNCLOS*

Art. 230(3) of UNCLOS states:

In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

“Violations” here must be understood only to include ship-source pollution violations, because Art. 230 is incorporated into Part XII of UNCLOS which deals specifically with protection and preservation of the marine environment.

Art. 230(3) of UNCLOS does not define “recognised rights of the accused”. It has caused some discussions. Yet, the majority of scholars have ultimately concluded that respective legal norm requires states to observe all human rights of accused persons. For instance, Pozdnakova, *inter alia* by reference to the opinion of other authors, has concluded:

[...] although the expression “recognised rights of the accused” is not the subject of any authoritative interpretation on the record, the provision should be understood as referring to the human rights of the persons involved in the proceedings, as guaranteed under international treaties and customary law.⁴³⁷

Thus, Art. 230(3) of UNCLOS embraces all human rights about which this dissertation is concerned.

Such conclusion may lead to think that Art. 230(3) of UNCLOS is of great importance for the purpose of this dissertation. However, this is very questionable. It is even questionable whether this legal norm has any value at all. Human rights of the accused should be observed anyway. General human rights instruments require that. In addition, Art. 300 of UNCLOS requires that (as it will be explained later). If so, then Art. 230(3) of UNCLOS is tautology. Oxman has expressed similar opinion.⁴³⁸ He has noted three possible purposes of respective legal norm, though:

⁴³⁷ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 193.

⁴³⁸ See Bernard H. Oxman, “Human Rights and the United Nations Convention on the Law of the Sea”, in *Columbia Journal of Transnational Law*, Volume 36, No. 1-2, 1997 at pp. 425-426.

One purpose, of course, is to serve as a reminder. Another could be to influence courts or legislatures in those states where the human rights norms of customary international law or human rights treaties are not otherwise directly executed by the courts and have not otherwise been enacted as municipal law. Yet another purpose could be to subject compliance with the relevant human rights requirements to compulsory arbitration or adjudication under the Convention.⁴³⁹

Relevant *travaux préparatoires* of UNCLOS does not help to find out the true purpose of including Art. 230(3) in UNCLOS, as the norm simply “originated with the Informal Group of Juridical Experts and was carried forward in subsequent texts”.⁴⁴⁰ Yet, it is very likely that the legal norm originated to serve the first two purposes proposed by Oxman. Oxman’s third proposed purpose (or perhaps just unnoticed consequence) of including Art. 230(3) in UNCLOS (to subject compliance with the relevant human rights requirements to compulsory arbitration or adjudication under UNCLOS), in the opinion of this author, deserves to be analysed in the separate research – to find out whether, indeed, UNCLOS grants specific law of the sea arbitration and adjudication bodies very wide authority to also deal with human rights, and, if it does, whether such granting is adequate; for instance, are respective arbitrators and judges competent enough to deliver qualitative judgment on human rights?

Also Art. 300 of UNCLOS, presumably, grants to specific law of the sea arbitration and adjudication bodies authority to deal with human rights. Art. 300 of UNCLOS provides:

State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.

⁴³⁹ OXMAN, *ibid.* at p. 426.

⁴⁴⁰ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 370.

It seems that the intention of the drafters of UNCLOS was by Art. 300 to preclude abuse of rights by one state to the disadvantage of another state, not to preclude abuse of rights by the state to the disadvantage of individuals.⁴⁴¹ Yet, the term “abuse of rights” in Art. 300 is left unqualified. Thus, respective rule can be interpreted as forbidding not only abuse of rights in relation to states, but also abuse of rights in relation to individuals, which naturally also includes abuse of rights to the detriment of human rights. Similar opinion was expressed by Saint Vincent and the Grenadines in the *M/V “LOUISA”* case.⁴⁴²

Case law, so far, has set only one limitation in regards to application of Art. 300 of UNCLOS, namely, that this article may not be invoked on its own.⁴⁴³ As ITLOS stated it in the *M/V “VIRGINIA G”* case:

In the view of the Tribunal, it is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions did not act in good faith and acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated in this respect.⁴⁴⁴

However, all previous analysis of UNCLOS showed that there are rather many provisions within UNCLOS which are linked to human rights. Consequently, Art. 300 of UNCLOS, in principle, may be invoked for safeguarding also human rights. Will law of the sea arbitration and adjudication bodies, indeed, get involved into adjudicating not only specific law of the sea issues, but also general human rights issues, is still an open question.

⁴⁴¹ Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V*, Dordrecht: Martinus Nijhoff Publishers, 1991 at p. 151.

⁴⁴² See *The M/V “LOUISA” (No. 18) Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment of 28 May 2013, ITLOS, paragraphs 96, 127 and 131.

⁴⁴³ *The M/V “LOUISA” (No. 18) Case, ibid.*, paragraph 137; *The M/V “VIRGINIA G” (No. 19) Case (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS, paragraph 396.

⁴⁴⁴ *The M/V “VIRGINIA G” (No. 19) Case, ibid.*, paragraph 398.

4. MARPOL

4.1. Introduction

MARPOL is a combination of two legal instruments adopted in 1973 and 1978, respectively. On 2 November 1973 the International Conference on Marine Pollution (convened by IMO) adopted the initial Convention (MARPOL 73). On 17 February 1978 the International Conference on Tanker Safety and Pollution Prevention (also convened by IMO) adopted the Protocol, which modified the initial Convention (1978 MARPOL Protocol). The Protocol absorbed its parent Convention. Consequently, the Protocol and its parent Convention became one single instrument – MARPOL 73/78, or simply MARPOL.

MARPOL is the main international convention regulating the prevention of ship-source pollution. Apart from general provisions incorporated into the main text of the Convention and its protocols, MARPOL is divided into six, rather comprehensive, annexes which cover, respectively: pollution by oil (Annex I), pollution by noxious liquid substances in bulk (Annex II), pollution by harmful substances carried by sea in packaged form (Annex III), pollution by sewage (Annex IV), pollution by garbage (Annex V) and air pollution (Annex VI).

Each of the above-mentioned Annexes has entered into force at different times. Annex I, which is obligatory for all contracting parties of MARPOL, entered into force together with the main text of the Convention on 2 October 1983. Annex II, which is also obligatory, entered into force on 6 April 1987, in accordance with Article II of the 1978 MARPOL Protocol. Annexes III to VI are optional. Consequently, their entrance into force was dependent on how many states, at particular point of time, opted to bind themselves with the provisions of a particular annex. Annex III entered into force on 1 July 1992. Annex IV – on 27 September 2003. Annex V – on 31 December 1988. Annex VI – on 19 May 2005.

As of August 2016, 154 states were State Parties to MARPOL, including its obligatory annexes – Annex I and Annex II. 146 states were State Parties to Annex III; 138 states – to Annex IV; 151 states – to Annex V; 87 states – to Annex VI.⁴⁴⁵

Further in this sub-chapter, similarly as in the sub-chapter on UNCLOS, those rules of MARPOL, which can be linked to criminal procedures or sanctions applicable against seafarers after large-scale ship-source oil pollution accidents, are identified and analysed in detail. Again, this is done from a human rights perspective. Where respective rules of MARPOL are unclear or inconsistent with human rights or UNCLOS, recommendations are made regarding their interpretation.

4.2. Right to liberty and MARPOL

Earlier it was stated that one of the procedural rules of UNCLOS which must be followed in case of deprivation of liberty of a seafarer, and non-observance of which potentially may amount to the violation of the right to liberty of a particular seafarer, is the requirement to facilitate involvement of other States (particularly flag State of a ship in question) into proceedings. MARPOL contains similar requirement:

- Art. 5(3) of MARPOL requires: if a State takes any action against a foreign ship for the reason that the ship does not comply with the provisions of MARPOL, this State shall immediately inform the consul or diplomatic representative of the State whose flag the ship is entitled to fly, or if this is not possible, the Administration of the ship concerned.
- Art. 6(3) of MARPOL requires: if a State detects possible violation of MARPOL from the side of a foreign ship, this State shall furnish relevant evidence to the Administration of the ship concerned.

⁴⁴⁵ IMO, “A Summary of IMO Conventions”, in Focus on IMO, 2009 at pp. 39-50; *MARPOL: Consolidated Edition 2006*, London: IMO, 2006 at pp. iii-viii; “Summary of Status of Conventions”, available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> [accessed 3 September 2016].

The above-mentioned rules of MARPOL must be applied in the system with the similar rules in UNCLOS. It, *inter alia*, means that in cases where a State deprives a seafarer of his liberty because of the alleged violation of MARPOL:

- this State is not only under the obligation to inform “immediately” the consul or diplomatic representative of the flag State of the ship in question (as required by Art. 5(3) of MARPOL as well as Art. 231 of UNCLOS) but, also, under the obligation, if master of the ship so requests, to notify the consul or diplomatic representative of the flag State “before taking any steps”, and only in case of emergency, while measures are being taken (as required by Art. 27 of UNCLOS);
- this State should, where possible, immediately notify the maritime authority (or, Administration) of the flag State in question always (as required by Art. 321 of UNCLOS), not only when it is impossible to provide respective notification to the consul or diplomatic representative of the flag State (as required by Art. 5(3) of MARPOL).

4.3. Right to Be Free From Cruel, Inhuman or Degrading Punishment and MARPOL

4.3.1. Introduction

The previous sub-chapter showed that MARPOL is linked to the right to liberty in a very similar way as is UNCLOS. Also to the right to be free from cruel, inhuman or degrading punishment MARPOL is linked in a similar way as is UNCLOS.

First of all, similar to UNCLOS, MARPOL prescribes to other persons than seafarers specific duties, non-observance of which potentially can be the true cause of a large-scale ship-source oil pollution accident (instead of the conduct on the side of seafarer). Such duties are, for instance:

- duties related to the construction, design, equipment and machinery of a ship, so called “CDEM standards” (see, for example, Parts A and B of Chapter 3 and Parts A and B of Chapter 4 of Annex I);

- supportive duties for ensuring stability of a ship (Reg. 27(3), Reg. 28(5) and Reg. 37(4) of Annex I);
- duty of the operators of ships to prepare:
 - oil pollution emergency plan for every oil tanker of 150 GT and above and every ship other than an oil tanker of 400 GT and above (Reg. 37 of Annex I);
 - ship to ship operations plan for every oil tanker of 150 GT and above engaged in the transfer of oil cargo between oil tankers at sea (Reg. 41 of Annex I).

As it was already stated in relation to UNCLOS, these duties of other persons than seafarers must always be kept in mind when examining an objective element of a crime – “causation”.

Secondly, similarly to UNCLOS, MARPOL directly addresses the question of severity of sanctions for ship-source pollution violations. The legal norm of MARPOL addressing this question will be analysed in Sub-chapter 4.3.2 below.

Differently from UNCLOS, MARPOL directly addresses, not only the question of severity of sanctions (question of amount), but, also, the question of liability (including criminal liability) for ship-source pollution violations. It does so by defining exceptions from liability. Legal norms of MARPOL which set such exceptions in regards to oil pollution will be analysed in Sub-chapter 4.3.3 below.

4.3.2. Legal Norm of MARPOL on Severity of Sanctions

Art. 4(4) of MARPOL (the article which, *inter alia*, requires states to define MARPOL violations as offences in their national law) states:

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.

This rule accords with Art. 217(8) of UNCLOS. Consequently, everything which was said in regards to Art. 217(8) of UNCLOS in Sub-chapter 3.3, “Right to Be Free from Cruel, Inhuman or Degrading Punishment and UNCLOS”, by analogy, is also true in regards to Art. 4(4) of MARPOL.

Different from UNCLOS, Art. 4(4) of MARPOL, apart from the requirement for penalties to be adequate in severity, also incorporates the requirement for penalties to be equally severe irrespective of where the violations occur. Interpretation of the requirement for penalties to be equally severe irrespective of where the violations occur by using only a literal (philological) method of interpretation may trigger the conclusion that this requirement is in conflict with Art. 230(1) and (2) of UNCLOS which allow to apply different penalties for, in fact, the same violation in different maritime zones – monetary penalties only for intentional and serious pollution in EEZ and also penalties other than monetary for intentional and serious pollution in territorial sea; monetary penalties only for unintentional and non-serious pollution in EEZ or territorial sea and also penalties other than monetary for unintentional and non-serious pollution in internal waters. Yet, conflict between MARPOL and UNCLOS does not exist. It can be concluded from the *travaux préparatoires* of MARPOL that the only thing which the requirement for penalties to be equally severe irrespective of where the violations occur asks for is: not to apply penalties of different severity for, in fact, the same violation in the same maritime zone of different states (for example, territorial sea of one state and territorial sea of another state). As Timagenis has explained it:

The intention of the provision was to oblige flag States to protect adequately the coasts of third States. At that time there existed an apprehension that flag States tend to impose severe penalties for violations committed within their own territorial sea but not in the territorial seas of third States. To cover this situation the provision under consideration was included in the draft. [...] This language does not mean that the same penalty should be imposed for a certain discharge close to the coast of a State as for a similar discharge on the high seas far from any coast or any fishing ground etc.⁴⁴⁶

⁴⁴⁶ Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 459.

One more note worth making in regards to MARPOL and principles for determining severity of sanctions is that Art. 11 of MARPOL sets several obligations in regards to collecting and circulating among the states text of laws, orders, decrees and regulations and other instruments which have been promulgated in individual states on the various matters within the scope of MARPOL (thus, also on the matters on severity of sanctions for MARPOL violations). Particularly, Art. 11(1)(a) requires states to send the relevant information to IMO and Art. 11(2) requires IMO to circulate the received information to all other State Parties to MARPOL. Such an exchange of information has potential to enhance cross-border proportionality of sanctions applied for ship-source pollution violations and, thus, help to secure the human right to be free from disproportionate sanctions, especially, if after receiving the information IMO organises it in adequate user-friendly form, for example, a table which compares sanctions for similar offences in different countries. Unfortunately, currently rules on reporting to IMO are largely disregarded by states⁴⁴⁷ and IMO does not organise the received information in user-friendly form with the purpose to enhance proportionality of sanctions across countries. This, however, may change, for example, if the issue is raised and addressed within the on-going discussion on a future IMO web-portal.⁴⁴⁸

4.3.3. Legal Norms of MARPOL on Exceptions from Liability

4.3.3.1. Introduction

Art. 4(1) and (2) of MARPOL state:

- (1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. [...]
- (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 therefor under the law of that Party. [...]

⁴⁴⁷ David M. Dzidzornu, “Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis”, in *Colorado Journal of International Environmental Law and Policy*, Volume 8, Issue 2, Summer 1997 at p. 312; EMSA, *Guidelines Addressing Illegal Discharges in the Marine Environment*, 2012 at p. 78.

⁴⁴⁸ For this discussion see *Information Related to a Future IMO Web-Portal*, note by the Secretary-General of IMO, C 114/13/1, 27 April 2015.

Reg. 15(1) of Annex I states: “any discharge into the sea of oil or oily mixtures from ships shall be prohibited”. Reg. 34(1) of Annex I prescribes similar prohibition in regards to cargo areas of oil tankers. It states: “any discharge into the sea of oil or oily mixtures from the cargo area of an oil tanker shall be prohibited.”⁴⁴⁹ Yet, there are situations when discharges of oil or oily mixtures (hereinafter – oil) are allowed. First of all, discharges of small quantities are allowed under particular conditions strictly defined by Reg. 15 and 34 of Annex I themselves. Secondly, specific types of discharges are allowed in accordance with Reg. 4 of Annex I.

As if both – Reg. 15 and 34 as well as Reg. 4 of Annex I of MARPOL – set exceptions from the general prohibition of discharges of oil as established in Art. 4(1) and (2) and Reg. 15 and 34 of Annex I of MARPOL. However, from the point of view of criminal liability, there is a rather important difference between these two exceptions. Exceptions under Reg. 15 and 34 of Annex I are part of the description of the offence. Exceptions under Reg. 4 of Annex I are not part of the description of the offence. When in a legal act exception is construed as a part of the description of the offence, burden is on the prosecution to prove that in the given situation a particular exception did not exist. When in a legal act exception is not construed as a part of the description of the offence, burden is on the alleged offender to prove that in the given situation a particular exception existed.⁴⁵⁰ Thus, it can be concluded that exceptions under Reg. 15 and 34 of Annex I of MARPOL must be disproved by prosecution, but exceptions under Reg. 4 of Annex I of MARPOL must be proved by an alleged offender (in our case, the seafarer). Due to this fact, only the exceptions under Reg. 4 of Annex I should be treated as “true exceptions”, or defences.⁴⁵¹

⁴⁴⁹ In accordance with Art. 2(3) of MARPOL, with “discharge” under MARPOL should be understood any release of harmful substances howsoever caused from a ship, except: dumping; release directly arising from the exploration, exploitation and associated off-shore processing of sea bed mineral resources; release for purposes of legitimate scientific research into pollution abatement or control.

⁴⁵⁰ Richard Eggleston, *Evidence, Proof and Probability*, London: Weidenfeld and Nicolson, 1978 at pp. 90-91.

⁴⁵¹ Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 451.

Reg. 4 of Annex I of MARPOL states:

Regulations 15 and 34 of this Annex shall not apply to:

- .1 the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or
- .2 the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
 - .1 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; and
 - .2 except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or
- .3 the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimize the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.

Reg. 4 of Annex I of MARPOL is not easy to follow. First of all, it has many layers. Secondly, it compiles rather divergent forms of exceptions. Thirdly, exact scope and content of respective exceptions are often not clear. Fourthly, at times, respective exceptions are not fully in line with the general principles for determining criminal liability. Consequently, at least to some extent, also the compatibility of Reg. 4 of Annex I of MARPOL with the principle of legality – the principle which, *inter alia*, requires States not to accuse and convict a person for a crime under insufficiently clear law – may be questioned.

All the above-sketched drawbacks of Reg. 4 of Annex I of MARPOL will become evident from further sub-chapters in which respective Regulation will be analysed in detail. This detailed analysis will be carried out from the perspective of general principles for determining criminal liability. Such approach is adopted with the aim to transform the rather hard to follow Reg. 4 of Annex I of MARPOL into language which is more familiar to people who are supposed to implement and enforce the respective Regulation, that is, to people who draft and enforce national criminal law.

4.3.3.2. MARPOL Exceptions from Liability and Defence of Necessity

Reg. 4(1) of Annex I of MARPOL

According to Reg. 4(1) of Annex I of MARPOL, a person may not be exposed to liability for the discharges into the sea of oil necessary for the purpose of securing the safety of a ship or saving life at sea. In regards to the respective exception, Timagenis has stated:

The exception is based on humanitarian reasons. Human life is among the highest values in the modern world and, therefore, in case of a direct and immediate conflict between the protection of the environment and human life, the latter is preferred. [...] Similarly, the safety of a ship is so closely connected with human life that it is treated in the same manner.⁴⁵²

The citation shows that the MARPOL exception “discharges necessary for the purpose of securing the safety of a ship or saving life at sea” is the result of weighing different valid interests (protection of the environment, safety of a ship and human life) and allowing to infringe upon the less important (protection of the environment) to preserve the more important (safety of a ship and human life). In other words, this exception is, in fact, the defence of necessity as it was introduced in Sub-chapter 2.4.2.11 of this dissertation.

However, the MARPOL exception “discharges necessary for the purpose of securing the safety of a ship or saving life at sea” is drafted in a manner which is not fully in line with the principles associated with the defence of necessity under general criminal law. The MARPOL exception is left unqualified. It may trigger the interpretation that under any circumstances (including when people from the ship are already in safety and only the ship, herself, remains to be saved) any amount of discharge of oil is justified. Defence of necessity under general criminal law is always qualified – because damage can be recognised as justified only when the principle of balancing of harm and benefit is observed.⁴⁵³ Consequently, the MARPOL exception should also be interpreted as encompassing the general

⁴⁵² Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 452.

⁴⁵³ Andrew Ashworth, *Principles of the Criminal Law*, 6th edition, Oxford: Clarendon Press, 2009 at p. 112.

condition that the balance between harm and benefit must be observed. This conclusion can also be reached by systemic interpretation of relevant rules; under Art. V of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, a similar exception from liability as MARPOL exception “discharges necessary for the purpose of securing the safety of a ship or saving life at sea” is applicable only if:

- discharge appears to be the only way of averting the threat, and
- there is every probability that the damage consequent upon such discharge will be less than would otherwise occur.⁴⁵⁴

Reg. 4(3) of Annex I of MARPOL

According to Reg. 4(3) of Annex I of MARPOL, a person may not be exposed to liability for the discharge into the sea of substances containing oil, approved by the flag State as well as the State in whose jurisdiction it is contemplated the discharge will occur, when being used for the purpose of combating a specific pollution incident in order to minimize the damage from pollution. Also this MARPOL exception, in fact, talks about “choosing between two evils”, consequently, – about the defence of necessity. It is allowed to infringe upon the less important interest (protection of the environment from relatively minor pollution resulting from discharge into the sea of substances containing oil) to preserve the more important interest (protection of the environment from relatively severe pollution, which can be minimised by discharge into the sea of substances containing oil). Although it is not explicitly stated in MARPOL, it can be assumed that exactly the above-mentioned balancing test is the one which the flag State as well as the State in whose jurisdiction it is contemplated the discharge will occur are supposed to carry out when deciding upon allowing or not allowing the use of particular substances for combating particular pollution.

⁴⁵⁴ IMO, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972.

4.3.3.3. MARPOL Exceptions from Liability and Corpus Delicti

Objective element “damage to a ship or its equipment”

According to Reg. 4(2) of Annex I of MARPOL, a person may not be exposed to liability for the discharge into the sea of oil resulting from damage to a ship or its equipment. Therefore, it is essential to understand in which specific cases oil pollution results from “damage to a ship or its equipment” and in which specific cases oil pollution results from some other things.

Damage is “physical harm caused to something in such a way as to impair its value, usefulness, or normal function.”⁴⁵⁵ There are discharges of oil which rather obviously are not result of physical harm to a ship or its equipment and, consequently, are not covered by the respective MARPOL exception from liability, for example, intentional pumping of oil out into the sea from the cargo tanks of a ship. However, in regards to many other cases involving discharge of oil, uncertainty exists. For instance, it can be questioned whether the expression “damage to a ship or its equipment” in Reg. 4(2) of Annex I of MARPOL covers only clearly evident and sudden damage or, also, such damage which results from latent defects, faulty design or wear and tear. This issue was addressed by the Australian courts in the case of *Morrison v. Peacock (M.V. Sitka II)* – the case in which it was examined as to whether or not the rupture of a hydraulic hose on the unloading crane caused by wear and tear constitutes “damage to a ship or its equipment” in the meaning of Reg. 4(2) of Annex I of MARPOL. The Australian High Court concluded that “damage to a ship or its equipment” means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment.⁴⁵⁶

⁴⁵⁵ Judy Pearsall, (ed.), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 2001 at p. 463.

⁴⁵⁶ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1086; Michael White, “Case Notes: *Morrison v Peacock (The Sitka II)* (2002) 76 ALJR 1545”, in *Australian and New Zealand Maritime Law Journal*, Volume 17, 2003 at pp. 135-136.

However, there are those who look to the judgment of the Australian High Court in the case of *Morrison v. Peacock (M.V. Sitka II)* with some dose of criticism. For example, White in his notes regarding the case has stated:

The High Court holding that the meaning and intent of the ‘damage’ defence relates to the speed of the event (a ‘sudden’ change) still leaves many fact situations that may be unclear.⁴⁵⁷

Indeed, open questions still remain, for instance: should the expression “damage to a ship or its equipment” be interpreted as covering any case involving sudden damage (also such cases when the damage has resulted from navigational error or other human mistake), or should this expression be interpreted as covering only such cases when the “primary” cause of the discharge of oil is respective damage?⁴⁵⁸ In fact, the whole argument which brought the Australian High Court in the case of *Morrison v. Peacock (M.V. Sitka II)* to the conclusion that only sudden damage to a ship or its equipment is covered by Reg. 4(2) of Annex I of MARPOL seems not very convincing. For example, the Court held that the use of the term “occurrence” in the respective rule of MARPOL implies that the detriment or harm was the result of a sudden event and not caused by a gradual process.⁴⁵⁹ However, the term “occur” means simply “happen, take place”.⁴⁶⁰ Any phenomenon can “occur” (or “happen”, or “take place”) both ways – suddenly as well as gradually.

The reality, unfortunately, is that nobody can be absolutely sure what specific cases drafters of Reg. 4(2) of Annex I of MARPOL intended to cover by the phrase “damage to a ship or its equipment” – *travaux préparatoires* of MARPOL do not allow us to identify this intent. Therefore, until relevant clarifications are made through amending MARPOL itself, it seems more appropriate to give the dictionary meaning to the term “damage” whenever applying Reg. 4(2) of Annex I of MARPOL, particularly so, because of the need to follow the rule of lenity (the rule which requires to interpret any unclear law in favour of the alleged offender). If the

⁴⁵⁷ WHITE, *ibid.*

⁴⁵⁸ See Robert Coleman, “A Broader Interpretation of Marpol Looks More Convincing”, in Lloyd’s List, 28 June 2006, where author suggests that the damage to ship or its equipment resulting from navigational error or other human mistake is not covered by Reg. 4(2) of Annex I of MARPOL.

⁴⁵⁹ DE LA RUE and ANDERSON, *supra* note 456 at p. 1086.

⁴⁶⁰ PEARSALL, *supra* note 455 at p. 1281.

dictionary meaning is given to the term “damage”, people in relatively many factual situations will be exempted from the liability (which is favourable to an alleged offender). If another meaning is given for the term “damage”, people in relatively few factual situations will be exempted from the liability (which is unfavourable to an alleged offender).

Subjective elements “intent”, “recklessness” and “knowledge”

According to Reg. 4(2)(2) of Annex I of MARPOL, not any discharge of oil resulting from damage to a ship or its equipment is exempted from the liability. When the damage to a ship or its equipment is caused either with intent, or recklessly, and with knowledge that damage would probably result, the person who caused the damage can still be held liable. In other words, the MARPOL exception “discharges resulting from damage to a ship or its equipment” covers only such cases when damage to a ship or its equipment is caused negligently, occurs due to the pure accident, or is caused without knowledge that damage would probably result. What should be understood by intent, recklessness, negligence and pure accident was already explained earlier. Therefore, here, it remains to be found out what “with/without knowledge that damage would probably result” means.

The very existence of the expression “with knowledge that damage would probably result” in Reg. 4(2)(2) of Annex I of MARPOL suggests that this expression provides some additional safeguard to people alleged of causing the discharge of oil. Such a conclusion can also be made from the writings of scholars, who have stressed the need to prove both – intent, or recklessness, and knowledge – before a person can be held liable for specific pollution. For example, Mukherjee has stated: “If there is evidence of intent, or recklessness coupled with knowledge – a two-fold requirement – then it must be treated as a criminal offence [...]”⁴⁶¹ This author, however, sees the expression “with knowledge that damage would probably

⁴⁶¹ Proshanto K. Mukherjee, “The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 491.

result” in Reg. 4(2)(2) of Annex I of MARPOL as tautology. Reasoning leading to such conclusion is as follows:

- Under general criminal law, reference to knowledge is usually made in relation to *conduct* – specific facts or circumstances forming part of the definition of the offence,⁴⁶² because knowledge (or lack of knowledge) of particular facts or circumstances may significantly increase (or diminish) blameworthiness of the conduct, for example, if the crime is “handling stolen goods knowing them to be stolen”, a person cannot be held liable if he did not know the fact that the goods he was handling were indeed stolen.
- Under general criminal law, knowledge in relation to *consequences* (knowledge that the consequences will certainly occur or knowledge that it is likely that the consequences will occur) is treated as an integral part of the notions of intent and recklessness. In fact, this knowledge is exactly one of the features which allow distinguishing intent and recklessness from negligence and pure accident. That is why scholars have sometimes even talked about “knowing violations” and “negligent violations”, instead of “intentional, reckless and negligent violations.”⁴⁶³ In other words, reference to the existence of knowledge in relation to consequences parallel to reference to intent or recklessness does not give any added value.
- Reg. 4(2)(2) of Annex I of MARPOL refers to the existence of knowledge in relation to consequences (“knowledge that damage would probably result”) parallel to reference to intent and recklessness. Consequently, reference to the existence of knowledge in the respective rule of MARPOL is tautology. It does not give any added value.

⁴⁶² Andrew Ashworth, *Principles of the Criminal Law*, 6th edition, Oxford: Clarendon Press, 2009 at pp. 182-184.

⁴⁶³ See, for example, Robert B. Parrish, Thomas C. Sullivan and Shea M. Moser, “Criminalization of Maritime Casualties”, in *Tulane Law Review*, Volume 87, Issues 5 and 6, June 2013 at p. 1014.

The fact that the expression “with knowledge that damage would probably result” in Reg. 4(2)(2) of Annex I of MARPOL is tautology, *inter alia*, means that, in fact, the MARPOL exception “discharges resulting from damage to a ship or its equipment” covers only such cases when damage to a ship or its equipment is caused negligently or occurs due to pure accident.

The respective MARPOL exception from liability is limited even further. Even when damage to a ship or its equipment is caused negligently or occurs due to pure accident, a person can still be held liable – if after the occurrence of the damage or discovery of the discharge this person did not take all reasonable precautions for the purpose of preventing or minimizing the discharge. Such conclusion can be derived from Par. 2.1 of Reg. 4 of Annex I of MARPOL read in system with Par. 2.2 of the same Regulation. These two paragraphs are linked with the conjunction “and”. It means that requirements in both paragraphs must exist simultaneously for a person to benefit from them. It is not enough that a person did not act intentionally or recklessly (Par. 2.2) if he failed to exercise due diligence after the accident (Par. 2.1). Similarly, it is not enough that a person exercise due diligence after the accident (Par. 2.1) if the accident, itself, was caused by his intentional or reckless conduct (Par. 2.2). Stated another way, in regards to negligent conduct failure to exercise due diligence before the accident is excusable simply because a person exercised due diligence after the accident; in regards to intentional and reckless conduct failure to exercise due diligence before the accident is not excusable simply because a person exercised due diligence after the accident (although, such “proper response” to the accident most probably will be treated as a mitigating factor when deciding upon specific sanctions to be imposed for the crime).

Under general criminal law: on the one hand, failure to exercise due diligence after “setting the train of events in motion” serves as an aggravating factor or even forms a separate crime (under the duty arising from the creation of a dangerous situation); on the other hand, exercise of due diligence after “setting the train of

events in motion” serves as a mitigating factor.⁴⁶⁴ Reg. 4(2) of Annex I of MARPOL seems to be in line with this idea. However, under general criminal law exercise of due diligence after “setting the train of events in motion” is not usually seen as mitigating the guilt of a person as far as to exclude his liability completely. Reg. 4(2) of Annex I of MARPOL does so – in regards to negligent discharges of oil.

Release from liability of a person who has caused discharge of oil by simple negligence, if after the accident this person responds properly, may raise relatively little objections. Yet, release from liability of a person who has caused discharge of oil by gross negligence, just because after the accident this person responds properly, may raise many objections and questions. For example, it can be questioned – is it appropriate not to allow to expose the master of a ship to any type of liability when this master, at first, has failed to take even the most simple precautions to avoid collision with another ship (in other words, has blatantly failed to exercise his duties), but after the collision this master takes all reasonable precautions for the purpose of preventing or minimizing the discharge. Particularly, such a question arises, because it has been argued that the very purpose of Reg. 4(2) of Annex I of MARPOL is to exempt from liability “unintentional discharges which could not be prevented”;⁴⁶⁵ discharges which result despite the fact that people “have done their best, before and after the damage and/or discharge, for the purpose of preventing or minimizing pollution.”⁴⁶⁶ It is clear that a number of actual discharges could be prevented, if persons had done their best (acted without gross negligence) not only after the damage and/or discharge but, also, before it. Therefore, the more appropriate MARPOL exception from liability than the one in regards to discharges of oil seems the one which is established in regards to discharges of sewage and garbage. In regards to these pollutants, MARPOL sets the following discharge free from liability: the discharge of sewage/garbage resulting from damage to a ship or its equipment if all reasonable precautions have been taken before and after the

⁴⁶⁴ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at pp. 32-33.

⁴⁶⁵ Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 454.

⁴⁶⁶ TIMAGENIS, *ibid.*

occurrence of the damage for the purpose of preventing or minimising the discharge.⁴⁶⁷ Indeed, with today's high concern with a clean environment it seems disproportionate to absolutely exclude from liability grossly negligent conduct resulting in marine pollution. The possibility to treat such conduct as, at least, regulatory offence with relatively low possible sanctions should be given to States. The idea that grossly negligent conduct in the maritime domain, in principle, should not be excluded from liability is evident also from Rule 2(a) of COLREG. It reads as follows:

Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

In short, this author agrees with the opinion of Pozdnakova that literal interpretation of Reg. 4(2) of Annex I of MARPOL leads to a rather illogical result.⁴⁶⁸ Systemic and teleological interpretation of relevant legal norms points to the conclusion that Reg. 4(2) of Annex I does not exclude from liability grossly negligent conduct. However, because of the rather simplistic text of Reg. 4(2) of Annex I, itself, ambiguity still remains.

With regard to the legislative history of Reg. 4(2) of Annex I of MARPOL Kopela has stated:

The condition related to intention, recklessness and knowledge was arguably introduced in order to ensure that even when precautions had been taken, any discharge due to damage stemming from such behaviour would still be prohibited. The legislative history of this provision does not give evidence that it was the intention of the drafters to allow accidental discharges due to negligence.⁴⁶⁹

⁴⁶⁷ See, Reg. 3(1)(2) of Annex IV and Reg. 7(1)(2) of Annex V of MARPOL.

⁴⁶⁸ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 242.

⁴⁶⁹ Sophia Kopela, "Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: the *Erika* Case", in *Review of European Community and International Environmental Law*, Volume 20, Issue 3, November 2011 at p. 315.

This author agrees with Kopela. However, relevant legislative history, also, does not give absolutely clear evidence that it was not the intention of the drafters to exempt from liability accidental discharges due to negligence, if, after the accident, a person responds properly. Thus, the situation stays ambiguous, but, as we already know, in cases of ambiguity, the rule of lenity must be applied, meaning that the reading which is more favourable to an alleged offender must be employed. Obviously, the reading which exempts negligent discharges of oil from liability is more favourable to an alleged offender than the reading which implies such liability. Thus, the conclusion that Reg. 4(2) of Annex I of MARPOL, in principle, exempts from the liability negligent discharges of oil still stands, and, consequently, State Parties of MARPOL are obliged to incorporate respective exception from liability in their national criminal law.

Pozdnakova might still disagree with this conclusion, as she has invoked the following argument in favour of those who are willing to ignore liability-related rules of MARPOL:

In this author's view, States should shape their national provisions on fault in such a way as to conform with MARPOL to the greatest possible extent. At the same time, MARPOL does not, in the author's view, attempt to national criminal law provisions (including those regulating the applicable standard of fault), thereby leaving considerable legislative discretion in this respect to the States.⁴⁷⁰

This author cannot agree with this statement. Reg. 4(2) of Annex I of MARPOL is clearly linked to criminal law, criminal law functions through national Criminal Codes and similar national legal instruments, consequently Reg. 4(2) of Annex I of MARPOL “attempts to national criminal law provisions”. It seems that Pozdnakova has artificially invoked the respective argument – just to overcome “illogical” MARPOL regime. However, as Tan has rightly pointed out: any ambiguity within MARPOL cannot simply be rectified by states unilaterally moving in to fill the gaps.⁴⁷¹ Just like State Parties to UNCLOS should follow Art. 230(1) and (2) of UNCLOS although, at least to some extent, these paragraphs seem to be inappropriate, State Parties to MARPOL should follow Reg. 4(2) of Annex I of

⁴⁷⁰ POZDNAKOVA, *supra* note 468 at p. 242.

⁴⁷¹ Allan Khee-Jin Tan, “The EU Ship-Source Pollution Directive and Coastal State Jurisdiction over Ships”, in *Lloyd's Maritime and Commercial Law Quarterly*, Bound Volume 2010 at p. 476.

MARPOL although, at least to some extent, this paragraph seems to be inappropriate. Only relevant adjustments of MARPOL can “cancel” the obligation to follow its Reg. 4(2) of Annex I. Despite that, several studies show that, in practice, states often ignore Reg. 4(2) of Annex I of MARPOL.⁴⁷²

Before proceeding to the next sub-chapter, one more clarifying note should be made in regards to Reg. 4(2) of Annex I of MARPOL. Reg. 4(2)(2) talks only about one group of seafarers – masters. It may trigger the conclusion that seafarers other than masters are not covered by the MARPOL exception “discharges resulting from damage to a ship or its equipment” and, consequently, differently from masters, they can also be exposed to liability for negligent conduct or pure accident even if after the occurrence of the damage or discovery of the discharge they take all reasonable precautions for the purpose of preventing or minimizing the discharge. However, to provide the safeguard from the liability to masters and, under similar factual circumstances, not to provide the same safeguard to other seafarers would be discrimination of these other seafarers. Therefore, the respective MARPOL safeguard from the liability should be interpreted as applicable to all seafarers. Advocate General Kokott in her opinion in the *INTERTANKO* case expressed a similar view. The Advocate General stated that MARPOL exemptions are to be construed as referring to the master merely “by way of example” and that the exemptions are to apply equally to other persons who may be prosecuted for discharges resulting from damage to the ship or its equipment.⁴⁷³ Yet, there are also those with a different view, for example, Ringbom has stated:

⁴⁷² See, for example, CMI, Fair Treatment of Seafarers: Summary of Responses of CMI Members to the Questionnaire, 2006 at pp. 57-63; BIMCO, Study of the Treatment of Seafarers, September 2010 at p. 9. See also the case study in this dissertation which indicates that after *Erika* and *Prestige* accidents the French Court of Appeal and the Spanish Supreme Court, respectively, ruled that Reg. 11(b) (under current numbering Reg. 4(2)) of Annex I of MARPOL may not be interpreted as excluding from penal liability negligent discharges of oil.

⁴⁷³ *INTERTANKO and others v. Secretary of State for Transport*, Opinion of Advocate General Kokott delivered on 20 November 2007, ECJ, paragraphs 84-94.

The main regime of Marpol is [...] one of prohibition in the absence of express exception. If other persons are not specifically exempted, the main discharge prohibition following from Marpol Regulations I/15 and 34 [...] remains the starting point. This, in combination with Article 4(2) [...], seems to suggest that other persons who have been found to cause a violation are, if not automatically liable under Marpol, at least subject to the liability rules for such persons established by individual State Parties.⁴⁷⁴

Among other things, the above quotation mentions “automatic liability”. This phrase creates associations with strict liability. The next sub-chapter examines closer the correlation between MARPOL exceptions from liability and strict liability.

4.3.3.4. MARPOL Exceptions from Liability and Strict Liability

Reg. 4(2) of Annex I of MARPOL has linked exceptions from liability for discharges of oil to existence or non-existence of certain objective and subjective elements (“damage to a ship or its equipment”, “intent”, “recklessness” and “knowledge”). It is very unusual to see such kind of objective and subjective elements (crucial elements) formulated as exceptions from liability. Usually such elements are used to define offence, not defence. It is done so with good reason – to safeguard the human right of an alleged offender to be presumed innocent until proved guilty (presumption of innocence). As it was stated earlier, if some elements of a conduct are formulated as defence, burden of proof of these elements shifts from prosecution to defence, but presumption of innocence requires to limit such shifting of the burden of proof as much as possible. Thus, Reg. 4(2) of Annex I of MARPOL, in fact, seriously limits the human right of alleged offenders (in our case – seafarers) to be presumed innocent until proved guilty. By shifting the burden of proof of non-existence of certain subjective elements of the offence (“intent”, “recklessness” and “knowledge”) to the alleged offender, Reg. 4(2) of Annex I of MARPOL, *inter alia*, has, in fact, made all discharges of oil resulting from the damage to a ship or its equipment half-way house offences.

⁴⁷⁴ Henrik Ringbom, *The EU Maritime Safety Policy and International Law*, Leiden: Martinus Nijhoff Publishers, 2008 at p. 420.

Scholarly literature suggests that limitations on presumption of innocence of alleged offenders resulting from MARPOL do not stop there. The mere fact that there exist MARPOL exceptions from liability has triggered the interpretation that any MARPOL violation which does not fall under these exceptions should be treated as a strict liability offence. For instance, de la Rue and Anderson have stated:

Save in cases where an exemption from liability applies, violations of international laws to prevent pollution are in general strict liability offences, proof of which does not depend on whether breach of the controls was deliberate or accidental, nor on the degree of fault involved in an accidental breach, the extent of damage or other factors.⁴⁷⁵

This author does not find such a conclusion well founded. MARPOL exceptions from liability identify cases when liability cannot be applied at all. It does not automatically mean that cases when liability, in principle, can be applied should be treated as strict liability offences. In other words, the following syllogism is wrong:

Premise 1: X cannot be treated as offence.

Premise 2: Y is not X.

Conclusion: Y is strict liability offence.

The only conclusion which can be made in this case: Y can be treated as an offence.

There are also scholars apart from this author who disagree with the opinion that, in general, MARPOL violations should be treated as strict liability offences. For example, Pozdnakova has stated:

The exceptions contained in MARPOL aim to introduce a common standard of care to be met by responsible actors in order to avoid accidental pollution from ships. The relevant provisions suggest *inter alia* that in general the application of sanctions for accidental pollution should be conditional on some degree of fault. [...] Thus, in this author's view, MARPOL discourages the application of strict liability for pollution violations.⁴⁷⁶

⁴⁷⁵ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1099. See also p. 1114 and Henrik Ringbom, *The EU Maritime Safety Policy and International Law*, *ibid.*, at p. 405.

⁴⁷⁶ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 226.

Perhaps the most truthful position is that MARPOL neither encourages, nor discourages the application of strict liability. It simply fails to address the issue clearly, thus, causing uncertainty, which in turn may cause further negative consequences. As Cartner, Fiske and Leiter have put it:

[...] allowing the shipmaster to be liable regardless of his fault seems an oddity. [...] But the lack of clear guidance in the Convention subjects the shipmasters to a disparity of regimes, so it is fair to say that the shipmaster's fate hinges entirely on the laws of the arresting state. The broad language provided by the MARPOL Convention can have grave implications regarding the shipmaster.⁴⁷⁷

Although the above citation talks only about “shipmasters” and only about “arrest”, worries expressed in it can be easily associated with all seafarers and their criminal liability, in general.

Allen has stated that, if drafters of law did their job properly, there should never be any room for doubt whether or not an offence is one of strict liability:

If *mens rea* is required this could be expressly stated by using one of the long list of words (e.g. intentionally, knowingly, wilfully, permitting, etc.) which impose this requirement. Alternatively, if the offence is intended to be one of strict liability, this could be expressly stated [...]⁴⁷⁸

When “broad language” is used, as it is done in MARPOL, those who implement and enforce the law are forced to apply different rules of interpretation to understand what the real intention of the drafters was – to make an offence strict liability offence or not. However, such interpretation may bring different results, because, at times, relevant rules of interpretation are conflicting, themselves.⁴⁷⁹ Nevertheless, keeping in mind the need to follow the rule of lenity and presumption of innocence of an alleged offender, in any case, a good starting point for the above-mentioned interpretation is the presumption of *mens rea* requirement, which means that: “The absence of express words imposing a requirement of proving *mens rea* is not conclusive that the offence is one of strict liability.”⁴⁸⁰

⁴⁷⁷ John A.C. Cartner, Richard P. Fiske and Tara L. Leiter, *The International Law of the Shipmaster*, London: Informa, 2009 at p. 203.

⁴⁷⁸ Michael Allen, *Textbook on Criminal Law*, 11th edition, Oxford: Oxford University Press, 2011 at p. 109.

⁴⁷⁹ ALLEN, *ibid.* at pp. 114-116.

⁴⁸⁰ ALLEN, *ibid.* at pp. 109-111.

4.3.3.5. General Scope of MARPOL Exceptions from Liability

Unfortunately, uncertainties related to Reg. 4 of Annex I of MARPOL do not end at the above-described issues. Also unclear is such the essential question as the general scope of this regulation. For example, it can be questioned whether the respective Regulation covers only operational discharges or any type of discharges.

It is evident from the mere text of Reg. 4 of Annex I of MARPOL that this Regulation covers only those discharges of oil which are addressed in Reg. 15 and 34 of the same Annex. However, it is not fully clear as to whether Reg. 15 and 34 address only operational discharges or any type of discharges. On the one hand, the respective regulations are incorporated into the parts of MARPOL titled “Control of operational discharges of oil” (which suggests that only operational discharges are covered). On the other hand, specific paragraphs within the respective regulations prohibit “any discharge into the sea of oil or oily mixtures” (which suggests that all types of discharges are covered). Also scholars have not been absolutely consistent on this issue. For instance, Osante, even in one and the same single article, first, states that Reg. 9 and 10 of Annex I of MARPOL cover only operational discharges, but just after this statement, he treats Reg. 11 of Annex I of MARPOL as covering any type of discharges.⁴⁸¹

Yet, the absolute majority of scholars treat Reg. 4 of Annex I of MARPOL as covering any type of discharges. Most often they do it straight away, without even mentioning the possible interpretation that the respective regulation covers only operational discharges. It leads one to believe that Reg. 15 and 34 in conjunction with Reg. 4 of Annex I of MARPOL should be read as follows: Reg. 15 and 34 set general prohibition of all types of discharges of oil in the first place, and, then, list those operational discharges which are allowed (in other words, respective

⁴⁸¹ Jose-Manuel Martin Osante, “Competition and the European Union Directive on Criminal Penalties for Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 14, Issue 5, September-October 2008 at pp. 418-419. Osante in his article refers to old numbering of Annex I of MARPOL – Reg. 9, 10 and 11, instead of Reg. 15, 34 and 4. Yet, it does not change the essence of the issue. Reg. 9 and 10 under old numbering, similarly as Reg. 15 and 34 under new numbering, talk about control of discharges of oil. Reg. 11 under old numbering, similarly as Reg. 4 under new numbering, talks about exceptions from liability for these discharges. New numbering entered into force on 1 January 2007.

regulations cover all types of discharges in the first place, and operational discharges secondary); consequently, Reg. 4 also covers all types of discharges of oil, not only operational discharges of oil.

Another question which can be asked regarding the general scope of Reg. 4 of Annex I of MARPOL is – should coastal States observe exceptions from liability incorporated into this Regulation in regards to discharges in any maritime zone or only in regards to discharges beyond its territorial sea? Particularly serious disputes on this issue have arisen in relation to Directive 2005/35. Therefore, this issue will be addressed in the next chapter – the chapter on Directive 2005/35.

5. Directive 2005/35

5.1. Introduction

In December 1999 the *Erika* accident happened off the coast of France resulting in large-scale oil pollution.⁴⁸² This accident, *inter alia*, triggered the EC to embark upon an analysis of the adequacy of the existing international system of liability for ship-source oil pollution. The focus of this analysis was on civil liability. However, to some extent, penal liability was also analysed. Based on this analysis, on 6 December 2000 (as a part of the so called “*Erika 2* package”) the EC made the proposal for a “Regulation of the European Parliament and the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures.”⁴⁸³ Art. 10 of the draft Regulation proposed to introduce a financial penalty to be imposed on any party, whether ship-owner, charterer, classification society or anybody else, who has contributed to the oil pollution by his grossly negligent conduct.⁴⁸⁴ The proposed Regulation was not adopted. Consequently, the above-mentioned proposal regarding penal liability also did not advance at that time. Yet, in November 2002 another large-scale ship-source oil pollution accident happened in European waters – the *Prestige* accident off the coast of Spain.⁴⁸⁵ It triggered new proposals regarding penal liability. On 5 March 2003 the EC made the proposal for a “Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including

⁴⁸² For detailed factual information about *Erika* accident see Chapter 6, “Case Study” of this dissertation.

⁴⁸³ 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*, 6 December 2000, COM (2000) 802 final.

⁴⁸⁴ COM (2000) 802 final, *ibid.*; Henrik Ringbom, “The *Erika* Accident and Its Effects on EU Maritime Regulations”, in Myron H. Nordquist and John Norton Moore, (ed.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, Hague: Martinus Nijhoff Publishers, 2001 at p. 278; Gotthard Gauci, “Challenging EC Pollution Regulation – the Lost Cause?”, in *Shipping and Transport International*, Volume 7, No. 2, 2008 at p. 24.

⁴⁸⁵ For detailed factual information about *Prestige* accident see Chapter 6, “Case Study” of this dissertation.

criminal sanctions, for pollution offences.”⁴⁸⁶ The proposed Directive prescribed enforcement measures, including criminal sanctions, to be applied to ships suspected of being engaged in illegal discharge of oil or noxious liquid substances in bulk.⁴⁸⁷ On 2 May 2003 the EC made the proposal for a “Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.”⁴⁸⁸ Based on what was in more general terms said in the earlier proposed Directive, the proposed Framework Decision, *inter alia*, prescribed specific penalties (such as fines of a certain amount of money and imprisonment of a certain length of time) to be imposed for specific ship-source pollution offences.⁴⁸⁹ On 12 July 2005 the proposed Framework Decision was adopted (Framework Decision 2005/667/JHA)⁴⁹⁰ and on 7 September 2005 the proposed Directive was adopted (Directive 2005/35).⁴⁹¹ Both of these legal instruments entered into force on 1 October 2005, after their publication in the Official Journal of the European Union. In accordance with Art. 11 of the Framework Decision 2005/667/JHA, EU Member States were obliged until 12 January 2007 to adopt the measures to comply with the provisions of the Decision. In accordance with Art. 16 of Directive 2005/35, EU Member States were obliged until 1 March 2007 to bring into force the national laws necessary to comply with the Directive. In February 2006 the term for the transposition of Directive 2005/35 into national law of EU Member States was changed from 1 March 2007 to 1 April 2007.⁴⁹²

⁴⁸⁶ Commission of the European Communities, 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 offences, 5 March 2003, COM (2003) 92 final.

⁴⁸⁷ COM (2003) 92 final, *ibid.* at pp. 13-15.

⁴⁸⁸ Commission of the European Communities, Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, 2 May 2003, COM (2003) 227 final.

⁴⁸⁹ COM (2003) 227 final, *ibid.* at p. 13.

⁴⁹⁰ *Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution*, OV L 255, 30.9.2005, p. 164.

⁴⁹¹ *Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences*, OV L 255, 30.9.2005, p.11.

⁴⁹² *Corrigendum to Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements*, OJ L 33, 4.2.2006, p. 87.

On 23 October 2007 the ECJ annulled Framework Decision 2005/667/JHA in its entirety on the grounds that the Council, by adopting Art. 2, 3 and 5 of the Decision concerning the definition of criminal offences and the nature of penalties, encroached on the competences of the Community.⁴⁹³ To fill the gap which arose after the judgment, on 11 March 2008 the EC made the proposal to amend Directive 2005/35. Substantially, the proposal was to supplement Directive 2005/35 with the legal norms which were previously incorporated into annulled Framework Decision 2005/667/JHA. Yet, not absolutely everything was taken over. For instance, those rules of annulled Framework Decision 2005/667/JHA which prescribed specific criminal penalties (such as fines of a certain amount of money and imprisonment of a certain length of time) were not there in the proposal.⁴⁹⁴ Such approach was in line with what the ECJ had said in its judgment, namely, that “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.”⁴⁹⁵ On 21 October 2009 amendments to Directive 2005/35 were adopted.⁴⁹⁶ Amendments entered into force on 16 November 2009 and EU Member States were obliged until 16 November 2010 to bring into force the national laws necessary to comply with the amendments.⁴⁹⁷

This author has not carried out review of the national laws of EU Member States to assess whether and how these states have transposed Directive 2005/35. For such comprehensive review separate research is needed. However, relevant review has been carried out by EMSA. Report of this review has not been published. However, an unpublished draft version of the report suggests that, in principle, all

⁴⁹³ *Commission of the European Communities v. Council of the European Union*, Judgment of 23 October 2007, ECJ, paragraphs 52-74 and paragraph 1 of the ruling.

⁴⁹⁴ Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, 11 March 2008, COM (2008) 134 final.

⁴⁹⁵ *Commission of the European Communities v. Council of the European Union*, *supra* note 493, paragraph 70.

⁴⁹⁶ See *Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements*, OJ L 280, 27.10.2009, p. 52.

⁴⁹⁷ Directive 2009/123/EC, *ibid.*, Art. 2 and 3.

EU Member States have transposed Directive 2005/35 into their national law.⁴⁹⁸ In other words, presumably, now national laws of all EU Member States reflect Directive 2005/35.

Generally speaking, Directive 2005/35, as it is in force now, prescribes to EU Member States:

- what kind of ship-source discharges of oil and noxious liquid substances in bulk should be treated as infringements (Art. 3, 4, 5 and 5b);
- which of the infringements should be treated as criminal offences (Art. 5a and 5b);
- when not only natural persons but also legal persons should be held liable for the infringements (Art. 8b);
- what kind of penalties should be imposed for the infringements (Art. 8, 8a and 8c);
- what enforcement measures should be applied to ships within a port of a Member State suspected of being engaged in illegal discharge of oil or noxious liquid substances in bulk (Art. 6);
- what enforcement measures should be applied by a Member State to ships in transit suspected of being engaged in illegal discharge of oil or noxious liquid substances in bulk (Art. 7).

Art. 1(1) of Directive 2005/35 states that the purpose of the Directive is:

[...] to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties [...], in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

⁴⁹⁸ EMSA, Study on the Implementation of Ship Source Pollution Directive 2005/35 in the EU Member States, unpublished draft version on file with author, p. 4.

Despite its laudable purpose, Directive 2005/35 has faced severe criticism. First of all, it has been argued that the Directive has not brought those positive changes which it potentially could have brought. For instance, Pozdnakova has argued that international standards for ship-source pollution in many aspects, indeed, are not absolutely clear, therefore their clarification with the help of EU law, in principle, is advisable. However, relatively little is clarified with Directive 2005/35.⁴⁹⁹ Secondly, it has been argued that Directive 2005/35, instead of helping to incorporate into EU law international standards for ship-source pollution (as claimed in its Art. 1(1)), actually conflicts with those standards, which, obviously, makes the overall regulation of the subject even more confusing.⁵⁰⁰ Compatibility of Directive 2005/35 with relevant international law will be analysed in Sub-chapter 5.2 below. It will be done through the prism of the *INTERTANKO* case. Afterwards, in Sub-chapter 5.3, legal norms of Directive 2005/35 on the severity of sanctions will be analysed separately. Throughout the analysis compatibility of Directive 2005/35 with relevant human rights will also be assessed.

⁴⁹⁹ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 252-253. See also *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraphs 122 and 123; *INTERTANKO and others v. Secretary of State for Transport*, Witness Statement of Colin Maxwell de la Rue dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraphs 84c and 93.

⁵⁰⁰ See, for example, Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at pp. 1119-1121; European Parliament, Committee on Regional Policy, Transport and Tourism, Report on the proposal for a European Parliament and Council Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences, 14 July 2003, COM (2003) 92 – C5-0076/2003/0037(COD).

5.2. *INTERTANKO Case*

5.2.1. *General Description of INTERTANKO Case*

On 23 December 2005 (that is, when Directive 2005/35 had already entered into force, but the term for its transposition into national law had not yet expired) five maritime industry bodies – INTERTANKO, INTERCARGO, the Greek Shipping Co-operation Committee, Lloyd’s Register and the International Salvage Union – filed an application to the High Court of Justice of England and Wales for judicial review of Directive 2005/35. Applicants claimed that Directive 2005/35 is inconsistent with the international law, particularly MARPOL and UNCLOS. They also claimed that Directive 2005/35 fails to define the standard of liability with sufficient legal certainty. After giving reasons of such opinion, applicants asked the High Court of Justice of England and Wales to refer the matter to the ECJ for preliminary ruling under Art. 234 of the Treaty Establishing the European Community.⁵⁰¹ The Court satisfied this request; with the decision on 4 July 2006 it stayed the national proceedings and referred the following questions to the ECJ:

- (1) In relation to straits used for international navigation, the exclusive economic zone or equivalent zone of a Member State and the high seas, is Article 5(2) of Directive 2005/35/EC invalid in so far as it limits the exceptions in Annex I Regulation 11(b) of Marpol 73/78 and in Annex II Regulation (6)(b) of Marpol 73/78 to the owners, masters and crew?
- (2) In relation to the territorial sea of a Member State:
 - (a) Is Article 4 of the Directive invalid in so far as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or
 - (b) Is Article 5(1) of the Directive invalid in so far as it excludes the application of the exceptions in Annex I Regulation 11(b) of Marpol 73/78 and in Annex II Regulation (6)(b) of Marpol 73/78?
- (3) Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in UNCLOS, and if so, is Article 4 invalid to that extent?
- (4) Does the use of the phrase “serious negligence” in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?⁵⁰²

⁵⁰¹ *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application, *supra* note 499.

⁵⁰² *INTERTANKO and others v. Secretary of State for Transport*, Case C-308/06, Judgment of 3 June 2008, ECJ, paragraph 29. As the questions were referred to ECJ before the new numbering of MARPOL entered into force, in the referral the old numbering is still used – Reg. 11(b) of Annex I, instead of Reg. 4(2) of this Annex, and Reg. 6(b) of Annex II, instead of Reg. 3(2) of this Annex.

On 3 June 2008 (that is, when the term for transposition of Directive 2005/35 into national law had already expired) the ECJ delivered its judgment on the case. In the judgment the ECJ stated that, in principle, the validity of any directive of the Community may be affected by the fact that this directive is incompatible with international law. However, this general rule is subjected to two conditions:

- 1) the Community must be bound by respective international law;
- 2) the Court can examine the validity of a directive in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise.⁵⁰³

The ECJ further ruled that:

- it cannot assess validity of Directive 2005/35 in the light of MARPOL, because the Community is not a party to MARPOL (thus, the first of the above-mentioned conditions is not met),⁵⁰⁴
- it cannot assess validity of Directive 2005/35 in the light of UNCLOS, because, although the Community is a party to UNCLOS, the nature and broad logic of UNCLOS prevents the Court from being able to assess the validity of Directive 2005/35 in the light of UNCLOS (thus, the second of the above-mentioned conditions is not met).⁵⁰⁵

Thus, the ECJ did not even start to analyse whether Directive 2005/35 is in conflict with MARPOL and UNCLOS or not. Consequently, the first three questions referred to the ECJ by the High Court of Justice of England and Wales were left completely unanswered. The fourth question – the one regarding legal certainty of the phrase “serious negligence” – was answered by the ECJ. Yet, the respective answer did not declare any of the rules of Directive 2005/35 invalid.⁵⁰⁶ Consequently, the Directive stayed as it was.

⁵⁰³ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 43-45.

⁵⁰⁴ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 47-52.

⁵⁰⁵ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 53-63.

⁵⁰⁶ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 69-80.

Obviously, the maritime industry bodies which initiated the case were not satisfied with such an outcome (an almost-zero outcome) of all their efforts to clarify the issues. The disappointment was expressed in common statement.⁵⁰⁷ Also this author thinks that the ECJ judgement in the *INTERTANKO* case is disappointing. It was possible for the ECJ to interpret the conditions which should be met to assess validity of a directive of the Community in the light of an international law so as to carry out the long awaited and highly necessary assessment of the validity of Directive 2005/35 in the light of MARPOL and UNCLOS;⁵⁰⁸ yet, unfortunately, the ECJ interpreted the respective conditions so as not to carry out the assessment.

Sub-chapters 5.2.2 and 5.2.3 below will attempt to do what the ECJ refused to do – to answer questions regarding the compatibility of Art. 4 and 5 of Directive 2005/35 with MARPOL and UNCLOS. Although, only Questions 2 and 3 referred to the ECJ in the *INTERTANKO* case will be analysed in this regard, as Question 1 does not concern seafarers and, thus, stands outside the scope of this dissertation. Similarly, taking into consideration the scope of this dissertation, analysis will be carried out only from the perspective of discharges of oil, despite the fact that Directive 2005/35 also covers discharges of noxious liquid substances in bulk. Sub-chapter 5.2.4 will be dedicated to the closer analysis of Question 4 referred to the ECJ in the *INTERTANKO* case, that is, the question on legal certainty of the phrase “serious negligence”.

⁵⁰⁷ See “Industry Coalition Statement on ECJ Ruling on EU SSP Directive”, available at: <https://www.intertanko.com/News-Desk/Press-Releases/Year-2008/Joint-Press-Release/> [accessed 4 October 2015].

⁵⁰⁸ In this regard, see, for example, *INTERTANKO and others v. Secretary of State for Transport*, Opinion of Advocate General Kokott delivered on 20 November 2007, ECJ, paragraphs 50, 55, 56, 59, 66, 67, 73 and 75.

5.2.2. Question 2 Referred to the ECJ in the *INTERTANKO* Case: Question on the Compatibility of Directive 2005/35 with MARPOL

Question 2 referred to the ECJ in the *INTERTANKO* case was:

In relation to the territorial sea of a Member State:

- (a) Is Article 4 of the Directive invalid in so far as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or
- (b) Is Article 5(1) of the Directive invalid in so far as it excludes the application of the exceptions in Annex I Regulation 11(b) of Marpol 73/78 [...]?

The essence of this question is: do Arts. 4 and 5 of Directive 2005/35, read together, conflict with Reg. 4(2) of Annex I of MARPOL?

Art. 4 of Directive 2005/35 prescribes:

1. Member States shall ensure that ship-source discharges of polluting substances, including minor cases of such discharges, into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or with serious negligence.
2. Each Member State shall take the necessary measures to ensure that any natural or legal person having committed an infringement within the meaning of paragraph 1 can be held liable therefor.

With “discharges of polluting substances” here must be understood discharges as per MARPOL.⁵⁰⁹ With “areas referred to in Article 3(1)”:

- (a) the internal waters, including ports, of a Member State, in so far as the MARPOL regime is applicable;
- (b) the territorial sea of a Member State;
- (c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2 of UNCLOS, to the extent that a Member State exercises jurisdiction over such straits;
- (d) EEZ or equivalent zone of a Member State, established in accordance with international law; and
- (e) the high seas.⁵¹⁰

⁵⁰⁹ See Art. 2(2) and (3) of Directive 2005/35.

⁵¹⁰ See Art. 3(1) of Directive 2005/35.

In relation to *large-scale* discharges (the type of discharges about which this dissertation is concerned), the term “infringements” within Art. 4 of Directive 2005/35 can be read as “criminal offences”. It will be explained later why such reading can be applied. The term “serious negligence” within Art. 4 of Directive 2005/35 must be read as “gross negligence”. Again, it will be explained later why such a reading must be applied.

Art. 5 of Directive 2005/35 states:

1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement, if it satisfies the conditions set out in Annex I, Regulations 15, 34, 4,1 or 4,3 [...] of Marpol 73/78.
2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew, if it satisfies the conditions set out in Annex I, Regulation 4,2 [...] of Marpol 73/78.

In other words, Art. 5 of Directive 2005/35 states that MARPOL exceptions from liability “discharges necessary for the purposes of securing the safety of a ship or saving life at sea” (Reg. 4(1) of Annex I of MARPOL) and “discharges necessary for the purposes of combating specific pollution incident” (Reg. 4(3) of Annex I of MARPOL) should be followed by EU Member States in regards to discharges of oil in any maritime zone. Yet, the MARPOL exception from liability “discharge resulting from damage to a ship or its equipment” (Reg. 4(2) of Annex I of MARPOL) should be followed by EU Member States only in regards to discharges of oil in straits used for international shipping, EEZs and on the high seas; in regards to discharges of oil in internal waters and territorial sea of a Member State the MARPOL exception from liability “discharge resulting from damage to a ship or its equipment” (Reg. 4(2) of Annex I of MARPOL) should not be followed.

MARPOL is applicable to all maritime zones. Only limitations on applicability of MARPOL are related to specific ships, not specific territories. For example, Art. 3(3) of MARPOL states that MARPOL shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. Thus, Directive 2005/35, by requiring EU Member States not to follow the MARPOL exception from liability “discharge resulting from damage to a ship or its equipment” in regards to discharges

of oil in their internal waters and territorial sea, clearly deviates from MARPOL. Nobody really denies that it is indeed so. However, great debate exists on the issue whether the deviation in question is lawful or unlawful. Figuratively speaking, there are two strongly opinionated camps – “supporters of the deviation” and “adversaries of the deviation” – in conflict with each other.

“Supporters of the deviation” assert that, while for coastal States and port States in regards to discharges outside their internal waters and territorial sea MARPOL constitutes maximal standard (or limitation), for coastal States in regards to discharges in their internal waters and territorial sea, similarly as for flag States, MARPOL constitutes just a minimal standard (or starting point). Consequently, in regards to discharges in their internal waters and territorial sea, coastal States may raise the standard, *inter alia*, by ignoring MARPOL exceptions from liability. The flow of arguments of “supporters of the deviation” is as follows:

- 1) Art. 9(2) and (3) of MARPOL state that MARPOL is not to prejudice the general jurisdictional regime established by UNCLOS;
- 2) in accordance with the general jurisdictional regime established by UNCLOS, in regards to discharges in straits used for international navigation, EEZs and on high seas coastal States and port States may adopt only such laws which conform to and give effect to GAIRES or applicable international rules and standards (Art. 42(1)(b), Art. 211(5) and Art. 218(1) of UNCLOS) – consequently, in regards to these discharges MARPOL (GAIRES, an applicable international rule and standard) constitutes maximal standard;
- 3) in accordance with the general jurisdictional regime established by UNCLOS, in regards to discharges in territorial sea, coastal State jurisdiction is not limited to GAIRES or applicable international rules and standards (Art. 211(4) of UNCLOS) – consequently, in regards to these discharges

MARPOL constitutes just a minimal standard.⁵¹¹

In other words, “supporters of the deviation” say that Art. 9(2) and (3) of MARPOL allow deviation from MARPOL, if such deviation is allowed by UNCLOS. Art. 211(4) of UNCLOS allows coastal States to deviate from MARPOL standards in regards to ship-source pollution in their territorial sea. Consequently, the deviation incorporated in Directive 2005/35 is lawful. This position can be depicted as follows:

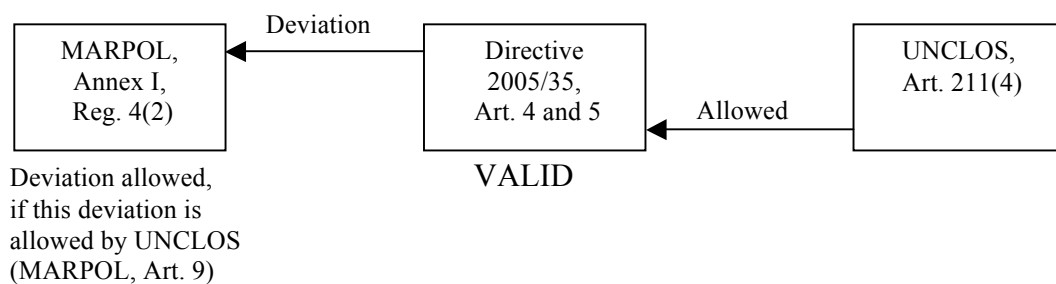


Figure 6 – Position of “supporters of the deviation” regarding validity of Art. 4 and 5 of Directive 2005/35.

⁵¹¹ Doris Konig, “The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?”, in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 776; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1124; Jason Chuah, “Advocate General’s Opinion on the EU Ship-Source Pollution Directive”, in *Journal of International Maritime Law*, Volume 14, Issue 1, January-February 2008 at p. 62; *INTERTANKO and others v. Secretary of State for Transport*, Opinion of Advocate General Kokott delivered on 20 November 2007, ECJ, paragraphs 26, 123, 126-127, 130 and 133-137.

Despite the fact that Directive 2005/35 requires to deviate from MARPOL in regards to both discharges in internal waters and discharges in territorial sea, discussions between “supporters of the deviation” and “adversaries of the deviation” usually are only on discharges in territorial sea. Most probably it is so because these discussions are based on legal norms of UNCLOS, but UNCLOS does not explicitly cover internal waters. However, everything what is said in this sub-chapter in regards to discharges in territorial sea can be extrapolated to cover also discharges in internal waters, because similarly as Art. 211(4) of UNCLOS grants coastal States in principle unlimited power to adopt national law on discharges in their territorial sea, customary international law grants coastal States in principle unlimited power to adopt national law on discharges in their internal waters.

“Adversaries of the deviation” disagree. They assert that for coastal States MARPOL never constitutes just a minimal standard. Instead, it constitutes uniform rules, which may never be ignored. Consequently, MARPOL exceptions from liability may also never be ignored.⁵¹²

First of all, “adversaries of the deviation” argue that the Preamble of MARPOL states that the Convention is establishing rules of universal purport, but

[...] the universality of applicability of MARPOL [...] supports the view that the thresholds of MARPOL, until amended, are binding on the States parties; moreover these thresholds are the very basis of the integrity of that Convention.⁵¹³

Secondly, “adversaries of the deviation” argue that also *travaux préparatoires* of MARPOL show that the aim of the drafters of MARPOL was to develop uniform rules from which State Parties of this Convention (including coastal States in regards to discharges in their territorial sea) may never depart. In this regard, “adversaries of the deviation” point to the fact that, during the process of drafting of MARPOL, proposals were made to allow coastal States a degree of flexibility to depart from MARPOL; however, these proposals were opposed with the argument that such “flexibility” will undermine the whole point of the Convention – to ensure the balance between the interests of flag States and coastal States.⁵¹⁴ “Supporters of the deviation” do not accept this argument. They say that, during the process of drafting of MARPOL, states actually did not completely reject the

⁵¹² Presentation by Epaminondas Embiricos, in London Shipping Law Centre, The Eighth Cadwallader Annual Memorial Lecture, “The Extra Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry”, Transcript of the Lecture, 4 October 2005, available at: http://www.shippinglbc.com/content/uploads/documents/8_cad.pdf [accessed 4 October 2015] at p. at p. 36; Gotthard Gauci, “Challenging EC Pollution Regulation – the Lost Cause?”, in Shipping and Transport International, Volume 7, No. 2, 2008 at p. 25; Allan Khee-Jin Tan, “The EU Ship-Source Pollution Directive and Coastal State Jurisdiction over Ships”, in Lloyd’s Maritime and Commercial Law Quarterly, Bound Volume 2010 at p. 483; *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraphs 16 and 63-74; *INTERTANKO and others v. Secretary of State for Transport*, Witness Statement of Colin Maxwell de la Rue dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraph 76.

⁵¹³ GAUCI, *ibid.* at p. 25. See also *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application, *ibid.*, paragraphs 16, 63 and 72.

⁵¹⁴ EMBIRICOS, *supra* note 512 at pp. 37-38; DE LA RUE and ANDERSON, *supra* note 511 at p. 1125; *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application, *ibid.*, paragraphs 71-73; *INTERTANKO and others v. Secretary of State for Transport*, Witness Statement of Colin Maxwell de la Rue, *supra* note 512, paragraphs 72-76.

possibility for coastal States to adopt more stringent standards than MARPOL, they simply left the issue to be decided later by UNCLOS and exactly because of this reason Art. 9(2) and (3) of MARPOL were adopted.⁵¹⁵ “Adversaries of the deviation” give counter argument to this statement. They say that Art. 9(2) and (3) of MARPOL were already in the draft Convention long before the debate on allowing or not allowing coastal States to adopt more stringent standards than MARPOL took place. Consequently, Art. 9(2) and (3) of MARPOL are not linked to that debate.⁵¹⁶

Thirdly, “adversaries of the deviation” argue that, differently from what “supporters of the deviation” say, MARPOL actually does not prejudice the general jurisdictional regime established by UNCLOS. For example, Embiricos has stated:

MARPOL Article 9(2) simply provides that nothing in the MARPOL Convention shall prejudice the debate at the UN Conference, which subsequently led to the UNCLOS Convention; and indeed there is no conflict between MARPOL and UNCLOS. UNCLOS Article 211(4) provides that coastal states may, in the exercise of their sovereign rights within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution. Yet it is precisely in the exercise of their sovereign rights that the EU Member States agreed to be bound by the terms of MARPOL. It is important to note that there is nothing in UNCLOS, which even purports to change MARPOL or effect it in any way. Thus, the Commission’s argument that the implementation of the Directive by the Member States is a legitimate exercise of sovereign rights under UNCLOS, is invalidated by the fact that such sovereign rights were already freely exercised when the Member States entered into a binding agreement with other States, which created the MARPOL Convention.⁵¹⁷

De la Rue and Anderson have expressed similar view:

If MARPOL standards were less stringent than others which states could have adopted without exceeding their sovereign powers, this did not mean that the Convention had prejudiced those powers: it remains open to contracting states to agree to amend the Convention by raising the relevant standard or, if they preferred, to denounce it and thereby free themselves to exercise their powers unilaterally.⁵¹⁸

⁵¹⁵ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1126.

⁵¹⁶ DE LA RUE and ANDERSON, *ibid.*

⁵¹⁷ EMBIRICOS, *supra* note 512 at p. 37.

⁵¹⁸ DE LA RUE and ANDERSON, *supra* note 515 at p. 1124. See also *INTERTANKO and others v. Secretary of State for Transport*, Witness Statement of Colin Maxwell de la Rue, *supra* note 512, paragraph 44; Thomas A. Mensah, “Sovereign Rights in Legislation of Member States Under UNCLOS and MARPOL”, in London Shipping Law Centre, The Eighth Cadwallader Annual Memorial Lecture, “The Extra Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry”, Transcript of the Lecture, 4 October 2005, available at: http://www.shippinglbc.com/content/uploads/documents/8_cad.pdf [accessed 4 October 2015] at p. 27.

In other words, “adversaries of the deviation” say that Art. 9(2) and (3) of MARPOL allow deviation from MARPOL only when there is a conflict between MARPOL and UNCLOS. Reg. 4(2) of Annex I of MARPOL does not conflict with Art. 211(4) of UNCLOS. Consequently, the deviation incorporated in Directive 2005/35 is unlawful. This position can be depicted as follows:

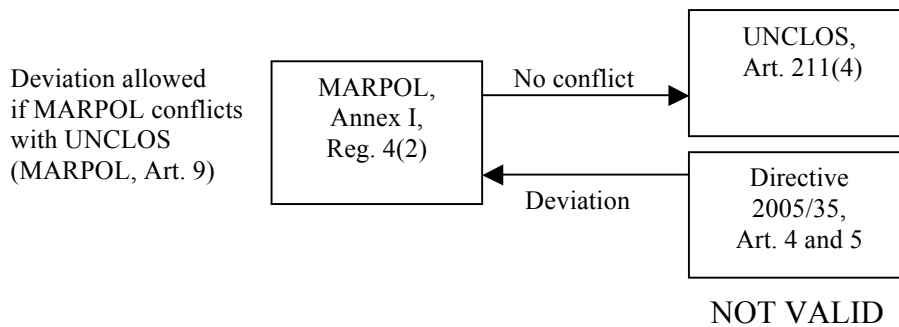


Figure 7 – Position 1 of “adversaries of the deviation” regarding validity of Art. 4 and 5 of Directive 2005/35.

For the sake of the completeness of discussion it should be noted here that at times “adversaries of the deviation” follow a different path of thinking as depicted above. At times, similarly as “supporters of the deviation”, they say that Art. 9(2) and (3) of MARPOL, indeed, allow deviation from MARPOL if such deviation is allowed by UNCLOS (even if there is no conflict between MARPOL and UNCLOS), just, differently from “supporters of the deviation”, they assert that the only states to which UNCLOS grants the right to deviate from MARPOL are flag States. To support this opinion “adversaries of the deviation” point to the difference between legal norm of UNCLOS which addresses flag State jurisdiction to adopt national law on ship-source pollution (Art. 211(2)) and legal norms of UNCLOS which address corresponding coastal State and port State jurisdiction. “Adversaries of the deviation” argue that, while Art. 211(2) of UNCLOS explicitly states that laws of flag States shall *at least* have the same effect as GAIRAS (which, in their view, indicates that any flag State, even the one which is State Party to MARPOL, is allowed to legislate beyond MARPOL), there is no such statement in legal norms addressing coastal State and port State jurisdiction. Consequently, the deviation

incorporated in Directive 2005/35 – deviation regarding coastal States, not flag States – is unlawful.⁵¹⁹ This position of “adversaries of the deviation” can be depicted as follows:

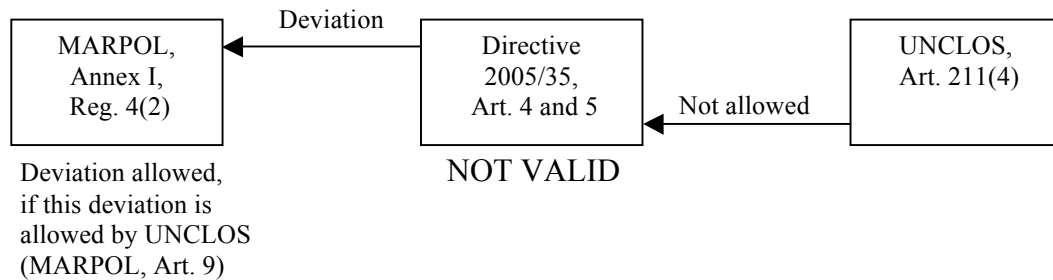


Figure 8 – Position 2 of “adversaries of the deviation” regarding validity of Art. 4 and 5 of Directive 2005/35.

Often it is hard to understand from the argumentation of “adversaries of the deviation” which position in regards to interpretation of Art. 9(2) and (3) of MARPOL they actually take – Position 1 (as depicted in Figure 7) or Position 2 (as depicted in Figure 8). It seems that at least some “adversaries of the deviation” take both of these positions simultaneously. Such practice, however, makes overall argumentation inconsistent, and thus weaker.

The above description of positions of “supporters of the deviation” and “adversaries of the deviation” shows that the core of the controversy between these two sides is different opinions on whether Art. 9(2) and (3) of MARPOL allow deviation from MARPOL (even when there is no conflict between MARPOL and UNCLOS) or not, and if allow, then to what extent. Exact wording of Art. 9(2) and (3) of MARPOL is as follows:

⁵¹⁹ See, for example, Thomas A. Mensah, “Sovereign Rights in Legislation of Member States Under UNCLOS and MARPOL”, in London Shipping Law Centre, The Eighth Cadwallader Annual Memorial Lecture, “The Extra Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry”, Transcript of the Lecture, 4 October 2005, available at: http://www.shippinglbc.com/content/uploads/documents/8_cad.pdf [accessed 4 October 2015] at pp. 24 and 27-28; Jose-Manuel Martin Osante, “Competition and the European Union Directive on Criminal Penalties for Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 14, Issue 5, September-October 2008 at pp. 424-425; *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraph 96.

- (2) Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag state jurisdiction.
- (3) The term “jurisdiction” in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention”.

Literal (philological), systemic and teleological methods of interpretation of Art. 9(2) and (3) of MARPOL are not capable of providing a clear answer to the above-mentioned question on which “supporters of the deviation” and “adversaries of the deviation” have different opinions. Consequently, the recourse by “adversaries of the deviation” to relevant *travaux préparatoires* of MARPOL is the step in the right direction for resolving the controversy.

During the drafting process of MARPOL, rules which ultimately became Art. 9(2) and (3) of MARPOL (initially they constituted Art. 10(2) and (3)) were negotiated as a package with Art. 4(2) of MARPOL – rule which sets coastal State jurisdiction to cause proceedings in regards to MARPOL violations. The purpose of adding Art. 9(2) and (3) to Art. 4(2) was to ascertain that the wide jurisdictional powers given to coastal States by Art. 4(2) are ultimately exercised in line with the limits of these powers which will be determined later – by UNCLOS. As Timagenis has put it:

[...] what could be generally said is that Article 4(2) should be interpreted (and it can be so interpreted) consistently with the general law of the sea concerning coastal State jurisdiction. Thus, for example, Article 4(2) may not be interpreted as meaning that coastal State may always cause proceedings for all violations in all of the areas under their jurisdiction.⁵²⁰

During the drafting process of MARPOL, rules which ultimately became Art. 9(2) and (3) of MARPOL were not debated extensively. It was not done so because these rules were considered as sufficiently clear. They were considered as sufficiently clear, because the debate on a similar regulation – Art. XIII of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (hereinafter – Dumping Convention) – was already accomplished. If to reflect the outcome of this debate in short, it can be said that states agreed that Art. XIII of the

⁵²⁰ Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at p. 522.

Dumping Convention prescribes: first, that nothing in the Convention should be read as limiting states during the envisaged development of UNCLOS to negotiate whatever jurisdictional regime they want; second, if respective negotiations lead to legal norms of UNCLOS which are in conflict with the Dumping Convention, to follow UNCLOS.⁵²¹ Thus, it can be concluded that the purpose of Art. 9(2) and (3) of MARPOL is similar to that of Art. XIII of the Dumping Convention. It, *inter alia*, means that “adversaries of the deviation” are right when they say that the development of Art. 9(2) and (3) of MARPOL is not linked to the specific debate on allowing or not allowing coastal States to adopt more stringent standards than MARPOL. This specific debate, indeed, took place during the drafting process of MARPOL, moreover this debate was extensive. However, it was linked to other rules than to those which ultimately became Art. 9(2) and (3) of MARPOL. These “other rules” (draft Art. 8, later draft Art. 9) in the latest stages of the negotiations read as follows:

- (1) Nothing in the present Convention shall be construed as derogating from the powers of any Contracting State to take more stringent measures where specific circumstances so warrant, within its jurisdiction, in respect of discharge standards.
- (2) A Contracting State shall not, within its jurisdiction, in respect of ships to which the Convention applies other than its own ships, impose additional requirements with regard to ship design and equipment in respect of pollution control. The requirements of this paragraph do not apply to waters the particular characteristics of which, in accordance with accepted scientific criteria, render the environment exceptionally vulnerable.
- (3) States which adopt special measures in accordance with this Article shall notify them to the Organization without delay. The Organization shall inform Contracting States about these measures.

The respective draft article did not receive sufficient support – because of the use of such vague phrases as “where specific circumstances so warrant”, “waters the particular characteristics of which render the environment exceptionally vulnerable” and “accepted scientific criteria”. Consequently, the respective draft article was deleted from the draft Convention.⁵²²

⁵²¹ TIMAGENIS, *ibid.* at pp. 243-244.

⁵²² TIMAGENIS, *ibid.* at pp. 488-502.

However, “supporters of the deviation” are right when they say that, during the process of drafting of MARPOL, states, actually, did not completely reject the possibility for coastal States to adopt more stringent standards than MARPOL. Despite the fact that the above-introduced draft article was deleted from the draft Convention, many states remained convinced that it does not deprive them from the right within their jurisdiction to adopt more stringent standards than MARPOL. Some of these states, for example, Australia, Canada and the Philippines, even made direct statements in this regard.⁵²³ Thus, in fact, during the drafting process of MARPOL, the very important issue of possibility for State Parties to MARPOL to adopt more stringent standards than MARPOL was simply left unsolved, with conflicting views still present. These conflicting views have surfaced again now within the discussions on the legality of Art. 4 and 5 of Directive 2005/35. Consequently, it can be concluded that the root cause of the controversy between “supporters of the deviation” and “adversaries of the deviation”, actually, is this failure of the drafters of MARPOL to agree on the issue when, if ever, State Parties to MARPOL may adopt more stringent standards than MARPOL. It, *inter alia*, means that, if the international maritime community wants to overcome the controversy between “supporters of the deviation” and “adversaries of the deviation”, fundamentally, it needs to return to the above-mentioned debate which was abandoned during the drafting process of MARPOL, and ultimately include in MARPOL clear legal norms reflecting results of this debate.

At the same time, it is rather clear that, even if the international maritime community returns to the above-mentioned debate, the satisfactory result of this debate will not come soon. Maybe it will never come. Consequently, there is also a need for the short-term solution – the interpretation of the law as it is in force now. This interpretation is provided further along in this sub-chapter.

⁵²³ Gregorios J. Timagenis, *International Control of Marine Pollution*, New York: Oceana Publications, 1980 at pp. 502-506.

Art. 237(1) and 311(2) of UNCLOS state that UNCLOS shall not alter the rights and obligations of State Parties which arise from other agreements compatible with UNCLOS. Art. 9(2) and (3) of MARPOL essentially state the same, just in reverse form and specifically in regards to MARPOL, namely, that in case MARPOL is incompatible with UNCLOS, UNCLOS shall alter the rights and obligations under MARPOL. Reg. 4(2) of Annex I of MARPOL is compatible with UNCLOS, as nothing in UNCLOS directly forbids States to exempt from liability discharges of oil resulting from damage to a ship or its equipment. Consequently, neither UNCLOS nor MARPOL sets State Parties to MARPOL (be they flag States, coastal States or port States) free from their obligation to follow Reg. 4(2) of Annex I of MARPOL.

Even if one disagrees that Art. 9(2) and (3) of MARPOL should be interpreted as permitting deviation from MARPOL only when MARPOL comes into conflict with UNCLOS, he must admit that such interpretation, in principle, is possible. In other words, he must admit that the content of Art. 9(2) and (3) of MARPOL is at least ambiguous. This conclusion is supported by the very fact that highly distinguished scholars have interpreted the respective legal norms of MARPOL differently. If so, the rule of lenity comes into play again – interpretation which is more favourable to an alleged offender should be followed. Obviously, the interpretation which leaves to an alleged offender all defences from liability incorporated in MARPOL (the interpretation of “adversaries of the deviation”) is more favourable to an alleged offender than the interpretation which takes away some of these defences (the interpretation of “supporters of the deviation”).

For those who, even after this argument, stay convinced that in regards to discharges in their internal waters and territorial sea coastal States (even those which are State Parties to MARPOL) may adopt more stringent standards than MARPOL, one more counter-argument can be invoked, namely, that just because more stringent standards than MARPOL are allowed in regards to respective discharges does not automatically mean that exceptions from liability incorporated in Reg. 4 of Annex I of MARPOL can be removed, because it can be questioned which standards, exactly, are “more stringent standards” in regards to Reg. 4 of Annex I of MARPOL:

- such standards which remove safeguards for alleged offenders incorporated in the Regulation – thus, by more extensive application of liability, securing “higher standard than minimal” in regards to protection of environment (as “supporters of the deviation” claim), or
- such standards which provide even more safeguards for alleged offenders than the Regulation does – thus, securing “higher standard than minimal” in regards to protection of alleged offenders.

In the opinion of this author, both above-given interpretations are justifiable. The first one can be justified by reference to the general purpose of MARPOL, which is to secure a clean environment. The second one can be justified by reference to the very nature of Reg. 4 of Annex I of MARPOL, itself. This Regulation, by setting different *defences from liability*, predominately provides protection to alleged offenders, not the marine environment. If both interpretations are possible, again, the rule of lenity should be applied. Thus, interpretation which is favourable to alleged offenders (second interpretation), not disadvantageous to them (first interpretation) should be followed.

Due to the above-given reasons, this author is of the view that under the law, as it is in force now, the requirement of Directive 2005/35 to treat as infringements discharges of oil which are exempted from liability under Reg. 4(2) of Annex I of MARPOL conflicts with this rule of MARPOL. Consequently, particularly taking into consideration that the claimed purpose of Directive 2005/35 is to incorporate international standards for ship-source pollution (thus, also MARPOL) into EU law, the EU shall align Directive 2005/35 with MARPOL, for example, by deleting Art. 5 of the Directive. If the EU fails to make the relevant alignment, others may return to challenging the validity of the requirement of the Directive to deviate from MARPOL. Several dispute settlement mechanisms are still available for this purpose.

One of the options is to involve an Arbitration Tribunal established in accordance with Art. 10 of MARPOL (hereinafter – Arbitration Tribunal under MARPOL). Arbitration Tribunal under MARPOL may be established to settle the disputes concerning the interpretation or application of MARPOL. The controversy between “supporters of the deviation” and “adversaries of the deviation” involves such disputes – dispute on the interpretation of Art. 9(2) and (3) of MARPOL and, related to it, dispute on the application of MARPOL to discharges of polluting substances in internal waters and territorial sea of a coastal State. For example, the following questions could be referred to an Arbitration Tribunal under MARPOL:

- Do Art. 9(2) and (3) of MARPOL give State Parties to MARPOL the right to adopt law which deviates from MARPOL in cases when there is no conflict between MARPOL and UNCLOS?
- If no, does national law of State X (State Party to MARPOL, national law of which does not follow Reg. 4(2) of Annex I of MARPOL in regards to discharges of oil in its internal waters and territorial sea) violate MARPOL?

Proceedings under Art. 10 of MARPOL could be initiated by those State Parties to MARPOL which are not EU Member States and are of the opinion that Art. 9(2) and (3) of MARPOL do not give State Parties to MARPOL the right to adopt national law which deviates from MARPOL (except when there is a conflict between MARPOL and UNCLOS) against those State Parties to MARPOL which are EU Member States and, consequently, by implementing Directive 2005/35 in their national law, willingly or unwillingly, but follow the opinion that Art. 9(2) and (3) of MARPOL give State Parties to MARPOL the right to adopt standards which deviate from MARPOL (even when there is no conflict between MARPOL and UNCLOS). Proceedings under Art. 10 of MARPOL may not be initiated directly against the EU, because the EU is not Party to MARPOL. Thus, the validity of Directive 2005/35 (EU law) may not be assessed within the respective proceedings. However, the decision of an Arbitration Tribunal under MARPOL regarding the interpretation of Art. 9(2) and (3) of MARPOL has high potential to influence an EU decision to amend Directive 2005/35 or not.

Another option for challenging the validity of the requirement of Directive 2005/35 to deviate from MARPOL is to involve a court or tribunal (ITLOS, ICJ, arbitral tribunal or special arbitral tribunal) in accordance with Part XV of UNCLOS. A court or tribunal under Part XV of UNCLOS may be involved to settle the disputes concerning the interpretation or application of UNCLOS, and the controversy between “supporters of the deviation” and “adversaries of the deviation” involves also such dispute – the dispute on the interpretation and application of Art. 211(4), Art. 237(1) and Art. 311(2) of UNCLOS. For example, the following questions could be referred to a court or tribunal under Part XV of UNCLOS:

- Does Art. 211(4) of UNCLOS, read in system with Art. 237(1) and Art. 311(2) of UNCLOS, give states which are State Parties to both UNCLOS and MARPOL the right to deviate from legal norms of MARPOL in cases where legal norms in question are not in conflict with UNCLOS?
- If no, do Directive 2005/35 and national law of State X (State Party to both UNCLOS and MARPOL national law of which does not follow Reg. 4(2) of Annex I of MARPOL in regards to discharges of oil in its territorial sea) violate UNCLOS?

Similar to proceedings under Art. 10 of MARPOL, proceedings under Part XV of UNCLOS could be initiated by those State Parties to both UNCLOS and MARPOL which are not EU Member States and are of the opinion that Art. 211(4) of UNCLOS does not give states which are State Parties to both UNCLOS and MARPOL the right to deviate from rules of MARPOL (except when there is a conflict between MARPOL and UNCLOS) against those State Parties to both UNCLOS and MARPOL which are EU Member States and, consequently, by implementing Directive 2005/35 in their national law, willingly or unwillingly, but follow the opinion that Art. 211(4) of UNCLOS does give states which are State Parties to both UNCLOS and MARPOL the right to deviate from rules of MARPOL (even when there is no conflict between MARPOL and UNCLOS). Differently from proceedings under Art. 10 of MARPOL, proceedings under Part XV of UNCLOS may also be initiated directly against the EU. In accordance with Art. 1 and 7 of Annex IX of

UNCLOS, Part XV of UNCLOS is applicable not only to states which are State Parties to UNCLOS but also to intergovernmental organizations Parties to UNCLOS. The EU is such an intergovernmental organisation.⁵²⁴ Thus, within the proceedings under Part XV of UNCLOS the validity of Directive 2005/35 may also be assessed. However, cases against the EU may only be referred to an arbitral tribunal construed in accordance with Annex VII of UNCLOS, because the EU has not submitted written declaration regarding its choice of one or more of the means for the settlement of disputes concerning the interpretation or application of UNCLOS, but in such cases, in accordance with Art. 287(3), (4) and (5) of UNCLOS, disputes shall be referred to an arbitral tribunal construed in accordance with Annex VII of UNCLOS, unless the parties otherwise agree.⁵²⁵

One more option which can be considered for challenging the validity of the requirement of Directive 2005/35 to deviate from MARPOL is to involve a national constitutional court in one of the EU countries. It can be done so because it is possible to argue that the requirement of Directive 2005/35 to treat as criminal offences particular discharges of polluting substances which are exempted from liability under MARPOL, not only conflicts with MARPOL, but also infringes upon human rights, particularly the principle of legality, which states that no one shall be held criminally liable for any act which do not constitute a crime at the time when it was committed. Constitutions of some EU countries prescribe that a particular country only accepts supremacy of EU law so long as this law guarantees human rights. Consequently, in these countries, when it is believed that human rights are violated by the national implementation of specific EU law, the issue can be referred to national constitutional court. For example, in Germany, it was done so in regards to the national implementation of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between

⁵²⁴ See information on the status of UNCLOS at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en.

⁵²⁵ It is worth to note here that one case directly against EU has been already successfully initiated in front of arbitral tribunal construed in accordance with Annex VII of UNCLOS – *The Atlanto-Scandic Herring Arbitration* in front of the Permanent Court of Arbitration.

Member States.⁵²⁶ On 18 July 2005 the German national law implementing this Framework Decision was declared void by the Federal Constitutional Court of Germany on the grounds that it violates human rights under Art. 2 (Personal Freedoms) and 16 (Citizenship-Extradition) of the Basic Law for the Federal Republic of Germany.⁵²⁷ Among other things, a national constitutional court within its proceedings may refer specific questions to the ECJ for preliminary ruling. In regards to Directive 2005/35, the relevant question for referral to the ECJ in this case would be: do Art. 4 and 5 of Directive 2005/35, by requiring EU Member States in regards to discharges of polluting substances in their internal waters and territorial sea not to follow certain exceptions from liability under MARPOL, violate Art. 7 of the European Convention on Human Rights and/or Art. 49(1) of the Charter of Fundamental Rights of the European Union (principle of legality)? While the ECJ within the *INTERTANKO* case refused to assess Directive 2005/35 in the light of MARPOL and UNCLOS, it will be very hard for the ECJ to refuse to assess Directive 2005/35 in the light of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, because in accordance with Art. 6 of the Treaty on European Union and Par. 1 of the accompanying Declaration concerning provisions of the Treaties both the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union are assimilated to the primary law of the EU.⁵²⁸

⁵²⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

⁵²⁷ *European Arrest Warrant Act case*, Judgment of 18 July 2005, 2BvR 22336/04, Federal Constitutional Court of Germany, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html [accessed 5 October 2015].

⁵²⁸ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13.

5.2.3. *Question 3 Referred to the ECJ in the INTERTANKO Case: Question on the Compatibility of Directive 2005/35 with the Right of Innocent Passage*

Question 3 referred to the ECJ in the *INTERTANKO* case was:

Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in UNCLOS, and if so, is Article 4 invalid to that extent?

In accordance with Art. 4 of Directive 2005/35, the mental state (*mens rea*) which should accompany ship-source pollution in the territorial sea for this pollution to be treated as infringement is “intent, recklessness or serious negligence”. In accordance with Art. 19(2)(h) of UNCLOS the mental state (*mens rea*) which should accompany ship-source pollution in the territorial sea for this pollution to be treated as non-innocent is “will”, that is “intent” (in addition, the pollution caused should be serious). This decoupling has raised concerns about the compatibility of Art. 4 of Directive 2005/35 with the right of innocent passage of foreign ships through the territorial sea. For example, Mensah has stated:

Article 211(4) of UNCLOS, on which the Directive appears to base itself, provides expressly that the laws and regulations adopted by a coastal state in exercise of its sovereignty within its territorial sea for the prevention, reduction and control of marine pollution “shall ... not hamper innocent passage of foreign vessels.” In this connection, it is worth noting that pursuant to Article 19, paragraph 2(h) of UNCLOS, the only act of pollution which can deprive a foreign ship of the right of innocent passage in the territorial sea is an “act of wilful and serious pollution contrary to this Convention”. Hence, in the absence of a wilful and serious act of pollution, passage by a foreign vessel in the territorial sea of a coastal state must be considered to be “innocent passage”. The EC Directive, on the other hand, lowers the requirement for the application of sanctions to a discharge from a foreign vessel involving, *inter alia*, “serious negligence”. This lower criterion is not to be found in either MARPOL or UNCLOS. In doing this the EC Directive adopts a standard whose effect is to hamper innocent passage of a foreign vessel through the territorial sea.⁵²⁹

⁵²⁹ Thomas A. Mensah, “Sovereign Rights in Legislation of Member States Under UNCLOS and MARPOL”, in London Shipping Law Centre, The Eighth Cadwallader Annual Memorial Lecture, “The Extra Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry”, Transcript of the Lecture, 4 October 2005, available at: http://www.shippinglbc.com/content/uploads/documents/8_cad.pdf [accessed 4 October 2015] at p. 28. See also *INTERTANKO and others v. Secretary of State for Transport, Case C-308/06*, Judgment of 3 June 2008, ECJ, paragraph 29; *INTERTANKO and others v. Secretary of State for Transport*, Grounds of the Application dated 23 December 2005, High Court of Justice of England and Wales (unpublished document on file with author), paragraph 97; Jason Chuah, “ECJ Approves Directive on Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 14, Issue 2, March-April 2008 at p. 181.

However, many commentators say that the above-described concern is unfounded. For instance, Pozdnakova has stated:

[...] Article 4 of Directive does not *prohibit* foreign vessels from transiting Member States' waters, but merely criminalizes certain (intentional, reckless and seriously negligent) conduct that *is not necessarily* for passage.⁵³⁰

Similarly, Konig argues:

Even if a passage through the territorial sea leading to an accidental discharge caused by serious negligence still had to be considered as innocent, a more stringent liability standard does not *per se* hamper the right of innocent passage.⁵³¹

This author agrees with Pozdnakova and Konig. Indeed, what Art. 4 of Directive 2005/35 requires from EU Member States is nothing more than to define in their national law as offences particular ship-source pollution. The mere defining of some conduct as offence in no way can hamper innocent passage. Innocent passage can be hampered only by specific enforcement measures, such as physical inspection and detention of the ship or her crew. Such enforcement measures are not addressed by Art. 4 of Directive 2005/35. They are addressed by Art. 6 and 7 of the Directive, and these articles, *inter alia*, require coastal States to apply Art. 4 of the Directive in a manner which does not hamper the right of innocent passage of a foreign ship through the territorial sea.

One more thing which does not speak in favour of the argument that Art. 4 of Directive 2005/35 breaches the right of innocent passage is that those who make the respective assertion, in a hidden way, contradict themselves. They base their argument on the wording of Art. 19(2)(h) of UNCLOS, which talks only about "wilful" (or "intentional") pollution. Yet, at the same time, they contest lawfulness of Art. 4 of Directive 2005/35 just in regards to pollution caused by serious negligence. Lawfulness of Art. 4 of Directive 2005/35 in regards to pollution caused by recklessness is not contested, despite the fact that recklessness, similarly as serious

⁵³⁰ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 241.

⁵³¹ Doris Konig, "The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?", in Tafsir Malick Ndiaye and Rudiger Wolfrum, (ed.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden: Martinus Nijhoff Publishers, 2007 at p. 776. See also Allan Khee-Jin Tan, "The EU Ship-Source Pollution Directive and Coastal State Jurisdiction over Ships", in Lloyd's Maritime and Commercial Law Quarterly, Bound Volume 2010 at p. 483.

negligence, is also not intent. It is rather clear why lawfulness of Art. 4 of Directive 2005/35 in regards to pollution caused by recklessness is not contested – because reckless pollution, differently from seriously negligent pollution, is clearly recognised as illegal by MARPOL. It means, if to admit that defining reckless pollution as an offence breaches the right of innocent passage, one must admit that not only Directive 2005/35 but also MARPOL breaches this right. Seemingly nobody is willing to make such an assertion. Yet, without doing so, the argument is inconsistent.

5.2.4. Question 4 Referred to the ECJ in the *INTERTANKO* Case: Question on Legal Certainty of the Term “Serious Negligence”

Question 4 referred to the ECJ in the *INTERTANKO* case was:

Does the use of the phrase “serious negligence” in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?

When answering this question in its judgment, the ECJ acknowledged the existence of the general principle of legal certainty as well as the more specific principle of legality.⁵³² However, the ECJ ruled that the use of the phrase “serious negligence” in Directive 2005/35 does not infringe upon the above-mentioned principles. Two distinct arguments were given to justify this ruling. First of all, the ECJ argued that the phrase “serious negligence” in Directive 2005/35 is sufficiently clear and precise, because this phrase can only be understood as entailing “unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.”⁵³³ Secondly, the ECJ argued that it is acceptable that the term “serious negligence” in Directive 2005/35 is not absolutely clear and precise, because this Directive (just like any EU directive) is not directly applicable to individuals; consequently, it is the Directive together with the national law implementing this Directive (not the Directive alone) which should ultimately

⁵³² *INTERTANKO and others v. Secretary of State for Transport, Case C-308/06*, Judgment of 3 June 2008, ECJ, paragraphs 69-71.

⁵³³ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 72-77 and 79.

fully satisfy the requirement of legal certainty.⁵³⁴ This author tends to agree with the second argument of the ECJ and, thus, also to its ruling that the lack of the definition of the term “serious negligence” in Directive 2005/35 does not infringe upon the general principle of legal certainty and the more specific principle of legality.

It is not to say, however, that the definition of the term “serious negligence” should not be there in Directive 2005/35. Such definition would be very helpful for harmonized and fair implementation of the Directive. This author, in general, sees inclusion in any legal instrument clear definitions of all not absolutely self-evident terms used in this instrument as extremely important work to do, because huge practical problems may arise from even small disagreements on the content of specific terms. The term “serious negligence” is not absolutely self-evident.

The explanation of the term “serious negligence” given by the ECJ (the explanation that serious negligence is “an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation”) largely accords with the explanation of the term “gross negligence.”⁵³⁵ Also scholars have treated the phrase “serious negligence” in Directive 2005/35 as synonymous with the phrase “gross negligence”; for example, Pozdnakova has stated: “The directive criminalises pollution from ships, including pollution caused by recklessness or gross negligence.”⁵³⁶ Osante has stated:

Discharges involving negligence not considered ‘serious’ (slight negligence, *culpa levissima*, simple negligence, etc) are not considered as offences and are therefore not subject to sanctions under the Directive.⁵³⁷

⁵³⁴ *INTERTANKO and others v. Secretary of State for Transport, ibid.*, paragraphs 78-79. See also *INTERTANKO and others v. Secretary of State for Transport*, Opinion of Advocate General Kokott delivered on 20 November 2007, ECJ, paragraph 144.

⁵³⁵ For the meaning of “gross negligence” see Sub-chapter 2.4.2.8.

⁵³⁶ Alla Pozdnakova, “Criminal Sanctions for Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 17, Issue 4, July-August 2011 at p. 259.

⁵³⁷ Jose-Manuel Martin Osante, “Competition and the European Union Directive on Criminal Penalties for Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 14, Issue 5, September-October 2008 at p. 420.

However, there is also the different view – the one which does not associate “serious negligence” with “gross negligence”. For example, Embiricos has stated:

[...] the addition of the word “serious” adds nothing to the word “negligence”. [...] The Commission tends to convey the **false** notion that serious negligence involves acts or omissions involving culpability at an intermediate level, between ordinary negligence and recklessness. In fact, no such level of culpability is recognized by law and it would be difficult if not impossible to define. In practice, serious negligence will tend to be found when ordinary negligence has caused or contributed to serious consequences. As virtually all pollution is nowadays considered serious, the Directive will, in practice, result in criminal sanctions for pollution caused by **ordinary negligence**.⁵³⁸

This author agrees with the ECJ, Pozdnakova and Osante that the phrase “serious negligence” should be interpreted as “gross negligence”. It is rather hard to interpret the phrase “serious negligence” other than “something more than ordinary, simple or civil negligence”, that is, “gross negligence”. If drafters of Directive 2005/35 would have wanted to define as infringement ordinary negligence, there would not be the word “serious” before the word “negligence”. If drafters of Directive 2005/35 would have wanted to associate the word “serious” with something other than the *mens rea* element “negligence” (for example, the *actus reus* element “harm”), the word “serious” would be explicitly linked with this other element, not negligence. Consequently, this author disagrees with the statements of Embiricos that the word “serious” adds nothing to the word “negligence” and that there is no level of culpability between ordinary negligence and recklessness.

However, the statements of Embiricos to some extent are true. First of all, the practice shows that states, indeed, tend to link the term “serious negligence” to the *actus reus* element “harm”.⁵³⁹ Secondly, criminal law systems of states differ significantly. Not all of these systems operate with such terms as “ordinary negligence”, “gross negligence” and “recklessness” (as scholarly literature predominantly does) and, indeed, not all of these systems recognise the level of

⁵³⁸ Presentation by Epaminondas Embiricos, in London Shipping Law Centre, The Eighth Cadwallader Annual Memorial Lecture, “The Extra Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry”, Transcript of the Lecture, 4 October 2005, available at: http://www.shippinglbc.com/content/uploads/documents/8_cad.pdf [accessed 4 October 2015] at p. 34.

⁵³⁹ For example, see the case study in this dissertation which indicates that after *Prestige* accident the Spanish Supreme Court, when assessing whether the negligence of the master of *Prestige* – Captain Mangouras – was serious or not, among other things, referred to “the importance of the legally protected asset affected”.

culpability between ordinary negligence and recklessness. For example, Art. 10 of the Criminal Law of the Republic of Latvia talks about “criminal self-reliance” instead of “recklessness” and about “criminal neglect” instead of “negligence”, both “criminal self-reliance” and “criminal neglect” are treated as “criminal offences through negligence”; but the concept directly reflecting the term “gross negligence” cannot be found within the Criminal Law of the Republic of Latvia, at all.⁵⁴⁰ Quite naturally, states whose general criminal law systems, in principle, do not distinguish the level of culpability between ordinary negligence and recklessness might be tempted to interpret the term “serious negligence” (the term with which even scholarly literature does not operate) whichever way seems fit, according to the existing system. Lack of the definition of the term “serious negligence” in Directive 2005/35, in principle, allows them to do so. As a result, the standard of criminal liability for ship-source oil pollution may turn out to be different in different EU Member States, *inter alia*, in some states ordinary negligence might be criminalised, in others not.

Is it a problem that some states may interpret the term “serious negligence” in Directive 2005/35 as incorporating ordinary negligence, but others not? It does not seem like a problem, if one looks solely at the rules of Directive 2005/35, itself. Art. 1(2) of the Directive states: “This Directive does not prevent Member States from taking more stringent measures against ship-source pollution in conformity with international law”. This legal norm has led to the following conclusion of Advocate General Kokott:

[...] the directive does not lay down a definitive, uniform standard but merely minimum requirements which by their nature do not call for uniform transposition in the Member States.⁵⁴¹

⁵⁴⁰ The Criminal Law, English translation, available at: <http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/dokumenti.html?folder=%2Fdocs%2FLRTA%2FLikumi%2F> [accessed 4 October 2015].

⁵⁴¹ *INTERTANKO and others v. Secretary of State for Transport*, Opinion of Advocate General Kokott delivered on 20 November 2007, ECJ, paragraph 150.

Thus, in principle, Directive 2005/35 allows states to criminalise ordinary negligence anyway. Whether a particular state does so based on Art. 1(2) or through the interpretation of the term “serious negligence”, practically, is of no difference.

The fact that some states may interpret the term “serious negligence” in Directive 2005/35 as incorporating ordinary negligence, but others not, appears more like a problem if, apart from looking solely at the rules of Directive 2005/35, one looks also at its Preamble. Recital 3 of the Preamble of Directive 2005/35 basically states that one of the aspirations of the Directive is to harmonise penal systems of EU Member States in regards to ship-source pollution. Leaving to EU Member States, in fact, the freedom to choose whether or not to criminalise ship-source pollution caused by ordinary negligence hardly contributes to the above-mentioned aspiration.

The fact that some states may interpret the term “serious negligence” in Directive 2005/35 as incorporating ordinary negligence, but others not, appears even more like a problem if one looks beyond Directive 2005/35. As it was explained earlier, criminalisation of ordinary negligence goes against the general principles of punishment and with that also against the human right to be free from cruel, inhuman or degrading punishment. In other words, it was explained there that criminalisation of ordinary negligence is unfair. Directive 2005/35, by not clearly indicating that ship-source pollution caused by ordinary negligence may not be criminalised, has lost an opportunity to diminish this unfairness.

Although Directive 2005/35, in principle, allows EU Member States to criminalise ship-source pollution caused by ordinary negligence, fortunately, it at least does not set an obligation to do so. Consequently, when implementing Directive 2005/35, states may still develop such national criminal law systems which are in line with the general principle of punishment that ordinary negligence should not be criminalised.

5.3. Legal Norms of Directive 2005/35 on Severity of Sanctions

Art. 8 of Directive 2005/35 prescribes: “Each Member State shall take necessary measures to ensure that infringements within the meaning of Articles 4 and 5 are punishable by effective, proportionate and dissuasive penalties”. This rule of Directive 2005/35 accords with the general rules on severity of sanctions for ship-source pollution violations incorporated in UNCLOS and MARPOL (Art. 217(8) of UNCLOS and Art. 4(4) of MARPOL respectively). As one will recall, respective rules of UNCLOS and MARPOL state that penalties imposed for ship-source pollution violations should be “adequate in severity to discourage violations”.

From the perspective of safeguarding rights of accused persons, Art. 8 of Directive 2005/35 can be said to be worded slightly better than corresponding legal norms of UNCLOS and MARPOL, as the Directive, differently from UNCLOS and MARPOL, *inter alia*, expressly refers to the requirement for penalties to be proportionate. Thus, Art. 8 of Directive 2005/35 can be considered as a rule which slightly clarifies corresponding legal norms of UNCLOS and MARPOL. By doing so, Art. 8 of Directive 2005/35 works for the claimed purpose of the Directive – to incorporate international standards for ship-source pollution into EU law.

However, Art. 5a(1) of Directive 2005/35 prescribes: “Member States shall ensure that infringements within the meaning of Article 4 and 5 are regarded as criminal offences”. Art. 8a prescribes: “Each Member State shall take the necessary measures to ensure that the offences referred to in Article 5a (1) [...] are punishable by effective, proportionate and dissuasive criminal penalties”. Thus, through Art. 5a and 8a of Directive 2005/35, the EU asserts that the only “effective, proportionate and dissuasive” penalty for basically all intentional, reckless or grossly negligent ship-source pollution violations is *criminal* penalty. In accordance with Art. 5a(2) of Directive 2005/35, the only exception in this regard is minor cases, where the act committed does not cause deterioration in the quality of water. Such minor cases, however, are outside the scope of this dissertation.

Art. 5a and 8a of Directive 2005/35 deviate from the spirit of Art. 230(1) and (2) of UNCLOS. One will recall that Art. 230(1) and (2) of UNCLOS allow coastal States to impose penalties other than monetary (for example, imprisonment) only for wilful and serious ship-source pollution in territorial sea. For other ship-source pollution violations penalties other than monetary are prohibited. Such prohibition points into direction that ship-source pollution violations which are not committed with intent (“wilfully”) should be treated as relatively minor violations (presumably, just as regulatory offences). Yet, Art. 5a and 8a of Directive 2005/35 require EU Member States to treat such violations as criminal offences. At the same time, it can be concluded that Art. 5a and 8a of Directive 2005/35 do not deviate from the letter of Art. 230(1) and (2) of UNCLOS, because Art. 9 of Directive 2005/35 states that all provisions of the Directive should be applied in accordance with Section 7 of Part XII of UNCLOS – the section of UNCLOS in which Art. 230 is also situated. Thus, EU Member States are simply left to work out, themselves, how in their national law to merge what is seemingly going in different directions: Art. 4 and 5 of Directive 2005/35 and Art. 230(1) and (2) of UNCLOS.

Pozdnakova has expressed an interesting argument in regards to the requirement of Directive 2005/35 to criminalise almost every intentional, reckless and seriously negligent ship-source pollution violation. She says that this requirement is not, actually, strict, that “logically the Member States will be allowed a certain margin of appreciation in this respect.”⁵⁴² The argument of Pozdnakova is based on actual practice. Actual practice indicates that, despite the existence of Directive 2005/35, within EU Member States, in regards to ship-source pollution violations “[c]riminal sanctions are still generally less common than administrative fines.”⁵⁴³ Yet, the requirement of Directive 2005/35 to criminalise almost every intentional, reckless and seriously negligent ship-source pollution violation is rather straightforward. It does not leave any margin of appreciation to EU Member States.

⁵⁴² Alla Pozdnakova, “Criminal Sanctions for Ship-Source Pollution”, in *Journal of International Maritime Law*, Volume 17, Issue 4, July-August 2011 at p. 251.

⁵⁴³ POZDNAKOVA, *ibid.* at pp. 234 and 251; EMSA, Study on the Implementation of Ship Source Pollution Directive 2005/35 in the EU Member States, unpublished draft version on file with author.

Consequently, nobody can be sure that the EU is following the logic of Pozdnakova, and, thus, slight deviations from Directive 2005/35 are actually allowed.

Nevertheless, this author agrees with the general idea of Pozdnakova that EU Member States shall enjoy a certain margin of appreciation in deciding whether to treat a specific violation as administrative or as criminal offence, because strict dictation in this regard encroach upon sovereignty of states.⁵⁴⁴ Unfortunately, Art. 5a and 8a of Directive 2005/35 strictly dictate that almost any intentional, reckless or seriously negligent ship-source pollution violation must be treated as a criminal, not administrative, offence. Thus, Art. 5a and 8a of Directive 2005/35, actually, encroach upon the sovereignty of EU Member States. Consequently, the respective articles should be deleted from the Directive.

⁵⁴⁴ Iliana Christodoulou-Varotsi, "Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC's Penal Approach", in *Transportation Law Journal*, Volume 33, No. 3, 2006/2007 at pp. 377-378.

6. Case Study

6.1. Introduction

Within the case study, four large-scale ship-source oil pollution accidents are analysed: the sinking of *Erika* off the coast of France on 11-14 December 1999 (Sub-chapter 6.2), the sinking of *Prestige* off the coast of Spain on 13-19 November 2002 (Sub-chapter 6.3), the grounding of *Tasman Spirit* in the access channel to the port of Karachi in Pakistan on 27 July 2003 (Sub-chapter 6.4) and the collision of *Hebei Spirit* and *Samsung No.1* near the port of Daesan in South Korea on 7 December 2007 (Sub-chapter 6.5). Each of the sub-chapters consists of two big parts – factual and analytical. In the factual part, facts of the case, starting from the development of the accident itself and ending with the criminal procedures and sanctions applied against seafarers after the accident, are described. Facts are described in the form of numbered paragraphs, for easy referencing later, in the analytical part. In the analytical part: first of all, by using the human rights compliance check-lists incorporated in Annex I of this dissertation, unfair application of criminal procedures and sanctions against seafarers is identified; secondly, some positive practice is identified; thirdly, some examples of unfair national law are identified.

6.2. Sinking of ERIKA

6.2.1. Facts

1. The ship involved in the accident

Erika – 37,283 dwt (19,666 GT) tanker: registered in Malta, owned by Malta-based Tevere Shipping Company, under technical management of Italy-based Panship Management and Services (hereinafter – Panship).⁵⁴⁵

⁵⁴⁵ Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at p. 86; Malta Maritime Authority, Report of the Investigation into the Loss of the Motor Tanker ERIKA on Sunday 12 December 1999, September 2000 at p. 2/1; IOPC Funds, *Erika*, available at: <http://www.iopcfunds.org/incidents/#111-1999-235-December> [accessed 3 November 2015].

2. Seafarers and other persons alleged to be guilty of causing the accident

2.1. Captain Karun Sunder Mathur – Indian master of *Erika*.⁵⁴⁶

2.2. Apart from Captain Mathur, 14 other natural and legal persons were alleged to be guilty for causing the accident. Among them were owners, managers, charterers and the classification society of *Erika* as well as officials responsible for controlling the traffic off the coast of France.⁵⁴⁷

3. Sinking and events before it

3.1. On 8 December 1999, at 19:45, *Erika* left Dunkirk (France) with the cargo of approximately 31,000 tonnes of heavy fuel oil on board. The ship was bound for the Mediterranean Sea.⁵⁴⁸

3.2. At the time of departure from Dunkirk, wind was force 7 on the Beaufort scale, but weather was deteriorating. In the afternoon of 9 December wind force was already 8 to 9, and there was heavy swell. The sea was similarly rough throughout 10 and 11 December. *Erika* was rolling and pitching heavily in the rough seas.⁵⁴⁹

3.3. On 11 December, at around 12:40, when *Erika* was already passing the Bay of Biscay, Captain Mathur noticed that the ship was listing to starboard. At around 13:40 deballasting was started.⁵⁵⁰

3.4. At 14:08 *Erika* transmitted a distress alert. However, the nature of distress was not stated in the alert message.⁵⁵¹

⁵⁴⁶ Judgment of the Paris Court of First Instance, *ibid.* at p. 9.

⁵⁴⁷ Judgment of the Paris Court of First Instance, *ibid.* at pp. 3-8 and 10-17.

⁵⁴⁸ Judgment of the Paris Court of First Instance, *ibid.* at pp. 86, 139, 140 and 142; Report of the Malta Maritime Authority, *supra* note 545 at pp. 1/2 and 5/1; IOPC Funds, *Erika*, *supra* note 545; CEDRE, *Erika*, available at: <http://wwz.cedre.fr/en/Our-resources/Spills/Spills/Erika> [accessed 3 November 2015].

⁵⁴⁹ Report of the Malta Maritime Authority, *ibid.* at pp. 5/1-5/4; CEDRE, *Erika*, *ibid.*; Judgment of the Paris Court of First Instance, *ibid.* at pp. 86, 141, 142, 171 and 172.

⁵⁵⁰ Judgment of the Paris Court of First Instance, *ibid.* at p. 143; Report of the Malta Maritime Authority, *ibid.* at p. 5/4.

⁵⁵¹ Judgment of the Paris Court of First Instance, *ibid.*; Report of the Malta Maritime Authority, *ibid.*; CEDRE, *Erika*, *supra* note 548; CEDRE, *Erika: Key Dates*, available at: <http://wwz.cedre.fr/en/Our-resources/Spills/Spills/Erika/Key-Dates> [accessed 3 November 2015].

3.5. Soon after transmitting the distress alert, Captain Mathur tried to contact Panship. However, he failed to reach Panship at that point in time.⁵⁵²

3.6. At 14:15 Captain Mathur contacted *Nautic* (the ship in the vicinity). He asked *Nautic* to assist *Erika* in case of emergency as well as to send to Panship the following message: “*Listing heavily to starboard, very rough sea. Can see oil coming out into sea from forward Manifold. Presently trying to correct list by ballast.*” *Nautic* failed to send the message. However, conversations between *Erika* and *Nautic* were heard by another nearby ship – *Sea Crusader*. Thus, when *Nautic* failed to send the message, *Sea Crusader* offered her assistance.⁵⁵³

3.7. At 14:16 and 14:18 CROSS Etel tried to contact *Erika* by phone, but without success.⁵⁵⁴

3.8. At around 14:18 Captain Mathur turned *Erika* by 180° (from 210 to 30) – to clear the deck from the wind and make verifications in the front part of the ship. During the verifications internal fuel leakage as well as several cracks on the deck were observed.⁵⁵⁵

3.9. At 14:30 *Sea Crusader* managed to send *Erika*'s message to Panship. The message included the following words: “*Heavy listing on starboard. Very rough sea. Leak of oil into the sea visible from the front of the distributor. Now trying to correct the listing with ballast, suspect hull failure. Sent a distress signal on SAT C.*”⁵⁵⁶

3.10. At 14:34 Captain Mathur contacted CROSS Etel and said that *Erika* is still listing, the evaluation of the situation is still ongoing, and immediate assistance is not required.⁵⁵⁷

⁵⁵² Malta Maritime Authority, Report of the Investigation into the Loss of the Motor Tanker ERIKA on Sunday 12 December 1999, September 2000 pp. 5/4-5/5.

⁵⁵³ Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at p. 144.

⁵⁵⁴ Judgment of the Paris Court of First Instance, *ibid.*

⁵⁵⁵ Judgment of the Paris Court of First Instance, *ibid.* at p. 145.

⁵⁵⁶ Judgment of the Paris Court of First Instance, *ibid.* at p. 151.

⁵⁵⁷ Judgment of the Paris Court of First Instance, *ibid.* at p. 146; Report of the Malta Maritime Authority, *supra* note 552 at p. 5/5.

3.11. At around 15:02 *Erika* was upright. Consequently, at 15:14 a telex was sent to CROSS Etel stating: “*situation under control, ship and the entire crew safe aboard, please cancel my distress call and reconsider the message as a security message*”.⁵⁵⁸

3.12. Between approximately 16:10 and 17:00 Captain Mathur communicated with Panship. Among other things, it was agreed that *Erika* should now proceed for refuge at Donges in the port of Nantes - Saint Nazaire (France).⁵⁵⁹

3.13. At 17:25 *Erika* sent the following telex to CROSS Etel: “*situation under control, ship and the entire crew safe aboard – please cancel the security message, the ship is going to a port of refuge*”. At 17:44 CROSS Etel requested the information about the new destination (port of refuge). At 18:05 Captain Mathur replied that he is heading to Donges.⁵⁶⁰

3.14. At around 19:00 Panship contacted Pomme maritime agency with the request to help organize *Erika*'s stop at Donges. The agency started arrangements. It, *inter alia*, involved the circulation of the information about oil leakages and cracks of the deck. At 22:15 CROSS Etel sent the following telex to *Erika*: “*your agent has contacted Saint-Nazaire port authorities and told them that you had a leak in your tanks. Could you inform us about the situation now? Please could you answer immediately?*”⁵⁶¹

3.15. At 22:27 Captain Mathur replied. He gave details of the situation, confirming the internal leak, and also making it clear that *Erika* had developed cracks on the main deck.⁵⁶²

⁵⁵⁸ Report of the Malta Maritime Authority, *ibid.* at p. 5/6; Judgment of the Paris Court of First Instance, *ibid.* at p. 150.

⁵⁵⁹ Report of the Malta Maritime Authority, *ibid.*

⁵⁶⁰ Judgment of the Paris Court of First Instance, *supra* note 553 at p. 156; Report of the Malta Maritime Authority, *ibid.* at pp. 5/6-5/7.

⁵⁶¹ Judgment of the Paris Court of First Instance, *ibid.* at pp. 159, 160, 162, 166 and 169; Report of the Malta Maritime Authority, *ibid.* at p. 5/7.

⁵⁶² Judgment of the Paris Court of First Instance, *ibid.* at pp. 169-170; Report of the Malta Maritime Authority, *ibid.*

3.16. At around 00:00 Captain Mathur observed that *Erika* was again listing to starboard, that the size of the cracks on deck had increased in width and that the ship was down by the head. Deballasting was started again. However, it was not giving any effect.⁵⁶³

3.17. On 12 December, at around 3:00, Captain Mathur observed that the oil was leaking into the sea, that the cracks on deck were getting even bigger and that the ship was hard to steer. In addition, abnormal metal rattling noises were heard.⁵⁶⁴

3.18. At 3:30 and 3:50 CROSS Etel unsuccessfully tried to reach *Erika* on HF radio. At 3:50 it sent the telex to *Erika* requesting to give the ship's position, course and speed. At 4:05 Captain Mathur provided the requested information. Information about the latest developments of the overall situation was not passed on to CROSS Etel.⁵⁶⁵

3.19. At around 5:15 Captain Mathur observed that half the side shell plating of no. 2 starboard tank was partially detached. At that time it had already become impossible to maneuver the ship, and oil was leaking heavily from the hull. The Captain sounded the general alarm.⁵⁶⁶

3.20. At 5:54 *Erika* transferred a distress message “*May-Day Erika – position 47 deg. 10N – 04 deg. 36 W – total rupture of the hull – requests immediate assistance – 26 crew members aboard – route to the North – speed 2.5 knots*”. Given position is in EEZ of France, around 55 km south of Penmarch.⁵⁶⁷

3.21. At around 8:00 a French naval rescue helicopter arrived on the scene and began winching up the crew members of *Erika*.⁵⁶⁸

⁵⁶³ Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at p. 172; Malta Maritime Authority, Report of the Investigation into the Loss of the Motor Tanker ERIKA on Sunday 12 December 1999, September 2000 at p. 5/8.

⁵⁶⁴ Judgment of the Paris Court of First Instance, *ibid.*

⁵⁶⁵ Judgment of the Paris Court of First Instance, *ibid.* at pp. 172-173; Report of the Malta Maritime Authority, *supra* note 563.

⁵⁶⁶ Judgment of the Paris Court of First Instance, *ibid.* at p. 172; Report of the Malta Maritime Authority, *ibid.*

⁵⁶⁷ Judgment of the Paris Court of First Instance, *ibid.* at p. 173.

⁵⁶⁸ Report of the Malta Maritime Authority, *supra* note 563.

3.22. At around 8:08 *Erika* suffered complete structural failure and broke in two. The two parts of the ship started to drift away from each other. The majority of the crew was still on board the ship – on the stern section of the wreck.⁵⁶⁹

3.23. At around 8:25, when five crew members had been taken off the wreck, the helicopter's winch broke down. The helicopter was forced to go back to the base for repairs. Two other helicopters were ordered to take off.⁵⁷⁰

3.24. At around 9:06 the port lifeboat of *Erika* was lowered with 13 crew members in it. The starboard lifeboat could not be launched. As a result, 9 people (8 crew members and a rescue diver) still remained on the wreck.⁵⁷¹

3.25. At around 9:12 the second French naval helicopter arrived and winched up 6 crew members. At around 10:05 the helicopter came back and picked up the last three stranded people – the master, chief mate and rescue diver. At around 10:15 another helicopter arrived on the scene and started to winch up the 13 crew members in the lifeboat. By 10:43 all people had been winched up to safety unharmed.⁵⁷²

3.26. Afterwards, French authorities decided to take the stern section of *Erika* to deep waters – to avoid it drifting towards the French island of Belle-Ile. Towing operations started at around 14:15. They continued until 14:15 the next day when the wreck, increasingly leaning, tilted vertical. At 14:53 it sank. During the night between 13 and 14 December the bow section of *Erika* also sank.⁵⁷³

⁵⁶⁹ Judgment of the Paris Court of First Instance, *supra* note 563 at pp. 86 and 174; Report of the Malta Maritime Authority, *ibid.* at p. 5/9.

⁵⁷⁰ Judgment of the Paris Court of First Instance, *ibid.* at p. 174.

⁵⁷¹ Judgment of the Paris Court of First Instance, *ibid.*; Report of the Malta Maritime Authority, *supra* note 563 at p. 5/9.

⁵⁷² Judgment of the Paris Court of First Instance, *ibid.*; Report of the Malta Maritime Authority, *ibid.*

⁵⁷³ Judgment of the Paris Court of First Instance, *ibid.* at pp. 86 and 175; Report of the Malta Maritime Authority, *ibid.*; CEDRE, *Erika*, available at: <http://wwz.cedre.fr/en/Our-resources/Spills/Spills/Erika> [accessed 3 November 2015]; IOPC Funds, *Erika*, available at: <http://www.iopcfunds.org/incidents/#111-1999-235-December> [accessed 3 November 2015].

4. Consequences

4.1. In total, approximately 20,000 tonnes of oil were spilled as a result of the accident.⁵⁷⁴

4.2. Response operations at sea met with little success owing to the poor weather conditions and widespread fragmentation of the slick. Ultimately less than 3% of the total spill volume was collected during these operations.⁵⁷⁵

4.3. On 26 December a considerable amount of oil began stranding around the mouth of the River Loire (in Loire-Atlantique department). Intermittent oiling subsequently occurred over some 400 km of shoreline between the Finistere department in north-west France and the Charente-Maritime department in south-west France. Areas of important coastal fisheries, mariculture (oysters and mussels), tourism resources as well as salt production were affected. Severe environmental impact was on sea birds. Ultimately, almost 65,000 oiled birds were collected from beaches, of which almost 50,000 were dead.⁵⁷⁶

5. Criminal procedures and sanctions against seafarers

5.1. On 13 December Captain Mathur was detained by police in Brest (France) – the place where he was taken ashore after the accident. There, Captain Mathur underwent initial questioning. Afterwards, he was transferred to Paris.⁵⁷⁷

5.2. On 15 December the Public Prosecutor with the Court of First Instance of Paris opened a judicial investigation of the case on the counts of endangerment of others and pollution by hydrocarbons.⁵⁷⁸

⁵⁷⁴ IOPC Funds, *Erika*, *ibid.*; CEDRE, *Erika*, *ibid.*

⁵⁷⁵ ITOPF, *Erika, West of France, 1999*, available at: <http://www.itopf.com/in-action/case-studies/case-study/erika-west-of-france-1999/> [accessed 3 November 2015].

⁵⁷⁶ ITOPF, *Erika, West of France, 1999*, *ibid.*; CEDRE, *Erika*, *supra* note 573; Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at pp. 86-87.

⁵⁷⁷ Judgment of the Paris Court of First Instance, *ibid.* at p. 97; Virginie Terrier, “Are “Black Tides” Inevitable?”, in *Coventry Law Journal*, Volume 6, Issue 2, 2001 at p. 30; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 156; “France: Erika Master Charged as Pollution Hits”, *Lloyd’s List*, 16 December 1999.

⁵⁷⁸ Judgment of the Paris Court of First Instance, *ibid.* at p. 87.

5.3. The same day – 15 December – Captain Mathur was referred to the investigating judge for a judicial review of his detention. The public prosecutor had advised to release the Captain, and simply keep him under judicial supervision. However, the investigating judge made the decision to continue detention.⁵⁷⁹

5.4. Captain Mathur appealed against the decision. On 22 December he was released from detention and put under judicial supervision. On 2 February 2000 Captain Mathur submitted the request to cancel his judicial supervision. On 4 February this request was partly satisfied. The Captain was allowed to leave France.⁵⁸⁰

5.5. On 1 February 2006 the investigating judge referred the case to the Court of First Instance of Paris.⁵⁸¹

5.6. For the investigating judge Captain Mathur was guilty of exposing other persons to an immediate risk of death or injury and for causing pollution. More specifically the Captain was accused of:

5.6.1. leaving the port of Dunkirk on 8 December 1999 in dangerous conditions while knowing the poor condition of the ship;

5.6.2. making many navigational errors starting from 11 December;

5.6.3. failing to apply the safety rules, for instance, to implement SOPEP and to inform the coastal authorities about the nature and severity of the difficulties *Erika* faced.⁵⁸²

5.7. Pollution charges against Captain Mathur were based on following rules:

5.7.1. Art. 1 of the Law No. 83-583 – this article prescribed punishment (fine of F 100,000 to 1,000,000 and/or imprisonment for three to ten years) for a master of a French ship guilty for an oil pollution in violation of MARPOL;

⁵⁷⁹ Judgment of the Paris Court of First Instance, *ibid.* at pp. 9 and 97; “France: Erika Oil Clogs Recovery Efforts”, Lloyd’s List, 17 December 1999.

⁵⁸⁰ Judgment of the Paris Court of First Instance, *ibid.*; “France: Erika Oil Clogs Recovery Efforts”, *ibid.*

⁵⁸¹ Judgment of the Paris Court of First Instance, *ibid.* at p. 3.

⁵⁸² Judgment of the Paris Court of First Instance, *ibid.* at pp. 52 and 98.

5.7.2. Art. 7 of the Law No. 83-583 – this article prescribed that Art. 1 is applicable also to foreign ships in EEZ, territorial sea and internal waters of France, however, in such a case only the fine may be imposed for offences in EEZ;

5.7.3. Art. 8 of the Law No. 83-583 – this article prescribed punishment (half of that laid down in Art. 1) for causing, by imprudence, negligence or failure to observe the laws and regulations, a maritime casualty, as defined by the Intervention Convention, if this casualty has resulted in the pollution of French territorial sea or internal waters⁵⁸³;

5.7.4. Art. 10 of the Law No. 83-583 – this article prescribed:

- that the court may, in view of the factual circumstances, in particular the working conditions of a master of a ship, decide that the payment of fine imposed on the master under the preceding articles, shall be wholly or partially borne by the operator or owner of a ship in question;
- that the natural person convicted under the preceding articles also incurs, as a supplementary punishment, the penalty of public display or publication of the pronounced decision;

5.7.5. Art. L218-10, L218-21, L218-22 and L218-24 of the Environmental Code – these articles incorporated respectively Art. 1, 7, 8 and 10 of Law No. 83-583, when this Law was abrogated in 2000;

5.7.6. Art. L213-12 of the Penal Code – this article prescribed that French criminal law is applicable to offences committed beyond territorial sea, when international conventions and the law provide for that;

⁵⁸³ In accordance with Art. II(1) of the Intervention Convention, “maritime casualty” is a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo. In accordance with Art. I(1) of the Intervention Convention, the Convention is applicable on the high seas. Expression “on the high seas” within Art. I(1) of the Intervention Convention shall be read as “beyond the territorial sea”, thus embracing also EEZ of the state.

5.7.7. Art. L121-3 of the Penal Code – this article prescribed that a misdemeanour exists not only in the case of intent, but also in cases of recklessness, negligence or failure to observe an obligation of due care or precaution imposed by any law or regulation.⁵⁸⁴

5.8. On 12 February 2007 the public hearing of the case started.⁵⁸⁵

5.9. At the beginning of the proceedings, several parties raised the issue of the compliance of French national law with MARPOL and UNCLOS. It was argued that:

5.9.1. French Law No. 83-583 conflicts with MARPOL in that the liability standard of “imprudence” (provided in Art. 8 of French Law No. 83-583) differs significantly from the liability standard of “intent or recklessness with knowledge that damage was likely to result” (provided in Reg. 11(b) of Annex I of MARPOL⁵⁸⁶);

5.9.2. irrespective of such conflict, French Law No. 83-583 may not be applied to a discharge in the EEZ, because French Law No. 83-583 is a national rather than international regime, but under Art. 211(5) of UNCLOS the legislative jurisdiction of a coastal State in its EEZ is limited to the adoption of laws conforming with and giving effect to GAIRAS.⁵⁸⁷

⁵⁸⁴ Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at p. 52; Law No. 83-583, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000692487&fastPos=1&fastReqId=1895241531&categorieLien=id&oldAction=rechTexte> [accessed 11 June 2016]; Environmental Code, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074220&dateTexte=20001001> [accessed 11 June 2016]; Penal Code, available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20151103> [accessed 11 June 2016].

⁵⁸⁵ Judgment of the Paris Court of First Instance, *ibid.* at p. 56; CEDRE, *Erika: Key Dates*, available at: <http://www.cedre.fr/en/Our-resources/Spills/Spills/Erika/Key-Dates> [accessed 3 November 2015].

⁵⁸⁶ Under current numbering of MARPOL: Reg. 4(2) of Annex I.

⁵⁸⁷ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1116; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 230.

5.10. At least 20 expert and study reports were examined during the judicial investigation. In regards to the guilt of Captain Mathur these reports were rather diverse. For example, the Expert Report Ordered by the Investigating Authorities indicated that the Captain can be held liable for several conducts (this report largely accorded with the findings of the prosecution); yet, the Expert Report of the Board Appointed by the Commercial Court of Dunkirk indicated that the true cause of the disaster was the actual state of corrosion of *Erika* and, consequently, none of the potential intervening parties, including the Captain, was in a position to have any effect on the fate of the ship.⁵⁸⁸

5.11. Arguments of the attorneys of Captain Mathur accorded with the findings of the Expert Report of the Board Appointed by the Commercial Court of Dunkirk and other studies which came to similar conclusions. Specifically, attorneys argued that many scientists, sailors, and specialists in navigation and maritime safety had acknowledged that *Erika* had sustained major structural damage and was irreparably condemned, that Captain Mathur had taken the right decisions and, thus, the charges against him were irrelevant.⁵⁸⁹

5.12. On 13 June 2007 the oral hearing of the case came to a close.⁵⁹⁰

5.13. On 16 January 2008 the Court delivered the judgment.⁵⁹¹

5.14. Regarding the issue of compliance of French national law with MARPOL and UNCLOS the Court ruled that:

5.14.1. Art. 8 of French Law No. 83-583 is not in conflict with Reg. 11(b) of Annex I of MARPOL, because these two legal norms have different scope of application. MARPOL deals with discharges as defined in Art. 2(3) of MARPOL (operational pollution), whereas Art. 8 of French Law No. 83-583 deals with discharges resulting from a maritime casualty as defined in the Intervention Convention (accidental pollution);

⁵⁸⁸ Judgment of the Paris Court of First Instance, *supra* note 584 at pp. 87, 98, 101, and 186-189.

⁵⁸⁹ Judgment of the Paris Court of First Instance, *ibid.* at p. 98.

⁵⁹⁰ Judgment of the Paris Court of First Instance, *ibid.* at p. 80.

⁵⁹¹ Judgment of the Paris Court of First Instance, *ibid.* at p. 1; IOPC Funds, *Erika*, available at: <http://www.iopcfunds.org/incidents/#111-1999-235-December> [accessed 3 November 2015]; CEDRE, *Erika: Key Dates*, *supra* note 584.

5.14.2. French Law No. 83-583 can be applied to discharges in the EEZ, because Art. 56(1)(b) iii) of UNCLOS gives to the coastal State jurisdiction in its EEZ for the protection and preservation of the marine environment.⁵⁹²

5.15. Regarding merits of the case, the Court held the following four parties criminally liable for causing pollution: the representative of the shipowner (Tevere Shipping), the president of the management company (Panship), the classification society (RINA) and the voyage charterer (Total). The representative of the shipowner and the president of the management company were found guilty of lack of proper maintenance leading to general corrosion of the ship. RINA was found guilty of imprudence in renewing the *Erika's* classification certificate on the basis of an inspection that fell below the standards of the profession. Total was found guilty of imprudence when carrying out its vetting operation prior to the chartering of *Erika*.⁵⁹³

5.16. All other accused persons, including Captain Mathur, were found not guilty on any account. Captain Mathur was found not guilty, because due to the contradictory pieces of information (including, contradictory expert reports) it was not possible to establish with certainty that the Captain's conduct was erroneous and, supposing it was, that it played a causal role during the shipwreck of *Erika*. In other words, even though some amount of suspicion of the Captain's guilt remained, it was not possible to establish his guilt beyond a reasonable doubt. Consequently, he was not convicted.⁵⁹⁴

5.17. Several parties appealed against the judgment to the Court of Appeal in Paris.⁵⁹⁵

⁵⁹² Judgment of the Case No.9934895010, Paris Court of First Instance, 16 January 2008 (unpublished English translation on file with author) at pp. 180-181; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at pp. 1116-1117; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at p. 231.

⁵⁹³ POZDNAKOVA, *ibid.* at pp. 232-233; IOPC Funds, *Erika*, *supra* note 591.

⁵⁹⁴ Judgment of the Paris Court of First Instance, *supra* note 592 at pp. 219 and 223-225.

⁵⁹⁵ IOPC Funds, *Erika*, *supra* note 591.

5.18. On 5 October 2008 the appeal case began.⁵⁹⁶

5.19. On 30 March 2010 the Court of Appeal rendered its judgment. Regarding the criminal liability of Captain Mathur, the Court of Appeal confirmed the judgment of the Court of the First Instance.⁵⁹⁷

5.20. Yet, the Court of Appeal adopted a different approach to the Court of the First Instance for reaching the conclusion that Art. 8 of French Law No. 83-583 is not in conflict with Reg. 11(b) of Annex I of MARPOL and that French Law No. 83-583 can be applied to discharges in the EEZ. In this regard the Court of Appeal ruled that:

5.20.1. Indeed, as the defendants claimed, the definition of discharge in Art. 2(3) of MARPOL does not make a distinction between voluntary and accidental discharges. Thus, MARPOL also covers accidental pollution. However, reading of Reg. 11(b) of Annex I of MARPOL in such a way as to, in principle, allow negligent discharges of oil is contrary to the objective of MARPOL as identified in its Preamble. Consequently, Reg. 11(b) of Annex I of MARPOL does not signify that the discharge is illegal only when the owner or the master acted with intent or recklessly and with knowledge. Thus, criminalisation of the negligent discharges by Art. 8 of French Law No. 83-583 is consistent with the letter and spirit of MARPOL.

5.20.2. Indeed, as the defendants claimed, in accordance with Art. 211(5) of UNCLOS, a coastal State in regards to discharges in its EEZ may only adopt laws and regulations “conforming to and giving effect to GAIRAS”. However, this provision shall be interpreted in a purposive way – as referring not only to international rules and standards *per se*, but also national laws rendering effective respective international rules and standards. In this respect, French Law No. 83-583 is compatible with MARPOL, whose purpose is to provide severe sanctions in order to prevent the occurrence of pollution incidents.⁵⁹⁸

⁵⁹⁶ CEDRE, *Erika: Key Dates*, available at:

<http://wwz.cedre.fr/en/Our-resources/Spills/Spills/Erika/Key-Dates> [accessed 3 November 2015].

⁵⁹⁷ IOPC Funds, *Erika*, available at: <http://www.iopcfunds.org/incidents/#111-1999-235-December> [accessed 3 November 2015]; CEDRE, *Erika: Key Dates*, *ibid.*

⁵⁹⁸ Sophia Kopela, “Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: the *Erika* Case”, in *Review of European Community and International Environmental Law*, Volume 20, Issue 3, November 2011 at pp. 315-316.

5.21. Several parties also appealed the judgment of the Court of Appeal – to the French Supreme Court (Court of Cassation).⁵⁹⁹

5.22. On 25 September 2012 the Court of Cassation rendered its judgment. In this judgment, the earlier judgment of the Court of Appeal was fully confirmed.⁶⁰⁰

6.2.2. Analysis

Violation of the right to liberty: deprivation of liberty without existence of recognised ground

After the *Erika* accident, master of *Erika* – Captain Mathur – was detained (see paragraph 5.1 above). Later he was brought forth for the automatic judicial review of the detention. During this automatic judicial review, the public prosecutor expressed opinion that there is no need to continue to detain the Captain; instead simply judicial supervision can be applied. However, the investigating judge made the decision to continue detention (see paragraph 5.3 above). The opinion of the public prosecutor gives strong belief that such severe measure as detention was not necessary in the circumstances in question. If so, the decision of the investigating judge to continue to detain the Captain violated his right to liberty.

Was the detention of the seafarer necessary measure either for securing fulfilment of the legal obligation or for securing non-absconding or for securing that the seafarer would not take action to obstruct the proceedings?	No	X
	Yes	Violation

Observance of the right to liberty: prompt automatic judicial review of the deprivation of liberty

In the *Erika* case, Captain Mathur was deprived of his liberty on 13 December 1999 (see paragraph 5.1 above). He was brought forth for the automatic judicial review of his deprivation of liberty two days later – on 15 December 1999 (see paragraph 5.3 above). Thus, the automatic judicial review of the deprivation of liberty of Captain Mathur was carried out promptly.

⁵⁹⁹ IOPC Funds, *Erika*, *supra* note 597.

⁶⁰⁰ IOPC Funds, *Erika*, *ibid.*

Was the seafarer after his deprivation of liberty brought for an automatic judicial review of his deprivation of liberty promptly?	No	
	Yes	X

Observance of the right to be free from cruel, inhuman or degrading punishment: the principle that a person may not be held liable for a particular crime if all elements of this crime are not present or proven beyond a reasonable doubt

After the *Erika* accident, Captain Mathur was charged for exposing other persons to an immediate risk of death or injury and for causing pollution (see paragraph 5.6 above). There was basis for reasonable suspicion that particular harm (risk of death or injury and pollution), at least partly, was caused by the conduct of the Captain, for example: by his belated and not full reporting of the accident. Nevertheless, in its judgment the Court of First Instance did not find Captain Mathur guilty on any account, because his guilt was not proven beyond a reasonable doubt (see paragraph 5.16 above). The Court of Appeal and the Court of Cassation confirmed this ruling (see paragraphs 5.19 and 5.22 above). Thus, the general principle of punishment that a person may not be held liable for a particular crime if all elements of this crime are not proven beyond a reasonable doubt was observed.

Was the seafarer convicted for the crime without proof of all elements of this crime beyond a reasonable doubt?	No	X
	Yes	

National law violating the principle of legality and rule of lenity

After the *Erika* accident, pollution charges against Captain Mathur, *inter alia*, were based on Art. L218-22 of the French Environmental Code, which prescribed punishment for any negligently caused maritime casualty, if this casualty has resulted in the pollution of French territorial sea or internal waters (see paragraphs 5.7.3 and 5.7.5 above). This French national law conflicted with Reg. 4(2) of Annex I of MARPOL, which, as explained earlier, taking into consideration the principle of legality and, related to this principle, rule of lenity, must be interpreted as exempting from liability basically all negligent discharges of oil resulting from damage to a ship or its equipment.

On 1 August 2008 the French Environmental Code was amended so that the rule prescribing punishment for any negligently caused maritime casualty moved from Art. L218-22 to Art. L218-19. Yet, in essence, this rule was not changed.⁶⁰¹ Thus, still today, the French Environmental Code violates the principle of legality and, related to this principle, rule of lenity.

It is worth to stress here that nothing was changed in Art. L218-22 of the French Environmental Code in years 2005-2007, for transposing Directive 2005/35 into French national law. Similarly, nothing was changed in Art. L218-19 of the French Environmental Code in years 2009-2010, for transposing amendments to Directive 2005/35 into French national law. France considered that its national law in place already before the adoption of Directive 2005/35 and its amendments set equivalent requirements to the ones in the respective EU instruments. In 2012, the National Report for France “Evaluation Study on the Implementation of Directive 2009/123/EC on amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringement” confirmed that Art. 218-19 of the French Environmental Code, in principle, is in line with Directive 2005/35, as amended, although “the French legislation is more stringent than the Directive, since it considers as a criminal offence any negligent discharge of polluting substances [...] while the Directive only provides criminal offences for discharges of polluting substances carried out with [...] serious negligence”.⁶⁰² The fact that the French national law which violates the principle of legality and, related to that principle, rule of lenity has been acknowledged as, in principle, being in line with Directive 2005/35, as amended, indicates that the Directive has failed to give to the EU Member States clear guidelines how to implement relevant legal norms from the international maritime conventions without breaching human rights.

⁶⁰¹ Environmental Code, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074220&dateTexte=20160612> [accessed 12 June 2016].

⁶⁰² Milieu Ltd. under Contract with the European Commission, National Report for France “Evaluation Study on the Implementation of Directive 2009/123/EC on amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringement”, Milieu Ltd., Brussels, November 2012 at pp. 5, 13, 17 and 30.

National law violating the right to non-discrimination

When *Erika* accident was investigated and adjudicated, Art. L218-21 of the French Environmental Code prescribed that only fines may be imposed for a MARPOL violation committed by a foreign ship in French EEZ. This rule reflected Art. 230(1) of UNCLOS. Yet, Art. L218-10 of the French Environmental Code left the possibility to impose imprisonment as a sanction for, in principle, the same violation, just committed by a master of a French ship (see paragraphs 5.7.1, 5.7.2. and 5.7.5 above). Thus, French national law was discriminatory towards masters of French ships. This deficiency of French national law was averted by the 1 August 2008 amendments to the French Environmental Code. As a result of these amendments, the Code now contains the general legal norm (Art. L218-22) stating that, where a ship-source pollution offense is committed beyond the territorial sea, only fines may be imposed.⁶⁰³ Consequently, both masters of foreign ships and masters of French ships are subjected to identical potential sanctions (fines) for MARPOL violations committed in French EEZ. However, the very existence of Art. L218-10 and L218-21 of the French Environmental Code in the first place proves that the earlier expressed concern of this author that the wording of Art. 230 of UNCLOS may trigger discrimination of seafarers on non-foreign ships is well founded.

6.3. Sinking of PRESTIGE

6.3.1. Facts

1. The ship involved in the accident

Prestige – 81,589 dwt (42,820 GT) tanker: registered in Bahamas; *de facto* owned by Greece-based Universe Maritime (although, according to the registry details the owner of the ship was Liberia-based Mare Shipping); operated by the same Greece-based Universe Maritime (although, with the help of several intermediaries); chartered by Swiss-based energy trading concern Crown Resources, which at the time of the accident was the part of one of Russia's largest private investment groups

⁶⁰³ Environmental Code, *supra* note 601.

Alfa Group Consortium.⁶⁰⁴

According to the certificates issued by the American Bureau of Shipping (classification society of *Prestige*), at the time of the accident *Prestige* complied with all required standards. However, she was disqualified by several energy companies (for example, Repsol and BP) due to her extensive age (at the time of the accident *Prestige* had been in service for 26 years), due to non-existence of her maintenance program as well as failure to meet other safety standards of these companies.⁶⁰⁵

2. Seafarers and other persons alleged to be guilty of causing the accident

2.1. Captain Apostolos Ioannis Mangouras – Greek master of *Prestige*.

2.2. Nikolaos Argyropoulos – Greek chief engineer of *Prestige*.

2.3. Ireneo Maloto – Filipino chief officer of *Prestige*.

2.4. Jose Luis Lopez-Sors Gonzalez – General Director of the Spanish General Directorate of Merchant Marine.⁶⁰⁶

2.5. None of the legal persons which potentially could be held liable for causing the accident (such as owner or classification society of *Prestige*) were charged in relation to the accident. They were not charged because, when the accident occurred, under Spanish law it was not possible to claim criminal liability of legal persons; it was only possible to claim civil liability of the said persons and also only after the final judgment in the criminal case had been rendered.⁶⁰⁷

⁶⁰⁴ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at p.95; Miguel Michinel, “The *Prestige* in the Courts”, in Australia and New Zealand Maritime Law Journal, Volume 21, No.2, 2007 at p.171; “History of Alfa Group Consortium”, available at: <http://www.alfagroup.org/about-us/history/> [accessed 9 November 2015]; “Crown Resources Agrees to Purchase Trading Company Owned by Rich”, The Wall Street Journal, 21 February 2001.

⁶⁰⁵ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 96;

⁶⁰⁶ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 51-93.

⁶⁰⁷ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 123; IOPC Funds, *Prestige*, available at: <http://www.iopcfunds.org/incidents/#126-2002-210-November> [accessed 9 November 2015].

3. Sinking and events before it

3.1. On 31 October 2002 *Prestige* left St. Petersburg (Russia) with the cargo of heavy fuel oil on board. Cargo was completed in Ventspils (Latvia), and ultimately constituted 76,972 tonnes (some 2,150 tonnes in excess weight).⁶⁰⁸

3.2. On 5 November *Prestige* left Ventspils and proceeded to Gibraltar, where the instructions regarding final port of destination were to be received.⁶⁰⁹

3.3. On 13 November *Prestige* was navigating in Spanish EEZ: in the Atlantic Ocean, within the Traffic Separation Scheme off Cape Finisterre. Weather conditions were adverse: there was a storm in the area. The ship was rolling heavily in the rough sea.⁶¹⁰

3.4. At around 15:10⁶¹¹ the crew of *Prestige* heard a loud noise, similar to an explosion. Structural failure occurred in the starboard side of the ship. This structural failure resulted in a considerable opening in the hull, which in turn resulted in spillage of a large part of the cargo into the sea as well as shifting of the entire cargo towards the said side. It placed the ship at risk of capsizing.⁶¹²

3.5. At 15:15 CZCS Finisterre received a SOS message from *Prestige*. At 15:33 evacuation of the crew was requested.⁶¹³

3.6. To correct the list of the ship, Captain Mangouras decided to take on sea water. This operation allowed him to right the ship in hours. However, at the same time, it worsened the ship's structural condition.⁶¹⁴

⁶⁰⁸ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 96-97; Judgment of the Case No.865/2015, Spanish Supreme Court, 14 January 2016 at p. 6.

⁶⁰⁹ Judgment of the Provincial Court of A Coruna, *ibid.*

⁶¹⁰ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 94, 95, 98 and 125; IOPC Funds, *Prestige*, *supra* note 607; Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, paragraph 2.2.11.

⁶¹¹ Here and further in this chapter the local time is given, although some of the referred documents occasionally refer to the Coordinated Universal Time or UTC.

⁶¹² Judgment of the Provincial Court of A Coruna, *supra* note 604 at pp. 97-98.

⁶¹³ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 99.

⁶¹⁴ Judgment of the Provincial Court of A Coruna, *ibid.*

3.7. At 16:50 Captain Mangouras contacted Universe Maritime (operator and *de facto* owner of *Prestige*) to inform it about the situation. After the talk with the Captain, Universe Maritime immediately activated its Emergency Response Plan, began to look for suitable salvage and towing assistance as well as appointed the agent at A Coruna (Spain) to look after the ship's interests in Spain and liaise with the Spanish authorities.⁶¹⁵

3.8. At around 17:00 the first rescue helicopter arrived on the scene and lifted off 7 of the crew. The second rescue helicopter arrived at around 17:30 and lifted off a further 17 of the crew. Three – the master, chief engineer and chief officer – voluntarily remained on the ship.⁶¹⁶

3.9. During the conversation which started at 18:17 CZCS Finisterre gave Captain Mangouras the order to allow the ship to be towed away from the coast by the tug *Ria de Vigo*. The order was expressed several times with increasing forcefulness. In response, Captain Mangouras repeatedly said that his owners are arranging towage and, therefore, he needs to talk with them before allowing the tow. Ultimately, the Spanish authorities agreed that the Captain talks with his owners first.⁶¹⁷

3.10. At around 19:20 Universe Maritime advised Captain Mangouras that a salvage agreement was about to be completed. Shortly before 20:00 an agreement was reached. It was that Smit Salvage would be salvor, Tecnosub co-salvor and Remolcanosa would provide tugs. Also the tug *Ria de Vigo*, which was already on the scene, was one of the Remolcanosa.⁶¹⁸

⁶¹⁵ Report of the Bahamas Maritime Authority, *supra* note 610, paragraph 2.4.4.

⁶¹⁶ Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.4.5; Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 99-100.

⁶¹⁷ Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.4.7 and Appendix I; Judgment of the Provincial Court of A Coruna, *ibid.* at p.100; Judgment of the Case No.865/2015, Spanish Supreme Court, 14 January 2016 at pp. 9., 145-146.

⁶¹⁸ Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.5.2.

3.11. At 19:49 Smit Salvage sent a facsimile to Universe Maritime requesting that they instruct Captain Mangouras to accept a tow from *Ria de Vigo*. Universe Maritime then telephoned the Captain. Yet, he was engaged in the works on deck, and, therefore, could not be reached at that point in time. The conversation between the Captain and Universe Maritime took place at around 20:35.⁶¹⁹

3.12. At 21:01 Captain Mangouras called Spanish authorities and confirmed that a salvage agreement had now been concluded and that he was ready to accept a towline.⁶²⁰

3.13. At around 21:30 the operation of connecting a towline begun. However, altered sea conditions and intrinsic difficulty to manoeuvre led to many unsuccessful attempts even after several other tugs arrived at the scene and even after additional personnel was landed on board *Prestige* to assist the operation. Consequently, *Prestige* continued drifting towards the Spanish coast. By the morning of 14 November she was only 4 km from shore.⁶²¹

3.14. On 14 November, at around 10:50, five Filipino crew members of *Prestige* – the second engineer, third engineer, electrician, oiler and pump man – returned to the ship by helicopter to assist operations.⁶²²

3.15. At around 13:40 making fast the tow finally was successful. Tugs then were ordered to follow course of 330 degrees, i.e. towards a storm from the north-west that was approaching.⁶²³

⁶¹⁹ Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, paragraph 2.5.3.

⁶²⁰ Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.5.4.

⁶²¹ Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.5.5 and Figure 3; Judgment of the Provincial Court of A Coruna, *supra* note 616 at p.100; Olivier Thomas Kramsch and Sabine Motzenbacker, “On the ‘Pirate Frontier’: Re-Conceptualizing the Scope of Ocean Governance in Light of the *Prestige* Disaster”, The Netherlands: University of Nijmegen, December 2003 at p.1.

⁶²² Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.5.10.

⁶²³ Judgment of the Provincial Court of A Coruna, *supra* note 616 at p.102.

3.16. Realising that *Prestige* was being towed away from the coast, and towards more severe weather, Captain Mangouras asked the ship to be taken to a place of refuge. This was refused. The Captain then suggested a course of 270 degrees, but this was also refused.⁶²⁴

3.17. The Spanish engineer, who had landed on board *Prestige* together with her returning crew members, ordered to start up the engine. Captain Mangouras was against this – he was of the opinion that the vibration of the engine would cause further damage to the hull. However, after a while, the Captain agreed to follow the order. After necessary repairs, at around 16:30 the engine was started. The Spanish engineer was then lifted off *Prestige*.⁶²⁵

3.18. At around 19:00, a salvage contract was signed between the Harbour Master of A Coruna and salvage company Smit Salvage. According to this contract Smit Salvage promised never to bring *Prestige* closer than 120 nautical miles from Spanish jurisdiction. It was also agreed that the course of *Prestige* would be escorted by Spanish navy vessels, which would prevent entry of the ship within the aforementioned 120 nautical miles zone. Head of Smit Salvage later argued that he did not agree with the 120 nautical miles requirement but had no other option than to sign the contract.⁶²⁶

3.19. On 15 November, at around 3:50, a salvage team (9 people) from Smit Salvage boarded *Prestige*.⁶²⁷

⁶²⁴ Report of the Bahamas Maritime Authority, *supra* note 619, paragraph 2.5.19.

⁶²⁵ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 101 and 117; Report of the Bahamas Maritime Authority, *ibid.*, paragraphs 1.6, 2.5.10 - 2.5.15 and 2.5.19.

⁶²⁶ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 100-101 and 140; Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.6.2.

⁶²⁷ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 102; Report of the Bahamas Maritime Authority, *ibid.*, paragraph 2.6.4.

3.20. Salvors then decided to stop the engine of *Prestige* and set a south-west course of 220 degrees. After establishing that the breach in the starboard side of the ship was of some 35 metres and that this was below the water line, despite the aforementioned salvage contract with the Harbour Master of A Coruna, salvors asked the Spanish authorities for a port of refuge. This request was refused.⁶²⁸

3.21. In the afternoon of 15 November the weather deteriorated. The salvage master decided that all personnel should be evacuated from *Prestige* for the night. Starting from around 15:30 proceedings to totally evacuate *Prestige* were carried out. At around 18:40 the helicopter with evacuated people landed at A Coruna airport.⁶²⁹

3.22. After total evacuation, *Prestige* continued on her course towed in a southerly direction. Structural damage to the ship became more and more evident and serious. *Prestige* also continued to leak a considerable volume of oil.⁶³⁰

3.23. On 16 November, at around 9:00, the salvage team returned to *Prestige*.⁶³¹

3.24. In the late hours of 18 November the *Prestige* towing convoy came close to Portuguese EEZ. Portuguese frigate informed the convoy that it could not enter Portuguese EEZ. Thus, the convoy was obliged to change course to the west.⁶³²

3.25. On 19 November, at around 8:00, *Prestige* split into two.⁶³³

3.26. At 11:45 the stern section of *Prestige* sank. At 16:18 the bow section of *Prestige* sank. Position of the sinking was approximately 260 km west of Vigo (Spain).⁶³⁴

⁶²⁸ Judgment of the Provincial Court of A Coruna, *ibid* at pp.102 and 146-147.

⁶²⁹ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 102; Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, paragraphs 2.6.11-2.6.12.

⁶³⁰ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 103.

⁶³¹ Report of the Bahamas Maritime Authority, *supra* note 629, paragraph 2.6.14.

⁶³² Judgment of the Provincial Court of A Coruna, *supra* note 625 at p. 104.

⁶³³ Judgment of the Provincial Court of A Coruna, *ibid.*

⁶³⁴ IOPC Funds, *Prestige*, available at: <http://www.iopcfunds.org/incidents/#126-2002-210-November> [accessed 9 November 2015]; Judgment of the Provincial Court of A Coruna, *ibid.*; Report of the Bahamas Maritime Authority, *supra* note 629, paragraph 2.6.20.

4. Consequences

4.1. In total, approximately 63,000 tonnes of oil were spilled as a result of the accident.⁶³⁵

4.2. Despite the enormous effort at sea, extensive coastal contamination occurred. Altogether, approximately 200 km of shoreline – the Spanish northern and north western coasts as well as the French western coast – was affected. Some light and intermittent contamination was also experienced on the French and English coasts of the English Channel. Areas of fishing, shell fishing and tourism were, *inter alia*, affected.⁶³⁶

5. Criminal procedures and sanctions against seafarers

5.1. On 15 November, at around 14:00, while he was still on board *Prestige*, the Office of A Coruna Harbour Master reported Captain Mangouras to the Court for obstruction.⁶³⁷

5.2. The same day, at around 18:45, that is immediately after the rescue helicopter with people from *Prestige* landed at A Coruna airport, Captain Mangouras was arrested by the Spanish Civil Guard.⁶³⁸

5.3. After arrest, Captain Mangouras was taken directly for questioning. Questioning continued for several hours until approximately 2:00 the following morning. Chief Engineer Argyropoulos and Chief Officer Maloto were also brought forth for questioning. They were questioned after the Captain, approximately from 2:00 to 4:45. Captain Mangouras repeatedly asked to be allowed to rest (all three men had been continuously occupied by duty and questioning for around 60 hours, without proper rest, food and normal facilities), but his requests were denied. After

⁶³⁵ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at p. 105; ITOPF, *Prestige, Spain/France, 2002*, available at: <http://www.itopf.com/in-action/case-studies/case-study/prestige-spainfrance-2002/> [accessed 9 November 2015].

⁶³⁶ ITOPF, *Prestige, Spain/France, 2002, ibid.*; Maria Jose Caballero, “The Prestige Disaster. One Year On”, Greenpeace, November 2003 at p. 5; Judgment of the Provincial Court of A Coruna, *ibid.* at p.104.

⁶³⁷ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 102.

⁶³⁸ Judgment of the Provincial Court of A Coruna, *ibid.*

questioning, Chief Engineer Argyropoulos and Chief Officer Maloto were allowed to go to a hotel. Captain Mangouras was kept in custody.⁶³⁹

5.4. On 16 November the Court of Preliminary Investigation no. 4 of A Coruna commenced preliminary proceedings of the case.⁶⁴⁰

5.5. On 17 November the Court ruled that Captain Mangouras should be remanded in custody, but this custody could be avoided by posting a bail of EUR 3,000,000.⁶⁴¹

5.6. The Court gave the following arguments to justify its decision:

5.6.1. there is sufficient evidence that the Captain is likely to be criminally liable for crime against natural resources and the environment as well as crime of resistance and disobedience (in this regard it should be noted that in the other place of the decision the Court formulated, in principle, the same argument in a slightly different way; there, it stated that the evidence show that *Prestige* was hit by a large wave, which was unforeseeable and caused serious damage, but, after that, certain conduct – repeated ignorance of orders given by the port authorities – took place, which could be regarded as involving criminal liability);

5.6.2. the above-mentioned crimes carry heavy penalties;

5.6.3. the liberty of the Captain can obstruct the investigation;

5.6.4. public opinion;

5.6.5. large sums of money involved in civil claims;

5.6.6. complete lack of any roots of the Captain in Spain and the ease with which he could leave the country and, thus, have the possibility of avoiding the course of justice.⁶⁴²

⁶³⁹ Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, paragraphs 2.6.12 and 3.8.1.

⁶⁴⁰ Judgment of the Provincial Court of A Coruna, *supra* note 635 at p.1; Ruling of the Preliminary Proceedings No.2787/2002-L, the Court of Preliminary Investigation no. 4 of A Coruna, 16 November 2002, as incorporated in the Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, Appendix L.

⁶⁴¹ Judgment of the Provincial Court of A Coruna, *ibid.*; Ruling of the Preliminary Proceedings No.2787/2002-L, the Court of Preliminary Investigation no. 4 of A Coruna, 17 November 2002, as incorporated in the Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, Appendix L.

5.7. On 18 November the Court of Preliminary Investigation no. 4 of A Coruna remitted the case to the Court of Preliminary Investigation no. 3 of A Coruna. On 19 November the case was remitted to the Court of Preliminary Investigation no. 2 of Corcubion. The same day the case was remitted even further – to the Court of Preliminary Investigation no. 1 of Corcubion. On 20 November the Court of Preliminary Investigation no. 1 of Corcubion commenced Investigation no. 960/2002, under which the preliminary investigation was subsequently carried out.⁶⁴³

5.8. On 19 November, while remittal of the case from one Spanish court to another was still going on, Captain Mangouras requested his release or, in the alternative, the reduction of bail to EUR 60,000.⁶⁴⁴

5.9. In a decision on 27 November the Court of Preliminary Investigation no. 1 of Corcubion dismissed the Captain's request, basically by giving the same arguments as the Court of Preliminary Investigation no. 4 of A Coruna in its decision of 17 November.⁶⁴⁵

5.10. Captain Mangouras appealed this decision to the same judge who issued it (*recurso de reforma*). In a decision on 7 December the judge confirmed his decision of 27 November thus rejecting the Captain's appeal.⁶⁴⁶

⁶⁴² Ruling of the Preliminary Proceedings No.2787/2002-L, *ibid.*

⁶⁴³ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 1-2; Appearance of Cipriano Catreje Martinez, the Court of Preliminary Investigation no. 2 of Corcubion, 16 November 2002, as incorporated in the Bahamas Maritime Authority, Report of the Investigation into the Loss of the Bahamian Registered Tanker *Prestige* off the Northwest Coast of Spain on 19th November 2002, Appendix L; Miguel Michinel, "The *Prestige* in the Courts", in *Australia and New Zealand Maritime Law Journal*, Volume 21, No.2, 2007 at p.172.

⁶⁴⁴ *Mangouras v. Spain*, Judgment of 8 January 2009, ECtHR, paragraph 12; *Mangouras v. Spain*, Judgment of 28 September 2010, ECtHR, paragraph 18.

⁶⁴⁵ *Mangouras v. Spain*, Judgment of 8 January 2009, *ibid.*; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.*

⁶⁴⁶ *Mangouras v. Spain*, Judgment of 8 January 2009, *ibid.* at p. 13; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.* at p. 19.

5.11. Captain Mangouras then appealed the decision to the Provincial Court of A Coruna – a higher court (*recurso de apelacion*). In a decision on 3 January 2003 the Provincial Court of A Coruna dismissed the appeal, again, basically by giving the same arguments as the Court of Preliminary Investigation no. 4 of A Coruna in its decision of 17 November.⁶⁴⁷

5.12. On 20 January 2003 Captain Mangouras appealed for protection of his human rights, particularly the right to liberty, to the Spanish Constitutional Court (*recurso de amparo*). Appeal was submitted on the grounds that firstly, the lower courts had failed to take into account personal circumstances of the Captain when determining the amount of bail, and secondly, the bail was set so high that it was impossible for the Captain to pay it, and therefore the sum of EUR 3,000,000 was unreasonable and arbitrary.⁶⁴⁸

5.13. On 6 February 2003, the London Steamship Owners' Mutual Insurance Association (London Club) (insurer of *Prestige*) put up the bail. The London Club announced that it did so on wholly humanitarian grounds, despite having no legal obligation to do so.⁶⁴⁹

5.14. The next day – on 7 February – the Court of Preliminary Investigation no. 1 of Corcubion ordered the release of the Captain, subject to the following conditions:

5.14.1. that the Captain supplies an address in Spain;

5.14.2. that he reports every day before 13:00 to the police headquarters corresponding to the address supplied;

5.14.3. that he be prohibited from leaving the country and surrenders his passport to the Court's registry.⁶⁵⁰

⁶⁴⁷ *Mangouras v. Spain*, Judgment of 8 January 2009, *ibid.* at p. 14; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.* at p. 20.

⁶⁴⁸ Response of Mr. Jose Maria Ruiz Soroa - defence lawyer of Captain Mangouras - to the authors request for respective information.

⁶⁴⁹ *Mangouras v. Spain*, Judgment of 28 September 2010, *supra* note 644, paragraph 21; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1107.

⁶⁵⁰ Judgment of the Provincial Court of A Coruna, *supra* note 643 at pp. 102-103; *Mangouras v. Spain*, Judgment of 8 January 2009, *supra* note 644, paragraph 15; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.*, paragraph 21; Olivia Murray, "Fair Treatment of Seafarers – International Law and Practice", in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 157.

5.15. In a decision on 29 September 2003 the Spanish Constitutional Court declared the above-mentioned (in paragraph 5.12) appeal of Captain Mangouras inadmissible. The Court ruled that various decisions by which the Captain was remanded in custody gave ample reasons for the amount of bail demanded, such as, the overriding objective of securing the Captain's presence at the trial, the seriousness of the offences, the disastrous situation caused by the spillage of the ship's cargo both domestically and abroad, the fact that the Captain is a non-national and the fact that he has no ties whatsoever in Spain. In addition to that, it was specifically noted in the decision that the Captain's financial and other personal circumstances, including his "professional environment", were taken into consideration.⁶⁵¹

5.16. On 25 March 2004, Captain Mangouras lodged a claim against Spain with ECtHR, similarly as in his appeal to the Spanish Constitutional Court alleging that Spain had violated his right to liberty. Specific arguments given in the claim were the following:

5.16.1. when remanding the Captain in custody on bail, Spanish judicial authorities repeatedly referred to criteria which were not relevant to support the decision of detention on bail or the amount of the bail;

5.16.2. an extraordinarily high amount of bail (EUR 3,000,000) was set for the release of the Captain; it is *prima facie* evident that an ordinary citizen is not capable of paying such an amount of money, and none of the decisions of the Spanish judicial authorities contained the information suggesting that, due to some reasons, the Captain is, nevertheless, capable of facing the bail;

5.16.3. an extraordinarily high amount of bail was fixed solely on the nature of the alleged offence and its harmful consequences without taking into consideration any personal circumstances of the Captain, except the fact that he is a foreigner; thus, the bail was fixed not in accordance with the real risk of absconding;

⁶⁵¹ *Mangouras v. Spain*, Judgment of 8 January 2009, ECtHR, paragraphs 17 and 18; *Mangouras v. Spain*, Judgment of 28 September 2010, ECtHR, paragraphs 24 and 25.

5.16.4. Spanish judicial authorities did not take into consideration two circumstances which were evident even without any inquest, and which made the interest of the Captain to abscond really minimal; first, that the Captain was 68 years old (Art. 92 of the Spanish Criminal Code stipulates that those sentenced who have reached the age of 70, or who will reach that age during their sentence, can be released from prison); second, that due to the safeguards incorporated in Art. 230 of UNCLOS the Captain faced monetary penalty only;

5.16.5. Spanish judicial authorities also never assessed the possibility of replacing the detention on bail with other less onerous measures such as prohibition to leave the country and police supervision, even though such measures were perfectly feasible in the circumstances in question and were repeatedly suggested by the representative of the Captain;

5.16.6. keeping the Captain in custody most probably was inspired simply by the desire of the Spanish authorities to keep someone in prison and, with that, to placate the public indignation caused by the accident.⁶⁵²

5.17. On 27 April 2004, that is soon after ECtHR proceedings were initiated, Spain reviewed the bail conditions of Captain Mangouras, but only on 19 November of that year was he permitted to return to his home country, Greece. At that point in time, he was permitted to go to Greece for a period of three months. On 4 March 2005 he was permitted to return to Greece permanently, subject to undertaking to return to Spain for the trial and subject to reporting to a local police station in Greece every two weeks.⁶⁵³

⁶⁵² *Mangouras v. Spain*, Judgment of 8 January 2009, *ibid.*, paragraphs 1, 3 and 21; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.*, paragraphs 3, 56, 58, 61 and 63.

⁶⁵³ *Mangouras v. Spain*, Judgment of 8 January 2009, *ibid.*, paragraph 19; *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.*, paragraph 26; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1110; Olivia Murray, "Fair Treatment of Seafarers – International Law and Practice", in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 157; Response of Mr. Jose Maria Ruiz Soroa - defence lawyer of Captain Mangouras - to the authors request for respective information.

5.18. On 8 January 2009 the Chamber of ECtHR delivered its judgment, unanimously ruling that Spain had not violated the right to liberty of Captain Mangouras. The Chamber gave the following arguments to justify its judgment:

5.18.1. that the bail was paid by London Club; that under the insurance contract between London Club and the owner of *Prestige* (who was also the Captain's employer) the Club undertook to cover civil liability for damage arising from pollution attributable to the ship; consequently, the security was paid by virtue of pre-existing contractual legal relationship;

5.18.2. that the Court cannot overlook the growing and legitimate concern about offences against the environment; that the seriousness of the natural disaster in question justified the domestic courts' concern to determine who was responsible for this disaster; consequently, it was reasonable for domestic courts to try to ensure that the Captain would appear for trial by fixing a high level of bail;

5.18.3. that the Captain was deprived of his liberty for a shorter time than the applicants in other cases examined by the Court, even notwithstanding the fact that the offences in question in these other cases were not against the important interests of the marine environment, as in this case.⁶⁵⁴

5.19. On 7 April 2009 Captain Mangouras requested that the case be referred to the Grand Chamber of ECtHR. On 5 June 2009 a panel of the Grand Chamber granted the request.⁶⁵⁵

5.20. On 23 September 2009 the Grand Chamber of ECtHR heard the case at an oral hearing.⁶⁵⁶

⁶⁵⁴ *Mangouras v. Spain*, Judgment of 8 January 2009, ECtHR, paragraphs 8 and 41-43.

⁶⁵⁵ *Mangouras v. Spain*, Judgment of 28 September 2010, ECtHR, paragraph 9.

⁶⁵⁶ *Mangouras v. Spain*, Judgment of 28 September 2010, *ibid.*, paragraph 12.

5.21. On 28 September 2010 the Grand Chamber of ECtHR delivered its judgment, similar to the Chamber ruling that Spain had not violated the right to liberty of the Captain Mangouras. The Grand Chamber gave following arguments to justify its judgment:

5.21.1. the amount set for bail exceeded the Captain's own capacity to pay, however, it is clear that in fixing the amount the domestic courts sought to take into account, in addition to the Captain's personal situation, the seriousness of the offence of which he was accused and also his "professional environment", circumstances which lent the case an "exceptional" character;

5.21.2. since the *Neumeister* judgment the Court has consistently held that "[the accused's] relationship with the persons who are to provide the security" is one of the criteria to be used in assessing the amount of bail;

5.21.3. the Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences, among other things a tendency to use criminal law as a means of enforcing environmental obligations;

5.21.4. the present case is of an exceptional nature and has very significant implications in terms of both criminal and civil liability; in such circumstances it is hardly surprising that the judicial authorities should adjust the amount required by way of bail in line with the level of liability incurred, so as to ensure that the persons responsible have no incentive to evade justice and forfeit security;

5.21.5. putting aside the considerations – "humanitarian", contractual or other – which may have motivated London Club to pay the bail, the very fact that payment was made would seem to confirm that the Spanish courts, when they referred to the Captain's "professional environment", were correct in finding – implicitly – that a relationship existed between the Captain and the persons who were to provide security;

5.21.6. the domestic courts, in fixing the amount of bail, took sufficient account of the Captain's personal situation, and in particular his status as an employee of the ship's owner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain.⁶⁵⁷

5.22. Yet, the judgment of the Grand Chamber of ECtHR was not made unanimously. It was a majority judgment (by 10 votes to 7). 7 judges who disagreed with the majority, *inter alia*, stated in their joint dissenting opinion that:

5.22.1. as it appears from the terms of Article 5(3) of the European Convention on Human Rights, itself, the setting of bail as a condition of release is designed to ensure not the reparation of any loss suffered in consequence of the suspected offence but only the presence of the accused at the trial; the sum set cannot accordingly be fixed by reference to the amount of any loss which might eventually be imputable to the accused or his employers but must be assessed principally by reference to him, his assets and his relationship with those persons, if any, who offer themselves as sureties to guarantee his appearance;

5.22.2. domestic courts must adduce sufficient arguments to justify the amount of bail fixed;

5.22.3. the seriousness of the charge not only cannot be the sole factor justifying the amount of the bail it cannot be the decisive factor; nor can the danger of absconding be evaluated solely on the basis of considerations relating to the gravity of the penalty likely to be imposed, other factors must also be taken into account, including: the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted; regard should also be given to the use of other preventative measures, alone or in conjunction with bail, to reduce the risk of absconding;

⁶⁵⁷ *Mangouras v. Spain*, Judgment of 28 September 2010, ECtHR, paragraphs 83, 84, 86, 88, 90 and 92.

5.22.4. although, in setting and upholding the amount of bail, no assessment appears to have been made by the Spanish courts of the Captain's personal assets, the sum of EUR 3,000,000 fixed self-evidently bore no relation to the personal means of the Captain;

5.22.5. in fixing the bail, the investigating judge made no reference to the owners or insurers of *Prestige*, or to any obligation on the part of either to meet any bail which might be set, the only suggestion that the financial support of the owners or insurers of the ship played a part in the decisions of the courts in setting or upholding the amount of the bail is in the delphic statement of the Constitutional Court that the Captain's "professional environment" had been taken into account, a phrase which is interpreted in the judgment as embracing the Captain's relationship with the shipowners;

5.22.6. London Club had no legal responsibility (whether by binding conventions, custom, practice or contractual arrangements) to indemnify the owners of *Prestige* in respect of the bail bond of a ship's Master who had been detained by the maritime authorities in the circumstances of the present case;

5.22.7. the fact that the bail was eventually posted by London Club is of limited importance in terms of Article 5(3) of the European Convention of Human Rights, of more significance is the fact that, in setting bail, the national courts based themselves on what was, at best, an unsupported assumption that the shipowners or their insurers would feel morally obliged to come to the Captain's rescue by posting bail;

5.22.8. the national courts do not appear to have taken account, when setting and upholding the bail, of the Captain's personal circumstances other than his Greek nationality and his lack of ties to Spain; there is no reference to his assets, the fact that he was 67 years old and of good character, the fact that he was a citizen of another EU Member State or his family circumstances, all of which had relevance to the risk that he might abscond;

5.22.9. the national courts do not appear to have given any consideration, when setting and upholding the bail, to the possibility to combine bail with other measures designed to secure the applicant's attendance at trial, such as those which were imposed when the Captain was eventually released and when he was subsequently allowed to return to Greece.⁶⁵⁸

5.23. On 30 November 2011 proceedings in Spain on the merits of the case were remitted to the Provincial Court of A Coruna.⁶⁵⁹

5.24. On 30 July 2012 the ruling was made to open the oral trial. This ruling contained a detailed list of charges.⁶⁶⁰

5.25. Captain Mangouras, Chief Engineer Argyropoulos and Chief Officer Maloto were all accused by an enormous number of persons (public institutions, NGOs, private companies and individuals). Many of these persons were primarily concerned about civil claims (under Spanish law, civil claims may be submitted in the criminal proceedings). However, all of them also brought forward their own criminal charges and requests for specific punishment.⁶⁶¹ These various criminal charges and requests for punishment will not be described here. Only charges brought forward by the Spanish Public Prosecution Service, the Spanish State and French State will be described.

5.26. The Spanish Public Prosecution Service accused Captain Mangouras on primary basis for a crime against natural resources and the environment (punishable under Art. 325, Art. 326, sections b) and e), and Art. 338 of the Criminal Code), requesting to sentence him to 7 years' imprisonment, a fine of 40 months with a daily quota of EUR 24 and special disqualification from being a ship's master for 5 years.⁶⁶²

⁶⁵⁸ *Mangouras v. Spain*, Judgment of 28 September 2010, ECtHR, Joint dissenting opinion of Judges Rozakis, Bratza, Bonello, Cabral Barreto, David Thor Bjorgvinsson, Nicolaou and Bianku, paragraphs 3(i), 3(iii), 4, 6, 7 and 9.

⁶⁵⁹ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at p. 51.

⁶⁶⁰ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 3.

⁶⁶¹ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 51-93; IOPC Funds, *Prestige*, available at: <http://www.iopcfunds.org/incidents/#126-2002-210-November> [accessed 9 November 2015].

⁶⁶² Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 51-52.

5.27. The Spanish State accused:

5.27.1. Captain Mangouras on primary basis for a crime against natural resources and the environment (punishable under Art. 325, Art. 326, sections b) and e), and Art. 338 of the Criminal Code) and a crime of resistance and disobedience (punishable under Art. 556 of the Criminal Code), requesting to sentence him to 6 years' imprisonment, a fine of 36 months with a daily quota of EUR 24 and special disqualification from his profession or office for 4 years and 6 months;

5.27.2. Chief Engineer Argyropoulos for a crime of resistance and disobedience (punishable under Art. 556 of the Criminal Code), requesting to sentence him to 6 months' imprisonment.⁶⁶³

5.28. The French State accused:

5.28.1. Captain Mangouras for a crime against natural resources and the environment (punishable under Art. 325, Art. 326, sections b) and e), and Art. 338 of the Criminal Code) and a crime of resistance and disobedience (punishable under Art. 556 of the Criminal Code), requesting to sentence him: for the first crime – to 6 years' imprisonment, a fine of 36 months with a daily quota of EUR 150 and special disqualification from his profession for 4 years; for the second crime – to 10 months' imprisonment;

5.28.2. Chief Engineer Argyropoulos and Chief Officer Maloto for a crime against natural resources and the environment (punishable under Art. 325, Art. 326, sections b) and e), and Art. 338 of the Criminal Code), requesting to sentence them to 5 years' imprisonment, a fine of 30 months with a daily quota of EUR 100 and special disqualification from their profession for 4 years.⁶⁶⁴

⁶⁶³ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 52-53.

⁶⁶⁴ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 56-57.

5.29. Relevant articles of the Spanish Criminal Code read as follows:

5.29.1. Art. 325:

“Whoever, breaking the laws or other provisions of a general nature that protect the environment, directly or indirectly causes or makes emissions, spillages, radiation, extractions or excavations, filling with earth, noises, vibrations, injections or deposits, in the atmosphere, the ground, the subsoil or the surface water, ground water or sea water, including the high seas, even those affecting cross border spaces, as well as the water catchment basins, that may seriously damage the balance of the natural systems, shall be punished with a sentence of imprisonment from two to five years, a fine from eight to twenty-four months and with special barring from his profession or trade for a period from one to three years. Should there be risk of serious damage to the health of persons, the sentence of imprisonment shall be imposed in its upper half.”

5.29.2. Art. 326, sections b) and e):

“A punishment higher in one degree shall be imposed [...], when commission of any of the acts described in the preceding Article takes place with any of the following circumstances concurring:

- b) When the specific orders by the administrative authority on correction or suspension of the activities defined in the preceding Section have been disobeyed;
- e) When a risk of irreversible or catastrophic deterioration has ensued.”

5.29.3. Art. 338:

“When the conduct defined in this Title affects any protected natural space, the penalties shall be imposed higher by one degree to those respectively foreseen.”

5.29.4. Article 556:

“Those who [...] resist the authority or its agents, or seriously disobey them, while carrying out the duties of office, shall be punished with a sentence of imprisonment of six months to one year.”⁶⁶⁵

⁶⁶⁵ *Criminal Code*, Ministeria de Justicia, 2011, available at: <http://www.legislationline.org/documents/section/criminal-codes> [accessed 9 November 2015].

5.30. Public hearing of the case lasted from 16 October 2012 to 10 July 2013. On 13 November 2013 the Court delivered the judgement.⁶⁶⁶

5.31. In its judgment, the Court, at once, excluded from any further consideration the liability of Chief Officer Maloto, due to procedural aspects. In accordance with Spanish law, cases cannot be heard *in absentia*. Mr. Maloto was in default. He had not been heard during the preliminary investigations and also did not appear for the trial. Consequently, all petitions for his sentencing were inadmissible.⁶⁶⁷

5.32. Regarding the cause of the accident the Court ruled that, despite the lengthy investigation, a multitude of expert reports and various hypotheses, it is still impossible to determine with exactitude the true cause of the accident. Similarly, the Court was of the opinion that it is impossible to determine what should have been the appropriate response to the accident.⁶⁶⁸

5.33. The most discussed “hypothesis” regarding the cause of the accident was the structural failure of a bulkhead due to defective maintenance or due to defective repair of the ship. In this regard the Court noted that, naturally, nobody can deny the structural failure; however, at the same time, nobody has been able to show beyond a reasonable doubt where exactly this took place or for what reason. Furthermore, even if, indeed, defective maintenance or defective repair was the cause of the failure, the crew members of *Prestige* cannot be held liable because this defective maintenance or defective repair was hidden from them (at least there is no evidence to the contrary).⁶⁶⁹

⁶⁶⁶ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 3 and 51; IOPC Funds, *Prestige*, available at: <http://www.iopcfunds.org/incidents/#126-2002-210-November> [accessed 9 November 2015].

⁶⁶⁷ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 107.

⁶⁶⁸ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 106-107, 121-122.

⁶⁶⁹ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 98, 108-109, 121, 125-126.

5.34. “Hypotheses” regarding the appropriate response to the accident were, for example, that:

5.34.1. Captain Mangouras, just after the list of *Prestige* occurred, needed to start the internal transfer of cargo, instead of flooding the tanks – because after the flooding of the tanks the ship carried excessive weight and the value of the bending moment was above the limit. At the same time, a number of experts stated that the Captain acted within the limits of acceptable risk.⁶⁷⁰

5.34.2. Spanish authorities, throughout the response to the accident, needed to consult relevant experts more – because decisions they actually took were not professional. In this regard the Court noted: “It is not that there was no professional advice, which there was and which was extraordinarily competent, and, if today some experts maintain a different thesis, it is not very clear that they are the correct ones, or better [...] or more explicit, or better founded, the situation is that there was a possibility of consulting other experts and this was not done, but that does not mean that there was failure to consult, nor that that consultation was compulsory or prudent or that the advice collected was insufficient.”⁶⁷¹

5.34.3. Spanish authorities, once *Prestige* was firmly under tow and without imminent risk of grounding, needed to take the ship to a place of refuge, instead of sending her away from the coast – because sending the ship away from the coast massively increased the area affected by the spill. At the same time, a number of experts stated that the decision to grant a place of refuge was technically risky and even illegal. The Court from its side added that the decision to send the ship away from the coast, although might look like a wrong decision now *post factum* (when everyone knows what occurred as a consequence), is debatable but does not look like an absolutely wrong decision from an *ante factum* perspective, for example, because:

⁶⁷⁰ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 116-117 and 120.

⁶⁷¹ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 148-149 and 152.

- the area where the accident happened is largely dependent on currents, winds and tide that are not absolutely predictable; thus the logical thing according to which the greater the distancing the greater the extent of pollution is not undisputed and pollution actually could have evolved in many different ways;
- many claim that the slick degrades, fragments and loses its polluting capacity in contact with the sea; it is also claimed that the slick further out to sea simply gives more time to respond to it before it reaches the coast;
- the experts, who criticised Spanish authorities after the accident, during the time of the accident mostly remained silent about its possible consequences, which indicates that nobody actually believed from a scientific perspective that the massive arrival of oil at very distant places is immediate possibility, although perhaps they needed to foresee such possibility.⁶⁷²

5.35. As a result, the Court made two broad conclusions, one of a procedural, another of a substantive nature, namely:

5.35.1. That, in principle, it was possible to investigate some important aspects of the accident, in detail, which has not been done. In this regard it should also be noted that the Court throughout its judgment addressed rather reproachful words towards technical experts and institutions which carried out preliminary investigation of the case.⁶⁷³

5.35.2. That it is difficult/impossible to attribute responsibility to any of the accused persons for the crime against natural resources and the environment (neither intent, nor recklessness, nor negligence of any of the accused persons has been proven in this regard). Consequently, all accused, including Captain Mangouras and Chief Engineer Argyropoulos, should be absolved of this crime.⁶⁷⁴

⁶⁷² Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 130-136, 138, 141 and 144-146.

⁶⁷³ See, for example, Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 107, 109-110, 112-116, 120-122 and 164.

⁶⁷⁴ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 122, 125, 128 and 172-173.

5.36. The Court not only absolved Captain Mangouras and Chief Engineer Argyropoulos of the crime against natural resources and the environment, it even praised them for their actions during the accident – by stating that their initial actions after the failure demonstrated bravery and commitment above the normal.⁶⁷⁵

5.37. However, the Court found Captain Mangouras guilty of the crime of resistance and disobedience, more precisely, of the refusal to make fast the tow when such order repeatedly, imperatively and unequivocally was given by the Spanish maritime authority.⁶⁷⁶

5.38. The Court acknowledged that Captain Mangouras had the right to question the appropriateness of the order from the safety and environmental protection point of view, but at the same time the Court noted that it was not the case in this particular situation (as the Captain did not refuse towing as such). In this particular situation the Captain refused to follow the order for merely economic reasons – negotiations of economically better terms of towing or salvage services to be provided.⁶⁷⁷

5.39. The penalty imposed upon Captain Mangouras for the crime of resistance and disobedience was 9 months imprisonment with a reduction in sentence of the time already spent in prison due to this crime.⁶⁷⁸

5.40. The Court justified the imposing of such a rather high penalty upon the Captain by saying: “If a blatant, cold and malicious failure to comply with the authorities is already one of notable gravity, when that is linked with the urgency of avoiding or reducing the scope of a spillage of fuel that caused immense losses, this gravity becomes even clearer.”⁶⁷⁹

⁶⁷⁵ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 126.

⁶⁷⁶ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 156, 160, 163-164 and 173.

⁶⁷⁷ Judgment of the Provincial Court of A Coruna, *ibid.* at pp. 156-157 and 159-162.

⁶⁷⁸ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 173.

⁶⁷⁹ Judgment of the Provincial Court of A Coruna, *ibid.* at p. 164.

5.41. Also Chief Engineer Argyropoulos was blamed for resistance and disobedience, more precisely, for disobeying specific orders of authorities to start up the ship's engines and even sabotaging the engines to prevent or complicate that start-up. However, Mr. Argyropoulos was found not guilty for these actions, because the Court found that the above-mentioned allegations were vague and, even if they were true, anyway, Mr. Argyropoulos acted under the command of Captain Mangouras.⁶⁸⁰

5.42. The process of the notification of the judgment to all parties, which also entailed the translation of the judgment into Greek, took several months and was achieved in May 2014.⁶⁸¹

5.43. Subsequently, several parties, including the Spanish Public Prosecution Service and Captain Mangouras, filed the cassation appeal to the Spanish Supreme Court.⁶⁸²

5.44. Part of the appellants complained about incorrect application by the Provincial Court of A Coruna of Art. 325 and 326 of the Spanish Criminal Code in relation to Captain Mangouras. Unlike the Provincial Court, the appellants considered that the Captain acted in a negligent manner in the handling of *Prestige* and thereby effectively contributed to the serious danger of pollution which gave rise to enormous damage to the environment.⁶⁸³

5.45. The hearing of the case at the Spanish Supreme Court was held on 29 September 2015, attended by the lawyers of the appellants; thus, Captain Mangouras was not present at the trial.⁶⁸⁴

5.46. On 14 January 2016 the Spanish Supreme Court delivered its judgement.⁶⁸⁵

⁶⁸⁰ Judgment of the Case No.00511/2013, Provincial Court of A Coruna, 13 November 2013 (unpublished English translation on file with author) at pp. 156, 158, 163 and 172-173.

⁶⁸¹ IOPC Funds, "Incidents Involving the IOPC Funds – 1992 Fund: Prestige", IOPC/OCT14/3/5, 8 September 2014, paragraph 4.3.5, available at: <http://documentservices.iopcfunds.org/meeting-documents/> [accessed 9 November 2015].

⁶⁸² Judgment of the Case No.865/2015, Spanish Supreme Court, 14 January 2016 at pp. 3 and 17-25.

⁶⁸³ Judgment of the Spanish Supreme Court, *ibid.* at pp. 51-52.

⁶⁸⁴ Judgment of the Spanish Supreme Court, *ibid.* at p.27.

⁶⁸⁵ Judgment of the Spanish Supreme Court, *ibid.* at p.1.

5.47. First of all, the Court noted that, in accordance with human rights, particularly the right to be heard in presence, it may decide only strictly legal questions, scrupulously respecting already proven facts; it may not re-evaluate the objective and subjective elements of the crime.⁶⁸⁶

5.48. Then, the Court recognised the validity of the findings of the Provincial Court of A Coruna that the cause of the accident was a structural failure of the ship and that there is no evidence proving that Captain Mangouras knew about the defective structural state of the ship prior to the accident.⁶⁸⁷

5.49. Then, the Court analysed Art. 325 of the Spanish Criminal Code – the article which defines the crime against natural resources and the environment. The Court argued that this crime requires the confluence of three essential elements:

5.49.1. causing or directly or indirectly carrying out any of the polluting activities mentioned in the article;

5.49.2. breach of an environmental regulation of a non-criminal character;

5.49.3. creation of a situation of serious danger for the legally protected asset, as a consequence of the performance of the unlawful polluting activity.⁶⁸⁸

5.50. All the above-mentioned elements were found present in the conduct of Captain Mangouras:

5.50.1. regarding the first element, the Court ruled that it is fulfilled, because spilling the cargo of fuel oil into the sea falls within the definition of “discharge”, which is one of the polluting activities mentioned in the article,⁶⁸⁹

5.50.2. regarding the second element, the Court ruled that it is fulfilled, because with his conduct the Captain breached MARPOL, UNCLOS, SOLAS, Intervention Convention, the International Convention on Load Lines, 1966 as well as the Spanish Port States and Merchant Marine Act, 1992;⁶⁹⁰

⁶⁸⁶ Judgment of the Spanish Supreme Court, *ibid.* at pp.29-38.

⁶⁸⁷ Judgment of the Spanish Supreme Court, *ibid.* at pp.41-50.

⁶⁸⁸ Judgment of the Spanish Supreme Court, *ibid.* at pp. 53-54.

⁶⁸⁹ Judgment of the Spanish Supreme Court, *ibid.* at p. 64.

⁶⁹⁰ Judgment of the Spanish Supreme Court, *ibid.* at pp. 64-70.

5.50.3. regarding the third element: first of all, the Court explained that this element indicates that the crime in question is a crime of endangerment (meaning that the existence of actual damage to the environment is not necessary for the commission of the crime; it suffices to give rise to a state of risk)⁶⁹¹; secondly, the Court ruled that the Captain created such an endangerment, particularly by the following conduct:

5.50.3.1. he undertook a voyage at a time when it was foreseeable, if not certain, that he would have to face adverse weather conditions;

5.50.3.2. he did so in a ship which was ageing and was with operational defects which he knew perfectly well: he had to navigate manually because the automatic pilot was not working, without the heating pipes that allowed the cargo to be heated with the intensity necessary to facilitate its transfer and with towing gear that was difficult to operate since it required at least four men and steam power to move it;

5.50.3.3. he overloaded the ship at the port of Ventspils and added even more weight to the ship, when, for correcting the list, allowed the entry of sea water into the tanks; it weakened the ship and greatly hampered her recovery;

5.50.3.4. he acted evasively when Spanish authorities tried to take under control the uncontrolled ship which was drifting towards the coast.⁶⁹²

5.51. The Court acknowledged that criminally punishable is only *serious* endangerment to the environment. The above-mentioned endangerment created by Captain Mangouras was found to be obviously serious (even more than serious), *inter alia*, because of the actual catastrophic result.⁶⁹³

⁶⁹¹ Judgment of the Case No.865/2015, Spanish Supreme Court, 14 January 2016 at pp. 56-57.

⁶⁹² Judgment of the Spanish Supreme Court, *ibid.* at pp. 74-84.

⁶⁹³ Judgment of the Spanish Supreme Court, *ibid.* at pp. 57-58 and 70-72.

5.52. Likewise, the Court acknowledged that criminally punishable is only such endangerment to the environment which is created by intent or serious negligence. The above-mentioned conduct of Captain Mangouras was found to be carried out with serious negligence – for the magnitude of the breach of the duty of care, the importance of the legally protected asset affected and the foreseeability of the risk. In relation to this finding, the Court ruled that serious negligence is not exempted from liability under Reg. 11(b) (under current numbering 4(2)) of Annex I of MARPOL.⁶⁹⁴

5.53. As a result, unlike the Provincial Court of A Coruna, the Spanish Supreme Court found Captain Mangouras guilty of the crime against natural resources and the environment (with aggravated circumstances and without any mitigating circumstances).⁶⁹⁵

5.54. Punishment imposed upon the Captain for the above-mentioned crime was: two years imprisonment (the lowest possible prison term for the given crime), twelve months fine (EUR 10 per day) and special disqualification from the exercise of the profession of ship's captain for one year and six months. The Court noted that the lowest possible prison term was set taking into consideration amount of time (more than thirteen years) that has elapsed since the incident occurred.⁶⁹⁶

5.55. As the Spanish Supreme Court found Captain Mangouras guilty of the crime against natural resources and the environment (Art. 325 of the Spanish Criminal Code), the disobedience of the Captain during the accident became one of the aggravating factors of this crime (Art. 326, section b) of the Spanish Criminal Code). Consequently, to avoid double jeopardy, the Court acquitted the Captain of the separate crime of disobedience (Art. 556 of the Spanish Criminal Code).⁶⁹⁷

⁶⁹⁴ Judgment of the Spanish Supreme Court, *ibid.* at pp. 60-53 and 83-84.

⁶⁹⁵ Judgment of the Spanish Supreme Court, *ibid.* at pp. 84-85 and 158.

⁶⁹⁶ Judgment of the Spanish Supreme Court, *ibid.* at p.159.

⁶⁹⁷ Judgment of the Spanish Supreme Court, *ibid.* at pp. 59, 86-87, 91, 145-148 and 160-161.

5.56. Captain Mangouras submitted a motion for dismissal of the Spanish Supreme Court judgment, arguing mainly that the judgment breaches his fundamental rights of defence, his right to a trial with all the guaranties, and his right to legality. The Court rejected the Captain's motion. Afterwards, the Captain expressed the intention to appeal the judgment to the Spanish Constitutional Court.⁶⁹⁸

6.3.2. Analysis

Violation of the right to liberty: deprivation of liberty without existence of recognised ground

After the *Prestige* accident Spanish authorities detained the master of *Prestige* – Captain Mangouras – for 83 days, from 16 November 2002 to 7 February 2003 (see paragraphs 5.3 and 5.14 above). The following grounds were given for the detention:

- 1) sufficient evidence (in other words, reasonable suspicion) that the Captain had committed a crime against natural resources and the environment as well as the crime of resistance and disobedience;
- 2) severity of sanctions potentially to be imposed upon the Captain;
- 3) risk that the Captain will obstruct the proceedings;
- 4) public opinion;
- 5) potentially large sums of money involved in civil claims;
- 6) danger that the Captain will abscond, particularly because he is a foreigner and lacks any roots in Spain (see paragraphs 5.5-5.6 and 5.9-5.11 above).

The validity of these grounds is analysed below.

⁶⁹⁸ IOPC Funds, *Prestige*, available at: <http://www.iopcfunds.org/incidents/incident-map/#126-2002-210-November> [accessed 23 July 2016].

Reasonable suspicion

Although the existence of reasonable suspicion that a person has committed a particular crime *per se* is not a recognised ground for the deprivation of liberty, as it was explained earlier, the existence of at least minimal reasonable suspicion that a person has committed a particular crime is a pre-condition for the deprivation of liberty due to the danger of absconding. In this context, the argument of Spanish authorities that there exists reasonable suspicion that Captain Mangouras committed a crime against natural resources and the environment as well as a crime of resistance and disobedience can be considered as a valid argument for the detention of the Captain.

In addition, the level of suspicion (minimal, medium, high suspicion) that a person has committed a particular crime is one of the factors to be taken into consideration when assessing exactly how high the risk is that the person will abscond proceedings. In this regard, it should be noted that the level of suspicion that Captain Mangouras committed the crime against natural resources and the environment could not be high at the time when the decisions to remand him in custody were taken, because at that time Spanish authorities, themselves, indicated that the direct cause of the accident was an unforeseeable large wave, thus, not actions of the Captain (see paragraph 5.6.1 above). Consequently, if Spanish authorities with their argument of existence of reasonable suspicion that Captain Mangouras committed the crime against natural resources and the environment, actually, wanted to indicate that the respective suspicion was *high* and, therefore, the risk of absconding was high, the argument must be considered as an invalid argument for the detention of the Captain.

Severity of sanctions

Again, although the severity of sanctions to be potentially imposed upon a person *per se* is not a recognised ground for the deprivation of liberty, it is one of the factors which shall be taken into consideration when assessing exactly how high the risk is that the person will abscond proceedings. In the *Prestige* case Captain Mangouras faced severe sanctions under the Spanish Criminal Code (see paragraph 5.29 above). However, the long term imprisonment sanctions which the Captain faced under this Code, actually, could not be applied or were unlikely to be applied – due to the safeguards incorporated in Art. 92 of the Spanish Criminal Code itself and Art. 230 of UNCLOS (see paragraph 5.16.4 above). Consequently, the argument of Spanish authorities that Captain Mangouras faced severe potential sanctions must be considered as an invalid argument for the detention of the Captain.

Risk of obstruction of proceedings

Although, in principle, the risk of obstruction of proceedings is recognised ground for the deprivation of liberty, as explained earlier, authorities may not rely upon this ground *in abstracto*. Yet, In the *Prestige* case, Spanish authorities gave absolutely no evidence supporting their allegation that, if released, Captain Mangouras will obstruct the proceedings. Consequently, the argument of Spanish authorities that, if released, Captain Mangouras will obstruct the proceedings must be considered as an invalid argument for the detention of the Captain.

Public opinion

Public opinion can never serve as a ground for the deprivation of liberty. Even more, if an authority bases its decision on public opinion (as Spanish authorities did when deciding to detain Captain Mangouras), this authority can be considered as being not impartial, but the right of one's case to be investigated by impartial tribunal and pre-trial institutions is one of the human rights under the fair trial umbrella. Consequently, the reference of Spanish authorities to public opinion, when deciding upon the detention of Captain Mangouras, must be considered as absolutely invalid.

Large sums of money involved in civil claims

Again, although large sums of money involved in civil claims *per se* are not recognised ground for the deprivation of liberty, they may be considered as one of the factors making the danger of absconding from corresponding criminal proceedings higher, particularly when civil liability is adjudicated together with criminal liability, as in the *Prestige* case. Consequently, the argument that the *Prestige* case involves civil claims of large sums of money can be considered as partly valid argument for the detention of the Captain.

Danger of absconding

Although, in principle, the danger of absconding is recognised ground for the deprivation of liberty, as explained earlier, authorities may not rely upon this ground without thoroughly examining necessity and proportionality of respective measure. In the *Prestige* case, Spanish authorities, when assessing the need to detain Captain Mangouras, clearly did not consider any factor militating against the detention of the Captain. All formal factors given (reasonable suspicion, severity of potential sanctions, public opinion and large sums involved in civil claims) were framed as unequivocally proving the need to detain the Captain; although, as earlier analysis showed, these factors also contained the aspects militating against the detention. Personal factors militating against the detention, such as Captain's good character and lack of criminal record, were not considered at all. Only one personal factor, which was militating for detention was taken into consideration – the fact that the Captain is foreigner and lacks any roots in Spain. In this regard Spanish authorities failed to take into consideration that the Captain was an EU citizen and, thus, can be subjected to relevant co-operation mechanisms which exist within the EU. In other words, Spanish authorities, when deciding upon detention of the Captain, failed to assess all relevant factors in their entirety. Consequently, the validity of the argument of Spanish authorities that there was a high risk that, if released, Captain Mangouras would abscond proceedings is highly questionable. If all relevant factors would have been assessed, it would have most probably become clear that the detention of the

Captain would not be necessary, or at least not proportional, measure for securing his attendance at ongoing proceedings.

Was the detention of the seafarer necessary measure either for securing fulfilment of the legal obligation or for securing non-absconding or for securing that the seafarer would not take action to obstruct the proceedings?	No	X
	Yes	Violation

Violation of the right to liberty: deprivation of liberty without convincingly demonstrating its justification

Even if one was to agree that the Spanish authorities actually considered all relevant factors before detaining Captain Mangouras, and thus that the detention was necessary and proportional measure in the circumstances in question, the right to liberty of the Captain was still violated, because such a vague and one-sided assessment of the relevant factors by the Spanish authorities as described above can hardly be considered as convincing demonstration of the need to detain the Captain. Yet, the right to liberty requires such demonstration.

Was the justification for the deprivation of liberty of the seafarer convincingly demonstrated by the authorities?	No	X
	Yes	Violation

Violation of the right to liberty: due care not taken in fixing amount of bail

In the *Prestige* case, Spanish authorities ruled that Captain Mangouras could avoid his pre-trial detention by posting a bail of EUR 3,000,000. The grounds given for justifying this amount (very high amount) of bail were the same as given for justifying the need of the detention as such – reasonable suspicion, severity of potential sanctions, public opinion, large sums of money involved in civil claims and the fact that the Captain is a foreigner and lacks any roots in Spain (see paragraphs 5.5-5.6 and 5.9-5.11 above). As already shown above, all of these factors were not evaluated thoroughly, and some of them were not even relevant to be considered when assessing the danger of absconding and consequently also the bail to be set. This fact had also been repeatedly noted by the Captain himself as well as 7 judges of the Grand Chamber of ECtHR in their dissenting opinion (see paragraphs 5.12,

5.16, 5.22.1, 5.22.3, 5.22.4, 5.22.6, 5.22.8 and 5.22.9 above). The Spanish Constitutional Court in its judgment on the case noted that the bail was fixed by also taking into consideration the Captain’s financial circumstances and his “professional environment” (see paragraph 5.15 above). Respective argument was repeated and elaborated in the judgments of ECtHR (see paragraphs 5.18.1, 5.21.1, 5.21.2, 5.21.5 and 5.21.6 above). However, this argument was factually wrong. As the Captain and 7 judges of the Grand Chamber of ECtHR in their dissenting opinion had also rightly pointed out, when fixing the amount of bail, Spanish authorities never made any reference, even slightly, to the Captain’s financial circumstances or his “professional environment” (see paragraphs 5.5-5.6, 5.9-5.12, 5.16.1, 5.22.5 and 5.22.7 above). Consequently, Spanish authorities did not take due care in fixing the amount of the bail. If the assets of the Captain and his relationship with the persons who are to provide the security would have been assessed with due care when fixing the bail, it would have most probably become clear that the bail of EUR 3,000,000 was excessive.

ECtHR in its judgments referred to some additional grounds as given by the Spanish authorities to justify the high amount of bail set for the release of Captain Mangouras: seriousness of the natural disaster (or harm) in question and growing concern about offences against the environment (see paragraphs 5.18.2 and 5.21.3 above). These grounds *per se* are also not relevant grounds either for deprivation of liberty, as such, or for fixing the amount of bail. Furthermore, respective factors are normally already taken into consideration when prescribing punishment for specific offences against the environment. Therefore, to refer to these factors in addition to the argument that the alleged offender faces severe sanctions seems unfair practice for proving the need to deprive a person from liberty, or to set high bail for his release.

Was due care taken in fixing the appropriate amount of bail for the release of the seafarer?	No	X
	Yes	Violation

Violation of the right to liberty: fixing the amount of bail without convincingly demonstrating its justification

Even if one was to agree that the Spanish authorities actually considered all relevant factors when fixing the amount of bail for the release of Captain Mangouras and, thus, the amount of bail fixed was appropriate in the circumstances in question, the right to liberty of the Captain was still violated, because justification of the amount of bail fixed was never convincingly demonstrated by the Spanish authorities in their relevant decisions. Arguments as if proving that the amount of bail set was appropriate were given only *post factum*. Such *post factum* arguments are not capable of removing the fact that the amount of bail was fixed arbitrarily, in the first place, even if later this arbitrary fixed amount of bail accidentally appears to be appropriate. Similar opinion can be found in the dissenting opinion of 7 judges of the Grand Chamber of ECtHR (see paragraphs 5.22.2 and 5.22.5-5.22.9 above).

Was the justification of the amount of bail fixed convincingly demonstrated by the authorities?	No	X
	Yes	Violation

If to follow the above-given manner of thinking, then a rather lengthy analysis of ECtHR on whether the insurer of *Prestige* could be reasonably expected to cover the bail for the Captain (see paragraphs 5.18.1, 5.21.1, 5.21.2, 5.21.5 and 5.21.6 above) basically becomes pointless for identification of the violation of human rights in the particular case. However, in general, this analysis is very important, because if, in principle, there is room for expectation that the owner or insurer of the ship will cover the bail for a crew member of this ship and, consequently, a relatively high bail is set yet in the specific case bail is not posted by the owner or insurer, detained seafarers may remain in custody for very long periods. Therefore, ship-owners and insurers must develop uniform practice in this regard. At the moment, different practice is still evident, *inter alia*, there have been cases when the bail for a crew member of the ship was posted by the owner or insurer of this ship.⁶⁹⁹

⁶⁹⁹ See, for example, *The "VOLGA" (No. 11) Case (Russian Federation v. Australia)*, Judgment of 23 December 2002, ITLOS, paragraphs 42 and 45.

Violation of the right to be free from torture and other cruel, inhuman or degrading treatment

In the *Prestige* case, Spanish authorities carried out initial questioning of the crew members of *Prestige* – Captain Mangouras, Chief Engineer Argyropoulo and Chief Officer Maloto – just after their rescue from the stricken ship. The questioning was rather lengthy, took place during the night hours and was carried out despite the fact that all three men had been continuously occupied by duty and questioning for around 60 hours, without proper rest, food and facilities (see paragraphs 5.2 and 5.3 above). Such treatment of the seafarers can be considered to be at least degrading.

Taking into consideration the cumulative effect of the conditions, was the treatment of the seafarer by the authorities at least degrading?	No	
	Yes	X Violation

Violation of the right to be free from cruel, inhuman or degrading punishment: the principle of legality and rule of lenity

In the *Prestige* case, the Spanish Supreme Court found Captain Mangouras guilty of the crime against natural resources and the environment (see paragraph 5.53 above). Specifically, the Captain was found guilty of seriously endangering the environment by his certain seriously negligent conduct (see paragraphs 5.49-5.52). This ruling, *inter alia*, was based on the argument that the crime against natural resources and the environment is a crime for the commission of which causing of the actual damage to the environment is not necessary (see paragraph 5.50.3 above). However, the wording of the rule which defines the crime against natural resources and the environment in Spain – Art. 325 of the Spanish Criminal Code – is not sufficiently clear in this regard (see paragraph 5.29.1 above). Consequently, taking into consideration the principle of legality and, related to this principle, rule of lenity, Art. 325 of the Spanish Criminal Code needed to be interpreted as requiring to prove that a person has caused the actual damage (not only the endangerment) to the environment before this person can be held liable for the crime. Likewise, as explained already earlier, Reg. 4(2) of Annex I of MARPOL is not sufficiently clear on the issue whether seriously negligent conducts are exempted from liability or not.

Consequently, again, taking into consideration the principle of legality and, related to this principle, rule of lenity, Reg. 4(2) of Annex I of MARPOL needed to be interpreted as exempting from liability seriously negligent conducts. Yet, the Spanish Supreme Court adopted the opposite interpretation (see paragraph 5.52 above).

Was the law based on which the seafarer was convicted sufficiently clear?	No	X
	Yes	Violation

Violation of the right to be free from cruel, inhuman or degrading punishment: the principle that a person may not be held liable for a particular crime if all elements of this crime are not present or proven beyond a reasonable doubt

Even if to agree that under Art. 325 of the Spanish Criminal Code a person can be held liable merely for the serious endangerment to the environment, the right of Captain Mangouras to be free from cruel, inhuman or degrading punishment was still violated. In the case of endangerment, elements which needed to be proven beyond a reasonable doubt before the Captain could be found guilty of the crime against natural resources and the environment were: certain illegal conduct of the Captain (the required act); serious endangerment of the environment (the required harm); causal link between the conduct and the harm in question; intent or serious negligence (required mental state). All these elements needed to be proven beyond a reasonable doubt already at the Provincial Court of A Coruna, because the Spanish Supreme Court could rule only on strictly legal questions which do not require re-evaluation of the objective and subjective elements of the crime (see paragraph 5.47 above). Yet, at the Provincial Court of A Coruna all of the above-mentioned elements were not proven beyond a reasonable doubt, particularly because at this Court the evidence was examined from the perspective of different harm – the actual damage (not only the endangerment) to the environment. Also, at the Spanish Supreme Court all of the above-mentioned elements were not proven beyond a reasonable doubt, for example, regarding the seriousness of the endangerment the Court ruled that it is “obvious”, without referring to any relevant evidence (see, paragraph 5.51 above). The reference to the actual catastrophic result was not

appropriate in this case, because, as it was acknowledged by the Court itself, the actual damage resulted not solely from the conduct of the Captain, consequently, solely his certain illegal conduct, if any, could as well cause only relatively minor risk to the environment.

Was the seafarer convicted for the crime without proof of all elements of this crime beyond a reasonable doubt?	No	
	Yes	X Violation

Violation of the right to be tried in presence

In the *Prestige* case, the Spanish Supreme Court (the cassation court) found Captain Mangouras guilty of the crime against natural resources and the environment, thus overturning the earlier not guilty judgment (see paragraph 5.53 and 5.35.2 above). Captain Mangouras was not present at the cassation trial (see paragraph 5.45 above). Although, the Court had stressed that, in accordance with human rights, particularly the right to be heard in presence, it may decide only strictly legal question (see paragraph 5.47 above), in fact, it involved in the re-evaluation of the objective and subjective elements of the crime, particularly, the Court invoked, basically, the new objective element “harm” (“serious endangerment to the environment” instead of “actual damage to the environment”). Consequently, the fact of endangerment needed to be established and seriousness of this endangerment assessed. In addition, all other relevant elements (such as objective element “causation” and subjective element “serious negligence”) needed to be re-evaluated from the perspective of the newly invoked harm (see paragraphs 5.49-5.52 above).

Did the proceedings in front of cassation court, at which seafarer was not present, involve not only questions of law but also questions of fact?	No	
	Yes	X Violation

Possible violation of the right to be tried without undue delay

In the *Prestige* case, the proceedings against Captain Mangouras, Chief Engineer Argyropoulo and Chief Officer Maloto began on 16 November 2002 (see paragraph 5.4 above). The Court of the First Instance rendered its judgment in the case on 13 November 2013, that is, around 11 years after the initiation of the case (see paragraph 5.30 above). The Court of the Second Instance rendered its judgment in the case on 26 January 2016, that is, more than 13 years after the initiation of the case (see paragraph 5.46 above). The *Prestige* case, undoubtedly, is a very complex case due to several reasons, including the international aspect, the number of participants and the fact that civil liability is examined together with criminal liability (see paragraphs 1, 2.1-2.3, 5.25 and 5.42 above). It indicates that a relatively long period of investigation and adjudication of this case might still be reasonable. However, more than 13 years is a strikingly long period of time. It can be concluded with a great amount of certainty that at least one of the reasons for such a long investigation and adjudication is the fact that, despite the complexity of the case, its preliminary investigation was ultimately commenced and carried out by the investigation bodies in a very small province – Corcubion (around 6,5 km²; around 2000 inhabitants) – which, obviously, has relatively few human and other resources (see paragraph 5.7 above). Therefore, it can be argued that, by making provincial bodies investigate such a complex case as the *Prestige* case, Spain has violated the human rights of Captain Mangouras, Chief Engineer Argyropoulo and Chief Officer Maloto to be tried without undue delay.

Was the seafarer tried without undue delay?	No	X
	Yes	Violation

Observance of the right to liberty: prompt automatic judicial review of the deprivation of liberty

In the *Prestige* case, Captain Mangouras was deprived of his liberty on 15 November 2002 (see paragraph 5.2 above). He was brought for the automatic judicial review of his deprivation of liberty two days later – on 17 November 2002 (see paragraph 5.5 above). Thus, the automatic judicial review of the deprivation of liberty of Captain Mangouras was carried out promptly.

Was the seafarer after his deprivation of liberty brought for an automatic judicial review of his deprivation of liberty promptly?	No	
	Yes	X

Observance of the right to be free from cruel, inhuman or degrading punishment: the principle that a person may not be held liable for a particular crime if all elements of this crime are not present or proven beyond a reasonable doubt

After the *Prestige* accident, Captain Mangouras and Chief Engineer Argyropoulos were charged for the crime against natural resources and the environment (see paragraphs 5.25-5.28 above). However, in its judgment the Provincial Court of A Coruna did not find the seafarers guilty of the respective crime. Instead, the Court ruled that, despite the lengthy investigation, a multitude of expert reports and various hypotheses, it is still impossible to determine with exactitude the true cause of the accident. Consequently, all accused, including Captain Mangouras and Chief Engineer Argyropoulos, should be absolved of the crime against natural resources and the environment (see paragraphs 5.32-5.35 above). Due to the vagueness of the charge, Mr. Argyropoulos was also absolved of the crime of resistance and disobedience (see paragraph 5.41 above). Thus, the Provincial Court of A Coruna observed the general principle of punishment that a person may not be held liable for a particular crime if all elements of this crime are not proven beyond a reasonable doubt.

Was the seafarer convicted for the crime without proof of all elements of this crime beyond a reasonable doubt?	No	X
	Yes	

Observance of the right to be tried in presence

After the *Prestige* accident, one of the persons charged for causing the accident was the chief officer of *Prestige*, Mr. Maloto (see paragraphs 5.25 and 5.28 above). However, Mr. Maloto was in default during the proceedings. The Court ruled that, due to this fact, all petitions for his sentencing were inadmissible (see paragraph 5.31 above). Thus, the right to be tried in presence was observed.

Was the hearing at the first instance court held in the absence of the seafarer?	No	X
	Yes	

Observance of the right not to be tried or punished twice for the same offence

In the *Prestige* case, the Court of the First Instance found Captain Mangouras guilty of the crime of resistance and disobedience (see paragraph 5.37 above). The Court of the Second instance acquitted the Captain of this crime, to avoid double jeopardy (see paragraph 5.55 above).

Was the seafarer punished again for an offence for which he had already been convicted in this country?	No	X
	Yes	

6.4. Grounding of *TASMAN SPIRIT*

6.4.1. Facts

1. The ship involved in the accident

Tasman Spirit – 87,587 dwt (45,603 GT) tanker: registered in Malta; owned by Malta-based Assimina Maritime; operated by Greece-based Polembros Shipping; at the time of the accident, under voyage charter to Pakistan National Shipping Corporation.⁷⁰⁰

⁷⁰⁰ Grounding of M.T. *Tasman Spirit* Inquiry Report Under Section 470 and 471 of Pakistan Merchant Shipping Ordinance, 2001 at p. 3; *Assimina Maritime Limited v Pakistan Shipping Corporation and HR Wallingford Limited*, [2004] EWHC 3005 (Comm), paragraph 2; “Common Sense Breaks Out!”, Fairplay, 13 April 2006 at p. 30.

2. Seafarers alleged to be guilty of causing the accident

- 2.1. Captain Demitrios Karystinos – Greek master of *Tasman Spirit*.
- 2.2. Georgios Meimetis – Greek chief officer of *Tasman Spirit*.
- 2.3. Joel Jamero – Philipino third officer of *Tasman Spirit*.
- 2.4. Greg Flores – Philipino AB of *Tasman Spirit*.
- 2.5. Dionisios Valsamos – Greek chief engineer of *Tasman Spirit*.
- 2.6. Roberto Manongsang – Philipino second engineer of *Tasman Spirit*.
- 2.7. Georgios Koutsos – Greek third engineer of *Tasman Spirit*.
- 2.8. Nikos Pappas – Tsavlis Greek salvage master.
- 2.9. Captain Muhammad Nasir Javed – Karachi Port Trust (Karachi port authority) Pakistani pilot who guided *Tasman Spirit* into the port.⁷⁰¹

3. Grounding and events before and after it

- 3.1. On 22 July 2003 *Tasman Spirit* left Kharg Island (Iran) with the cargo of 67,532 tonnes of light crude oil on board. The destination of the ship was the port of Karachi (Pakistan).⁷⁰²
- 3.2. On 26 July, at 13:30 *Tasman Spirit* arrived at an anchorage off the port of Karachi.⁷⁰³
- 3.3. On 27 July, at 10:47 the pilot boarded *Tasman Spirit*. However, the ship could not proceed to the port at once, because tugs were not available.⁷⁰⁴

⁷⁰¹ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at pp. 8-10; “A Nightmare with No End in Sight”, Fairplay, 20 November 2003 at p. 31.

⁷⁰² Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at pp. 3-4; *Assimina Maritime Limited v Pakistan Shipping Corporation and HR Wallingford Limited*, *supra* note 700, paragraph 4.

⁷⁰³ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 4

⁷⁰⁴ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.*, Annex C.

3.4. At 12:19 *Tasman Spirit* proceeded to the port, up the buoyed approach channel. Ship's speed was 8 knots. Her under keel clearance was 2.4 m (as per official data available at the time of grounding, the channel depth was 12.2 m, height of tide – 2.1 m, i.e. total available depth – 14.3 m, the draft of *Tasman Spirit* – 11.9 m, i.e. under keel clearance – 2.4 m).⁷⁰⁵

3.5. At 12:45 engine speed of *Tasman Spirit* was reduced to half-ahead and, subsequently, at 12:48 further reduced to slow ahead.⁷⁰⁶

3.6. At 12:50 *Tasman Spirit* started to alter the course to port in order to negotiate the bend in the channel. However, the ship did not respond effectively, even when the wheel was put hard over to port (maximum limit of rudder).⁷⁰⁷

3.7. At 12:53 engine speed of *Tasman Spirit* was increased to half ahead and immediately thereafter to full ahead. The pilot asked the master of *Tasman Spirit* to ask for maximum revolutions on the engine to get optimum turning affect. Tug *Sohrab* was summoned to immediately come and assist *Tasman Spirit* in turning.⁷⁰⁸

3.8. The increase in helm and speed responded positively and *Tasman Spirit* started to turn gradually towards port to negotiate the bend. However, due to slow response, the ship came closer to the eastern extremity of the channel.⁷⁰⁹

3.9. At 12:57 *Tasman Spirit* grounded.⁷¹⁰

3.10. Immediately after the grounding, the engine of *Tasman Spirit* was stopped and put to full astern. Harbour control was informed about the grounding.⁷¹¹

⁷⁰⁵ Grounding of M.T. *Tasman Spirit* Inquiry Report Under Section 470 and 471 of Pakistan Merchant Shipping Ordinance, 2001 at pp. 4, 5 and 10, and Annex C; *Assimina Maritime Limited v Pakistan Shipping Corporation and HR Wallingford Limited*, [2004] EWHC 3005 (Comm), paragraph 4.

⁷⁰⁶ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 5.

⁷⁰⁷ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at pp. 5-6.

⁷⁰⁸ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 5 and Annex C.

⁷⁰⁹ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 5.

⁷¹⁰ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 4; *Assimina Maritime Limited v Pakistan Shipping Corporation and HR Wallingford Limited*, *supra* note 705, paragraph 4.

⁷¹¹ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.* at p. 6.

3.11. At 13:05 the tug *Sohrab* arrived on the starboard bow of *Tasman Spirit* and started pushing at full power. Meanwhile tugs *Taqatwar* and *Shehzore* were also called in to get *Tasman Spirit* afloat and into the centre of the channel. However, efforts of the tugs failed – *Tasman Spirit* was not moving, only her head was yawing approximately 5 degrees on each side.⁷¹²

3.12. At 16:00 there still was no change in the position of *Tasman Spirit*. Karachi Port Trust postponed the operation till the next high water in the evening.⁷¹³

3.13. The grounded *Tasman Spirit* was subjected to continuous stress from the heavy swell of the prevailing south-west monsoon. In the course of inspections on board, it became apparent that most of the cargo tanks had been ruptured.⁷¹⁴

3.14. 11 from 18 crew members of *Tasman Spirit* were evacuated. 7 – master, chief officer, third officer, AB, chief engineer, second engineer and third engineer – volunteered to stay with the ship to assist in the salvage operations.⁷¹⁵

3.15. On 31 July owners of *Tasman Spirit* called in Tsavliris-Russ salvage services. On 4 August salvage operations were under way. During the next few weeks roughly half of the crude oil cargo and most of the bunker fuel was successfully transferred from *Tasman Spirit*. Yet, in between these transfer operations, on 11 August the grounded ship started to show signs of breaking up and eventually broke in two overnight on 13/14 August, spilling several thousand tonnes of cargo. The crew abandoned the ship.⁷¹⁶

3.16. On 22 August the structure of *Tasman Spirit* collapsed.⁷¹⁷

⁷¹² Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.*, Annex C.

⁷¹³ Grounding of M.T. *Tasman Spirit* Inquiry Report, *ibid.*

⁷¹⁴ ITOPF, *Tasman Spirit, Pakistan, 2003*, available at: <http://www.itopf.com/in-action/case-studies/case-study/tasman-spirit-pakistan-2003/> [accessed 13 November 2015].

⁷¹⁵ “Pressure Pays Off as Karachi Eight Freed”, *Fairplay*, 22 April 2004 at p.5.

⁷¹⁶ “Common Sense Breaks Out!”, *Fairplay*, 13 April 2006 at p. 30; ITOPF, *Tasman Spirit, Pakistan, 2003*, *supra* note 712; CEDRE, *Tasman Spirit*, available at: <http://wwwz.cedre.fr/en/Our-resources/Spills/Spills/Tasman-Spirit> [accessed 13 November 2015]; Grounding of M.T. *Tasman Spirit* Inquiry Report, *supra* note 705 at p. 2.

⁷¹⁷ CEDRE, *Tasman Spirit*, *ibid.*

3.17. On 23 August salvage operations were taken over by Salvage Master Pappas.⁷¹⁸

3.18. On 29 August further release of oil was reported. Progressive break up of *Tasman Spirit* continued.⁷¹⁹

4. Consequences

4.1. In total, approximately 27,000 tonnes of oil were spilled as a result of the accident.⁷²⁰

4.2. The shoreline affected was: Clifton Beach next to Karachi, mangrove swamps in the area as well as some places in the port of Karachi itself.⁷²¹

4.3. Notified claims included reimbursement of all direct government costs incurred in responding to the spill, financial losses of income and earning potential (fishermen, residents, hawkers and businesses) and the natural resource damage/restoration costs.⁷²²

5. Criminal procedures and sanctions against seafarers

5.1. On 28 July 2003, upon receiving the report on the grounding of *Tasman Spirit* from the Pakistan National Shipping Corporation, Principal Officer of Pakistan Mercantile Marine Department initiated a preliminary inquiry into the accident in accordance with Section 471(2) of Pakistan Merchant Shipping Ordinance, 2001, which states: “[...] the Federal Government may appoint any person to hold a preliminary inquiry respecting any shipping casualty.”⁷²³

⁷¹⁸ “A Nightmare with No End in Sight”, Fairplay, 20 November 2003 at p. 31; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 157; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1109.

⁷¹⁹ CEDRE, *Tasman Spirit*, *supra* note 716; ITOPI, *Tasman Spirit, Pakistan, 2003*, *supra* note 714.

⁷²⁰ CEDRE, *Tasman Spirit*, *ibid.*

⁷²¹ CEDRE, *Tasman Spirit*, *ibid.*

⁷²² *Tasman Spirit* Oil Spill – Assessment Report, available at:

<https://docs.unocha.org/sites/dms/Documents/Pakistan.pdf> [accessed 13 November 2015];

“KARACHI: Pakistan to Claim \$2bn from Owners of *Tasman*”, DAWN, 31 May 2005, available at: <http://www.dawn.com/news/141429/karachi-pakistan-to-claim-2bn-from-owners-of-tasman> [accessed 13 November 2015].

⁷²³ Grounding of M.T. *Tasman Spirit* Inquiry Report Under Section 470 and 471 of Pakistan Merchant Shipping Ordinance, 2001, 22 October 2003 at p. 2; Merchant Shipping Ordinance, 2001, available at: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=PAK&p_classification=18&p_origin=SUBJECT [accessed 13 November 2015].

5.2. Crew members of *Tasman Spirit*, who had volunteered to stay with the ship to assist salvage operations, were not allowed to leave Pakistan while preliminary inquiry into the accident was going on. They co-operated with the inquiry and, ultimately, were released from any further requirement to contribute to that process. However, they still were not allowed to leave Pakistan.⁷²⁴

5.3. On 12 September, when salvage operations were finished, Tsavlis personnel involved in the salvage operations were not allowed to leave Pakistan. After one week Tsavlis personnel were told that, except for Salvage Master Pappas, they could leave the country. Pakistani authorities did not explain why the Salvage Master Pappas could not leave the country. It was also not explained later, despite sending several requests and reminders.⁷²⁵

5.4. On 3 October the crew members of *Tasman Spirit* as well as Salvage Master Pappas (hereinafter – “Karachi Eight”) were detained.⁷²⁶

5.5. On 6 October the crew members of *Tasman Spirit* secured bail and were released. However, their travel documents were held by the court and they themselves were put under “house arrest” in the Pearl Continental Hotel Karachi. Later Salvage Master Pappas also secured his bail and was released under the same conditions.⁷²⁷

5.6. Official explanation as to why exactly the “Karachi Eight” were not allowed to leave Pakistan was never given to them. There were just public announcements from Pakistani authorities that the “Karachi Eight” would be held in custody until the end of the inquiry. Pakistani authorities, *inter alia*, argued that holding the “Karachi Eight” was the legitimate right of Pakistan, that all seafarers are legitimate targets in any country and that Pakistan has gone a yard extra in releasing many members of the crew and the salvor purely on humanitarian grounds.⁷²⁸

⁷²⁴ “HOSTAGES to Misfortune”, Fairplay, 23 October 2003 at p.17.

⁷²⁵ “A Nightmare with No End in Sight”, *supra* note 718.

⁷²⁶ DE LA RUE and ANDERSON, *supra* note 718 at p. 1109; “*Tasman* Engineer Now Faces ‘Suicide’ Charge”, Fairplay, 22 January 2004 at p. 6.

⁷²⁷ DE LA RUE and ANDERSON, *ibid.*; “HOSTAGES to Misfortune”, *supra* note 724.

⁷²⁸ “HOSTAGES to Misfortune”, *ibid.* at p. 16.

5.7. Many others, however, have argued that the “Karachi Eight” were deprived of their liberty simply as security for compensation for the damage caused by the *Tasman Spirit* accident.⁷²⁹

5.8. The situation in regards to compensation for the damage caused by the *Tasman Spirit* accident was difficult, and discussions between involved parties did not evolve well. When the accident happened, Pakistan was not party to the CLC and Fund Convention. Consequently, it could not recover the damages through the compensation mechanisms incorporated into these conventions. An offer from the American Club (P&I Club of *Tasman Spirit*) to compensate on the same basis as CLC was rejected. Karachi Port Trust demanded a much higher compensation of USD 1,8 billion; and, reportedly, the “Karachi Eight” were intended to be held until the security of USD 1 billion had been provided. The owner and insurers of *Tasman Spirit* refused to negotiate the compensation issues until the “Karachi Eight” are held on what they described as spurious criminal charges filed by Karachi Port Trust. In addition, Assima Maritime served the counter-claim of USD 6.5 billion to Karachi Port Trust, blaming it for not maintaining the announced depth of the approach channel to the port.⁷³⁰

⁷²⁹ See, for example, statements from UK Club and Swedish Club in “Seafarers on the Brink”, Fairplay, 15 January 2004 at p. 7; “HOSTAGES to Misfortune”, *ibid.*; Anthony G. Olagunju, “Criminalization of Seafarers for Accidental Discharges of Oil: Is There Justification in International Law for Criminal Sanctions for Negligent or Accidental Pollution of the Sea?”, in *Journal of Maritime Law and Commerce*, Volume 37, No. 2, April 2006 at p. 222; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1109.

⁷³⁰ DE LA RUE and ANDERSON, *ibid.*; CEDRE, *Tasman Spirit*, available at: <http://www.cedre.fr/en/Our-resources/Spills/Spills/Tasman-Spirit> [accessed 13 November 2015]; “Common Sense Breaks Out!”, Fairplay, 13 April 2006 at p. 31; “*Tasman Spirit* Heads to Court”, 23 October 2003 at p. 4; “HOSTAGES to Misfortune”, *supra* note 724; “*Tasman* Engineer Now Faces ‘Suicide’ Charge”, *supra* note 726 at p. 7.

5.9. In late October a preliminary inquiry report into the accident was released. As a cause of the accident the inquiry indicated the combination of multiple reasons:

5.9.1. Slightly late entrance into the channel. It was argued in the report that, since Captain Karystinos was fully aware of the fact that *Tasman Spirit* entered the channel the considerable amount of time after high tide, he could have refused to come alongside the berth at that time. It was acknowledged in the report that, in general, in accordance with official data provided by Pakistani authorities, the available depth of water was still sufficient for *Tasman Spirit* to safely navigate the channel. However, it was also pointed to the fact that the Captain needed to take into consideration the following note which was on the chart used by the ship: “The Dredged Depths in channel, berths and moorings are generally maintained but silting is liable to occur. Dredging is in progress continually.”

5.9.2. Delayed actions. It was argued in the report that, considering the severity of prevalent monsoon conditions, actions taken for negotiating the bend should have been initiated earlier. The report also noted that progress of *Tasman Spirit* in the channel was not properly monitored and, consequently, the ship’s drift towards the eastern edge of the channel was not noticed by Captain Karystinos and the pilot at the appropriate time to take remedial actions.

5.9.3. Slow response of engine and rudder. It was argued in the report that *Tasman Spirit* failed to provide the desired maximum revolution as per the pilot’s requirements at the time of turning when the response to helm was found slower. In this regard the report noted that, since for negotiating the bend the rudder was put to hard over to port and remained in that position, there was a likelihood that an increase in speed would be slower because of the drag effect which is common in these circumstances, and this should have been realized by Captain Karystinos and the pilot.

5.9.4. Squat effect. It was noted in the report that Captain Karystinos overlooked the squat effect, which considering the size of *Tasman Spirit* could have been in the region of one meter (squat effect is the hydrodynamic phenomenon by which a ship moving quickly through shallow water creates an area of lowered pressure that causes the ship to be closer to the seabed than would otherwise be expected). It was further argued that this squat effect in combination with the rolling and pinching of the ship due to heavy swell which was experienced that day (which likely increased the draft even more) *Tasman Spirit* was actually navigating with very unsafe level of under keel clearance which could have been one of the reasons for the slow response of the engine and rudder while negotiating the bend in the channel.

5.9.5 Prevalent weather conditions. It was acknowledged in the report that, besides the elements of human error, prevalent weather conditions also played a key role in the grounding of *Tasman Spirit*. It was noted that, in accordance with the weather report obtained from the Pakistani Meteorological Department, an unusual phenomenon of gusty winds from the South East to East were blowing on the day of the accident and the state of the sea was reported to be moderate to rough and occasionally very rough. However, as per statements of Captain Karystinos and the pilot, the swell continued to be South Westerly. Thus, it is very likely that *Tasman Spirit* was caught up with wind blowing from her starboard side whereas the swell was hitting her on the port. This phenomenon, coupled with an ebb tide, were the apparent factors preventing the ship from turning as desired.

5.9.6. Ship's failure to maintain its position in the middle of the channel and its drift towards eastern extremity. It was noted in the report that the factors mentioned above resulted in the ship's drift from the centre of the channel towards its eastern edge.

5.9.7. Unusual siltation. It was noted in the report that the position where *Tasman Spirit* grounded is an area which is prone to siltation, and this siltation can be well imagined because of a bend in the channel.⁷³¹

⁷³¹ Grounding of M.T. *Tasman Spirit* Inquiry Report Under Section 470 and 471 of Pakistan Merchant Shipping Ordinance, 2001, 22 October 2003 at pp. 12-21.

5.10. Also after the preliminary inquiry report into the accident was released the “Karachi Eight” remained under house/hotel arrest.

5.11. On 5 January 2004 the third engineer of *Tasman Spirit* – George Koutsos – attempted to commit suicide. Mr. Koutsos tried to slit his neck and arm muscles with sharp pieces of broken glass in his hotel room. He was rushed to hospital with extensive bleeding. Captain Karystinos as well as the son of Mr. Koutsos later said that Mr. Koutsos was suffering chronic home sickness, exacerbated when other detainees were joined by their families over the Christmas period, while his family members were not able to visit him. The grown-up son of Mr. Koutsos joined him after the suicide attempt.⁷³²

5.12. Under Section 325 of Pakistan Penal Code an attempt to commit suicide is a criminal offence. Consequently, the charge of an attempt to commit suicide was added to the charges against Third Engineer Koutsos.⁷³³

5.13. On 23 February the Ministry of Communications report leaked to the press, blaming Captain Karystinos for causing the accident.⁷³⁴

5.14. On 26 March the new Minister of Communications signalled a U-turn, saying he will treat the case sympathetically. He appointed a powerful review committee to decide the fate of the “Karachi Eight”. The Committee was headed by the city’s dominant political force, the MQM party, the dynamic parliamentary leader Farooq Sattar.⁷³⁵

⁷³² “Pressure Pays Off as Karachi Eight Freed”, *Fairplay*, 22 April 2004 at p. 4; “*Tasman* Engineer Now Faces ‘Suicide’ Charge”, 22 January 2004 at p. 6.

⁷³³ “*Tasman* Engineer Now Faces ‘Suicide’ Charge”, *ibid.*; Pakistan Penal Code, 1860, available at: <http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html> [accessed 13 November 2015].

⁷³⁴ “Pressure Pays Off as Karachi Eight Freed”, *supra* note 732.

⁷³⁵ “Pressure Pays Off as Karachi Eight Freed”, *ibid.*

5.15. Pakistan was under constant international pressure to release the “Karachi Eight”. Several bodies intervened directly, for example, the IMO and EU, the Greek Foreign Ministry and the Union of Greek Shipowners. In addition to the direct interventions in support of the “Karachi Eight”, many commentators expressed severe critique towards Pakistan for holding the “Karachi Eight”. Some of the commentators even labelled the deprivation of liberty of the “Karachi Eight” as hostage-taking.⁷³⁶

5.16. On 17 April, literally hours before the scheduled Karachi magistrate’s court hearing on the issue, the above-mentioned (in paragraph 5.14) committee recommended the release of the “Karachi Eight”. Consequently, the court released travel documents of the “Karachi Eight”, thus allowing them to return home. It has been argued that it was done in return for specific benefits to Pakistan, such as Greek support for Pakistan in the upcoming voting at the European Parliament regarding the adoption of the Cooperation Agreement between the European Community and the Islamic Republic of Pakistan.⁷³⁷

6.4.2. Analysis

Violation of the right to liberty: deprivation of liberty without convincingly demonstrating its justification

In the *Tasman Spirit* case, 7 crew members of *Tasman Spirit* and Salvage Master Pappas were deprived of their liberty by Pakistani authorities for over 8 and over 7 months, respectively. First, they were put on the Exit Control List, then detained and then put under house/hotel arrest (see paragraphs 5.2-5.5 and 5.16 above). Yet, justification for the deprivation of liberty of the “Karachi Eight” was never convincingly demonstrated, even after several requests and reminders. Pakistani

⁷³⁶ See, for example, statements from UK Club and Swedish Club in “Seafarers on the Brink”, Fairplay, 15 January 2004 at p. 7 ; “HOSTAGES to Misfortune”, Fairplay, 23 October 2003 at p.16; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the Journal of International Maritime Law, Volume 18, Issue 2, March-April 2012 at p. 157; Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1109.

⁷³⁷ “Pressure Pays Off as Karachi Eight Freed”, *supra* note 732; DE LA RUE and ANDERSON, *ibid.*; Council decision concerning the conclusion of the Cooperation Agreement between the European Community and the Islamic Republic of Pakistan, Procedure, available at: <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32004D0870> [accessed 9 January 2016].

authorities gave only very general public announcements in this regard, such as that the men would be held until an inquiry was held (see paragraphs 5.3 and 5.6 above).

Was the justification for the deprivation of liberty of the seafarer convincingly demonstrated by the authorities?	No	X
	Yes	Violation

Violation of the right to liberty: deprivation of liberty without existence of recognised ground

The facts of the *Tasman Spirit* case point towards the conclusion that the real reason for the deprivation of liberty of the “Karachi Eight” was to secure the best possible deal with related third parties regarding civil claims (see paragraph 5.8 above). Yet, civil claims are not recognised ground for the deprivation of liberty of a person.

The fact that at one point in time the “Karachi Eight” were released from their detention and put under house/hotel arrest upon securing bail (see paragraph 5.5 above) as well as the content of general public announcements of the Pakistani authorities about deprivation of liberty of the “Karachi Eight” (see paragraph 5.6 above) point towards the conclusion that the formal ground for the deprivation of liberty was the danger of absconding. However, for the deprivation of liberty on the ground of danger of absconding to be justified, first of all, there must be reasonable suspicion that the person deprived of liberty has committed the crime. The possibility there existed reasonable suspicion that the “Karachi Eight” committed the crime is analysed below.

Captain Karystinos

Conclusions in the preliminary inquiry report into the accident suggested that there could be reasonable suspicion that the accident was caused by reckless or negligent conduct of Captain Karystinos (see paragraphs 5.9.1-5.9.4 and 5.9.6-5.9.7 above). Yet, this suspicion could not be great, because *Tasman Spirit* grounded, although not in the middle, but still, within the limits of the channel which in accordance with the official data was deep enough for the ship to pass (see paragraphs 3.4, 3.8 and 3.9 above). In such a case, the decision to proceed through the channel, despite

information suggesting that in some places the channel might not be as deep as officially claimed, still seems to be within the limits of justified professional risk and, thus, not a reckless or negligent decision.

Chief Officer Meimetis, Third Officer Jamero, AB Flores, Chief Engineer Valsamos, Second Engineer Manongsang and Third Engineer Koutsos

There could not be reasonable suspicion that the accident was caused by Mr. Valsamos, Mr. Manongsang and Mr. Koutsos (engineers of *Tasman Spirit*), because engineers are not responsible for navigating a ship. Also Mr. Meimetis, Mr. Jamero and Mr. Flores could not be reasonably suspected for causing the accident, because they also acted under the command of Captain Karystinos (master of the ship).

Salvage Master Pappas

There could also not be reasonable suspicion that the accident was caused by Salvage Master Pappas, because salvage operations were taken over by him only on 23 August 2003, when the structure of *Tasman Spirit* had already collapsed and further break up and release of oil were irreversible (see paragraphs 3.15-3.18 above).

Was the detention of the seafarer necessary measure either for securing fulfilment of the legal obligation or for securing non-absconding or for securing that the seafarer would not take action to obstruct the proceedings?	No	X
	Yes	Violation

Violation of the right to be tried by an independent and impartial tribunal

The facts of the *Tasman Spirit* case point towards the conclusion that the decisions in regards to the deprivation of liberty of the “Karachi Eight” first and foremost were made politically and, only afterwards, just formally, by judicial bodies (see paragraphs 5.13, 5.14 and 5.16 above). It indicates that the rights of the “Karachi Eight” to be tried by an independent and impartial tribunal were violated.

Was there justified basis for suspicion that the judge adjudicating the seafarers’ case was bias in some way (for example, that he in practice was in a subordinate relationship to some other organ of the state)?	No	
	Yes	X Violation

6.5. Collision of *HEBEI SPIRIT* and *SAMSUNG NO.1*

6.5.1. Facts

1. Ships involved in the accident

1.1. *Hebei Spirit* – 269,605 dwt (146,848 GT) VLCC: registered in Hong Kong (China); owned by Hebei Spirit Shipping Company (Hong Kong, China); operated by V-Ships (Isle of Man, United Kingdom).

1.2. *Samsung No.1* – 11,828-ton ocean crane barge: registered in South Korea; owned and operated by Samsung Corporation and its subsidiary Samsung Heavy Industries, which belong to the Samsung Group (South Korea).

1.3. *Samsung T-5* – 311-ton tug owned and operated by Samsung Corporation and its subsidiary Samsung Heavy Industries, which belong to the Samsung Group (South Korea).

1.4. *Samho T-3* – 182-ton tug owned and operated by Samsung Corporation and its subsidiary Samsung Heavy Industries, which belong to the Samsung Group (South Korea).

1.5. *Samsung A-1*: an around 89-ton anchor boat owned and operated by Samsung Corporation and its subsidiary Samsung Heavy Industries, which belong to the Samsung Group (South Korea).⁷³⁸

2. Seafarers and others alleged to be guilty of causing the accident

2.1. Captain Jasprit Singh Chawla – Indian master of *Hebei Spirit*.

2.2. Shyam Chetan – Indian chief officer of *Hebei Spirit*.

2.3. Masters of *Samsung No.1*, *Samsung T-5* and *Samho T-3*.

⁷³⁸ Marine Accident Investigation Section of the Marine Department of the Hong Kong Special Administrative Region, Report of Investigation into the Collision Between the Hong Kong Registered Ship “Hebei Spirit” and Korean Crane Barge “Samsung No.1” on 7 December 2007, 10 February 2009, paragraphs 2.1-2.5; IOPC Funds, *Hebei Spirit*, available at: <http://www.iopcfunds.org/incidents/incident-map/#140-2007-185-December> [accessed 18 November 2015].

2.4. Hebei Spirit Shipping Company – the owner of *Hebei Spirit*.

2.5. Samsung Heavy Industries – the owner and operator of *Samsung No.1*, *Samsung T-5*, *Samho T-3* and *Samsung A-1*.⁷³⁹

3. Collision and events before and after it

3.1. On 26 November 2007, prior to proceeding to the works occurring at the Incheon Grand Bridge construction site (Incheon, South Korea), a towing capability inspection of the towing convoy consisting of *Samsung No.1*, *Samsung T-5*, *Samho T-3* and *Samsung A-1* was carried out in Busan (South Korea). Among other conditions the inspection recommended that the towing convoy was not to depart if winds were in excess of Beaufort scale force 5.⁷⁴⁰

3.2. On 6 December 2007, when the towing convoy was already about to depart from the Incheon Grand Bridge construction site to head south for Samsung Heavy Industries at Gohyun port in Geoje (South Korea), the master of *Samsung T-5* (person in charge for the planned towing voyage) received an adverse weather forecast. It was anticipated that during the planned towing voyage wind would amount to Beaufort scale force 6 to 7 and particularly poor weather would be occurring in the waters around Daesan (South Korea) in the early morning of 7 December. Yet, the master of *Samsung T-5* considered that the forecasted weather would not affect the voyage, because at the time of departure the wind did not reach Beaufort scale force 5 and the strong winds forecast was for the sea areas of 20 miles from the coast, while the towing convoy was planned to navigate only 10 miles away from the coast. Consequently, at around 14:50 the towing voyage was commenced. *Samsung No.1* was towed stern first by *Samsung T-5* and *Samho T-3*. *Samsung A-1* was escorting at the other end of the barge.⁷⁴¹

⁷³⁹ IOPC Funds, *Hebei Spirit*, *ibid.*

⁷⁴⁰ Hong Kong Report, *supra* note 738, paragraphs 4.2.3 and 5.1.1.

⁷⁴¹ Hong Kong Report, *ibid.*, paragraphs 1.1, 2.2.2, 2.3, 2.4, 4.2.2, 4.2.4, 4.2.6, 4.2.7, 5.1.2, 5.1.3, 6.1 and Appendix 1.

3.3. Meanwhile, in the afternoon of 6 December, *Hebei Spirit* arrived at Daesan with 263,541 tonnes of cargo on board.⁷⁴²

3.4. At 17:18 Daesan VTS informed *Hebei Spirit* to proceed to the assigned anchorage off Daesan. At 19:18 *Hebei Spirit* anchored at a position instructed by VTS. Then, VTS informed *Hebei Spirit* that the pilot would be boarding the next day (i.e. 7 December) at 14:00 to take the ship to the port. Captain Chawla informed the chief engineer accordingly and then left the bridge leaving the third officer and AB on anchor-watch on the bridge. Later, Captain Chawla still made several brief visits to the bridge with the last visit at 21:15. The Captain also wrote the night orders that the watch-keeping officers should follow the company anchor watch standing orders and call the Captain if they had any concerns or required his attendance.⁷⁴³

3.5. In the early morning of 7 December, as the weather deteriorated, tugs towing *Samsung No.1* started to lose their control over the barge. The whole towing convoy was moving in a zigzag direction, deviating from the intended course. At around 4:44 the course of the towing convoy was changed to a northern direction, with the aim to find shelter back in Incheon. However, this manoeuvre was not successful. Even after changing the course, the towing convoy drifted further south.⁷⁴⁴

3.6. Despite the fact that the towing convoy was out of control, the master of *Samsung T-5* did not inform about it VTS or ships in the vicinity.⁷⁴⁵

3.7. At around 5:20, VTS observed the zigzag track of the towing convoy and tried to reach it on VHF for clarification. There was no response from the towing convoy.⁷⁴⁶

3.8. At around 5:50, the master of *Samho T-3* observed a huge target on the radar suggesting a risk of collision. This target was *Hebei Spirit*.⁷⁴⁷

⁷⁴² Marine Accident Investigation Section of the Marine Department of the Hong Kong Special Administrative Region, Report of Investigation into the Collision Between the Hong Kong Registered Ship “Hebei Spirit” and Korean Crane Barge “Samsung No.1” on 7 December 2007, 10 February 2009, paragraphs 1.2, 4.1.1 and 6.2; IOPC Funds, *Hebei Spirit*, available at: <http://www.iopcfunds.org/incidents/incident-map/#140-2007-185-December> [accessed 18 November 2015].

⁷⁴³ Hong Kong Report, *ibid.*, paragraphs 1.2, 4.1.1, 4.1.2, 4.1.4, 4.1.5, 6.2 and Appendix 1.

⁷⁴⁴ Hong Kong Report, *ibid.*, paragraphs 4.2.9 and 4.2.10.

⁷⁴⁵ Hong Kong Report, *ibid.*, paragraph 5.3.1.

⁷⁴⁶ Hong Kong Report, *ibid.*, paragraph 5.3.2 and Appendix 1.

3.9. At around 6:05, the chief officer of *Hebei Spirit*, Mr. Chetan, called Captain Chawla to the bridge telling him that a towing convoy was causing concern. The barge was shaping up to pass only 0.15 nautical miles (i.e. less than 300 m) ahead of the bow of *Hebei Spirit*.⁷⁴⁸

3.10. At around 6:06 Captain Chawla arrived on the bridge. He, first, sounded more than 5 blasts in quick succession on the forward whistle, checked the radars to see how far away the towing convoy actually was, and then, at 6:09, called VTS informing it that the convoy was fast approaching from a distance of 0.8 nautical miles (i.e. less than 1,5 km) ahead.⁷⁴⁹

3.11. VTS told *Hebei Spirit* that the towing convoy would have difficulty controlling its manoeuvring due to rough weather. It further requested *Hebei Spirit* to take some measures to cope with the situation. In reply, Captain Chawla informed that he was preparing to use the anchor and the engine.⁷⁵⁰

3.12. At 6:14 Captain Chawla instructed the deck cadet to call the towing convoy on VHF radio, ask it what its intentions were and ask it to keep clear of *Hebei Spirit*, but the towing convoy did not reply.⁷⁵¹

3.13. As the towing convoy did not reply, Captain Chawla told the deck cadet to inform VTS that the towing convoy would be passing very close to *Hebei Spirit*. In reply, VTS told *Hebei Spirit* to stand-by.⁷⁵²

⁷⁴⁷ Hong Kong Report, *ibid.*, paragraph 4.2.11 and Appendix 1.

⁷⁴⁸ Hong Kong Report, *ibid.*, paragraph 4.1.6 and Appendix 1.

⁷⁴⁹ Hong Kong Report, *ibid.*, paragraphs 4.1.7, 4.1.10, 4.3.1 and Appendix 1.

⁷⁵⁰ Hong Kong Report, *ibid.*, paragraph 4.3.1.

⁷⁵¹ Hong Kong Report, *ibid.*, paragraphs 4.1.11, 5.3.2 and Appendix 1.

⁷⁵² Hong Kong Report, *ibid.*, paragraph 4.1.11.

3.14. Meanwhile, Captain Chawla ordered the chief engineer to get the engine ready for manoeuvring as quickly as possible. Chief Officer Chetan and AB were ordered to go to forecandle to check the anchor. Upon receiving the information that the anchor cable was almost in an up and down direction, Captain Chawla ordered to give the engine a kick astern, to get the ship moving astern. At 6:17 engine was put to a dead slow astern.⁷⁵³

3.15. Around the same time, at 6:17, the first communication with the towing convoy was established. VTS managed to contact *Samsung T-5* via mobile phone.⁷⁵⁴

3.16. After the conversation, at 6:22, VTS notified *Hebei Spirit* to heave the anchor to avoid collision with *Samsung No.1*. At that time, *Samsung No.1* was already approaching at only 0.3 nautical miles (i.e. around 500 m) from the bow of *Hebei Spirit*, and *Hebei Spirit* had already paid out 9 shackles (i.e. 247 m) of its anchor chain. For a ship like *Hebei Spirit* it would take at least 30 minutes to heave up the 9 shackles of cable from the water. Consequently, there was no time to raise the anchor. Furthermore, if the anchor was heaved, *Hebei Spirit* would get closer to *Samsung No.1* and thus increase the chance of collision. Captain Chawla clarified the situation to VTS and, instead of heaving up the anchor, continued to give astern engine movement and slacken the anchor cable to increase the passing distance.⁷⁵⁵

3.17. At 6:32 *Samsung No.1* uneventfully passed ahead of *Hebei Spirit* from the starboard to the port side. The distance between *Hebei Spirit* and *Samsung No.1* slowly started to increase.⁷⁵⁶

⁷⁵³ Marine Accident Investigation Section of the Marine Department of the Hong Kong Special Administrative Region, Report of Investigation into the Collision Between the Hong Kong Registered Ship “Hebei Spirit” and Korean Crane Barge “Samsung No.1” on 7 December 2007, 10 February 2009, paragraph 4.1.13 and Appendix 1.

⁷⁵⁴ Hong Kong Report, *ibid.*, paragraphs 5.3.1, 5.3.3 and Appendix 1.

⁷⁵⁵ Hong Kong Report, *ibid.*, paragraphs 4.1.14, 4.1.15, 4.3.2, 5.3.3, 5.3.5, 5.5.1, 5.5.2 and Appendix 1.

⁷⁵⁶ Hong Kong Report, *ibid.*, paragraphs 1.2, 4.1.15, 4.2.11, 6.2 and Appendix 1.

3.18. After passing, the tugs towing *Samsung No.1* increased the engine power, probably in an attempt to clear from *Hebei Spirit*. However, at around 6:51 the tow line connecting *Samsung No.1* and *Samsung T-5* broke. As a result *Samsung No.1* began drifting back towards *Hebei Spirit*.⁷⁵⁷

3.19. At 6:52 VTS contacted *Hebei Spirit* again asking her to pick up the anchor and move immediately to another safe place. *Hebei Spirit* reinstated the position that it would be difficult to raise anchor at such moment as the crane barge was still crossing ahead.⁷⁵⁸

3.20. Captain Chawla continued to watch. As *Samsung No.1* continued to move towards *Hebei Spirit*, at 6:57 the engine of *Hebei Spirit* was put to dead slow astern again, followed quickly by slow astern and half astern. At 6:58 Captain Chawla ordered Chief Officer Chetan to slip the anchor cable. However, a short while later Mr. Chetan reported that he was having difficulty hammering out the securing pin.⁷⁵⁹

3.21. From the side of the towing convoy, as the tow wire parted, the master of *Samsung T-5* notified *Samsung No.1* about it. The master of *Samsung No.1* ordered his crew to drop the anchor to avoid the collision and requested *Samho T-3* to pull them away from the drifting path. However, it did not help the situation. Due to the rough weather, the barge continued to drift towards *Hebei Spirit*.⁷⁶⁰

3.22. Just after 7:00 *Samsung No.1* was already almost upon the port forward of *Hebei Spirit* and the crane jibs and hooks were swinging dangerously close above the forecandle deck. The anchor party quickly left the forecandle. With collision imminent, Captain Chawla sounded the general alarm.⁷⁶¹

⁷⁵⁷ Hong Kong Report, *ibid.*, paragraphs 1.2, 4.1.16, 4.2.11, 5.3.7, 6.2 and Appendix 1.

⁷⁵⁸ Hong Kong Report, *ibid.*, paragraph 4.3.3 and Appendix 1.

⁷⁵⁹ Hong Kong Report, *ibid.*, paragraph 4.1.16 and Appendix 1.

⁷⁶⁰ Hong Kong Report, *ibid.*, paragraph 4.2.12.

⁷⁶¹ Hong Kong Report, *ibid.*, paragraph 4.1.17.

3.23. At around 7:06 *Samsung No.1* struck the port side of *Hebei Spirit*, rupturing one of the cargo tanks. The crane hooks damaged the foremast of the ship. Just after, the barge made two more contacts with *Hebei Spirit*, rupturing two more cargo tanks.⁷⁶²

3.24. At 7:16 VTS asked *Hebei Spirit* if they could extend the anchor chain to the maximum and continued to move astern. *Hebei Spirit* replied that they had already done that.⁷⁶³

3.25. At 7:19 *Hebei Spirit* requested VTS to send a few tugs to help the situation. In reply VTS said it would be difficult for them to do so because the location was too far away from their base.⁷⁶⁴

3.26. At 7:21 the engine of *Hebei Spirit* was put dead slow ahead and rudder hard to port to swing away from *Samsung No.1*. As *Samsung No.1* passed clear astern, Captain Chawla received reports of oil leaking into the sea from the damaged cargo tanks.⁷⁶⁵

3.27. At 7:28 Captain Chawla reported the pollution to VTS. At 7:30 he broadcasted a navigational warning on VHF radio.⁷⁶⁶

3.28. Thereafter, Captain Chawla gave instructions to carry out ullage and sounding check of all cargo tanks, ballast tanks, void spaces and the engine room to make sure there were no leaks other than the ones already identified. This operation was accomplished at around 9:45.⁷⁶⁷

⁷⁶² Marine Accident Investigation Section of the Marine Department of the Hong Kong Special Administrative Region, Report of Investigation into the Collision Between the Hong Kong Registered Ship “Hebei Spirit” and Korean Crane Barge “Samsung No.1” on 7 December 2007, 10 February 2009, paragraphs 1.1, 1.2, 4.1.18, 4.3.4, 6.1, 6.2 and Appendix 1.

⁷⁶³ Hong Kong Report, *ibid.*, paragraph 4.3.4 and Appendix 1.

⁷⁶⁴ Hong Kong Report, *ibid.*, paragraph 4.3.4 and Appendix 1.

⁷⁶⁵ Hong Kong Report, *ibid.*, paragraphs 4.1.19, 4.1.20 and Appendix 1.

⁷⁶⁶ Hong Kong Report, *ibid.*, paragraphs 4.1.20, 4.3.4 and Appendix 1.

⁷⁶⁷ Hong Kong Report, *ibid.*, paragraph 4.1.21; Korean Maritime Safety Tribunal, Marine Pollution Accident from the Collision Between Crane Barge *Samsung No.1* Towed by Tugboats *Samsung T-5* and *Samho T-3*, and Oil Tanker *Hebei Spirit*, paragraph 3.2.4.

3.29. Meanwhile, at 9:38, an officer from the Korean Coast Guard was winched down to *Hebei Spirit* by a helicopter. After consulting with this officer, collision mats were installed at the damaged areas.⁷⁶⁸

3.30. Captain Chawla was concerned about the risk of an explosion. Therefore, at around 10:00, inert gas was blown into all cargo oil tanks, including those leaking oil.⁷⁶⁹

3.31. From 10:35 cargo transfer was started – oil from the ruptured port tanks were transferred into centre and starboard tanks (although, the possibilities for this action were limited, as *Hebei Spirit* was almost fully laden). This operation was accomplished at 11:45.⁷⁷⁰

3.32. In between, from 11:15, ballasting into starboard side ballast tanks was also started to list the ship to starboard and thus lower the oil level in the damaged port tanks.⁷⁷¹

3.33. Despite all the response measures taken, the spill continued. It stopped only in the late evening on 8 December.⁷⁷²

4. Consequences

4.1. In total, approximately 11,000 tonnes of oil was spilled as a result of the accident.⁷⁷³

4.2. Oil began coming on shore late in the night on 7 December. Ultimately, over 300 km of shoreline was affected. The spill affected aquaculture, fishing, recreational beaches, national marine park ecology and migratory bird habitats.⁷⁷⁴

⁷⁶⁸ Hong Kong Report, *ibid.*, paragraph 4.1.23 and Appendix 1; Korean Report, *ibid.*

⁷⁶⁹ Hong Kong Report, *ibid.*, paragraph 4.1.24 and Appendix 1; Korean Report, *ibid.*

⁷⁷⁰ Hong Kong Report, *ibid.*, paragraphs 4.1.23, 4.1.24, 5.5.3 and Appendix 1; Korean Report, *ibid.*

⁷⁷¹ Hong Kong Report, *ibid.*, paragraph 4.1.24 and Appendix 1; Korean Report, *ibid.*

⁷⁷² Hong Kong Report, *ibid.*, paragraph 4.1.24 and Appendix 1; Korean Report, *ibid.*

⁷⁷³ Hong Kong Report, *ibid.*, paragraphs 1.3 and 6.3; IOPC Funds, *Hebei Spirit*, available at: <http://www.iopcfunds.org/incidents/incident-map/#140-2007-185-December> [accessed 18 November 2015]; CEDRE, *Hebei Spirit*, available at: <http://www.cedre.fr/en/Our-resources/Spills/Spills/Hebei-Spirit> [accessed 18 November 2015]; Joint UNEP/OCHA Environment Unit, Rapid Environmental Assessment: 'Hebei Spirit' Oil Spill - Republic of Korea, December 2007, Switzerland: Joint UNEP/OCHA Environment Unit, 2008 at pp. 5 and 7.

⁷⁷⁴ IOPC Funds, *Hebei Spirit*, *ibid.*; CEDRE, *Hebei Spirit*, *ibid.*; UNEP/OCHA, Rapid Environmental Assessment, *ibid.*

5. Criminal procedures and sanctions against seafarers

5.1. In January 2008 the Public Prosecutor of the Seosan Branch of Daejeon District Court charged Captain Chawla and Chief Officer Chetan (hereinafter – “Hebei Two”) of destruction of property (*Hebei Spirit* herself) and violation of marine pollution laws. Two officers were particularly blamed for not weighing the anchor and giving the way to *Samsung No.1*. Masters of *Samsung No.1*, *Samsung T-5* and *Samho T-3* were also charged.⁷⁷⁵

5.2. Masters of *Samsung T-5* and *Samho T-3* were detained. The “Hebei Two” were not detained, but they were not permitted to leave South Korea.⁷⁷⁶

5.3. On 23 June 2008 the Seosan Branch of Daejeon District Court delivered its judgement in the case. The court found that the cause of the accident was the second-hand tow and that there was insufficient reason for *Hebei Spirit* to have weighed anchor and moved the ship. Consequently:

5.3.1. master of the tug *Samsung T-5* was sentenced to three years imprisonment and a fine of KRW 2 million;

5.3.2. master of the tug *Samho T-3* was sentenced to one year imprisonment;

5.3.3. Samsung Heavy Industries was sentenced to a fine of KRW 30 million;

5.3.4. master of the crane barge *Samsung No.1* was found not guilty;

5.3.5. also the “Hebei Two” were found not guilty.⁷⁷⁷

⁷⁷⁵ IOPC Funds, *Hebei Spirit*, *ibid.*

⁷⁷⁶ IOPC Funds, *Hebei Spirit*, *ibid.*; Marine Accident Investigation Section of the Marine Department of the Hong Kong Special Administrative Region, Report of Investigation into the Collision Between the Hong Kong Registered Ship “Hebei Spirit” and Korean Crane Barge “Samsung No.1” on 7 December 2007, 10 February 2009, paragraphs 3.4 and 4.2.1.

⁷⁷⁷ IOPC Funds, *Hebei Spirit*, *ibid.*; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the Journal of International Maritime Law, Volume 18, Issue 2, March-April 2012 at p. 160; “Shipping World United Behind Hebei Two”, in INTERTANKO Annual Review and Reports 2008/2009 at p. 32.

5.4. The public prosecutor and Samsung Heavy Industries appealed against this judgement to the Criminal Court of Appeal (Daejeon Court). Consequently another trial was expected. Pending this trial, the “Hebei Two” still were not allowed to leave the country.⁷⁷⁸

5.5. Legal attempt was made to get the court to lift the departure ban. Monetary and other guarantees for the return of the “Hebei Two” to South Korea and presence in court as and when required were offered. By mid-August this legal attempt had failed.⁷⁷⁹

5.6. In September 2008 the initial report of the technical investigation of the accident (the investigation purely into the causes of the accident) was delivered by the Incheon District Maritime Safety Tribunal. This report, *inter alia*, stated that the “Hebei Two” were also partly responsible for the collision.⁷⁸⁰

5.7. Samsung Heavy Industries, the masters of the tugs and the “Hebei Two” all appealed against the decision of the Incheon District Maritime Safety Tribunal to the Korea Central Maritime Safety Tribunal.⁷⁸¹

5.8. In December 2008 the Central Maritime Safety Tribunal delivered its decision. The decision was similar to that of the Incheon District Maritime Safety Tribunal.⁷⁸² The following causes of the collision and consequent pollution, *inter alia*, were indicated in the decision:

- 5.8.1. towing fleet’s lack of towing ability in the adverse weather conditions;
- 5.8.2. towing fleet’s failure to take shelter timely;
- 5.8.3. towing fleet’s failure to notify others about its emergency situation;
- 5.8.4. towing fleet’s lookout negligence;
- 5.8.5. *Samsung No. 1*’s failure to anchor at an early stage;
- 5.8.6. *Hebei Spirit*’s inappropriate anchor watch;

⁷⁷⁸ IOPC Funds, *Hebei Spirit*, available at: <http://www.iopecfunds.org/incidents/incident-map/#140-2007-185-December> [accessed 18 November 2015]; MURRAY, *ibid.*; “Shipping World United Behind Hebei Two”, *ibid.*

⁷⁷⁹ “Shipping World United Behind Hebei Two”, *ibid.*

⁷⁸⁰ IOPC Funds, *Hebei Spirit*, *supra* note 778.

⁷⁸¹ IOPC Funds, *Hebei Spirit*, *ibid.*

⁷⁸² IOPC Funds, *Hebei Spirit*, *ibid.*

5.8.7. *Hebei Spirit's* failure to maintain readiness of the main engine;

5.8.8. *Hebei Spirit's* inappropriate actions to avoid the collision, particularly, failure to drag the anchor by using the main engine;

5.8.9. *Hebei Spirit's* inappropriate actions to prevent large-scale pollution, particularly, failure to build up optimal conditions to prevent additional oil leakage, for example, it was argued in the report that the oil leakage areas were blocked and cargo transfer operations were started too late (only around 3 hours after the accident) and blowing of inert gas into the damaged tanks, which accelerated the spill, was not necessary.⁷⁸³

5.9. On 10 December 2008, the Criminal Court of Appeal (Daejeon Court) rendered its judgement in the case. This judgment largely accorded with the decision of the Central Maritime Safety Tribunal. The Court:

5.9.1. reduced the sentence against the masters of the two tugs;

5.9.2. overturned the non-guilty judgement for the master of crane barge *Samsung No.1* and imposed on him a 30-month prison sentence along with a KRW 2 million fine;

5.9.3. overturned the non-guilty judgement for the “Hebei Two” and imposed an 18-month prison sentence along with a KRW 20 million fine on the master and an 8-month prison sentence along with a KRW 10 million fine on the chief officer;

5.9.4. sentenced the owner of *Hebei Spirit* – Hebei Spirit Shipping Company – to a fine of KRW 30 million.⁷⁸⁴

5.10. The appeal court also considered the “Hebei Two” to be a “flight risk” and therefore ordered them both to be arrested and taken straight to prison.⁷⁸⁵

⁷⁸³ IOPC Funds, *Hebei Spirit, ibid.*; Korean Maritime Safety Tribunal, Marine Pollution Accident from the Collision Between Crane Barge *Samsung No.1* Towed by Tugboats *Samsung T-5* and *Samho T-3*, and Oil Tanker *Hebei Spirit*, paragraph 4.

⁷⁸⁴ IOPC Funds, *Hebei Spirit, ibid.*; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at p. 160; Keith Wallis and Marcus Hand, “‘Hebei Two’ are Jailed”, in *Lloyd’s List*, 11 December 2008, available at: <http://www.lloydlist.com/ll/sector/regulation/article49267.ece> [accessed 18 November 2015].

⁷⁸⁵ IOPC Funds, *Hebei Spirit, ibid.*; “Shipping World United Behind Hebei Two”, in *INTERTANKO Annual Review and Reports 2008/2009* at p. 34.

5.11. When taken out of the court, the “Hebei Two” were handcuffed and paraded like common criminals to the public.⁷⁸⁶

5.12. During the detention in prison the “Hebei Two” were held in tiny (barely larger than a single bed), filthy, freezing individual cells with a hole in the floor for a toilet. They were let out for one hour a day. Very limited visits were allowed. Captain Chawla, a Sikh, had his long turban and Kada removed. Furthermore, prison authorities refused to provide the Captain with food appropriate for his religion (vegetarian food), thus forcing him to survive just on rice and water. Later detainees were transferred to the Cheongju Detention Centre. There was heating and also other conditions were slightly better.⁷⁸⁷

5.13. *Hebei Spirit* interests appealed the judgement of the Criminal Court of Appeal to the Supreme Court.⁷⁸⁸

5.14. There were significant protests at the conviction and following detention of the “Hebei Two”. On 14 January 2009 shipping industry bodies announced a major protest rally to take place at the South Korean Embassy in London on 23 January.⁷⁸⁹

5.15. Just one day after, on 15 January, the Supreme Court released the “Hebei Two” on bail pending their appeal. However, the “Hebei Two” were still not allowed to leave South Korea. Under the conditions of bail, they were obliged to stay under house arrest at a hotel in Seoul. The Supreme Court said that it took into account international opinion when replacing the detention with house/hotel arrest.⁷⁹⁰

5.16. Taking into account the decision of the Supreme Court to release the “Hebei Two” from detention, it was decided to cancel the previously planned protest rally in London.⁷⁹¹

⁷⁸⁶ WALLIS and HAND, *supra* note 784; “Shipping World United Behind Hebei Two”, *ibid.*

⁷⁸⁷ “Free the Hebei Spirit”, available at: <https://freehebeispirit.wordpress.com/> [accessed 18 November 2015].

⁷⁸⁸ IOPC Funds, *Hebei Spirit*, available at: <http://www.iopcfunds.org/incidents/incident-map/#140-2007-185-December> [accessed 18 November 2015].

⁷⁸⁹ MURRAY, *supra* note 784; “Shipping World United Behind Hebei Two”, *supra* note 785.

⁷⁹⁰ MURRAY, *ibid.*; “Shipping World United Behind Hebei Two”, *ibid.*

⁷⁹¹ “Shipping World United Behind Hebei Two”, *ibid.*

5.17. In April 2009, the Supreme Court:

5.17.1. upheld the decision to imprison the master of tug *Samsung T-5*;

5.17.2. upheld the decision to imprison the master of crane barge *Samsung No.1*;

5.17.3. confirmed the fines imposed by the Court of Appeal;

5.17.4. cleared the “Hebei Two” from the property destruction charges (charges giving rise to jail sentences). Also the Court of Appeal’s decision to detain the “Hebei Two” was annulled. However, officers were not fully exonerated – the charges of causing pollution and the associated fines were not annulled;

5.17.5. referred the whole case back to the Criminal Court of Appeal (Daejeon Court) for re-examination.⁷⁹²

5.18. The final hearing by the Criminal Court of Appeal (Daejeon Court) was held on 26 May 2009. On 11 June 2009 judgment from this hearing was released. The case was dismissed. On this day (after 550 days being deprived of their liberty) the “Hebei Two” left South Korea.⁷⁹³

6.5.2. Analysis

Violation of the right to liberty: deprivation of liberty without existence of recognised ground

Just after the *Hebei Spirit* accident the “Hebei Two” were not detained, yet, to prevent absconding, they were not permitted to leave South Korea (see paragraph 5.2 above). On 23 June 2008 the Court of First Instance found the “Hebei Two” not guilty for the accident (see paragraph 5.3 above). With such judgment delivered, *inter alia*, suspicion that the “Hebei Two” had committed the crime diminished considerably. Consequently, the risk of absconding of “Hebei Two” also diminished. Nevertheless, pending the appeal trial, the “Hebei Two” were still not allowed to leave South Korea, even after relevant monetary and other guarantees were offered for their return and presence in court as and when required (see paragraphs 5.4 and

⁷⁹² IOPC Funds, *Hebei Spirit*, *supra* note 788; Olivia Murray, “Fair Treatment of Seafarers – International Law and Practice”, in the *Journal of International Maritime Law*, Volume 18, Issue 2, March-April 2012 at pp. 160-161.

⁷⁹³ IOPC Funds, *Hebei Spirit*, *ibid.*; MURRAY, *ibid.*

5.5 above). It can be argued that at least at this point in time deprivation of liberty of the “Hebei Two” became unnecessary, or at least disproportionate, measure.

Was the deprivation of liberty of the seafarer (ban to leave country after acquittal by the Court of First Instance) proportional measure for securing non-absconding?	No	X
	Yes	Violation

On 10 December 2008 the Court of Second Instance found the “Hebei Two” guilty for the accident and, *inter alia*, imposed prison sentences on both seafarers (see paragraph 5.9.3 above). These sentences were not immediately enforceable, because the judgment of the Court of Second Instance was also not yet final. However, the “Hebei Two” were detained and taken to prison immediately after the judgment was delivered, because the court considered both seafarers to be a “flight risk” (see paragraph 5.10 above). It is highly doubtful that such severe measure as detention was necessary measure in the circumstances in question. In fact, later actions of the South Korean courts themselves indicate that the detention was not necessary; on 15 January 2009, taking into consideration international opinion, the South Korean Supreme Court replaced the detention with the house/hotel arrest (see paragraph 5.15 above). If such replacement was possible under the pressure of international opinion, one must admit that it was also possible earlier, without such pressure. Or, it must be concluded that the South Korean Supreme Court is not an independent and impartial court; that under the pressure of third parties (in our case, “international opinion”) it makes decisions which in the court’s own opinion are inadequate.

Was the deprivation of liberty of the seafarer (detention after conviction by the Court of Second Instance) necessary measure for securing non-absconding?	No	X
	Yes	Violation

Violation of the right to be free from torture and other cruel, inhuman or degrading treatment

In the *Hebei Spirit* case, after the Court of Second Instance found the “Hebei Two” guilty for causing the accident, both seafarers were detained and, when taken out of court, they were paraded like common criminals to the public (see paragraph 5.11 above). During the detention the “Hebei Two” were held in tiny, filthy, freezing individual cells with a hole in the floor for a toilet. Very limited visits were allowed. Captain Chawla, a Sikh, had his long turban and Kada removed. Furthermore, prison authorities refused to provide the Captain with food appropriate for his religion, thus forcing him to survive just on rice and water (see paragraph 5.12 above). Such treatment can be considered at least degrading.

When the seafarer was removed to or from the institution, was he exposed to public view as little as possible, and were proper safeguards adopted to protect the seafarer from insult, curiosity and publicity in any form?	No	X Violation
	Yes	

Did the accommodation provided for the use of the detained seafarer meet requirements of health?		
Space	No	X Violation
	Yes	
Heating	No	X Violation
	Yes	
Sanitary installations	No	X Violation
	Yes	

Was the seafarer during his detention allowed to communicate with his family and reputable friends at regular intervals, both by correspondence and by receiving visits?	No	X Violation
	Yes	

Were the religious beliefs and moral precepts of the seafarer respected during his detention?	No	X Violation
	Yes	

Violation of the right to be free from cruel, inhuman or degrading punishment: the principle that a person may not be held liable for a particular crime if all elements of this crime are not present or proven beyond a reasonable doubt

In the *Hebei Spirit* case, the “Hebei Two” were charged and later found guilty of destruction of property (*Hebei Spirit* herself) and violation of marine pollution laws. Masters of *Samsung No.1*, *Samsung T-5* and *Samho T-3* were also charged and later found guilty of causing the accident (see paragraphs 5.1, 5.3, 5.9 and 5.17 above). Presence of the elements of the alleged crimes in the conduct of the particular seafarers is analysed below.

Captain Chawla

Captain Chawla took appropriate measures to overcome the first collision risk situation (the situation when the towing convoy was approaching and shaping to pass very close ahead of *Hebei Spirit*): he arrived to the bridge immediately after the Chief Officer called him there (see paragraphs 3.9 and 3.10 above), evaluated the situation, sounded blasts on the forward whistle (see paragraph 3.10 above), called the towing convoy (see paragraph 3.12 above) and cooperated with VTS (see paragraphs 3.10, 3.11, 3.13 and 3.16 above). The only VTS order which was not followed in the first collision risk situation was the order at around 6:22 to heave up the anchor. This order was not followed due to safety reasons (see paragraph 3.16 above). Consequently, particular disobedience was justified.

Similarly, Captain Chawla took appropriate measures to overcome the second collision risk situation (the situation when the tow line connecting *Samsung No.1* and *Samsung T-5* broke and tugs lost control of the barge): he moved *Hebei Spirit* astern as much as possible and then made the decision to slip the anchor cable (see paragraph 3.20 above). It was argued that, instead, Captain Chawla needed to drag the anchor (see paragraph 5.8.8 above). However, the failure to make the decision to drag the anchor can be considered as a criminally punishable (grossly negligent) omission only if in the circumstances in question it was easy to make such a decision. In this regard, it should be kept in mind that, first of all, the decision needed to be made in the state of emergency; thus, very quickly. Secondly, dragging of the

anchor was not the only, obvious, action to take; the measure actually attempted (slipping of the anchor cable) was similarly adequate.

Also after the collision Captain Chawla acted adequately: he swung *Hebei Spirit* away from *Samsung No.1*, reported to VTS, broadcasted a navigational warning, carried out ullage and sounding checks, installed collision mats at the damaged areas, blew inert gas into all cargo tanks, transferred oil from the ruptured tanks into other tanks and, with the help of ballast water, listed the ship to starboard to lower the oil level in the damaged port tanks (see paragraphs 3.27-3.32 above). It was argued that the oil leakage areas were blocked and cargo transfer operations were started too late and the blowing of inert gas into the damaged tanks, which accelerated the spill, was not necessary (see paragraph 5.8.9 above). In the opinion of this author, there is some basis for the allegation that the oil leakage areas were blocked and cargo transfer operations were started too late. Yet, it is highly doubtful that there is a casual link between the respective omissions and large-scale pollution which occurred. Even if respective measures were taken earlier, it would not have reduced the scale of pollution significantly, particularly, because *Hebei Spirit* was almost fully laden (see paragraph 3.31 above). The decision to blow inert gas into the damaged tanks was made because the Captain was concerned about the risk of explosion, and consequently even bigger harm (see paragraph 3.30 above). The respective decision was not manifestly ill-founded, even if the risk of explosion was actually relatively low.

Chief Officer Chetan

Chief Officer Chetan also took proper measures to overcome the first collision risk situation: he called the Captain to the bridge (see paragraph 3.9 above) and then followed his order to go to the fore-castle to check the anchor (see paragraph 3.14 above). It was argued that the Chief Officer was not carrying out proper anchor watch and, consequently, identified the collision risk situation and called the Captain to the bridge too late (see paragraph 5.8.6 above). However, even if it is true, there is no causal link between this belated action and collision, because the first collision risk situation was successfully overcome – *Samsung No.1* uneventfully passed ahead

of *Hebei Spirit* and the distance between *Hebei Spirit* and the barge started to increase (see paragraph 3.17 above). When Chief Officer Chetan called the Captain to the bridge, he could not be expected to predict that after averting the first collision risk situation, the second collision risk situation would occur.

In the second collision risk situation Chief Officer Chetan acted fully under command of the Captain. He complied with all orders: tried to slip the anchor cable (see paragraph 3.20 above), returned aft when collision was already imminent (see paragraph 3.22 above) and, after the collision, together with other crew, implemented response measures (see paragraphs 3.27-3.32 above).

Masters of Samsung No.1 and Samho T-3

The person in charge of the towing voyage was the master of the tug *Samsung T-5* (see paragraph 3.2 above). Consequently, he, not the masters of *Samsung No.1* and *Samho T-3*, was responsible for all decisions taken in regards to the towing voyage. Furthermore, in the situation when the risk of collision with *Hebei Spirit* grew rapidly – when the tow line connecting *Samsung No.1* and *Samsung T-5* broke and the tugs lost control of the barge – the masters of *Samsung No.1* and *Samho T-3* took appropriate steps to try to avoid the collision. *Samsung No.1* dropped the anchor and requested *Samho T-3* to pull the barge away from the drifting path. *Samho T-3* tried to do so (see paragraph 3.21 above).

Was the conduct of the seafarer factual and legal (proximate) cause of the harm?	No	X
	Yes	Violation

Did the seafarer do the conduct intentionally, recklessly or with gross negligence?	No	X
	Yes	Violation

Violation of the right to be free from cruel, inhuman or degrading punishment: disproportionate punishment

In the *Hebei Spirit* case, the Court of Second Instance imposed: an 18-month prison sentence along with a KRW 20 million fine on Captain Chawla, an 8-month prison sentence along with a KRW 10 million fine on Chief Officer Chetan and a 30-month prison sentence along with a KRW 2 million fine on the master of *Samsung No.1* (see paragraph 5.9 above). Even if to agree that, in principle, the “Hebei Two” and the master of *Samsung No.1* could be held liable for causing the accident, due to the facts already described in the previous section, there is no basis to argue that the conduct of the above-mentioned seafarers was so blameworthy as to require the imposition of such a severe penalty as imprisonment. It should be reminded here, though, that the Supreme Court later cleared “Hebei Two” from the charges giving rise to jail sentences (property destruction charges) (see paragraph 5.17.4 above).

Did the sanction imposed upon the seafarer fit the offence?	No	X
	Yes	Violation

7. IMO/ILO Guidelines on Fair Treatment of Seafarers

7.1. Introduction

The case study incorporated in the previous chapter of this dissertation proves that the concerns of the international maritime community about the unfair application of criminal procedures and sanctions against seafarers in the aftermath of large-scale ship-source oil pollution accidents are well-grounded; as in relation to all four analysed cases certain derogations from human rights were identified. Consequently, there is a need for instruments capable of bringing considerable positive change into practice. The international maritime community sees IMO/ILO Guidelines on Fair Treatment of Seafarers (hereinafter in this chapter – the Guidelines) as such an instrument, even despite the fact that the Guidelines are only “soft law”. Such a conclusion can be made from the facts that: calls are made repeatedly for the implementation and promulgation of the Guidelines,⁷⁹⁴ surveys are carried out for understanding how effectively the Guidelines are actually implemented in particular states and recommendations are given on how to improve the respective implementation. For example, ITF and IFSMA, in co-operation with CMI and SRI, have carried out a relevant survey and, as a result, have urged for: IMO Member States already giving effect to the Guidelines to provide copies of their relevant laws if approached by other Member States; and IMO Technical Cooperation Committee to provide technical assistance to those Member States that have requested assistance to give effect to the Guidelines, *inter alia*, to develop

⁷⁹⁴ IMO, Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, A 24/Res.987, adopted on 1 December 2005, Paragraph 6; IMO, Adoption of Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, Resolution LEG.3(91), adopted on 27 April 2006, Paragraph 3; IMO, Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 98/6/1, 18 February 2011, submitted by ICS, ISF, BIMCO, INTERTANKO and INTERCARGO; IMO, Promotion as Widely as Possible of the Application of the 2006 Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, A 27/Res.1056, adopted on 30 November 2011; IMO, Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 99/6, 2 March 2012, submitted by ILO.

written guidance and training materials on the implementation of the Guidelines as well as to host regional and/or national workshops on the issue.⁷⁹⁵

This chapter will analyse the Guidelines from the perspective of human rights which are treated as a standard of fairness for the purposes of this dissertation with the aim to find out to what extent, if any, the Guidelines are capable of enhancing enjoyment of respective human rights and, thus, indeed, bring positive change into practice.

7.2. Right to Liberty and the Guidelines

Paragraph 1 of the Guidelines states: “It is recommended that these Guidelines be observed in all instances where seafarers may be detained by public authorities in the event of a maritime accident”. Thus, the scope of the application of the Guidelines is linked to seafarers’ potential detention. It indicates that the safeguarding of the right to liberty of seafarers is one of the priorities of the Guidelines. Paragraph 2, which defines the objective of the Guidelines, indicates the same, as, similar to Paragraph 1, it refers directly to detention. Paragraph 2 states:

[...] The objective of these Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary.

The meaning of the term “detention” for the purposes of the Guidelines is given in Paragraph 8 of the Guidelines:

“detention” means any restriction on the movement of seafarers by public authorities, imposed as a result of a maritime accident, including preventing them leaving the territory of a State other than the seafarer’s country of nationality or residence.

This meaning of the term “detention” under the Guidelines is similar to the meaning of the term “deprivation of liberty” under the human rights instruments. However, there is one difference. The notion of detention under the Guidelines excludes the situations when a seafarer is precluded to leave the territory of a state a national or

⁷⁹⁵ IMO, Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 101/4/1, 14 March 2014, submitted by ITF, IFSMA and CMI; IMO, Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 102/4, 2 March 2015, submitted by ITF, IFSMA, CMI and InterManager; IMO, Fair Treatment of Seafarers in the Event of a Maritime Accident, LEG 103/5, 26 April 2016, submitted by ITF.

resident of which he is. The notion of deprivation of liberty under human rights instruments does not set such a limitation, because the right to liberty is the right to move wherever a person wants, including out of his own country. Paragraph 4 of the Guidelines states that these Guidelines do not seek to interfere with the full enjoyment of the basic rights of seafarers, including those provided by international human rights instruments. Thus, the definition of the term “detention” within the Guidelines does not conflict with human rights; it simply excludes the seafarers’ right to move out of his own country from the scope of the Guidelines. Yet, in the opinion of this author, such exclusion is unjustified.

Paragraph 9.11 of the Guidelines recommends to the port or coastal State, in the aftermath of a maritime accident, to use all available means to preserve evidence to minimize the continuing need for the physical presence of any seafarer. In essence, this Paragraph is merely a call to observe the certain aspect of the right to liberty, namely, the prohibition of unreasonably long deprivation of liberty, as it was introduced earlier in this dissertation. Thus, Paragraph 9.11 of the Guidelines has little, if any, added value; if, in practice, states do not follow the respective requirement, even despite the fact that they are obliged to do so under binding human rights instruments, it is unlikely that they will start to follow the respective requirement simply after an additional rhetorical reminder to do so; more substantial encouragement is necessary.

Also Paragraphs 9.14, 9.15 and 9.18 of the Guidelines, in essence, are merely a call to observe certain aspects of the right to liberty, here being, the prohibition of unnecessary deprivation of liberty. Although, Paragraph 9.15 has slightly higher added value; it explains to a port or coastal State that, when a seafarer in question is employed in a regular shipping service to the port or coastal State in question, the need to deprive this seafarer of liberty diminishes. The author believes that more of such maritime-specific explanations in the Guidelines would have been appreciated by law enforcement institutions and courts, which, in practice, need to make sometimes difficult decisions whether or not under the circumstance in question it is necessary to deprive a seafarer from liberty.

Paragraphs 10.9, 11.4 and 12.5 of the Guidelines, in essence, urge the flag State, the seafarer State and shipowners, respectively, to co-operate with the port or coastal State which investigates the maritime accident, for example, by assisting in the return to the investigating state of seafarers subject to their jurisdiction who are witnesses in the case (Paragraphs 10.9 and 11.4) and by preserving evidence (Paragraph 12.5). If the flag State, the seafarer State and shipowners follow the above-mentioned recommendation to co-operate, the necessity to deprive a seafarer of liberty in the aftermath of a maritime accident may diminish, because reliable guarantees for the return of the seafarer to the investigating state, if and when necessary, will be given, necessary evidence will be collected faster and alike. Consequently, Paragraphs 10.9, 11.4 and 12.5 of the Guidelines have the potential to enhance the enjoyment of the right to liberty by seafarers. However, in the opinion of this author, the overall legal framework would have been clearer, and potential practical benefits even greater, if there were more detailed guidelines on the issue – the Guidelines on Penal Proceedings Which Involve Seafarers, *inter alia*, containing relatively detailed legal norms on co-operation of relevant stakeholders.

Paragraph 10.11 of the Guidelines, *inter alia*, urges the flag State, in the case when a port or coastal State which investigates a maritime accident does not promptly release a crew member involved in the accident, upon the posting of a reasonable bond or financial security, to utilise international dispute resolution mechanisms. Obviously, utilization of these mechanisms may ultimately lead to the release of a seafarer unfairly deprived of his liberty. However, here, it must be recalled that, in the opinion of this author, the international dispute resolution mechanism prescribed by Art. 292 of UNCLOS is not available to a flag State in relation to the release of crews; it is available only in relation to the release of ships.

7.3. Right to Be Free from Torture and Other Cruel, Inhuman or Degrading Treatment and the Guidelines

Paragraph 5 of the Guidelines states: “Seafarers are entitled to protection against coercion and intimidation from any source during or after any investigation into a maritime accident”. Paragraph 9.4 of the Guidelines prescribes that the port or coastal State should “ensure that seafarers are treated in a manner which preserves their basic human dignity at all times”. These Paragraphs reflect the right to be free from torture and other cruel, inhuman or degrading treatment. Yet, again, they are merely a call to observe the respective human right. Consequently, Paragraphs 5 and 9.4 of the Guidelines have little, if any, added value.

Paragraph 9.1 urges the port or coastal State “to take steps to ensure that adequate measures are taken to preserve [...] the economic rights of detained seafarers”. Paragraphs 9.5 and 10.5 urge the port or coastal State and the flag State, respectively, to “ensure/verify that adequate provisions are in place to provide for the subsistence of each detained seafarer, including, as appropriate, wages, suitable accommodation, food and medical care”. Paragraph 9.10, *inter alia*, urges the port or coastal State to ensure that all seafarers detained are provided with the means to communicate privately with their family members. All these recommendations reflect the certain aspects of the earlier discussed Rules for the Treatment of Prisoners. However, the Rules for the Treatment of Prisoners gives much wider and detailed recommendations than the Guidelines. Consequently, in the opinion of this author, for better protection of seafarers, the international maritime community could join the overall efforts (for example, through human rights NGOs) to enhance the enforcement of the Rules for the Treatment of Prisoners, instead of including in the Guidelines only a few declarative norms on the subject. Anyway, it is rather naive to think that the treatment of seafarers deprived of their liberty can be considerably improved without the gradual improvement of the treatment of persons deprived of their liberty, in general.

Paragraph 9.13 of the Guidelines prescribes the following:

promptly conduct interviews with seafarers, when done for a coastal State investigation following a maritime accident, taking into consideration their physical and mental condition resulting from the accident.

This author finds the respective Paragraph more helpful than the earlier-mentioned Paragraphs 5, 9.1, 9.4, 9.5, 9.10 and 10.5, because, differently from the earlier-mentioned paragraphs, Paragraph 9.13 gives a maritime-specific explanation. The explanation given is, basically, that a maritime accident is such an event which may significantly impact the physical and psychological health of involved seafarers; consequently, lengthy interviews of these seafarers, just after a maritime accident, has the increased potential to constitute, at least, degrading treatment. This message is worth being delivered by the maritime community to relevant law enforcement officials and judges worldwide. Yet, arguably, better means than the Guidelines may be found for delivering the respective message, for example, personal meetings with relevant law enforcement officials and judges during which the realities of different maritime accidents are explained to them, *inter alia*, with the help of memorable visual aids, such as films and photos.

Paragraph 11.2 of the Guidelines urges the seafarer State to “monitor the physical and mental well-being and treatment of seafarers of their nationality involved in a maritime accident, including any associated investigations”. Obviously, such a monitoring has potential to diminish ill-treatment of seafarers after maritime accidents. Thus, the respective rule of the Guidelines has some added value.

Paragraph 12.7 of the Guidelines urges shipowners to “ensure/verify that adequate provisions are in place to provide for the subsistence of each seafarer, including, as appropriate, wages, suitable accommodation, food and medical care”. This recommendation is almost identical to the one given to the port or coastal State and the flag State in Paragraphs 9.5 and 10.5, respectively. The difference is that the guideline to shipowners covers all seafarers, while the guideline to the port or coastal State and flag State covers only detained seafarers. It indicates that the overall responsibility for ensuring that adequate provisions are in place to provide for the subsistence of seafarers is thought to be on shipowners, but, in the case of detention,

also on the detaining State. The same can be concluded from Paragraph 6 of the Guidelines, where, in a similar context, the shipowner is mentioned before the detaining State. Paragraph 6 of the Guidelines reads as follows:

The investigation of a maritime accident should not prejudice the seafarer in terms of repatriation, lodging, subsistence, payment of wages and other benefits and medical care. These should be provided at no cost to the seafarer by the shipowner, the detaining State or an appropriate State.

In the opinion of this author, though, responsibility of shipowners incorporated in Paragraphs 6 and 12.7 of the Guidelines is so important that it must be a part of the relevant “hard law”, namely, MLC.

7.4. Right to Be Free from Cruel, Inhuman or Degrading Punishment and the Guidelines

Paragraph 9.3 of the Guidelines urges the port or coastal State to observe human rights in general, thus, also the right to be free from cruel, inhuman or degrading punishment. Paragraphs 9.12 and 9.20 of the Guidelines urge the port or coastal State to observe particular legal norms of MARPOL and UNCLOS, including the punishment-related legal norms. However, apart from these general calls to follow certain “hard law”, the right to be free from cruel, inhuman or degrading punishment is not covered by the Guidelines.

7.5. Right to Fair Trial and the Guidelines

Paragraphs 9.1 and 10.1 of the Guidelines prescribe that the port or coastal State and the flag State, respectively, should take steps to ensure that any investigation to determine the cause of a maritime accident is conducted in a fair manner. Paragraphs 9.6 and 9.16 prescribe that the port or coastal State should ensure that due process protections are provided to all seafarers. Paragraphs 10.7, 11.6 and the introductory part of Paragraph 12 prescribe that the flag State, the seafarer State and shipowners, respectively, should assist seafarers in securing their fair treatment. The above-mentioned rules can be considered as general calls to

observe or facilitate observance of the right to fair trial. Yet, again, such general calls have little, if any, added value.

Several Paragraphs of the Guidelines can be linked to the right to be tried without undue delay. All of these Paragraphs can be divided in two big groups:

- 1) general calls to observe the right to be tried without undue delay;
- 2) specific calls to co-operate, which may facilitate the expeditious investigation and, thus, enjoyment of the right to be tried without undue delay.

Within the first group fall the following Paragraphs: Paragraphs 9.1 and 10.1 which urge the port and coastal State and the flag State, respectively, to take steps to ensure that any investigation is conducted in an expeditious manner; Paragraph 9.16 which urges the port and coastal State to conclude its investigation promptly; and Paragraph 9.19 which urges the port and coastal State to “take steps to ensure that any court hearing, when seafarers are detained, take place as expeditiously, as possible”. Within the second group fall the following Paragraphs: Paragraph 10.6 which urges the flag State to “ensure that shipowners honour obligations to co-operate in any flag, coastal or port State investigation following a maritime accident”; Paragraph 11.6 which urges the seafarer State to “take steps to provide support and assistance [...], to facilitate the expeditious handling of the investigation”; Paragraph 12.3 which urges shipowners to “take action to expedite the efforts of a port, coastal, or flag State investigation”; Paragraph 12.4 which urges shipowners to “take steps to encourage seafarers and others under their employment [...] to co-operate with any investigation”; and Paragraph 13.4 which urges seafarers, themselves, to “participate in an investigation, to the extent possible, [...] with port, coastal or flag State investigators, by providing truthful information to the best of their knowledge and belief”. As it was stated earlier, those rules of the Guidelines which address co-operation the author sees as, in principle, valuable. However, for even greater practical benefits, she advocates the development of wider, more detailed guidelines covering the issue – the Guidelines on Penal Proceedings Which Involve Seafarers.

The Guidelines on Penal Proceedings Which Involve Seafarers, *inter alia*, could cover two more specific issues addressed by the Guidelines, namely, the issue of the obligation to pass to the relevant stakeholders the information on the proceedings initiated against the seafarer and the issue of the right of relevant stakeholders to visit and privately communicate with the detained seafarer. These issues are covered by the following Paragraphs of the Guidelines: 9.2, 9.9, 9.10, 10.2, 10.10, 11.1, 11.5 and 12.2. Paragraphs 9.2, 10.2, 11.1 and 12.2 prescribe that the port or coastal State, the flag State, the seafarer State and shipowners, respectively, should take steps to provide seafarers' representative organizations with access to seafarers. Paragraph 9.9 prescribes that the port or coastal State should:

ensure that the obligations of the Vienna Convention on Consular Relations, including those relating to access, are promptly fulfilled and that the State(s) of the nationality of all seafarers concerned are notified of the status of such seafarers as required, and also allow access to the seafarers by consular officers of the flag State.

Paragraph 9.10 prescribes that the port or coastal State should:

ensure that all seafarers detained are provided with the means to communicate privately with all of the following parties:

- family members;
- welfare organisations;
- the shipowner;
- trade unions;
- the Embassy or Consulate of the flag State and of their country of residence or nationality;

and

- legal representatives.

Paragraphs 10.10 and 11.5 prescribe that the flag State and the seafarer State, respectively, should “take steps to ensure that its consular officers are permitted access to the involved seafarers”. All of these legal norms of the Guidelines, in principle, are very important; they are, to a large extent, maritime-specific and have potential to enhance the enjoyment of the right to defence. In addition, they have potential to enhance the enjoyment of the right to be free from cruel, inhuman or degrading treatment, because, as explained earlier, this right, *inter alia*, is concerned about detainees' contact with the outside world, including their family members and reputable friends. However, in the opinion of this author, the above-mentioned Paragraphs of the Guidelines could be better linked to the relevant “hard law” provisions. This dissertation showed that the relevant “hard law” provisions – Art.

27(3), 223 and 231 of UNCLOS and Art. 5(3) of MARPOL – are not clear and coherent. The Guidelines have lost an opportunity to help states to interpret the respective unclear and incoherent “hard law” provisions. Instead, the Guidelines have added new rules on the respective issues, thus making the overall legal framework even more complex.

Paragraph 9.7 of the Guidelines addresses, at once, three different rights under the fair trial umbrella: the right to have the assistance of an interpreter; the right to defend oneself in person or through legal assistance; and the right not to incriminate oneself. Paragraph 9.7 prescribes that the port or coastal State shall:

ensure that seafarers are, where necessary, provided interpretation services, and are advised of their right to independent legal advice, are provided access to independent legal advice, are advised of their right not to incriminate themselves and their right to remain silent, and, in the case of seafarers who have been taken into custody, ensure that independent legal advice is provided.

The right not to incriminate oneself is referred to in the introductory part of Paragraph 12 of the Guidelines as well. There, shipowners are urged to protect the right of seafarers to avoid self-incrimination. Yet, again, both Paragraph 9.7 and the introductory part of Paragraph 12 are nothing more than mere calls to observe or facilitate observance of general human rights. Paragraph 13 of the Guidelines invites seafarers, themselves, to take steps to ensure their rights: Paragraph 13.1 – the right to have the assistance of an interpreter; Paragraph 13.3 – the right to defend oneself in person or through legal assistance; and Paragraphs 13.2 and 13.4 – the right not to incriminate oneself. Also Paragraph 13 of the Guidelines is highly declarative. However, in the opinion of this author, the respective paragraph has some added value. Seafarers are eagerly asking for informative materials on their rights.⁷⁹⁶ Paragraph 13 of the Guidelines can be considered as such a material and, thus, must be welcomed. Although, more detailed information covering all relevant human rights and their exact content would be more helpful.

⁷⁹⁶ In this regards see, for example, Nautilus International, *Criminalisation of Seafarers Report*, 2011 and SRI *Criminal Survey*, 2013.

7.6. Right to Non-Discrimination and the Guidelines

Paragraph 9.6 of the Guidelines prescribes that the port or coastal State should “ensure that due process protections are provided to all seafarers in a non-discriminatory manner”. This legal norm can be considered as a general call to observe not only the right to fair trial, as mentioned above, but also the right to non-discrimination.

7.7. Final Remark on the Guidelines

Previous sub-chapters indicate that this author finds the Guidelines to be, to a large extent, declaratory and fragmented and, thus, incapable of bringing considerable positive change into practice. At the same time, these sub-chapters indicate that the author sees the ideas incorporated in some of the rules of the Guidelines as good basis for further, more substantial developments. These developments will be still revisited in the next, final chapter.

8. Conclusions and Recommendations

8.1. Introduction

The starting point of this dissertation was the observation that, since the late 1990s and the early 2000s, the international maritime community has been highly concerned about the unfair application of criminal procedures and sanctions against seafarers, particularly after large-scale ship-source oil pollution accidents. It was further noted, that such an unfairness is, indeed, worrying, because it may bring severe negative consequences to individual seafarers as well as the shipping sector in broader terms. The author acknowledged efforts made by the international maritime community towards minimising the respective unfairness. At the same time, it was noted that, unfortunately, despite all efforts, the issue of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents has remained topical and, consequently, it is necessary to explore new ways of how to address this issue. The dissertation strived to do so.

The following objectives of the dissertation were set:

- to identify unfair international law, EU law and examples of unfair national law on criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents;
- to identify unfair enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents;
- to make recommendations for eradication of the identified problems.

For achieving the above mentioned objectives and, with that, facilitating the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, the following research questions were analysed in the dissertation:

1. What rights concerning criminal procedures and sanctions are prescribed by international and regional human rights instruments?
2. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by specific international “hard law” instruments (UNCLOS and MARPOL) and whether relevant legal norms in these instruments are clear and comply with human rights? If legal norms are unclear or do not comply with human rights, how they should be interpreted and what can be done to improve them?
3. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by Directive 2005/35 and whether relevant legal norms in this Directive are clear and comply with human rights, UNCLOS and MARPOL? If relevant legal norms of Directive 2005/35 are unclear or do not comply with human rights, UNCLOS or MARPOL, how these legal norms should be interpreted and what can be done to improve them?
4. What are examples of unfair national laws on criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents?
5. Does the practical enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents comply with human rights?
6. What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by IMO/ILO Guidelines on Fair Treatment of Seafarers and whether relevant legal norms in these guidelines are capable to bring significant positive change in practice?

In this concluding chapter, the above-mentioned research questions will be revisited and user-friendly lists of main recommendations related to each of the questions provided. At the end of the chapter, the potential overall ways forward for facilitating the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (and beyond) will be discussed and relevant recommendations provided.

However, before turning to the research questions (the substantive part of the dissertation), it is worth noting some important statements which were made already in Chapter 1 “Introduction” of the dissertation, when clarifying the scope of dissertation and use of terms:

- The best available standard of fair criminal procedures and sanctions is relevant human rights: the right to liberty; the right to be free from torture and other cruel, inhuman or degrading treatment; the right to be free from cruel, inhuman or degrading punishment; the right to fair trial; and the right to non-discrimination.
- Despite the fact that causes of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents are diverse, the dissertation focuses only on explaining and improving relevant law, because the author has a legal background.
- Despite the fact that rules on criminal procedures and sanctions can predominantly be found in national law and also enforcement of the respective procedures and sanctions takes place at national level, the dissertation focuses on human rights and relevant rules in international and EU legal instruments, due to limited amount of time to carry out the research and due to belief of the author that the detailed analysis of relevant international and EU law is absolutely necessary precondition for further research on national law and enforcement.
- The use of the term “criminalisation” in the context of unfair treatment of seafarers by law enforcement institutions is misleading. It is better to talk about “unfair application of criminal procedures and sanctions” instead.

- The meaning of the term “accidental pollution” is not absolutely clear within the domain of law of the sea, and the meaning of this term within the domain of law of the sea differs from its meaning within the domain of criminal law. This must be kept in mind whenever using this term, to escape misunderstandings.

8.2. Research Question 1

Research question 1 was: What rights concerning criminal procedures and sanctions are prescribed by international and regional human rights instruments? This research question was answered in Chapter 2, where detailed analysis of all relevant human rights was carried out. Based on the respective analysis, relevant human rights compliance check-lists were prepared and incorporated into Annex I. It is recommended for people from all target groups of this dissertation to utilise the analysis incorporated into Chapter 2 and the human rights compliance check-lists incorporated into Annex I of this dissertation whenever assessing fairness of criminal procedures or sanctions against seafarers and making allegations in this regard. It will lead to more meaningful dialogue on the issue as now, when allegations rather often are made without referring to any standard of fair criminal procedures and sanctions.

The analysis of the specific human rights revealed that the content of some of these human rights is relatively clear, but the content of others of these human rights is less clear. The content of the right to liberty is relatively clear, particularly because there is rich case law of human rights tribunals regarding this right. In essence, the right to liberty prohibits arbitrary deprivation of liberty. For deprivation of liberty not to be arbitrary, four conditions must be met. First of all, there must be sufficiently precise law (jurisdictional rules and procedural rules) regulating a particular deprivation of liberty. Secondly, this law must be complied with. Thirdly, a particular deprivation of liberty must only be carried out on the basis of a recognised ground, such as: conviction, non-compliance with a legal obligation, risk that the accused will fail to appear for trial (danger of absconding) or risk that the accused

will take action to obstruct the proceedings. Fourthly, the existence of a particular recognised ground must be convincingly demonstrated. Although deprivation of liberty after conviction, deprivation of liberty for non-compliance with a legal obligation, deprivation of liberty on grounds of the danger of absconding and deprivation of liberty on grounds of the risk of obstruction of the proceedings, in principle, are recognised as non-arbitrary, to avoid being branded as arbitrary, the respective deprivations of liberty should still satisfy several specific conditions; for example, the condition of necessity and proportionality. Apart from the explicit prohibition of arbitrary deprivation of liberty, human rights instruments set the following guarantees for persons deprived of liberty: right to be informed on the reasons for deprivation of liberty and charges, right to automatic judicial review of deprivation of liberty and right to actively seek a judicial review of deprivation of liberty. Failure to provide these guarantees also constitutes the violation of the right to liberty.

The content of the right to be free from torture and other cruel, inhuman or degrading treatment is less clear than the content of the right to liberty, predominantly because there is basically no binding international standard which would allow one to determine which specific treatment is, at least, degrading. Without developing such a binding international standard, the uncertainty will remain. However, it would be wrong to say that, at the moment, it is absolutely impossible to determine the treatment which is, at least, degrading. To a very large extent, it is possible thanks to the human rights tribunals which, nevertheless, have adjudicated on the issue. In addition, support is provided by authoritative “soft law”, for example, the Rules for the Treatment of Prisoners, which, *inter alia*, cover such areas of the treatment of persons deprived of their liberty as: accommodation; personal hygiene, bedding and clothing; food; exercise and work; medical care; discipline and punishment; contact with the outside world; religion; and removal to or from institutions.

A much harder thing to do than to determine the *treatment* which is at least degrading is to determine the *punishment* which is at least degrading and, thus, violating the human right to be free from cruel, inhuman or degrading punishment. Again, there is basically no relevant binding international standard (“International Criminal Code” or similar legal instrument). Furthermore, the relevant case law of human rights tribunals is also very limited, because human rights tribunals adopt the position that issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement. It was acknowledged in Chapter 2 that issues related to just and proportional punishment are, indeed, very complex and debatable; for example, it was shown how hard it is to develop the worldwide scale of relative seriousness of different offences (the scale which, in fact, is crucial for setting fully proportional punishment for any given offence). However, at the same time, it was argued in the Chapter that the above-mentioned very passive position of human rights tribunals in regards to the right to be free from cruel, inhuman or degrading punishment is not fully justified, because, despite the disagreements, there are still punishment-related rules regarding which a sufficient degree of consensus exists. These “rules” are general principles of punishment, such as: the principle that the application of criminal liability should be kept to an irreducible minimum, the principle of legality and the principle that criminal liability should not be applied if *corpus delicti* of a particular crime is not present or proven beyond a reasonable doubt. Consequently, it is recommended for people from all target groups of this dissertation as well as for the human rights tribunals to utilise general principles of punishment, as they were introduced in Chapter 2, when assessing whether particular punishment is at least degrading.

Similar to the content of the right to liberty, the content of the right to fair trial is relatively clear, particularly because there is rich case law of human rights tribunals regarding this right. The right to fair trial, actually, is just an “umbrella” term under which many other rights exist, such as: right to a public hearing; right to be tried by competent, independent and impartial tribunal established by law; presumption of innocence; right to be informed of charges; right to have adequate

time and facilities for the preparation of the defence; right to be tried without undue delay; right to be tried in presence; right to defend oneself in person or through legal assistance; right of a charged person to examine witnesses against him and to obtain the examination of witnesses on his behalf; right to have assistance of an interpreter; right not to incriminate oneself; right to the review of conviction and sentence; and right not to be tried or punished twice for the same offence. The content of all these rights was disclosed within Chapter 2. For example, it was explained that:

- the right to a public hearing obliges courts to hold an oral hearing of the case without excluding the public from this hearing;
- impartiality of a tribunal means the lack of prejudice or bias of this tribunal;
- the institution of strict penal liability violates the presumption of innocence;
- if a person charged with a criminal offence does not defend himself personally or engage legal assistance of his own choosing, he has a right to be assisted by the legal assistant provided by the state;
- the right of a charged person to examine witnesses against him and to obtain the examination of witnesses on his behalf means that, before a person charged of a criminal offence can be convicted, all evidence against him must be produced in his presence at a public hearing with a view to allowing adversarial argument;
- the right to have the assistance of an interpreter applies not only to oral statements but also to documentary materials;
- the right to the review of conviction and sentence must be, not only always existing, but also easily accessible, that is, it should not involve great complexities that render this right illusory.

Also the content of the right to non-discrimination, in principle, is clear. Yet, this right has different scope under the European Convention on Human Rights and all other main international and regional human rights instruments. While all other main international and regional human rights instruments require any right to be applied without discrimination, the European Convention on Human Rights requires only the rights incorporated in the Convention (so, only human rights themselves) to

be applied without discrimination. Consequently, ECtHR has also addressed the right to non-discrimination, not as an independent right, but only in conjunction with other particular human rights. Such European practice is unfavourable to people and, thus, should be changed.

Main recommendations related to research question 1:

- 1) For people from all target groups of this dissertation to utilise the analysis incorporated into Chapter 2 and the human rights compliance check-lists incorporated into Annex I of this dissertation whenever assessing fairness of criminal procedures or sanctions against seafarers and making allegations in this regard.
- 2) For people from all target groups of this dissertation as well as for the human rights tribunals to utilise general principles of punishment when assessing whether particular punishment is at least degrading.
- 3) For EU law-makers to align the European Convention on Human Rights with all other main international and regional human rights instruments in regards to the right to non-discrimination.

8.3. Research Question 2

Research question 2 was: What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by specific international “hard law” instruments (UNCLOS and MARPOL) and whether relevant legal norms in these instruments are clear and comply with human rights? If legal norms are unclear or do not comply with human rights, how they should be interpreted and what can be done to improve them? The answer to this research question began in Chapters 3 and 4. The question will be continued to be answered in this chapter, particularly when potential overall ways forward will be discussed and relevant recommendations provided.

Chapter 3 analysed legal norms of UNCLOS which can be linked to criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents. During the analysis, several links between relevant legal norms of UNCLOS and relevant human rights were found. For example, it was found that: Art. 27, 223, 225 and 231 of UNCLOS are linked to the right to liberty; Art. 217(8) and 230(1) and (2) – to the right to be free from cruel, inhuman or degrading punishment; Art. 218, 223 and 228 – to the right to fair trial; all relevant rules of UNCLOS on jurisdiction – to both the right to fair trial and the right to liberty; and Art. 230(3) and 300 – to all human rights.

Regarding Art. 220(7) and 226(1)(b) of UNCLOS (the articles on prompt release in relation to ship-source pollution violations), it was concluded that they are unrelated to the right to liberty, because they regulate only prompt release of ships (property), but holders of the right to liberty (just like any other human right) are humans, not property. At the same time, it was noted that further research on the issues related to prompt release of ships and crew under UNCLOS is necessary.

As examples of rules of UNCLOS which were found to be not fully in line with human rights the following rules can be mentioned:

- Art. 230(1) and (2) – the rules which prescribe that different kinds of punishment other than monetary (for example, imprisonment) may be applied by a coastal State only for such ship-source pollution violations in its territorial sea which render passage of a foreign ship through this territorial sea non-innocent. Art. 230(1) and (2) do not secure balance of sanctions for different offences, because these rules safeguard against penalties other than monetary only in the cases of “marine pollution violations”. Consequently, if after a ship-source pollution accident a seafarer is charged with “maritime safety violation” or another type of violation, not a “marine pollution violation”, he may still face penalties other than monetary, even if this “maritime safety violation” or another type of violation, *per se*, is relatively petty. Such approach is not in line with the right to be free from cruel, inhuman or degrading punishment.

- Art. 218(4) and 228 – the rules which prescribe when a coastal State or port State should suspend or terminate proceedings in regards to pollution violation upon taking of these proceedings by another state. On the one hand, these rules safeguard against the violations of the right not to be tried or punished twice for the same offence; but, on the other hand, they trigger such violations: by prescribing specific exceptions from the general obligation to suspend proceedings on request of the flag State and by prescribing that nothing can preclude a flag State to take any measures irrespective of prior proceedings by another State.
- Art. 224, 225, 227, 228 and 230 – the rules which prescribe different kinds of safeguards in relation to the prevention and preservation of the marine environment; for example: that the powers of enforcement may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect; that in the exercise of their powers of enforcement, States shall not endanger the safety of navigation; and that proceedings to impose penalties shall not be instituted after the expiry of three years from the date on which the violation was committed. However, respective safeguards are envisaged only for foreign ships. It can lead to the situation where in relation to an, in fact, one and the same alleged violation one group of seafarers is left without relevant safeguards compared to another group of seafarers solely on the basis of the nationality of the ship they are serving on. It is against the right to non-discrimination.

It was argued in Chapter 3 that all legal norms of UNCLOS, thus the above-mentioned legal norms of UNCLOS also, must be read subject to human rights, *inter alia*, because such obligation follows from Art. 230(3) and 300 of UNCLOS. At the same time, it was acknowledged that the scope of Art. 230(3) and 300 of UNCLOS is not fully clear and, consequently, further research in this regard is necessary, particularly for determining whether the respective articles grant specific law of the sea arbitration and adjudication bodies very wide authority to also deal with human

rights and, if they do, whether such granting is adequate; for instance, are respective arbitrators and judges competent enough to deliver qualitative judgment on human rights?

As examples of rules of UNCLOS which were found to be unclear the following rules can be mentioned:

- Art. 27, 223 and 231 – the rules requiring states to facilitate involvement of others (representatives of other states and representatives of relevant international organisations) into proceedings. It is hard to understand from the totality of Art. 27, 223 and 231, exactly, when and, exactly, who should be notified about enforcement measures taken against a foreign ship alleged of committing a ship-source pollution violation and, exactly, when and, exactly, whose attendance in proceeding should be facilitated. The Chapter provided the recommendation how to interpret Art. 27, 223 and 231 of UNCLOS in their totality.
- Art. 220(1) – the rule which prescribes that only when a ship is *voluntarily within a port or at an off-shore terminal of a State*, that State may institute proceedings in respect to any violation of its laws for the prevention, reduction and control of pollution from ships when the violation has occurred within the territorial sea or EEZ of that State. On the one hand, Art. 220(1), as if, strongly limits coastal State jurisdiction. On the other hand, such limitations are illogical and out of the general system of flag State, coastal State and port State jurisdiction. Ultimately, the recommendation was made to treat Art. 220(1) as accommodating only one specific practical scenario – the scenario where just after committing an alleged ship-source pollution violation in the territorial sea or EEZ a foreign ship proceeds outwards (not inwards), without hot pursuit being exercised, leaving respective waters and, then, after a shorter or longer period returns. When just after committing an alleged ship-source pollution violation in the territorial sea or EEZ a foreign ship proceeds inwards, a coastal State may exercise its jurisdiction on board

the ship just like this ship would have been intercepted in a maritime zone in which an alleged violation took place.

- Art. 211(5) – the rule which prescribes that a coastal State in its national law may define as violation only such conducts in its EEZ which violate “generally accepted international rules and standards”. The problem identified in regards to this rule was that there are no clear-cut criteria for determining whether a particular degree of acceptance of a particular rule or standard is high enough to reach the threshold of “generally accepted”. Ultimately, it was recommended for the international maritime community to establish minimum requirements to be met for an international rule or standard in the maritime field to be considered as “generally accepted”. Until such minimum requirements are established, it was recommended for coastal States to apply criminal procedures or sanctions against seafarers on board foreign ships in its EEZ only when this ship violates such “generally accepted rules and standards” which have reached the level of customary international law.

Taking into consideration that, during the analysis, relatively many legal norms of UNCLOS on jurisdiction were found to be unclear, the user-friendly table addressing the issue of criminal jurisdiction over large-scale ship-source oil pollution accidents was prepared and incorporated into Annex II. It is recommended for all target groups of this dissertation to utilise this table if and when necessary.

Obviously, all identified deficiencies of UNCLOS could be averted by developing relevant amendments to UNCLOS. Yet, the recommendation to amend UNCLOS was not made within Chapter 3, particularly because there is a strong belief within the maritime community that amending UNCLOS can bring more evil than good. Fear exists, if UNCLOS is reopened for amendments, among other things, states may propose such amendments which destroy the existing balance between the powers of flag States, coastal States and port States. Consequently, it seems unrealistic to amend any rule of UNCLOS in the nearest future. Therefore, in this

nearest future, all deficiencies of UNCLOS, where possible, should be averted with the help of methods of interpretation of legal norms, as was done within Chapter 3.

Chapter 4 analysed rules of MARPOL which can be linked to criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents. During this analysis, it was concluded that, similar to Art. 27, 223 and 231 of UNCLOS, Art. 5(3) of MARPOL contains the requirement for states which apply enforcement measures against a foreign ship alleged of committing a ship-source pollution violation to facilitate involvement of others (particularly representatives of the flag State of the ship in question) into proceedings. However, the above-mentioned legal norms of UNCLOS and MARPOL are not absolutely coherent. Consequently, the recommendation was made as to how to interpret Art. 27, 223 and 231 of UNCLOS and Art. 5(3) of MARPOL in their totality. It was also concluded in Chapter 4 that, similar to Art. 217(8) and Art. 230(1) and (2) of UNCLOS, Art. 4(4) of MARPOL directly addresses the question of severity of sanctions for ship-source pollution violations; but, differently from UNCLOS, MARPOL also directly addresses the question of liability (including criminal liability) for these violations – by defining exceptions from liability. Unfortunately, the regulation of MARPOL, which defines exceptions from liability in regards to oil pollution – Reg. 4 of Annex I – was found to be deficient in several aspects.

First of all, it was found out that the use of some terms in Reg. 4 of Annex I of MARPOL is unclear, for example: the term “damage to a ship or its equipment”, the term “with knowledge that damage would probably result” and the term “master”. Ultimately, it was recommended to interpret these terms as follows:

- the term “damage to a ship or its equipment” – giving the dictionary meaning to the term, i.e., as covering any physical harm caused to a ship or its equipment in such a way as to impair its value, usefulness, or normal function (until there are no rules directly stating that latent defects, faulty design or wear and tear of a ship or its equipment should not be considered as “damage to a ship or its equipment”);

- the term “with knowledge that damage would probably result” – to treat as tautology and thus carrying no practical importance;
- the term “master” – as referring to the master merely by way of example, which means that, despite the fact that Reg. 4(2) of Annex I of MARPOL refers only to master, exception from the liability incorporated in this paragraph should also apply equally to seafarers other than masters.

Secondly, it was found out that some of the legal norms of Reg. 4 of Annex I of MARPOL deviate from the general principles of punishment as well as from other similar legal norms in the maritime domain, for example:

- Reg. 4(1), in fact, establishes the defence of necessity. The defence of necessity in Reg. 4(1) is left unqualified, while under general principles of punishment this defence is always qualified – to secure balance between the harm done and harm averted. Also, in Article V of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter possibility to benefit from the defence of necessity is made dependent on particular pre-conditions: the condition that the discharge appears to be the only way of averting the threat and the condition that there is every probability that the damage consequent upon the discharge will be less than would otherwise occur.
- Reg. 4(2) excludes from any form of penal liability cases when damage to a ship or its equipment ultimately resulting in the discharge of oil is caused negligently and after the occurrence of the damage or discovery of the discharge a person takes all reasonable precautions for the purpose of preventing or minimising the discharge. Under general principles of punishment *grossly* negligent conducts are recognised as, in principle, deserving to be punished – at least with relatively minor sanctions. In line with this principle are also rules of MARPOL, itself, just in regards to pollutants other than oil. Also, Rule 2(a) of COLREG points towards the conclusion that grossly negligent conducts in regards to obligations towards maritime safety and a clean environment should be treated as offences.

Yet, at the same time, it was showed in Chapter 4 that not all above-mentioned deviations of Reg. 4 of Annex I of MARPOL from general principles of punishment can be “corrected” by simply reading a relevant general principle into the Regulation. It was showed that, in some instances, the rule of lenity precludes such reading.

Thirdly, it was found out that the mere fact that there exists Reg. 4 of Annex I of MARPOL (MARPOL exceptions from liability) has triggered the interpretation that any MARPOL violation that does not fall under the MARPOL exceptions from liability should be treated as a strict liability offence. It was concluded in the Chapter that, actually, MARPOL is silent on the issue whether its violations, in principle, must be treated as strict liability offences or not; but, in such a case, keeping in mind the need to follow the rule of lenity and presumption of innocence, the *means rea* requirement must be presumed.

Finally, it was found out that the general scope of Reg. 4 of Annex I of MARPOL is also unclear; for example, it was concluded that it is unclear whether the Regulation covers only operational discharges of oil or any type of discharges of oil. Ultimately, it was recommended to interpret the Regulation as covering any type of discharges of oil. Similarly, it was concluded that it is unclear whether coastal States should observe the exceptions from liability incorporated into the Regulation in regards to discharges in any maritime zone or only in regards to discharges beyond its territorial sea. However, the task of finding the answer to this essential question was left for Chapter 5 on Directive 2005/35, because the particular issue has been widely disputed in relation to this Directive.

All the above-mentioned deficiencies of Reg. 4 of Annex I of MARPOL can be rectified by developing relevant amendments to Annex I of MARPOL, particularly because to amend an Annex of MARPOL is a relatively easy thing to do (in accordance with Art. 16(2)(f)(ii) of MARPOL, it can be accomplished by the tacit acceptance procedure). Yet, the recommendation to amend Annex I of MARPOL was not stressed within Chapter 4, because, if one looks at this Annex in context – in system with other rules of MARPOL and in system with IMO “safety conventions” (such as SOLAS, STCW and COLREG) – it becomes evident that to amend just

Annex I of MARPOL is not the best option for further development. Every Annex of MARPOL contains a Regulation on exceptions from penal liability for ship-source pollution violations. Yet, these Regulations are not coherent. It is hard to see justification for such a divergent regime in regards to different pollutants. Consequently, it is necessary to review legal norms on penal liability in all MARPOL Annexes, not just Annex I. Yet, this also might not be enough. Not only violations of MARPOL may cause ship-source pollution, also violations of IMO “safety conventions” may cause such pollution. Thus, without setting in IMO “safety conventions” exceptions from penal liability similar to those in MARPOL, it is largely impossible to secure a truly proportional liability and sanctioning system. Yet, to amend all relevant IMO conventions in a harmonised manner might be very challenging work to do, seemingly even more challenging than to develop a new IMO convention establishing general principles of penal liability in the maritime domain, which would then cover violations of all other IMO conventions.

Main recommendations related to research question 2:

- 1) For people from all target groups of this dissertation to utilise the analysis incorporated into Chapters 3 and 4 as well as the user-friendly table incorporated into Annex II of this dissertation whenever interpreting rules of UNCLOS and MARPOL, which can be linked to criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents, *inter alia*:
 - to read Art. 230(1) and (2) of UNCLOS subject to the right to be free from cruel, inhuman or degrading punishment;
 - to read Art. 218(4) and 228 of UNCLOS subject to the right not to be tried or punished twice for the same offence;
 - to read Art. 224, 225, 227, 228 and 230 of UNCLOS subject to the right to non-discrimination;

- to read Art. 220(1) of UNCLOS as accommodating only the scenario where just after committing an alleged ship-source pollution violation in the territorial sea or EEZ a foreign ship proceeds outwards (not inwards), without hot pursuit being exercised, leaving respective waters and, then, after a shorter or longer period returns;
 - to read Reg. 4 of Annex I as covering any type of discharges of oil, not only operational discharges of oil;
 - to read the term “damage to a ship or its equipment” in Reg. 4 of Annex I of MARPOL as covering any physical harm caused to a ship or its equipment in such a way as to impair its value, usefulness, or normal function;
 - to read the term “master” in Reg. 4 of Annex I of MARPOL as covering all seafarers;
 - taking into consideration the rule of lenity, to read Reg. 4(2) of Annex I of MARPOL as excluding from any form of penal liability cases when damage to a ship or its equipment ultimately resulting in the discharge of oil is caused negligently and after the occurrence of the damage or discovery of the discharge a person takes all reasonable precautions for the purpose of preventing or minimising the discharge;
 - taking into consideration the rule of lenity and presumption of innocence, not to treat as a strict liability offence any MARPOL violation that does not fall under the MARPOL exceptions from liability.
- 2) For the international maritime community to establish minimum requirements to be met for an international rule or standard in the maritime field to be considered as “generally accepted”. Until such minimum requirements are established, for coastal States to apply criminal procedures or sanctions against seafarers on board foreign ships in its EEZ only when this ship violates such “generally accepted rules and standards” which have reached the level of customary international law.

- 3) For IMO to develop the new convention establishing general principles of penal liability in the maritime domain, which would then cover violations of all other IMO conventions.⁷⁹⁷ If this recommendation is not followed – for IMO to amend Reg. 4 of Annex I of MARPOL so that the deficiencies of this legal norm identified by this dissertation are rectified as well as to incorporate in all its “safety conventions” the legal norm similar to Reg. 4 of Annex I of MARPOL. If also this recommendation is not followed – for IMO to amend, at least, Reg. 4 of Annex I of MARPOL accordingly so that the law on penal liability in the maritime domain is improved at least to some extent.

8.4. Research Question 3

Research question 3 was: What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by Directive 2005/35 and whether relevant legal norms in this Directive are clear and comply with human rights, UNCLOS and MARPOL? If relevant legal norms of Directive 2005/35 are unclear or do not comply with human rights, UNCLOS or MARPOL, how these legal norms should be interpreted and what can be done to improve them? The answer to this research question began in Chapter 5 and, similar to research question 2, will be continued to be answered in this concluding chapter.

At the beginning of Chapter 5 it was noted that the international maritime community has highly criticised Directive 2005/35, *inter alia*, for incompatibility of its Art. 5 with the MARPOL exceptions from liability and incompatibility of its Art. 4 with the rules of UNCLOS on the right to innocent passage. Unfortunately, the ECJ in the *INTERTANKO* case refused to assess the validity of Directive 2005/35 in light of MARPOL and UNCLOS. Consequently, the opportunity to clarify whether,

⁷⁹⁷ This recommendation will be addressed in more detail at the end of the Chapter, when discussing the potential overall ways forward for facilitating the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (and beyond).

indeed, Directive 2005/35 conflicts with MARPOL and UNCLOS was lost. Chapter 5 revisited the issue.

After relevant analysis, it was concluded that Art. 5 of Directive 2005/35 – the article which requires EU Member States (which are all State Parties to MARPOL) not to follow the MARPOL exception from liability “discharge resulting from damage to a ship or its equipment” in regards to discharges in their internal waters and territorial sea – conflicts with Reg. 4(2) of Annex I of MARPOL. Consequently, it was recommended for the EU to delete Art. 5 of Directive 2005/35. If the EU fails to do so, it was recommended for the international maritime community to consider initiation of new proceedings: either proceedings under Art. 10 of MARPOL, proceedings under Part XV of UNCLOS or proceedings at the constitutional court of an EU Member State which does not accept supremacy of EU law if this law is not in line with human rights (because, if Art. 5 of Directive 2005/35, indeed, conflict with MARPOL, the compatibility of the respective Directive with human rights, particularly the principle of legality, can also be questioned).

At the same time, it was concluded in Chapter 5 that the root cause of the controversy on whether Art. 5 of Directive 2005/35 conflicts with MARPOL or not is the fact that during the drafting process of MARPOL the issue of possibility for State Parties to MARPOL to adopt more stringent standards than MARPOL, although widely debated, was ultimately left unsolved, with conflicting views still present. Consequently, for overcoming the above-mentioned controversy, fundamentally, it is necessary to return to the debate which was abandoned during the drafting process of MARPOL and, then, include in MARPOL clear rules reflecting results of this debate.

Regarding the potential conflict of Art. 4 of Directive 2005/35 – the article which basically requires EU Member States to define in their national law as an offence any intentional, reckless or seriously negligent ship-source pollution – with the rule of UNCLOS on the right to innocent passage, it was concluded in Chapter 5 that there is no such conflict, because the mere defining of some conduct as an offence in no way can hamper innocent passage. Innocent passage can be hampered only by specific enforcement measures, such as physical inspection and detention of the ship or her crew. Yet, those articles of the Directive which address such enforcement measures – Art. 6 and 7 – envisage that Art. 4 may be applied only in a manner which does not hamper the right of innocent passage.

In addition to the concern that Directive 2005/35 conflicts with MARPOL and UNCLOS, the international maritime community has also expressed the concern that the use of the term “serious negligence” in Art. 4 of the Directive, without clearly defining this term, conflicts with the principle of legal certainty. In the *INTERTANKO* case, the ECJ ruled that there is no such conflict, because the term “serious negligence” can be easily associated with the term “gross negligence” as well as because Directive 2005/35 (just like any EU directive) is not directly applicable to individuals; consequently, it is the Directive together with the national law implementing this Directive (not the Directive alone) which should ultimately fully satisfy the requirement of legal certainty. Chapter 5 acknowledged the soundness of this ruling. However, it was further argued that the incorporation of the clear definition of the term “serious negligence” in the Directive is still highly desirable. Without such definition, some states might still be tempted to criminalise not only gross negligence but also ordinary negligence. Yet, criminalisation of ordinary negligence goes against the general principles of punishment and, with that, also against the human right to be free from cruel, inhuman or degrading punishment.

The concern of the potential *criminalisation* of ordinary negligence exists because Art. 5a and 8a of Directive 2005/35 requires EU Member States to treat almost all intentional, reckless or seriously negligent ship-source pollution violations not simply as offences but as *criminal* offences. It was concluded in Chapter 5 that this requirement encroaches upon the sovereignty of EU Member States as well as goes against the spirit of Art. 230(1) and (2) of UNCLOS, which seemingly aim to decriminalise majority of ship-source pollution violations. Consequently, the recommendation was made to delete Art. 5a and 8a of the Directive.

Main recommendations related to research question 3:

- 1) For the EU to delete Art. 5, 5a and 8a of Directive 2005/35. If the EU fails to do so, for the international maritime community to consider initiation of new proceedings: either proceedings under Art. 10 of MARPOL, proceedings under Part XV of UNCLOS or proceedings at the constitutional court of an EU Member State which does not accept supremacy of EU law if this law is not in line with human rights.
- 2) For the EU to incorporate in Directive 2005/35 clear definition of the term “serious negligence”.
- 3) For the international maritime community to return to the debate which was abandoned during the drafting process of MARPOL, namely, whether State Parties to MARPOL may adopt more stringent standards than MARPOL or not and, then, include in MARPOL clear rules reflecting results of this debate.

8.5. Research Questions 4 and 5

Research question 4 was: What are examples of unfair national laws on criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents? Research question 5 was: Does the practical enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents comply with human rights? These research questions were answered, in tandem, in Chapter 6, where four specific large-scale ship-source oil pollution accidents – the sinking of *Erika*, the sinking of *Prestige*, the grounding of *Tasman Spirit* and the collision of *Hebei Spirit* and *Samsung No.1* – were analysed. Taking into consideration that the focus of the whole work is on human rights and relevant rules in international and EU legal instruments (not national legal instruments), research question 4 was addressed in Chapter 6, only in passing, to give a brief insight into the problem of unfair national laws. For identification of more examples of unfair national laws and developing specific recommendations how to remedy the identified deficiencies further research is needed. Research question 5 was addressed in Chapter 6 in more detail, because, although also the practical enforcement of laws on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents is not the main focus of this dissertation, this practical enforcement is the best way to illustrate the essence of the problem addressed by this dissertation.

This dissertation identified the following unfair national law:

- Art. L218-19 of the French Environmental Code – the article which prescribes punishment for any negligently caused maritime casualty, if this casualty has resulted in the pollution of French territorial sea or internal waters. It was concluded that this legal norm conflicts with Reg. 4(2) of Annex I of MARPOL, which, taking into consideration the principle of legality and, related to this principle, rule of lenity, must be interpreted as exempting from liability basically all negligent discharges of oil resulting from damage to a ship or its equipment.

- Art. L218-10 and L218-21 of the French Environmental Code (as they were in force at the time of investigation and adjudication of *Erika* accident) – the articles which left the possibility to impose imprisonment as a sanction for a MARPOL violation committed by a master of a French ship in French EEZ, while for, in principle, the same violations, just committed by a foreign ship, only fines were envisaged, as prescribed by Art. 230(1) of UNCLOS. It was concluded that such legal regime violates the right to non-discrimination.

In relation to Art. L218-19 of the French Environmental Code, additional conclusion was made, namely, that despite the above-mentioned unfairness of the respective article, the report carried out by Milieu Ltd. under Contract with the European Commission acknowledged that this article is in line with Directive 2005/35. This fact was found to be indicative that Directive 2005/35 has failed to give to the EU Member States clear guidelines on how to implement relevant rules from the international maritime conventions without breaching human rights. This finding, in turn, accorded with what was stated earlier, in Chapter on Directive 2005/35, namely that the Directive has been criticised not only for its conflicts with UNCLOS and MARPOL, but also for its failure to provide to the EU Member States highly desirable clarifications of the relevant legal norms in these international maritime conventions.

In relation to Art. L218-10 and L218-21 of the French Environmental Code (as they were in force at the time of investigation and adjudication of *Erika* accident), it was noted that the discriminatory nature of these articles has been averted by the 1 August 2008 amendments to the French Environmental Code. However, the very existence of Art. L218-10 and L218-21 of the French Environmental Code in the first place proved that the earlier expressed concern of this author that the wording of Art. 230 of UNCLOS may trigger discrimination of seafarers on non-foreign ships is well founded.

Regarding the practical enforcement of laws on criminal procedures and sanctions against seafarers, it was found out that after all four large-scale ship-source oil pollution accidents analysed within Chapter 6 seafarers faced criminal procedures or sanctions which were not in line with one or another human right: in all four cases, specific violations of the right to liberty were identified; in the *Prestige* case and the *Hebei Spirit/Samsung No.1* case, specific violations of the right to be free from torture and other cruel, inhuman or degrading treatment as well as the right to be free from cruel, inhuman or degrading punishment were identified, in addition; in the *Prestige* case and the *Tasman Spirit* case violations of specific rights under the fair trial umbrella (such as the right to be tried without undue delay, the right to be tried in presence and the right to be tried by independent and impartial tribunal) were identified, in addition. All these identified derogations from human rights proved that the concerns of the international maritime community about the unfair application of criminal procedures and sanctions against seafarers in the aftermath of large-scale ship-source oil pollution accidents are well founded. The fact that some of the identified violations of human rights in regards to *Prestige* case happened as recently as January 2016 proved that the problem of unfair application of criminal procedures and sanctions against seafarers in the aftermath of large-scale ship-source oil pollution accidents is not the history; it is a topical problem.

At the same time, it would be wrong to say that criminal procedures and sanctions applied against seafarers in the aftermath of large-scale ship-source oil pollution accidents are always hopelessly unfair. Chapter 6 revealed several positive examples – the application of criminal procedures and sanctions in line with human rights. In the opinion of this author, it is important to also highlight these positive examples whenever discussing the problem of unfair treatment of seafarers: first of all, because important lessons can be learnt not only from negative examples but also from positive examples; secondly, because prising somebody for a positive practice has the potential to encourage others to follow this practice.

Consequently, it is recommended for the maritime industry NGOs to continue to develop reports which list examples of unfair treatment of seafarers by law enforcement institutions in particular states (like the BIMCO Study of the Treatment of Seafarers), because such reports highlight the topicality of the problem and, thus, encourage relevant institutions to work towards elimination of this problem. At the same time, it is recommended to the maritime industry NGOs to also start to develop such reports which show good practice – the examples of fair treatment of seafarers by law enforcement institutions in particular states.

Main recommendation related to research question 5:

For the maritime industry NGOs to continue to develop reports which list examples of unfair treatment of seafarers by law enforcement institutions in particular states. At the same time, to also start to develop such reports which list examples of fair treatment of seafarers by law enforcement institutions in particular states.

8.6. Research Question 6

Research question 6 was: What rights concerning criminal procedures and sanctions applicable against seafarers after large-scale ship-source oil pollution accidents are prescribed by IMO/ILO Guidelines on Fair Treatment of Seafarers and whether relevant legal norms in these guidelines are capable to bring significant positive change in practice? This research question was answered in Chapter 7.

Chapter 7 started with the observation that the international maritime community believes that IMO/ILO Guidelines on Fair Treatment of Seafarers are capable of bringing considerable positive change in practice. Further in the Chapter it was examined whether this belief of the international maritime community is valid. The examination was carried out from the perspective of human rights which are treated as a standard of fairness for the purposes of this dissertation: the right to liberty; the right to be free from torture and other cruel, inhuman or degrading treatment; the right to be free from cruel, inhuman or degrading punishment; the right to fair trial; and the right to non-discrimination.

As a result, it was found out that IMO/ILO Guidelines on Fair Treatment of Seafarers, to some extent, address all of the above-mentioned human rights. However, at the same time, it was found out that many rules of the Guidelines, for example, Paragraphs 5, 9.1, 9.3-9.7, 9.11-9.12, 9.14, 9.16, 9.18-9.20, 10.1, 10.5, 10.7, 11.6 and introductory part of Paragraph 12, are only declarative calls to observe or facilitate observance of particular human rights. In the opinion of this author, such calls have little, if any, added value; if, in practice, states do not follow particular human rights, even despite the fact that they are obliged to do so under binding human rights instruments, it is unlikely that they will start to follow the respective human right simply after an additional rhetorical reminder to do so; more substantial encouragements are necessary. IMO/ILO Guidelines on Fair Treatment of Seafarers were found to be not only, to a large extent, declarative, but also very fragmented, for example, it was found out that: the scope of the Guidelines is limited to the cases of seafarers' potential detention; the situations when a seafarer is precluded to leave the territory of a state, a national or resident of which he is, are not covered by the Guidelines; only individual aspects of relevant human rights are covered; and the very important right to be free from cruel, inhuman or degrading punishment is covered extremely poorly.

Some of the rules of IMO/ILO Guidelines on Fair Treatment of Seafarers were found to have some added value, thus:

- Paragraphs 9.2, 9.9-9.10, 10.2, 10.6, 10.9-10.10, 11.1, 11.4-11.6, 12.2-12.5 and 13.4 were praised for encouraging co-operation between relevant stakeholders;
- Paragraphs 9.13 and 9.15 were praised for providing maritime-specific explanations to law enforcement institutions, which, generally, have relatively little maritime-specific knowledge;
- Paragraph 13 was praised for providing the information on their rights directly to seafarers, particularly because seafarers eagerly ask for such information.

Yet, these, in principle, valuable legal norms within IMO/ILO Guidelines on Fair Treatment of Seafarers, still, were found to be very fragmented. Consequently, for achieving greater practical benefits, it was recommended within Chapter 7 for the international maritime community, instead of focusing only on the promulgation of IMO/ILO Guidelines on Fair Treatment of Seafarers, to take other steps as well, such as: to prepare more detailed relevant “soft law”, for example, the Guidelines on Penal Proceedings Which Involve Seafarers; to carry out personal meetings with law enforcement officials and judges during which maritime-related issues would be discussed; to prepare for seafarers informative materials covering all relevant human rights; and to join the overall efforts (for example, through human rights NGOs) to enhance the enjoyment of relevant human rights.

One specific rule of IMO/ILO Guidelines on Fair Treatment of Seafarers – the rule which requires shipowners to ensure that adequate provisions are in place to provide for the subsistence of each seafarer in the aftermath of a maritime accident – was found to be so important for safeguarding the seafarers’ right to be free from torture and other cruel, inhuman or degrading treatment, that it was recommended to move this rule to the relevant “hard law”, namely, MLC.

Main recommendations related to research question 6:

- 1) For the international maritime community to prepare more detailed relevant “soft law”, for example, the Guidelines on Penal Proceedings Which Involve Seafarers.
- 2) For the international maritime community to carry out personal meetings with law enforcement officials and judges during which maritime-related issues would be discussed.
- 3) For the international maritime community to prepare for seafarers informative materials covering all relevant human rights.
- 4) For the international maritime community to join the overall efforts (for example, through human rights NGOs) to enhance the enjoyment of relevant human rights.

- 5) To move to MLC the rule of IMO/ILO Guidelines on Fair Treatment of Seafarers which requires shipowners to ensure that adequate provisions are in place to provide for the subsistence of each seafarer in the aftermath of a maritime accident.

8.7. Potential Overall Ways Forward

Taking into consideration the earlier findings of this dissertation, as the best way forward towards improving the international law on criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (and beyond) this author sees the development of a new IMO convention (the International Convention for the Unification of Certain Rules Relating to Penal Liability in the Maritime Domain), accompanied by two non-binding IMO guidelines (the Sanctioning Guidelines for Offences in the Maritime Domain and the Guidelines on Penal Proceedings Which Involve Seafarers). The Convention must not be lengthy; it must only cover the basic issues related to penal liability. The Guidelines must be relatively comprehensive, to allow, respectively: to identify, as far as possible, the relative seriousness of different offences in the maritime domain and apportion sanctions for them accordingly and to comprehend the specific aspects of the maritime domain which must be taken into consideration when carrying out penal proceedings which involve seafarers. Annexes III, IV and V of this dissertation list some legal norms which could potentially be included in the above-mentioned new IMO instruments. However, of course, development of the complete Convention and Guidelines requires thorough debate.

The flow of thought which led this author to the recommendation to develop the above-mentioned new IMO instruments was as follows:

- 1) Different case studies, including the case study incorporated in this dissertation, show that practices in regards to the application of penal liability and specific sanctions and procedures in relation to offences in the maritime domain, despite several similarities, actually differ considerably from state to state. Such differences do not allow the securing of a fully-proportional penal liability and sanctioning system, which is one of the desires of human rights. Therefore, the existence of some common international standard in regards to penal liability and sanctioning system in relation to offences in the maritime domain is desirable.
- 2) For developing the above-mentioned common international standard it is not enough to amend just one existing maritime convention (for example, MARPOL); several of them need to be amended (for example, also SOLAS, COLREG and STCW) – because interests safeguarded by these different conventions (the interest to protect the marine environment, the interest to protect the safety of life at sea and other interests) are often not mutually exclusive. If so, including specific rules on penal liability only in one of the existing maritime conventions will leave the room for ignoring respective rules, simply by defining a particular offence through the prism of another convention. Furthermore, legal norms on specific sanctions may not be included in any convention (a “hard-law” instrument) because strict dictates regarding specific sanctions encroaches upon the sovereignty of states. Consequently, these legal norms, if developed at all, must be included in a “soft-law” instrument.
- 3) Leaving the issue of penal liability in the maritime domain to be settled through amending different existing maritime conventions includes the high risk that the system ultimately developed will still not be harmonised, because, in such a case, the drafting process will be very fragmented.

- 4) The development of one single instrument on penal liability in the maritime domain and accompanying sanctioning and procedural guidelines will allow for in depth and coherent discussion on all relevant issues. Although the maritime community continuously expresses concerns related to penal liability, maritime conventions in this regard have to large extent remained a piecemeal, at times even deviating from the general principles of punishment. An attempt should be made to change it.

Several scholars, similar to this author, have pointed to the fact that, for improving the penal liability and sanctioning system for offences in the maritime domain, the relevant action at international level is needed. For example, in relation to ship-source pollution violations, de la Rue and Anderson have stated that the clarity is desirable in the definition of penal liability standards in international rules.⁷⁹⁸ Pozdnakova has stated:

In practice, real problem lies not in the absence of domestic legislative action within the field [...], but in the absence of a harmonized international approach to the criminalization of ship-source pollution. This also causes legal uncertainty for alleged offenders due to inconsistencies between States in the formulation and application of criminal penalties.⁷⁹⁹

As a result, Pozdnakova has proposed that IMO adopts “a new non-binding instrument on penalties for discharge violations (e.g., guidelines), in which the criminalization of ship-source pollution would be addressed”.⁸⁰⁰ This proposal of Pozdnakova is somewhat similar to the proposal made by this author. However, at the same time, it is different in several aspects.

⁷⁹⁸ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London: Informa, 2009 at p. 1114.

⁷⁹⁹ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, Leiden: Martinus Nijhoff Publishers, 2012 at pp. 41-42. See also p. 324.

⁸⁰⁰ POZDNAKOVA, *ibid.* at p. 42.

First of all, the proposal of Pozdnakova is relatively narrow; it covers only ship-source pollution offences. The proposal of this author covers all offences in the maritime domain, because, as found out earlier, the truly proportional penal liability and sanctioning system for “pollution offences” may not be achieved by looking at these offences separately; it is necessary to look at them in context with all other offences in the maritime domain.

Secondly, the proposal of Pozdnakova is relatively general; it urges IMO to develop relevant a new legal instrument, but does not elaborate on exact legal norms to be potentially included in this legal instrument. The proposal of this author provides such legal norms.

Thirdly, the proposal of Pozdnakova is relatively “soft”; it urges IMO to develop “soft law” only. This author sees the development of “soft law” only as the second option. As the first option she sees the development of one basic “hard law” instrument (the International Convention for the Unification of Certain Rules Relating to Penal Liability in the Maritime Domain), accompanied by relevant “soft law”. In the opinion of this author, only “soft law” may not be enough for bringing considerable positive change in practice, particularly, because in regards to penal law states have very strong and different traditions which they hardly will be ready to give up just because *advised* to do so by IMO. An important factor to be taken into consideration, in this regard, is also the fact that people to whom any law on penal liability and sanctioning system is primarily addressed (institutions which draft general penal law, police officers, prosecutors, judges) are people outside the maritime domain – the domain in which different IMO “soft law” instruments are traditionally rather highly respected and, thus, have proven to be capable of improving practice even without the existence of corresponding “hard law”.

Pozdnakova has argued that development of relevant “hard law” instrument would take too long and may ultimately even fail to bring about a binding treaty, as shown by the failure of the Convention on the Protection of the Environment through Criminal Law.⁸⁰¹ This Convention was adopted on 4 November 1998, however, so far, has been ratified by only one state and, consequently, has not entered into force.⁸⁰² However, it must be kept in mind that the content of the Convention on the Protection of the Environment through Criminal Law considerably differs from the proposed content of the International Convention for the Unification of Certain Rules Relating to Penal Liability in the Maritime Domain, particularly: the Convention on the Protection of the Environment through Criminal Law (similar to Directive 2005/35 analysed in this dissertation) contains relatively specific pollution-related rules, arguably encroaching upon sovereignty of states, for example, rules dictating which specific pollution offences states must treat as criminal offences and which specific pollution offences states must treat as regulatory offences⁸⁰³; the International Convention for the Unification of Certain Rules Relating to Penal Liability in the Maritime Domain is intended by this author to set only very basic principles of penal liability, leaving all more debatable issues for “soft law”.⁸⁰⁴ In other words, the development of such IMO legal instruments as proposed by this dissertation has never been attempted before. Consequently, their successful development may not be ruled out right away, just because of the failure of the Convention on the Protection of the Environment through Criminal Law.

Of course, regardless of whether one strives to develop international “hard-law” or “soft-law” on a penal liability and sanctioning system for different offences in the maritime domain, the challenge still remains enormous. Yet, if accepted and accomplished, it will be a remarkable step towards enhancing proportionality of this system worldwide and, with that, also enhancing the enjoyment of human rights by seafarers. Furthermore, success of the development of a penal liability and

⁸⁰¹ POZDNAKOVA, *ibid.*

⁸⁰² For the actual status of the Convention see: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/172>.

⁸⁰³ See the Convention on the Protection of the Environment through Criminal Law, ETS No.172.

⁸⁰⁴ See Annexes III, IV and V of this dissertation in their totality.

sanctioning system for different offences in the maritime domain may potentially trigger relevant bodies from other domains to engage in similar endeavour. Ultimately, it may lead to the global cross-sectoral system, which, from the perspective of human rights, would be an ideal result.

As it was stated already at the very beginning, the focus of this dissertation is on law. Consequently, the main conclusions and recommendations of this dissertation are also related to law – its interpretation and improvement. Yet, it should be remembered that law is only one element of the wider mechanism with the help of which the fair application of criminal procedures and sanctions against seafarers can be enhanced. This dissertation, particularly its case study, allows one to make some speculations about different causes of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents:

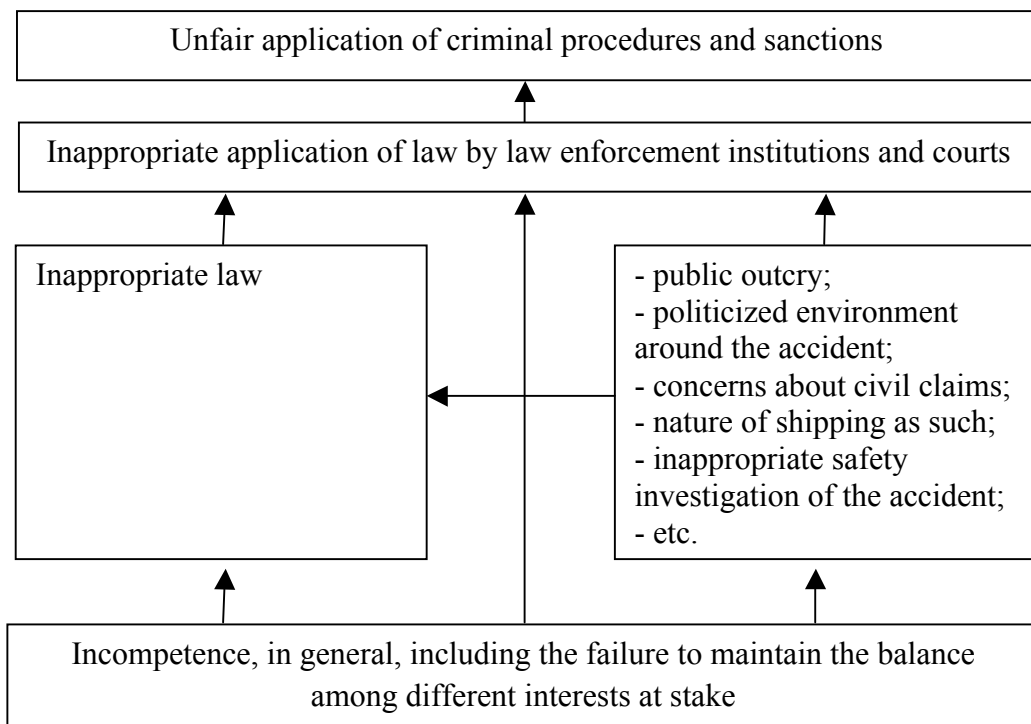


Figure 9 – Possible causes of the problem of the unfair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents.

For achieving the fullest possible enhancement of the fair application of criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents (and beyond) it is necessary to work on the elimination of all the above-mentioned causes of unfairness. Importantly, respective work must be done by people from all relevant fields closely co-operating with each other. Such co-operation seems to be lacking at the moment.

First of all, better co-operation between actors in the maritime domain (such as IMO, maritime administrations and maritime academies) and actors in the penal law domain (such as bodies drafting general penal law, police, prosecution, courts and police academies) must be developed, in several aspects, for example:

- when relevant law both in the maritime domain and the general penal law domain is drafted (at all levels: international, regional and national);
- when relevant conferences, seminars and workshops are organised;
- when relevant courses at the higher education institutions preparing both maritime experts and police officers, prosecutors or judges are developed and delivered.

Such co-operation: on the one hand, has potential to encourage actors from the maritime domain to understand and, consequently, respect general principles of punishment more; on the other hand, it has the potential to encourage actors from the penal law domain to understand and, consequently, respect maritime interests more. To achieve such understanding and respect is vitally important for positive change in practice, particularly because criminal law is not enforced by people from the maritime domain; it is enforced by people from the penal law domain. Thus, addressing the problem of the unfair application of criminal procedures and sanctions against seafarers only at maritime forums and by maritime experts, as it is largely done now, can bring little practical benefit.

Secondly, better co-operation between actors in the maritime domain and actors in the human rights domain, particularly relevant maritime industry NGOs (such as SRI, BIMCO and INTERTANKO) and human rights NGOs (such as Amnesty International and Human Rights Watch), must be developed. Such co-operation, again, has the potential to be mutually beneficial: on the one hand, it may give to the maritime industry NGOs a wider platform from which to fight against human rights violations in the maritime domain; on the other hand, it may give to the human rights NGOs more examples proving the need to enhance human rights, including the fair application of criminal procedures and sanctions, in general. That the problem of the unfair application of criminal procedures and sanctions is a general problem, which potentially in one or another form might be faced by anybody, not only seafarers, is clear from any single case from the case law of ECtHR and IACtHR mentioned in this dissertation. Similarly, other information sources point to the fact that seafarers and the maritime sector at large are not the only victims of the unfair application of criminal procedures and sanctions.⁸⁰⁵ Thus, all affected by the problem must unite their efforts against the common evil. General human rights NGOs can be of great help in accomplishing this merger of efforts.

⁸⁰⁵ See, for example, Andrew Guest, “Feature: Just the Answer to Criminalisation?”, available at https://www.bimco.org/en/News/2010/05/26_Feature_Week_21.aspx?RenderSearch=true [accessed 6 April 2014], noting issues related to unfair application of criminal procedures and sanctions in aviation sector identical to ones in maritime sector; “L’Aquila Quake: Italian Scientists Guilty of Manslaughter”, available at <http://www.bbc.com/news/world-europe-20025626> [accessed 6 April 2014], discussing the case when six Italian scientists were sentenced to six years in prison for multiple manslaughter because, in the courts view, they had provided inexact, incomplete and contradictory information about the danger of the tremors felt ahead of the deadly earthquake.

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Annex I
Human Rights Compliance Check-Lists

**Compliance check-list
RIGHT TO LIBERTY**

1.	Did the procedures applied against the seafarer restrict his movement?	No	No violation. No need to answer the following questions.
		Yes	

2.	Did the restriction of the movement of the seafarer amount to a deprivation of liberty?	No	No violation. No need to answer the following questions.
		Yes	

3.	Was the law based on which the seafarer was deprived of his liberty sufficiently clear?	No	Violation.
		Yes	

4.	Was the deprivation of liberty of the seafarer one of the following types of a deprivation of liberty: 1) deprivation of liberty after conviction; 2) deprivation of liberty for non-compliance with a legal obligation; 3) preventive deprivation of liberty?	No	Violation.
		Yes	

Questions 5-7 below must be answered only if the deprivation of liberty of the seafarer was a deprivation of liberty after conviction.

5.	Did the punishment imposed by the conviction involve a deprivation of liberty?	No	Violation.
		Yes	

6.	Was the conviction the result of flagrant denial of justice?	No	
		Yes	Violation.

7.	Was there sufficient causal connection between the deprivation of liberty of the seafarer and the conviction?	No	Violation.
		Yes	

Questions 8-13 below must be answered only if the deprivation of liberty of the seafarer was a deprivation of liberty for non-compliance with a legal obligation.

8.	Did there exist unfulfilled legal obligation on the side of the seafarer?	No	Violation. No need to answer questions 9-13 below.
		Yes	

9.	Was the legal obligation of specific and concrete nature?	No	Violation.
		Yes	

10.	Was the seafarer given an opportunity to fulfil the legal obligation voluntarily?	No	Violation.
		Yes	

11.	Was the deprivation of liberty necessary measure for securing fulfilment of the legal obligation?	No	Violation.
		Yes	

12.	Was the deprivation of liberty proportional measure for securing fulfilment of the legal obligation?	No	Violation.
		Yes	

13.	Was the seafarer released as soon as the legal obligation was fulfilled?	No	Violation.
		Yes	

Question 14 below must be answered only if the deprivation of liberty of the seafarer was a preventive deprivation of liberty.

14.	Was the preventive deprivation of liberty based on one of the following reasons: 1) danger of absconding; 2) risk that the seafarer would take action to obstruct the proceedings; 3) risk that the release of the seafarer would cause public disorder?	No	Violation. No need to answer questions 15-23 below.
		Yes	

Questions 15-19 below must be answered only if the reason of the deprivation of liberty of the seafarer was danger of absconding.

15.	Did there exist reasonable suspicion that the seafarer committed the offence in question?	No	Violation.
		Yes	

16.	Did there exist real danger of absconding?	No	Violation.
		Yes	

17.	Was the deprivation of liberty necessary measure for securing non-absconding?	No	Violation.
		Yes	

18.	Was the deprivation of liberty proportional measure for securing non-absconding?	No	Violation.
		Yes	

Questions 19-20 below must be answered only if a payment of a bail was set as a condition for the release of the seafarer.

19.	Was due care taken in fixing the appropriate amount of bail for the release of the seafarer?	No	Violation.
		Yes	

20.	Was the justification of the amount of bail fixed convincingly demonstrated by the authorities?	No	Violation.
		Yes	

Questions 21-23 below must be answered only if the reason of the deprivation of liberty of the seafarer was a risk that the seafarer would take action to obstruct proceedings.

21.	Was there factual evidence supporting the fear that the seafarer, if released, would take action to obstruct the proceedings?	No	Violation.
		Yes	

22.	Was the deprivation of liberty necessary measure for securing that the seafarer would not take action to obstruct the proceedings?	No	Violation.
		Yes	

23.	Was the deprivation of liberty proportional measure for securing that the seafarer would not take action to obstruct the proceedings?	No	Violation.
		Yes	

Question 24 below must be answered only if the reason of the deprivation of liberty of the seafarer was a risk that the release of the seafarer would cause public disorder.

24.	Was there factual evidence supporting the fear that the release of the seafarer would cause public disorder?	No	Violation.
		Yes	

25.	Did the state which deprived the seafarer of his liberty have jurisdiction to do so?	No	Violation.
		Yes	

26.	Did the official who carried out the act of deprivation of liberty of the seafarer have jurisdiction to do so?	No	Violation.
		Yes	

27.	Was the deprivation of liberty of the seafarer carried out in accordance with the relevant national law?	No	Violation.
		Yes	

28.	Was the seafarer after his deprivation of liberty informed of the reasons for his deprivation of liberty and charges against him?	No	Violation. No need to answer questions 29-32 below.
		Yes	

29.	Was the seafarer informed of the reasons for his deprivation of liberty and charges against him personally or through his representative?	No	Violation.
		Yes	

30.	Was the seafarer informed of the reasons for his deprivation of liberty and charges against him promptly?	No	Violation.
		Yes	

31.	Was the information of the reasons for the deprivation of liberty and charges provided to the seafarer in a language he understands?	No	Violation.
		Yes	

32.	Was the information of the reasons for the deprivation of liberty and charges provided to the seafarer in simple, non-technical language?	No	Violation.
		Yes	

Questions 33-38 below must be answered only if the seafarer is deprived of his liberty on suspicion of having committed a criminal offence.

33.	Was the seafarer after his deprivation of liberty brought for an automatic judicial review of his deprivation of liberty?	No	Violation. No need to answer questions 34-38 below.
		Yes	

34.	Was the authority before which the seafarer was brought for an automatic review of his deprivation of liberty judge or other officer authorized by law to exercise judicial power?	No	Violation.
		Yes	

35.	Was the seafarer after his deprivation of liberty brought for an automatic judicial review of his deprivation of liberty promptly?	No	Violation.
		Yes	

36.	Did the authority before which the seafarer was brought for an automatic review of his deprivation of liberty examine all relevant merits of the particular deprivation of liberty?	No	Violation.
		Yes	

37.	Did the seafarer participate in person at the hearing at which his deprivation of liberty was automatically reviewed?	No	Violation.
		Yes	

38.	Was the principle of equality of arms followed during the automatic judicial review of the deprivation of liberty of the seafarer?	No	Violation.
		Yes	

Question 39-45 below must be answered only if the seafarer made an application of his deprivation of liberty to be reviewed.

39.	Did the authorities examine the seafarers' application of his deprivation of liberty to be reviewed?	No	Violation. No need to answer questions 40-45 below.
		Yes	

Question 40 below must be answered only if the examination of the application was refused on the basis of there being an unreasonably short period of time since the previous judicial review of the deprivation of liberty of the seafarer.

40.	Was the period since the previous judicial review of the deprivation of liberty of the seafarer unreasonably short?	No	Violation.
		Yes	

41.	Was the authority which reviewed the deprivation of liberty of the seafarer after his relevant application a judge or other officer authorized by law to exercise judicial power?	No	Violation.
		Yes	

42.	Was the judicial review of the deprivation of liberty of the seafarer after his relevant application carried out speedy?	No	Violation.
		Yes	

43.	Did the authority which reviewed the deprivation of liberty of the seafarer after his relevant application examine all relevant merits of the particular deprivation of liberty, particularly the circumstances which might have changed since the previous review?	No	Violation.
		Yes	

44.	Did the seafarer participate in person at the hearing at which his deprivation of liberty was reviewed after his relevant application?	No	Violation.
		Yes	

45.	Was the principle of equality of arms followed during the judicial review of the deprivation of liberty of the seafarer after his relevant application?	No	Violation.
		Yes	

45.	In every case, was the justification for the deprivation of liberty of the seafarer convincingly demonstrated by the authorities?	No	Violation.
		Yes	

Compliance check-list
RIGHT TO BE FREE FROM TORTURE AND OTHER CRUEL, INHUMAN
OR DEGRADING TREATMENT

1.	Taking into consideration the cumulative effect of the conditions, was the treatment of the seafarer by the authorities at least degrading?	No	
		Yes	Violation

Questions 2-51 below must be answered only if the seafarer was held as a prisoner (untried or convicted).

Question 2 below must be answered only if the seafarer was held as an untried prisoner.

2.	Was the seafarer incarcerated together with convicted persons?	No	
		Yes	Violation.

3.	Did the accommodation provided for the use of the seafarer meet requirements of health?		
3.1.	Space	No	Violation.
		Yes	
3.2.	Lighting	No	Violation.
		Yes	
3.3.	Heating	No	Violation.
		Yes	

3.4.	Ventilation	No	Violation.
		Yes	
3.5.	Sanitary installations	No	Violation.
		Yes	
3.6.	Bathing and shower installations	No	Violation.
		Yes	
3.7.	General cleanliness	No	Violation.
		Yes	

4.	Was the seafarer enabled to use a bath or shower frequently enough (according to season and geographical region, but at least once a week in a temperate climate)?	No	Violation.
		Yes	

5.	Was the seafarer provided with water and such toiletry articles as are necessary for health and cleanliness?	No	Violation.
		Yes	

6.	Was the seafarer provided with facilities for the proper care of the hair and beard?	No	Violation.
		Yes	

7.	Was the seafarer provided with separate, sufficient and clean bedding?	No	Violation.
		Yes	

Questions 8 and 9 below must be answered only if the seafarer was held as an untried prisoner.

8.	Was the seafarer allowed to wear his own clothing?	No	Violation.
		Yes	

9.	If the seafarer was wearing prison clothing, was it different from that supplied to convicted prisoners?	No	Violation.
		Yes	

10.	Was the prison clothing provided to the seafarer suitable for the climate and adequate to keep him in good health?	No	Violation.
		Yes	

11.	Was the prison clothing provided to the seafarer degrading or humiliating?	No	
		Yes	Violation.

12.	Was the prison clothing provided to the seafarer clean and in proper condition?	No	Violation.
		Yes	

13.	Was the underclothing of the seafarer changed and washed as often as necessary for the maintenance of hygiene?	No	Violation.
		Yes	

14.	When the seafarer was removed outside the institution for an authorized purpose, was he allowed to wear his own clothing or other inconspicuous clothing?	No	Violation.
		Yes	

15.	Was the seafarer provided at the usual hours with the food of nutritional value, of wholesome quality and well prepared (amount, variety, warm or cold etc.)?	No	Violation.
		Yes	

16.	Was drinking water available whenever seafarer needed it?	No	Violation.
		Yes	

Questions 17-19 below must be answered only if the seafarer was held as an untried prisoner.

17.	Did the seafarer express the desire to have his food procured at his own expense from the outside?	No	No need to answer question 18.
		Yes	

18.	Was the seafarer allowed to have his food procured at his own expense from the outside?	No	Violation.
		Yes	

19.	Was the seafarer required to work when he did not want to?	No	
		Yes	Violation.

20.	Was the seafarer employed in outdoor work?	No	
		Yes	No need to answer question 21.

21.	Did the seafarer have at least one hour of suitable exercise in the open air daily if weather permitted?	No	Violation.
		Yes	

22.	Was the seafarer examined by the medical officer as soon as possible after his admission to the institution?	No	Violation.
		Yes	

23.	Was the seafarer sick and needing treatment of a medical specialist during imprisonment?	No	No need to answer questions 24-28.
		Yes	

24.	Was the seafarer transferred to the hospital facility in the institution or to the civil hospital?	No	Violation.
		Yes	

Questions 25 and 26 below must be answered only if the seafarer was transferred to the hospital facility in the institution.

25.	Were the equipment, furnishing and pharmaceutical supplies of the hospital facility proper for the medical care and treatment of the seafarer?	No	Violation.
		Yes	

26.	Was the staff of the hospital facility suitably trained?	No	Violation.
		Yes	

Questions 27 and 28 below must be answered only if the seafarer was held as an untried prisoner.

27.	Did the seafarer express the will to be visited and treated by his own doctor at his own expense?	No	No need to answer question 28.
		Yes	

28.	Was the seafarer allowed to be visited and treated by his own doctor at his own expense?	No	Violation.
		Yes	

29.	Was the seafarer disciplinarily punished during his imprisonment?	No	No need to answer questions 30-33
		Yes	

30.	Was the disciplinary punishment imposed against the seafarer necessary for safe custody and well-ordered community life?	No	Violation.
		Yes	

31.	Was there in place law or regulation of the competent administrative authority defining conduct constituting a disciplinary offence, the type and duration of punishment which may be inflicted for each disciplinary offence and the authority competent to impose such punishment? And, was the disciplinary punishment against the seafarers imposed in line with this law or regulation?	No	Violation.
		Yes	
32.	Was the seafarer before his punishing for disciplinary offence given a proper opportunity of presenting his defence?	No	Violation.
		Yes	
33.	Was the disciplinary punishment against the seafarer cruel, inhuman or degrading (corporal punishment, placing in a dark cell etc.)	No	
		Yes	Violation.
34.	Were chains or irons used against the seafarer during his imprisonment?	No	
		Yes	Violation.
35.	Were any other instruments of restraint used against the seafarer during his imprisonment (handcuffs, truncheons, metal cage during the hearings etc.)?	No	No need to answer question 36.
		Yes	
36.	Was the use of instruments of restraint against the seafarer necessary?	No	Violation.
		Yes	
37.	Was the seafarer during his imprisonment allowed to communicate with his family and reputable friends at regular intervals, both by correspondence and by receiving visits?	No	Violation.
		Yes	

38.	Was the seafarer during his imprisonment kept informed regularly of the more important items of news by the reading of newspapers, by hearing wireless transmissions, or by any similar means?	No	Violation.
		Yes	

39.	Did the institution where the seafarer was imprisoned have a library for the use of prisoners, adequately stocked with both recreational and instructional books, and was the seafarer encouraged to make full use of it?	No	Violation.
		Yes	

Questions 40 and 41 below must be answered only if the seafarer was held as an untried prisoner.

40.	Did the seafarer express the desire to procure at his own expense books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution?	No	No need to answer question 41.
		Yes	

41.	Was the seafarer allowed to procure at his own expense books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution?	No	Violation.
		Yes	

42.	Were the religious beliefs and moral precepts of the seafarer respected during his imprisonment?	No	Violation.
		Yes	

43.	Were the money, valuables, clothing and other effects belonging to the seafarer, which under the regulations of the institution he was not allowed to retain, on his admission to the institution placed in safe custody? Did the seafarer sign the respective inventory?	No	Violation.
		Yes	
44.	Was the seafarer allowed at once to inform his family of his imprisonment?	No	Violation.
		Yes	
45.	Was the seafarer during his imprisonment transferred to another institution for continuing to be imprisoned there?	No	No need to answer question 46.
		Yes	
46.	Was the seafarer allowed at once to inform his family of his transfer to another institution for continuing to be imprisoned there?	No	Violation.
		Yes	
47.	Did the seafarer die, suffer serious illness, or was he seriously injured during his imprisonment?	No	No need to answer question 48.
		Yes	
48.	Was the spouse or the nearest relative or any other person previously designated by the seafarer informed about the death, serious illness or serious injured of the seafarer?	No	Violation.
		Yes	
49.	When the seafarer was removed to or from the institution, was he exposed to public view as little as possible, and were proper safeguards adopted to protect the seafarer from insult, curiosity and publicity in any form?	No	Violation.
		Yes	

50.	Did the seafarer submit complaint to the relevant national authorities about his ill-treatment during his imprisonment?	No	No need to answer question 51.
		Yes	

51.	Did the relevant national authorities carry out effective (independent, thorough and prompt) investigation of the allegation of ill-treatment of the seafarer?	No	Violation.
		Yes	

Compliance check-list
RIGHT TO BE FREE FROM CRUEL, INHUMAN OR DEGRADING PUNISHMENT

1.	Was the seafarer convicted?	No	No violation. No need to answer the following questions.
		Yes	

2.	Was the conduct for which the seafarer was convicted defined as a crime in national criminal law?	No	Violation.
		Yes	

3.	Was the law based on which the seafarer was convicted sufficiently clear?	No	
		Yes	No need to answer question 4.

4.	Was the unclear law interpreted to the detriment of the seafarer, <i>inter alia</i> , by applying law by analogy?	No	
		Yes	Violation.

5.	Did the seafarer do the conduct (act or omission) as defined in rule under which he was convicted?	No	Violation.
		Yes	

6.	Was the crime for which the seafarer was convicted defined by harm (for example, pollution caused)?	No	No need to answer questions 7-9.
		Yes	
7.	Was the harm caused as defined by rule under which the seafarer was convicted?	No	Violation.
		Yes	
8.	Was the conduct of the seafarer factual cause of the harm?	No	Violation. No need to answer question 9.
		Yes	
9.	Was the conduct of the seafarer legal (proximate) cause of the harm?	No	Violation.
		Yes	
10.	Was the crime for which the seafarer was convicted defined by objective elements other than conduct and harm (for example, particular territory where the conduct was carried out)?	No	No need to answer question 11.
		Yes	
11.	Were other objective elements of the crime as defined by rule under which the seafarer was convicted present?	No	Violation.
		Yes	
12.	If the definition of crime under which the seafarer was convicted required intent as a pre-condition for criminal liability, did the seafarer do the conduct intentionally?	No	Violation.
		Yes	
13.	If the definition of the crime under which the seafarer was convicted required intent or recklessness as a pre-condition for criminal liability, did the seafarer do the conduct intentionally or recklessly?	No	Violation.
		Yes	

14.	If the definition of the crime under which the seafarer was convicted required intent, recklessness or gross negligence as a pre-condition for criminal liability, did the seafarer do the conduct intentionally, recklessly or with gross negligence?	No	Violation.
		Yes	
15.	Was the criminal sanction imposed upon the seafarer for simple negligence?	No	
		Yes	Violation.
16.	Was the crime for which the seafarer was convicted defined by subjective elements other than intent, recklessness or negligence (for example, specific aim or specific motive)?	No	No need to answer question 17.
		Yes	
17.	Were other subjective elements of a crime as defined by rule under which the seafarer was convicted present?	No	Violation.
		Yes	
18.	Was the seafarer convicted for the crime without proof of all elements of this crime beyond a reasonable doubt?	No	
		Yes	Violation
19.	Was the criminal sanction imposed upon the seafarer on the basis of strict liability?	No	
		Yes	Violation.
20.	Did the seafarer do the conduct for which he was convicted in the situation of necessity?	No	No need to answer question 21.
		Yes	
21.	Was the conduct for which the seafarer was convicted carried out in the situation of necessity?	No	
		Yes	Violation.

22.	Was the sanction imposed upon the seafarer proportional?		
22.1.	Did the sanction fit the offence?	No	Violation.
		Yes	
22.2.	Was the sanction for the offence in balance with the sanctions for other offences in the same jurisdiction?	No	Violation.
		Yes	

**Compliance check-list
RIGHT TO FAIR TRIAL**

1.	Was the seafarer tried?	No	No need to answer questions 2-17.
		Yes	

2.	Was the seafarers' case adjudicated at an oral hearing which was open to the public, including the press (public hearing)?	No	
		Yes	

Question 3 below must be answered only if the hearing was not open to the public.

3.	Was the exclusion of the public from the hearing necessary for the protection of public order or national security?	No	Violation.
		Yes	

Questions 4 and 5 below must be answered only if the case in principle was open to the public.

4.	Was the information on time and the venue of the hearing available to the public?	No	Violation.
		Yes	

5.	Were adequate facilities for the attendance of the public to the hearing provided?	No	Violation.
		Yes	
6.	Was the judgment of the seafarers' case made public?	No	Violation.
		Yes	
7.	Was the tribunal adjudicating the seafarers' case established by an act of parliament?	No	Violation.
		Yes	
8.	Was the bench adjudicating the seafarers' case composed in accordance with the relevant law?	No	Violation.
		Yes	
9.	Did the tribunal adjudicating the seafarers' case have jurisdiction to do so?	No	Violation.
		Yes	
10.	Was the judge adjudicating the seafarers' case, in fact, a party to the litigation (for example, had financial interest in the outcome of the case)?	No	
		Yes	Violation.
11.	Was there justified basis for suspicion that the judge adjudicating the seafarers' case was bias in some other way (for example, that he in practice was in a subordinate relationship to some other organ of the state, that he previously had acted as public prosecutor in relation to the case or that he is not independent from some private pressure group)?	No	
		Yes	Violation.

12.	Was the hearing at the first instance court held in the absence of the seafarer?	No	
		Yes	Violation. No need to answer question 13.

13.	Was the seafarer indeed “heard” during the hearing at the first instance court?	No	Violation.
		Yes	

Questions 14 -16 below must be answered only if the case went to appeal or cassation court.

14.	Was the hearing at the appeal or cassation court held in the absence of the seafarer?	No	
		Yes	

Question 15 below must be answered only if the case at the appeal or cassation was held in presence of the seafarer.

15.	Was the seafarer indeed “heard” during the hearing at the appeal or cassation court?	No	Violation.
		Yes	

Question 16 below must be answered only if the case at the appeal or cassation was held in the absence of the seafarer.

16.	Did the proceedings in front of appeal or cassation court involve not only questions of law but also questions of fact?	No	
		Yes	Violation.

17.	Was the judgment in the seafarers’ case duly reasoned?	No	Violation.
		Yes	

18.	Before the final judgment was made, did public officials refrain from saying or doing anything which would indicate that they believed the seafarer to be guilty of an offence?	No	Violation.
		Yes	
19.	Was the seafarer required to prove his innocence?	No	
		Yes	Violation.
20.	Was the seafarer informed of the charges against him?	No	Violation. No need to answer questions 21-24 below.
		Yes	
21.	Was the seafarer informed of the charges against him personally or through his representative?	No	Violation.
		Yes	
22.	Was the seafarer informed of the charges against him promptly?	No	Violation.
		Yes	
23.	Was the information of the charges provided to the seafarer in a language he understands?	No	Violation.
		Yes	
24.	Was the information of the charges provided to the seafarer detailed?	No	Violation.
		Yes	
25.	Did the seafarer have adequate time for the preparation of his defence (for example, were judicial decisions notified to him timely)?	No	Violation.
		Yes	

26.	Did the seafarer have adequate facilities for the preparation of his defence (for example, was he held in a pre-trial detention facility which had adequate access to natural light and air)?	No	Violation.
		Yes	

27.	Was the seafarer tried without undue delay?	No	Violation.
		Yes	

Question 28 below must be answered only if the seafarer decided to invoke legal assistance of his own choosing.

28.	Was the seafarer forced to be assisted by the lawyer provided by the state?	No	
		Yes	Violation.

Question 29 below must be answered only if legal assistance to the seafarer was provided by the state.

29.	Was the provided legal assistance effective?	No	Violation.
		Yes	

30.	Was the seafarer allowed to communicate with his legal assistant freely (was the permitted number and length of visits from a legal assistant adequate)?	No	Violation.
		Yes	

31.	Was the seafarer allowed to communicate with his legal assistant privately (out of the hearing of third parties)?	No	Violation.
		Yes	

32.	Was the seafarer given an opportunity to examine all statements against him (to arise any doubt about the quality of these statements), <i>inter alia</i> , by obtaining the examination of statements on his behalf?	No	
		Yes	

Question 33 below must be answered only if the seafarer was not given an opportunity to examine all statements against him.

33.	Was the conviction of the seafarer based solely on or to a decisive degree on statements of a person whom the seafarer had no opportunity to examine?	No	
		Yes	Violation.

Questions 34-36 below must be answered only if the seafarer did not understand or speak the language used during the trial or pre-trial stage of proceedings.

34.	Were oral statements and documentary materials interpreted to the seafarer?	No	Violation.
		Yes	

35.	Was the provided interpretation adequate (continuous, precise, impartial etc.)?	No	Violation.
		Yes	

36.	Was the interpretation provided free of charge?	No	Violation.
		Yes	

37.	Was the seafarer compelled to testify against himself or to confess guilt?	No	
		Yes	Violation.

Questions 38-40 below must be answered only if the seafarer was convicted.

38.	Was the seafarer provided an opportunity of his conviction or sentence being reviewed by a higher tribunal?	No	Violation.
		Yes	

39.	Was the right to the review of conviction or sentence easily accessible to the seafarer?	No	Violation.
		Yes	

Question 40 below must be answered only if the seafarers' case actually went for a review by a higher tribunal.

40.	Was the review of the seafarers' case carried out superficially, in merely formal manner?	No	
		Yes	Violation.

41.	Was the seafarer prosecuted, tried or punished again for an offence for which he had already been finally convicted or acquitted in this country?	No	
		Yes	Violation.

Question 42 below must be answered only if the seafarer was tried or punished in one of the EU countries.

42.	Was the seafarer prosecuted, tried or punished again for an offence for which he had already been finally convicted or acquitted in this country or any other EU country?	No	
		Yes	Violation.

Question 43 below must be answered only if the seafarer was tried or punished in one of the countries, which is State Party to the American Convention on Human Rights.

43.	Was the seafarer prosecuted, tried or punished again for an offence for which he had already been finally acquitted in this country or any other country?	No	
		Yes	Violation.

Compliance check-list
RIGHT TO NON-DISCRIMINATION

1.	Was the seafarer treated differently than others in a similar situation?	No	No violation. No need to answer the following questions.
		Yes	
2.	Were there very weighty reasons for treating the seafarer differently than others in the similar situation?	No	Violation.
		Yes	

Annex II
**Criminal Jurisdiction over Large-Scale
Ship-Source Oil Pollution Accidents**

<i>Scenario</i>	<i>Jurisdiction</i>		<i>Limitations of jurisdiction</i>
<p>I. Internal waters – internal waters</p> <p>A ship is alleged to have carried out in the internal waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the internal waters of this state (in addition, possibly also other areas) and the ship in question is still in the internal waters of the state.</p>	<p>L e g i s l a t i v e</p>	<p>Flag State</p> <p>Coastal State</p> <p>Port State</p>	<p>X</p> <p>X</p>
	<p>E n f o r c e m e n t</p>	<p>Flag State</p> <p>Coastal State</p> <p>Port State</p>	<p>X</p> <p>X</p>
			<p>If the ship is in internal waters of another state (not a flag State, itself), a flag State may only exercise such enforcement measures which do not require physical intervention on board the ship.</p>

2.	<p>Internal waters – territorial sea/archipelagic waters</p> <p>A ship is alleged to have carried out in the internal waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the internal waters of this state (in addition, possibly also other areas), but now the ship in question is in the territorial sea/archipelagic waters of the state (is outward-bound).</p>	L e g i s l a t i v e	<p>Flag State</p> <p>Coastal State</p> <p>Port State²</p>	X	
E n f o r c e m e n t			<p>Flag State</p> <p>Coastal State</p> <p>Port State²</p>	X	<p>If the ship is in territorial sea/archipelagic waters of another state (not a flag State, itself), a flag State may exercise only such enforcement measures which do not require physical intervention on board the ship.</p> <p>Enforcement measures which hamper passage (such as physical inspection and detention of the ship, or arrest of crew) may not be exercised if after committing an alleged offence in internal waters of the state a ship left internal waters as well as territorial sea/archipelagic waters of the state and now has come back.</p>

3.	<p>Territorial sea/archipelagic waters – territorial sea/archipelagic waters</p> <p>A ship is alleged to have carried out in the territorial sea/archipelagic waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the territorial sea/archipelagic waters of this state (in addition, possibly also other areas), and the ship in question is still in the territorial sea/archipelagic waters of the state.</p>	L e g i s l a t i v e	Flag State	X	
			Coastal State	X	<ul style="list-style-type: none"> Adopted law shall not apply to the design, construction, manning or equipment of foreign ships unless this law gives effect to generally accepted international rules or standards.³ In regards to straits subject to the regime of transit passage, law may only be adopted to give effect to applicable international rules and standards.⁴
			Port State ²		
		E n f o r c e m e n t	Flag State	X	If the ship is in territorial sea/archipelagic waters of another state (not a flag State, itself), a flag State may exercise only such enforcement measures which do not require physical intervention on board the ship.
			Coastal State	X	Enforcement measures which hamper passage (such as physical inspection and detention of the ship, or arrest of crew) may not be exercised if after committing an alleged offence in territorial sea/archipelagic waters of the state a ship left these waters outwards and now has come back.
			Port State ²		

4.	<p>Territorial sea/archipelagic waters – internal waters</p> <p>A ship is alleged to have carried out in the territorial sea/archipelagic waters of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the territorial sea/archipelagic waters of this state (in addition, possibly also other areas), but now the ship in question is in the internal waters of the state (is inward-bound).</p>	L e g i s l a t i v e	Flag State	X	
			Coastal State	X	<ul style="list-style-type: none"> Adopted law shall not apply to the design, construction, manning or equipment of foreign ships unless this law gives effect to generally accepted international rules or standards.³ In regards to straits subject to the regime of transit passage, law may only be adopted to give effect to applicable international rules and standards.⁴
			Port State ¹		
		E n f o r c e m e n t	Flag State	X	If the ship is in internal waters of another state (not a flag State, itself), a flag State may exercise only such enforcement measures which do not require physical intervention on board the ship.
			Coastal State	X	Enforcement measures which hamper passage (such as physical inspection and detention of the ship, or arrest of crew) may not be exercised if after committing an alleged offence in territorial sea/archipelagic waters of the state a ship left these waters outwards and now has come back. In such cases only port State jurisdiction may be applied, i.e. the measures may be exercised if the ship has voluntarily come within the port or at the off-shore terminal. ⁵
			Port State ¹		

5.	<p>EEZ – EEZ or territorial sea/archipelagic waters</p> <p>A ship is alleged to have carried out in the EEZ of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the EEZ of this state (in addition, possibly also other areas), and the ship in question is either still in the EEZ of the state or in the territorial sea/archipelagic waters of the state (is inward-bound).</p>	<p>L e g i s l a t i v e</p>	<p>Flag State</p>	<p>X</p>	<ul style="list-style-type: none"> • Only such law may be adopted which conforms to and gives effect to generally accepted international rules or standards.³ • In regards to specific ice-covered areas⁶ such law which goes beyond generally accepted international rules or standards may also be adopted, if specific conditions mentioned in Article 234 of UNCLOS are met.
	<p>E n f o r c e m e n t</p>	<p>Flag State</p>	<p>X</p>	<p>If the ship is in territorial sea/archipelagic waters of another state (not a flag State, itself), a flag State may exercise only such enforcement measures which do not require physical intervention on board the ship.</p> <ul style="list-style-type: none"> • Only applicable international rules and standards may be enforced.⁴ • In regards to specific ice-covered areas⁶ other law than applicable international rules and standards may also be enforced, if specific conditions mentioned in Article 234 of UNCLOS are met. • Enforcement measures which hamper passage (such as physical inspection and detention of the ship, or arrest of crew) may not be exercised if after committing an alleged offence in EEZ of the state a ship left these waters outwards and now has come back. 	
		<p>Coastal State</p>	<p>X</p>		
		<p>Port State²</p>			
		<p>Coastal State</p>	<p>X</p>		
		<p>Port State²</p>			

6.	<p>EEZ – internal waters</p> <p>A ship is alleged to have carried out in the EEZ of the state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is the EEZ of this state (in addition, possibly also other areas), but now the ship in question is in the internal waters of the state (is inward-bound).</p>	L e g i s l a t i v e	Flag State	X	
			Coastal State	X	<ul style="list-style-type: none"> • Only such law may be adopted which conforms to and gives effect to generally accepted international rules or standards.³ • In regards to specific ice-covered areas⁶ such law which goes beyond generally accepted international rules or standards may also be adopted, if specific conditions mentioned in Article 234 of UNCLOS are met.
			Port State ¹		
		E n f o r c e m e n t	Flag State	X	If the ship is in internal waters of another state (not a flag State, itself), a flag State may only exercise such enforcement measures which do not require physical intervention on board the ship.
Coastal State			X	<ul style="list-style-type: none"> • Only applicable international rules and standards may be enforced.⁴ • In regards to specific ice-covered areas⁶ other law than applicable international rules and standards may also be enforced, if specific conditions mentioned in Article 234 of UNCLOS are met. • Enforcement measures which hamper passage (such as physical inspection and detention of the ship, or arrest of crew) may not be exercised if after committing an alleged offence in EEZ of the state a ship left these waters outwards and now has come back. In such cases only port State jurisdiction may be applied, i.e. the measures may be exercised if the ship has voluntarily come within the port or at the off-shore terminal.⁵ 	
Port State ¹					

7.	<p>High seas – port or off-shore terminal</p> <p>A ship is alleged to have carried out on the high seas conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is high seas (in addition, possibly also other areas), but now the ship in question is within a port or at an off-shore terminal of the state.</p>	L e g i s l a t i v e	Flag State	X	
			Coastal State ⁷		
			Port State	X	Only such law may be adopted which is functionally necessary to accommodate corresponding enforcement.
		E n f o r c e m e n t	Flag State	X	If the ship is within a port or at an off-shore terminal of another state (not a flag State, itself), a flag State may exercise only such enforcement measures which do not require physical intervention on board the ship.
			Coastal State ⁷		
			Port State	X	<ul style="list-style-type: none"> • Jurisdiction may be exercised only if the ship has voluntarily come within the port or at the off-shore terminal.⁵ • Only applicable international rules and standards may be enforced.⁴ • Upon request, all records of the investigation shall be transmitted to the flag State. • Upon decision of the flag State to pre-empt proceedings, respective proceedings shall be suspended (except cases of “major damage to the coastal State” or cases of “a flag State which has repeatedly disregarded its obligations”⁸).

8.	<p>EEZ, territorial sea/archipelagic waters or internal waters of other state – port or off-shore terminal</p> <p>A ship is alleged to have carried out in EEZ, territorial sea/archipelagic waters or internal waters of other state conduct resulting in large-scale ship-source oil pollution. The area affected by the pollution is respectively EEZ, territorial sea/archipelagic waters or internal waters of other state (in addition, possibly also other areas), but now the ship in question is within a port or at an off-shore terminal of the state.</p>	L e g i s l a t i v e	Flag State	X	
			Coastal State ⁷		Only such law may be adopted which is functionally necessary to accommodate corresponding enforcement.
			Port State	X	
		E n f o r c e m e n t	Flag State	X	If the ship is within a port or at an off-shore terminal of another state (not a flag State, itself), a flag State may only exercise such enforcement measures which do not require physical intervention on board the ship.
			Coastal State ⁷		
			Port State	X	<ul style="list-style-type: none"> • Jurisdiction may only be exercised upon request from the flag State or the coastal State (except when violation has caused or is likely to also cause pollution in internal waters, territorial sea or EEZ of the port State). • Jurisdiction may only be exercised if the ship has voluntarily come within the port or at the off-shore terminal.⁵ • Only applicable international rules and standards may be enforced.⁴ • Upon request, all records of the investigation shall be transmitted to the flag State or the coastal State. • Upon decision of the flag State to pre-empt proceedings, respective proceedings shall be suspended (except cases of “major damage to the coastal State” or cases of “a flag State which has repeatedly disregarded its obligations”⁸). • Upon decision of the coastal State to pre-empt proceedings, respective proceedings shall be terminated.

¹ Under this scenario port State jurisdiction is absorbed by coastal State jurisdiction.

² Not applicable. Under this scenario a ship will never be within a port.

³ “Generally accepted international rules and standards” are international rules and standards supported by sufficient state practice. What exactly constitutes “sufficient” state practice is not clearly defined.

⁴ “Applicable international rules and standards” are international rules and standards which, at the time of the violation, are operational in the direct relationship between the flag State on the one hand, and the coastal State on the other. In other words, “applicable international rules and standards” are international rules and standards which are binding law in both the flag State and the coastal State in question.

⁵ “Voluntarily” means – not due to *force majeure* or distress.

⁶ Ice-covered areas where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

⁷ Not applicable. Under this scenario an accident is not happening in the waters of a coastal State.

⁸ What exactly constitutes “major damage to the coastal State” and “a flag State which has repeatedly disregarded its obligations” is not clearly defined.

NOTES

1. If a coastal State exercises hot pursuit of the ship in accordance with Article 111 of UNCLOS, after “catching” the ship as a result of hot pursuit, a coastal State has jurisdiction over this ship *mutatis mutandis* as in the maritime zone in which an alleged violation took place.
2. Apart from cases mentioned above, only a flag State of the ship in question has jurisdiction over violations on high seas.
3. It is not fully clear how the general principles of criminal jurisdiction of states (such as subjective territorial principle, objective territorial principle, nationality principle, protective principle, passive personality principle and universality principle) interact with the regime of criminal jurisdiction under UNCLOS, whether the application of the general principles is limited by UNCLOS, or not. Consequently, states are largely free to choose which one of the two passes to follow.
4. Enforcement jurisdiction against foreign ships may be exercised only by officials duly authorised to that effect and capable of proving this authorisation by showing a relevant service card.
5. Enforcement measures at sea against a foreign ship may only be applied from warship, military aircraft, or other ship or aircraft on government service duly authorised to that effect and with the help of its marking clearly identifiable as, indeed, being warship, military aircraft, or other ship or aircraft on government service.
6. The above table describes the regime of criminal jurisdiction over large-scale ship-source oil pollution accidents only under UNCLOS. It should be kept in mind that general powers under UNCLOS might be further limited by other more specific legal instruments, for example, Regulation 4 of Annex I of MARPOL.

Annex III

**Potential Legal Norms of
the International Convention for the
Unification of Certain Rules Relating to
Penal Liability in the Maritime Domain**

- Legal norm defining the key terms used in the Convention, such as: “offences in the maritime domain”, “minor offences”, “*corpus delicti*”, “factual causation”, “legal causation”, “intent”, “recklessness”, “negligence”, “gross negligence”, “simple negligence”, “strict liability” and “absolute liability”.
- A legal norm reminding of the need to follow relevant human rights when applying penal procedures and sanctions in relation to offences in the maritime domain.
- A legal norm reminding of the need to follow the jurisdictional limits established by UNCLOS when applying penal procedures and sanctions in relation to offences in the maritime domain.
- A legal norm requiring to prove *corpus delicti* before a person may be held liable for an offence in the maritime domain;
- A legal norm reminding that, when an offence is defined by particular harm (for example, pollution), it is necessary to prove, not only the existence of this harm and the existence of the conduct which potentially might have caused this harm, but also the factual and legal causation between the harm in question and the conduct in question. It must be, *inter alia*, thoroughly examined whether the true cause of the harm was not the conduct of persons other than seafarers directly involved in the maritime accident, for example, the conduct of ship-owner or ship-builder.
- A legal norm requiring, in cases of *criminal* liability, to prove *corpus delicti* beyond a reasonable doubt.
- A legal norm allowing, in cases of milder forms of liability other than criminal (administrative/regulatory liability), to prove *corpus delicti* only on a balance of probabilities.

- A legal norm stating that strict liability (the form of liability when the proof of *mens rea* is not required but such defences as the defence of reasonable mistake and the defence of necessity are still available to the alleged offender) may be applied only in regards to minor offences and only in exceptional cases (the cases when the application of strict liability is likely to significantly enhance the enforcement regime in deterring respective offences).
- A legal norm stating that absolute liability (the form of liability when the proof of *mens rea* is not required and no defences are available) may never be applied.
- A legal norm stating that the application of *criminal* liability for conducts caused by simple negligence is forbidden and for conducts caused by intent, recklessness or gross negligence must be kept to irreducible minimum (should be imposed only for serious offences, for which other, milder forms of intervention, such as administrative or civil liability, are not sufficient).
- A legal norm requiring the specific sanctions prescribed and applied for offences in the maritime domain to be proportional, in the sense: the single offence against the sanction for this offence; the single offence and its sanction against other offences and their sanctions in the same jurisdiction; and, as far as possible, the single offence and its sanction against the sanctions for the same offence in other jurisdictions. The reference to the Sanctioning Guidelines for Offences in the Maritime Domain can be added to this legal norm.
- A legal norm requiring the consideration of all relevant maritime-specific aspects when applying penal procedures against seafarers. The reference to the Guidelines on the Application of Penal Procedures Against Seafarers can be added to this legal norm.

Annex IV
Potential Legal Norms of the
Sanctioning Guidelines for Offences in the
Maritime Domain

- A legal norm setting the broad categories of seriousness of different offences, for example:

Category A	Great harm and high culpability
Category B	Great harm and low culpability Little harm and high culpability
Category C	Little harm and low culpability

If deemed necessary, the sub-categories can be added.

- A legal norm defining “great harm”, for example: death or grievous bodily injury of a human, significant environmental damage or significant economic loss.
- A legal norm defining “high culpability”, for example: intent and recklessness.
- A legal norm stating that application of strict liability may be considered only in relation to the Category C offences.
- A legal norm permitting to move a specific offence one category higher under exceptional circumstances, for example, an extremely high rate of a particular offence in a particular geographical area.
- A legal norm setting the basic punishments and their bands, for example:

	Starting point	Range
Imprisonment	5 years	0,5-10 years
Fine Band 1	125% of monthly income	100-175% of monthly income
Fine Band 2	50% of monthly income	25-100% of monthly income

If deemed necessary, the sub-bands can be added.

- A legal norm apportioning specific punishment bands to specific categories of offences, for example:

Category A offence	Imprisonment (for natural persons) Fine Band 1 and above (for juridical persons)
Category B offence	Fine Band 1
Category C offence	Fine Band 2

- A legal norm listing aggravating factors and their weight, for example:

Factor	Weight
The offence was committed repeatedly	3
The offence was committed, taking advantage of the person's official, financial or other dependence on the offender	3
The offence has caused harm of a catastrophic level	2
The person committing the offence, for purpose of having his punishment reduced, has knowingly provided false information regarding an offence committed by another person	2
The person committing the offence, for purpose of escaping liability or having punishment reduced, has knowingly created false evidence or concealed existing evidence	1
The offence was committed under the influence of alcohol, narcotic or other intoxicating substances	1

- A legal norm listing mitigating factors and their weight, for example:

Factor	Weight
The perpetrator of the offence is of a good character and does not have previous criminal record	3
The offence was committed due to official, financial or other dependence	3
The offender has voluntarily compensated for harm caused by the offence to the victims or has eliminated the harm caused	2
The offender has actively furthered the disclosure and investigation of the offence	2
The offence was committed as a result of unlawful or immoral behaviour of the victim	1
The offence was committed in the situation of distress	1

- A legal norm stating that the balance of aggravating and mitigating factors must be taken into consideration when deciding upon the specific punishment to be imposed for specific offence.
- A legal norm stating that: in cases when aggravating factors significantly outweigh mitigating factors the offence can be treated as a one category higher as it otherwise would be and in cases when mitigating factors significantly outweigh aggravating factors the offence can be treated as a one category lower as it otherwise would be. Category C offences accompanied by many mitigating factors must be exempted from penal liability completely.

- A legal norm indicating which other conducts must be exempted from penal liability completely, for example: conduct carried out in the situation of self-defence, conduct carried out in the situation of necessity and conduct caused by simple negligence if afterwards a person takes proper measures to avert or minimise the harm.

Annex V

Potential Legal Norms of the Guidelines on Penal Proceedings Which Involve Seafarers

- A legal norm clarifying exactly how officials on government service must be “marked” to be identifiable as to be, indeed, on government service and authorised to arrest or detain seafarers at sea (such a legal norm, *inter alia*, would help to implement Art. 224 of UNCLOS).
- A legal norm clarifying how to carry out arrest or detention of a seafarer at sea, without endangering such interests as safety of navigation and clean environment (such a legal norm, *inter alia*, would help to implement Art. 225 of UNCLOS).
- A legal norm clarifying that, in cases when a seafarer is detained at sea, far away from coast, and, therefore, is not brought before competent legal authority for judicial review of his deprivation of liberty within the four-day period, he must be brought for this review immediately after the transfer ashore (such a legal norm would reflect maritime-specific case law of human rights tribunals).
- A legal norm listing maritime-specific aspects to be taken into consideration, when assessing the necessity and proportionality of deprivation of liberty of a seafarer, for example:
 - The fact that in accordance with human rights it is disproportionate to deprive a person of liberty in any other context other than criminal proceedings; consequently, a seafarer may not be deprived of liberty in relation to a safety investigation of a maritime accident.
 - The fact that not for everything in relation to a ship responsible persons are seafarers. Consequently, responsibility of a seafarer for a particular offence, actually, might be not as great as it looks at the first glance; other relevant stakeholders (such as shipowner, shipbuilder and classification society) might be primarily responsible.
 - The fact that the seafarers’ State has provided the record indicating that a seafarer in question is of good character, has not committed any offence before, and alike.
 - The fact that a seafarer in question is employed in a regular shipping service to the port or coastal State in question.

- A legal norm stating that, when fixing a bail for the release of a seafarer, it must be taken into consideration that bails are not covered by ship insurance contracts.
- Legal norms on co-operation of relevant stakeholders in the maritime domain and the law enforcement and judicial domain, *inter alia*:
 - Legal norms clarifying, exactly, when and, exactly, who should be notified about certain penal procedures applied against seafarers and, exactly, when and, exactly, whose attendance in proceedings should be facilitated (such legal norms, *inter alia*, would help to implement Art. 27, 223 and 231 of UNCLOS and Art. 5(3) of MARPOL in their totality).
 - Legal norms clarifying to which stakeholders in the maritime domain access to a detained seafarer must be provided, and what are limitations in this regard.
 - A legal norm requiring the stakeholders in the maritime domain to provide, as quickly and fully as possible, all information required by law enforcement institutions and courts within the proceedings.