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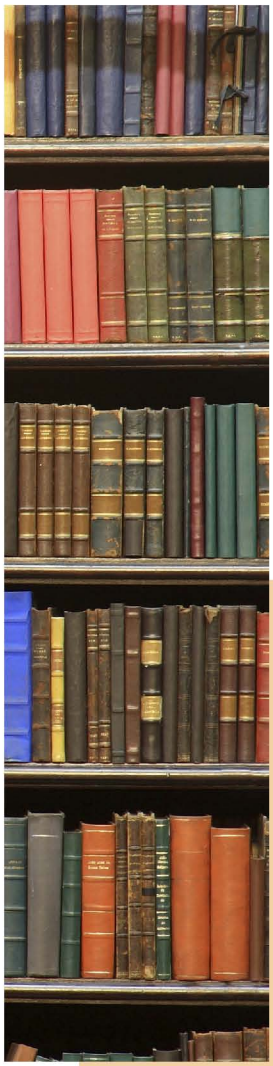

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A comment on the proposal of the International Academy of Environmental sciences

NOTE

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Note

Abstract

Different legal mechanisms can regulate actions that are dangerous to the environment in different ways. The IAES proposes the use of international and EU criminal jurisdictions to prevent and punish environmental crime, and puts forwards suggestions for relevant institutional reform.The two levels of the reform proposed by the IAES, that is European and international, would correspond to different rationalities, and could be complementary to each other. However, a reflection on the elements of an eventual definition of an environmental crime, at EU and international level, as well as procedural questions, including that of (collective) remedies, is still to be held, and remains central to holding polluters responsible both before international and EU judicial *fora*.

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CONTENTS

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EECC	European Environmental Criminal Court
IAES	International Academy of Environmental Sciences
IECC	International Environmental Criminal Court
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

The International Academy of Environmental Sciences (IAES) has presented the European Parliament's Environmental, Public Health and Food Safety Committee with a proposal for the creation of a European and, as a next step, an International Environmental Criminal Court. The IAES formulates specific proposals for European and international reform with the aim of preventing environmental disasters and punishing environmental crimes through the use of criminal law. This paper assesses the legal viability and repercussions of the IAES's proposals.

In the European context, the IAES proposes the creation of a European Environmental Criminal Court, as part of the EU edifice, which could guarantee juridical control of the use of environmental resources, and lead towards a coherent environmental international criminal justice system. EU environmental law is reasonably developed, and includes two relatively recent legal instruments that provide for criminal sanctions in case of environmental degradation. The Lisbon Treaty could provide a legal basis for further strengthening EU legislation on environmental crimes. Despite its abundance, the application of environmental law in Member States is not always consistent. The IAES suggests the creation of a new EU institution; but this would be complicated under the current EU structure, and its added value compared to the current EU judicial structure is not evident. A simpler option could be the creation of a specialised chamber of the ECJ, or a specialised court attached to the General Court, which would be competent for all 'environmental' cases no matter the procedure (e.g. preliminary references, or infringement proceedings), and thus ensure effective enforcement and a more coherent application of EU environmental legislation, including existing criminal law instruments. Enhanced access to justice, at national and EU level, could help reinforce this effect. At any rate, private individuals or entities cannot be sued in EU courts for environmental crimes. If a more direct EU intervention were to be supported, modification of the nature of EU environmental competences would be necessary by means of a Treaty revision, which is currently rather unlikely.

In the international context, the IAES proposes the enlargement of the current competence of the International Criminal Court (ICC) by creating a new specific environmental crime, or reinterpreting 'crimes against humanity' to include environmental crimes. Such a proposal would raise the profile and visibility of environmental crimes. However, and although modifying the ICC is legally viable, a degree of international consensus is required and the process is time-consuming. Furthermore, there are certain issues to be resolved in order to ensure the effectiveness of such a mechanism in combating environmental crime, such as the focus on harm to humans, as well as questions over non-intentional crimes and corporate liability. A new definition of environmental crime could solve some of these problems. Another alternative could be the creation of a new international institution that is an International Environmental Criminal Court.

1. INTRODUCTORY REMARKS AND METHODOLOGY

In a speech to the European Parliament's Environmental, Public Health and Food Safety Committee (ENVI Committee) on 14 July 2010, Professor Antonino Abrami, Acting President of the International Academy of Environmental Sciences (IAES), proposed the creation of two new bodies: a European Environmental Criminal Court, which should 'ensure a coherent European environmental criminal justice system' and, as a next step, an International Environmental Criminal Court, which could stand on its own, or as part of the International Criminal Court, and would have jurisdiction over international environmental disasters.

At the request of the ENVI Committee, this paper examines the context and, more importantly, the legal viability and parameters of these suggestions, exploring certain options that could help meet the IAES objectives.

For the purpose of drafting the paper, primary legal sources have been studied and a relevant literature review (in EN and FR) has been undertaken. Contacts have also been undertaken with European Commission services. Professor Antonino Abrami of the IAES has also been requested to provide clarifications.

Where necessary, references are made to the written statement submitted to the Committee on behalf of the IAES (in Annex), and entitled "Proposal of two historical reforms: an International Environmental Criminal Court (IECC), a European Environmental Criminal Court (EECC)" - hereinafter 'the IAES proposal'.

After a brief presentation of the proposal, the paper takes a look at the legal and practical difficulties -partly evoked in the proposal- as to holding natural persons or legal entities liable for environmental damage. It then goes on to examine the IAES's suggestions for an EECC and an IECC, also in light of these findings. Finally, an attempt is made in each case to put forward suggestions as to the options available and the steps needed, in order to have the IAES proposal objectives achieved.

Given the time restrictions, and the limited focus of this paper on the IAES proposal, more general considerations linked with the possible legal definition of environmental crime (notably in the EU context) and with holding polluters liable for environmental damage at national, EU and international level but not directly related to the IAES proposal are either very briefly touched upon, or completely left out. They could eventually be explored at a future occasion.

2. BRIEF PRESENTATION OF THE IAES PROPOSAL

According to the IAES, environmental disasters continue to endanger individuals and ecosystems. Recent environmental catastrophes testify to the growing need for a coherent international response to the challenge of protecting the environment, since weak, incomprehensive or unenforced legislation does not suffice to prevent environmental disasters, or does not provide an adequate remedy. Against this background, the IAES proposes methods to 'guarantee an effective justice system, through "proportionate, effective and dissuasive sanctions"'[1].

To achieve these goals, the IAES presents two options. The first option is to "create a new EU Institution which could guarantee the juridical control of the use and/or abuse of environmental resources, and ensure a coherent environmental criminal justice system"[2]. The second proposal is to create another (international) Court, the IECC, as a complement to the EECC; for the time being, as a concrete step to this direction it is suggested to "enlarge the current competence of [the] International Criminal Court, with the provision... of a new specific crime: 'Intentional Environmental Disaster'" or to expand the definition of 'crimes against humanity' to include a similar crime.[3]

3. SOME PRELIMINARY REMARKS ON EXISTING LEGAL TOOLS FOR ENVIRONMENTAL PROTECTION AND THEIR SHORTCOMINGS, AND THE ROLE OF CRIMINAL LAW

Before taking a closer look at the IAES suggestions regarding the EECC and the IECC, some preliminary remarks are considered useful here concerning the context of the problems to which the IAES proposal strives to give an answer, and the added value that it could bring.

3.1. The IAES proposal context: piecemeal development of (civil) liability regimes in the field of environmental damage

As environmental pollution commonly has trans-national dimensions, various international texts have hitherto attempted to deal with it, aiming rather at compensating victims and in certain cases funding environmental restoration. Thus, (civil) liability regimes exist with regard to environmental pollution or degradation, often by reference to the polluting agent or type of environment harmed. Civil liability regimes exist, e.g., for oil pollution[4], nuclear risks[5], transboundary movements of hazardous wastes[6], damage to biodiversity from genetically modified organisms[7], pollution affecting international lakes or watercourses[8]. But the piecemeal fashion in which they have been developed does not always contribute to

1 IAES proposal, p. 4.
2 IAES proposal, p. 5.
3 IAES proposal, p. 10.
4 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage amended by the Protocol signed in London on 27 November 1992, 1971 Brussels International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage amended by the 1992 London Protocol.
5 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and 1964 Additional Protocol, 1963 Brussels Supplementary Convention and two further 1982 Protocols, 1962 Convention on the Liability of Operators of Nuclear Ships and Additional Protocols, 1971 Convention on Civil Liability During the transport of nuclear material at sea.
6 Article 12 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes
7 2003 Cartagena Protocol on Biosafety.
8 Article 7 of 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

their effectiveness. To take an example, the well-known oil pollution regime imposes the principle of strict liability and system of compulsory liability on ship owners, as well as special funds for compensating victims; however, maximum levels of compensation are set, which means that claims can (and are) still left unmatched, while the mechanism for sharing the costs among polluters leads, to a certain extent, to the annulment of the polluter-pays principle, and its deterring function.

At European level, a couple of attempts to harmonise national liability regimes, under the auspices of the Council of Europe[9], have not attracted the number of State ratifications required for their entry into force, and have thus so far remained dead letter. The second of those instruments, that is the Convention on the Protection of Environment through Criminal Law, constitutes actually one of the few international efforts to harmonise environmental criminal law listing types of criminal acts and common rules for responsibility and criminal processes.

However, to a different extent, such international instruments require national measures for their effective application, leaving the choice of remedies to the States and entrusting their enforcement to national courts - or, in certain cases, EU ones. What is more, should States violate their obligations, they may only be held accountable at international level.

On the contrary, a mechanism allowing individual applicants to challenge State acts and omissions has been set up under another Council of Europe Convention, the European Convention on Human Rights. Its Court has developed an important case-law in the environmental field. Although the ECHR recognises no Human Right to a safe and healthy environment[10], the Court plays an increasingly important role in enhancing environmental rights and remedies, basically under administrative and civil law. Such a role is performed, first, through the case-law interpretation of existing substantive Human Rights, such as the right to private and family life and home, to embrace environmental aspects[11]; second, it is realised through the use of procedural Human Rights as instruments for greater transparency and participation in environmental decision-making and access to justice, in the spirit of the Århus Convention[12]. Although the ECtHR jurisdiction only comes into play once national remedies have been exhausted, as it is the case with the ICC (see below), it is important that the ECtHR goes a long way into controlling national legal systems and practices, towards what the IAES calls an 'effective system of Justice'. It should be finally noted here that the Lisbon Treaty makes express provision for EU accession to the ECHR

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9 Convention on Civil Liability for damage resulting from activities dangerous to the environment ('Lugano Convention' - Lugano 21.VI. 1993) & Convention on the Protection of Environment through Criminal Law (Strasbourg 4.XI. 1998), see also A. Szoenyi Dandachi, "La Convention sur la protection de l'environnement. par le droit pénal", Revue Juridique de l'Environnement, 3/2003, p. 281-288.

10 Nonetheless, States are encouraged to establish a constitutional right to the environment (Council of Europe Parliamentary Assembly, Recommendation 1614 (2003) "Environment and Human Rights", 26 April 1996).

11 See, for instance, *Lopez-Ostra v. Spain*, Application n° 16798/90, Judgment of 9 December 1994, Series A No 303-C, *Öneryildiz v. Turkey* [GC], Application n° 48939/99, Judgment of 30 November 2004, ECHR 2004-XII 79.

12 This instrument broke new ground in the field of environmental rights, establishing three so-called "pillars", namely rights to information, participation in decision-making and access to justice. It aims to ensure broad access to justice in environmental matters, and more particularly "adequate and effective", "equitable, timely and not prohibitively expensive" remedies (art.9 par.4). At EC level, the adoption of legislation on the implementation of the Århus access to justice provisions at Member-State level has been left incomplete. Indeed, upon approval of the Convention, the EC declared that "the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention", and that Member-States remain, thus, "responsible for the performance of these obligations" (http://www.unece.org/env/pp/ctreaty.htm). The proposal for an EC Directive on access to justice in environmental matters (COM (2003) 624 Final) was met with too much resistance from Member-States, and the idea seems now abandoned (http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186297). See also F. De Lange, "Beyond Greenpeace, Courtesy of the Århus Convention", 3 Yearbook of European Environmental Law (2003), p.227.

(Article 6 (2)), therefore the EU institutional, and judicial, structure would be submitted to a similar control.

3.2. Liability in the field of environmental law, the special case for criminal sanctions

At national level, liability for environmental damage may be engaged under administrative, civil, or criminal law. Administrative law forms a large part of environmental law at national level. Enforcement is entrusted to the State and violations trigger administrative penalties, including suspension or withdrawal of permits and fines. Alternatively or additionally, civil law provides individuals with a method of rectifying damage caused by illegal behaviour. By granting individuals the means to enforce their legal rights, and commonly claim damages, civil law discourages illegal acts, and thereby enhances environmental protection, e.g., in private nuisance or negligence cases.

However, the decision to enforce a right does not necessarily reflect the polluting act's impact on the environment, as the applicant's financial resources or other irrelevant considerations may influence such a decision - although class or representative suits may provide relevant answers.

Finally, criminal liability is reserved for the worst violations of a jurisdiction's laws. Criminal law also has a labelling function; as the EU Directive 2008/99/EC on the protection of the environment through criminal law states[13], criminal penalties "demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" [14].

Thus, although different liability mechanisms may present different merits, and combining them could allow to close gaps and inconsistencies in holding polluters liable, criminal law has an important role to play in deterring environmental violations.

The IAES proposal does not touch upon the eventual definition of an environmental crime, or relevant remedies, these issues cannot be discussed here in detail. However, such parameters remain crucial for achieving environmental justice in practice, and will be used to comment briefly on the actual merits of the respective EECC and IECC ideas. They include, for instance, the type of legal interests to be protected by establishing a crime, and subsequently whether only harm suffered by humans as a result of environmental disasters is punished (anthropocentric approach), or whether just the impairment to the environment itself[15] may trigger a crime (ecocentric approach). Further, criminal liability may not in principle be imposed without fault, contrary to civil law, where strict liability is often imposed in case of more or less hazardous activities. Therefore, the criminal law definition of the required *mens rea* is another important question, as many environmental crimes are not committed intentionally, and even the foreseeability required in case of recklessness or negligence might be difficult to prove. A third consideration concerns liability for legal persons, such as companies, since the source of environmental disasters often lies in industrial activities. Finally, the importance of the available remedies cannot be overstated. The choice of remedy is central, if criminal law is to achieve prevention and restore

[13] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328 of 6 December 2008.

[14] As Directive 2008/99/EC states, criminal law can "demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law." (Preambule, para. 3).

[15] Pure ecological damage can be defined as "a prejudice caused directly to the environment, taken as such independently of its consequences on goods or persons." (F. Caballero "Essai sur la notion juridique de nuisance", LGDJ, 1981, p.293).

environmental damage where possible. The abovementioned Convention on the Protection of Environment through Criminal Law contains a provision (Article 8) which allows States to order the reinstatement of the environment instead of or in addition to criminal sanctions.

4. AN EU INSTITUTION AS A EUROPEAN ENVIRONMENTAL CRIMINAL COURT

4.1. EU competences and legislation in the field of liability for environmental damage, including through criminal law

Under the Lisbon Treaty, the Union's 'environmental' competences are set out in Articles 191 - 193 TFEU. These provisions have not been altered with the new Treaty, save an express reference to the international efforts for combating climate change. Environmental protection is a shared EU competence; unlike, for instance, competition policy at the EU internal market level, the Commission does not in this area have any powers to adopt measures against private entities, in order to sanction 'anti-environmental' behaviour. Furthermore, Member States are expressly allowed to maintain or adopt "more stringent protective measures"[16] than those prescribed in EU environmental legislation, which means that the latter does not aim at full harmonisation.

Member States are generally free to choose the means of implementing EU legislation (principle of 'national procedural autonomy'), but at the same time EU law instruments typically require that relevant penalties should be effective and dissuasive[17]. Moreover, the ECJ has required through its case-law[18] that national remedies can safeguard the effective application of EC law and that they be equivalent to those granted in case of similar cases where purely national law is involved.

More particularly, the IAES proposal refers to the Directive 2008/99/EC on the protection of the environment through criminal law as the EU answer to the IAES concerns. This Directive requires Member States to adopt "effective, proportionate and dissuasive criminal penalties" in the case of certain environmental offences (arising from violations of a list of EU environmental law instruments covering diverse areas, such as transport of hazardous materials, nature protection, air emission standards and genetically modified organisms). The Directive has been adopted after a long saga, including an ECJ decision, concerning the relevant competences, and does not define the type, or minimum level, of penalty to be imposed. As such, the Directive does not harmonise national systems, but this seemed to be as far as the EU may go.[19] It is worth noting here in passing that, under the Lisbon Treaty, Article 83 (2) provides that, "(i)f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation

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16 See also, e.g., Case C-378/08, *ERG and others*, 9 March 2010, para. 66.

17 See further R. Meeus, "Specific sanctioning requirements in EU environmental directives", October 2010. http://www.eufje.org/EN/conferences/brussels_2010/program_including_presentations

18 A landmark decision in this case was Case C-213/89 R. v. Secretary of State for Transport, ex parte Factortame Ltd. & others, 19 June 1990, ECR I-2433; see for further analysis of relevant case-law D. Chalmers, G. Davies & G. Monti, *European Union Law: Text and materials*, Cambridge University Press, 2nd edition, 2010, p. 277 s., P. Craig & G. de Búrca, *EU law: text*, *cases, and materials,* Oxford University Press, 4th edition, 2008, p. 313 s.

19 The Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, which was annulled and replaced with the Directive contained slightly more concrete provisions concerning penalties to be imposed but, similarly, remained far from harmonising national criminal legislation in the field: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:029:0055:0058:EN:PDF; in a ship source pollution case, the Court had judged that the determine type and level of criminal penalties did not fall within EC competence (Case C-440/05 *Commission v Council*, 23 October 2007, ECR I-9097).

of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned", following the same legislative procedure as the 'harmonisation measure'.

To fall within the jurisdiction of the Directive, the relevant acts must be committed with at least serious negligence.[20] Provision should also be made to allow for legal entities, such as companies, to be convicted. [21] The deadline for transposition is 26th December 2010, yet only Spain has hitherto informed the Commission of any transposition measures, while France and Sweden consider that no additional measures are necessary for their national law to comply with the requirements of the Directive.[22]

Additionally, Directive 2009/123/EC[23] requires Member States to adopt legislation imposing criminal penalties in case of ship-source discharges of polluting substances. The *mens rea* for the relevant acts is at least serious negligence[24] and, as with Directive 2009/123/EC, it applies to legal persons as well.[25] The deadline for the transposition was 26th November 2010.[26]

Therefore, at least at legislative level relevant instruments are now in force, containing useful elements of an eventual environmental crime definition as discussed above, and it remains to be seen how they will be applied in practice. The Lisbon Treaty could grant more powers to define the type (and level?) of sanctions in EU legislation, through amending the Directives. In that sense, it could go a step further in harmonising Member State criminal law in this field. It could also be so that, for instance, the reinstatement of the environment is expressly included in the EU legislation as a measure to be imposed on the polluter as an addition to any criminal sanctions.

As already said above, an important consideration in environmental cases lies with the types of remedies available. More particularly, with regard to reparation, including prevention and environmental restoration, an earlier EU instrument is more relevant: the so-called 'Environmental Liability Directive' (Directive 2004/35/EC). This provides for an essentially administrative regime of liability for environmental damage (that is, damage on water, land, biodiversity), aimed at prevention, or else restoration thereof by making the polluter pay. In the aim of prevention, the same regime also applies to imminent threat of damage. The Directive has a limited scope in the sense of the origin of the damage: it applies to a list of 'occupational' activities, comparable to those of Directive 2008/99/EC, which pose a danger for human health and the environment and, unlike Directive 2008/99/EC, imposes strict liability. In case of damage to biodiversity[27], liability may also be imposed for other non-listed occupational activities, so long as there is fault or negligence. A causal link between the damage and the activity must be established, but the

[20] Article 3 of the Directive.
[21] Article 6 of the Directive.
[22] Email of 15th November 2010 (Yannis Couniniotis, DG ENV, A.2); according to the ECJ, no sanction can be imposed by Member States in direct application of the Directive without transposition (Case C-168/95, *Luciano Arcaro*, 26 September 1996, ECR I-4705).
[23] 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 of 27 October 2009.
[24] Article 4 of the Directive.
[25] Article 8b of the Directive.
[26] For the time being, nine Member States have notified the Commission of full transposition measures, and four of partial transposition measures : Email of 14th December 2010 (Daniel Warin, DG MOVE, C.1)
[27] Biodiversity is defined by reference to EC law (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206 of 22 July 1992 and Council Directive 79/409 of 2 April 1979, OJ L 103 of 25 April 1979) and national law.

Directive does not specify how, therefore leaving this for national law.[28]

Taken aside the criminal and administrative liability instruments, it is suggested here that EU environmental law instruments are often complementary, and thus the application of all EU environmental legislation is important in safeguarding environmental protection. All the more so, as the activities giving rise to sanctions in the abovementioned criminal and administrative liability tools are classified as unlawful by reference to other existing EU environmental legislation.[29]

4.2. Overview of the EU court structure and types of procedures and remedies available

The European Court of Justice may deal with the application of EU law, and more particularly EU environmental law, in the Member States through two main judicial avenues: the infringement proceedings brought by the European Commission against Member States breaching their obligations under EU law[30] and the preliminary references submitted by national courts[31], whenever issues of interpretation and validity of EU law arise in national court proceedings.

The first avenue, namely the infringement proceedings, remains up to the discretion of the European Commission. Environmental cases make up almost one fifth of all the infringement proceedings.[32] Fines may be imposed too, against Member States found to violate their obligations, and the Lisbon Treaty further facilitates this practice[33]. As already mentioned, the formal enforcement of EU legislation is entrusted to the European Commission. The latter disposes of a margin of appreciation, as to whether or not to attack a Member State before the ECJ, and the European Parliament has again recently deplored, concerning infringement proceedings, the "lack of improvement with regard to transparency, particularly with reference to the 'EU Pilot' project and the issue of human resources".[34] Further, although fines may be imposed on Member States violating their obligations, these usually come after long years of proceedings and have not necessarily ensured compliance[35], nor are they destined to, e.g., environmental restoration, whenever environmental violations are concerned, but rather nourish the general EU budget. It seems, therefore, that it is not the lack of a judicial institution, but other questions, such as whether cases actually would reach the Court, and the effectiveness and speed of the procedures and remedies, that might prove problematic.

Unlike the so-called 'privileged applicants' (EU institutions and bodies, Member States), private individuals (non-privileged applicants) have only very limited access to challenge the validity of EU acts under Article 263 (and 'environmental applicants' have hitherto failed

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28 Case C-378/08, see above n. 16.

29 For instance, costs are not borne by polluters due to the limitations in the oil pollution regime might fall under the EU waste legislation, which unlike the environmental liability directive does not create an exception: Case C-188/07, *Commune de Mesquer v Total*, 24 June 2008, ECR I-4501.

30 Article 258 TFEU.

31 Article 267 TFEU.

32 http://ec.europa.eu/community_law/docs/docs_infringements/annual_report_27/statannex_1-3_en.pdf

33 See, for instance, Article 260(3) (a penalty may be imposed already at the same time as finding an infringement) – for further comment see Chalmers *et al*, above n. 17, p. 343 s.

34 European Parliament resolution of 25 November 2010 on the 26th Annual Report on Monitoring the Application of European Union Law (2008), INI/2010/2076 http://www.europarl.europa.eu/oeil/file.jsp?id=5855242

35 The first fine ever imposed against a Member State was actually on an environmental case (Case C-387/97, *Commission v Greece, 4 July 2000, ECR I-5047*) – and see a critique of its effectiveness in C Harlow & R Rawlings, "Accountability and law enforcement: the centralized EU infringement procedure", (2006) 31 European Law Review, p. 447 at 462.

to obtain standing[36]). Furthermore, private individuals cannot attack Member States for breaches of EU law nor may private individuals or entities be sued before the EU courts.

Private individuals can indirectly challenge incorrect transposition or interpretation of EU law by a Member State in private lawsuits or directly attack the State and claiming civil damages, under certain conditions.[37] A Member State can also be held liable for acts or omissions of the national courts under certain conditions, therefore individuals are not really left without remedy, at least in case of manifest judicial error. [38]

National courts are as much part of the EU court structure, as they apply EU law in national proceedings. By means of their preliminary questions a 'dialogue' is established between them and the ECJ, towards a harmonised application of EU law throughout the EU, as aimed for by the IAES. As already said, the ECJ has particularly insisted that national remedies are effective and equivalent to those applicable in similar situations governed by national law, so that an efficient application of EU law may be ensured in practice.

Enhancing participation in national criminal proceedings for individuals - victims of pollution, or groups aiming to protect the environment, could also contribute to the disperse and effective enforcement of environmental legislation. The abovementioned Council of Europe Convention contains a relevant provision (Article 11 - rights for groups to participate in proceedings). The Århus Convention, to which the EU is also party, constitutes an expression of these ideas, albeit outside criminal law and procedure. In the French Total case, associations, along with municipalities and communes, stood as civil parties and requested (and were granted) damages.

Therefore, a broad range of procedures and remedies exist in the EU structure, towards an effective application of EU legislation, albeit not necessarily linked with criminal law.

4.3. The IAES proposal and relevant options

As to the EECC, the IAES proposal does not go into much detail, but broadly suggests 'to create a new EU Institution which could guarantee the juridical control of the use and/or abuse of environmental resources, and ensure a coherent European environmental criminal justice system, more suitable to deal with the current situation'. [39]

In order to create a new EU institution, a Treaty revision is necessary, which requires long and hard negotiations, and ultimately a consensus among the 27 EU Member-States. [40] But even overcoming these issues, it seems legally and practically unjustifiable that, under the current institutional structure, a new Court shall be set up to deal only with the application

[36] See, e.g., Case T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, 28 November 2005, , ECR II-3051., C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, 2 April 1998, ECR I- 1651.

[37] Joint Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, 19 November 1991, ECR I- 5357; for a summary of the post-Francovich ECJ case-law, see the European Commission document entitled : "Case law of the Court of Justice of the European Union connected with claims for damages relating to breaches of EU law by Member States ", 15 July 2009 http://ec.europa.eu/community_law/infringements/pdf/jur_09_30385_en.pdf , and academic comment in M. Poiares Maduro & L. Azoulai (*ed*.), The Past and Future of EU Law, Hart Publishing 2010.

[38] Case C-173/03, *Traghetti del Mediterraneo SpA*, 13 June 2006, ECR I- 5177.

[39] IAES proposal, p. 5.

[40] In order to add a new EU institution, an ordinary revision procedure is needed under Article 47 TEU, including a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. This shall refer its recommendations to an inter-governmental conference. The European Parliament may submit proposals for the amendment of the Treaties. In principle, the modified Treaty needs to be ratified by all Member States.

of one or two EU law instruments, that is the Directive 2009/88 possibly in combination with Directive 2009/123 - in any case, the EU courts may not deal with pure national law interpretation matters nor can they act as 'appeal' courts to attack national court decisions.

If the IAES statement expresses doubts as to the ECJ's ability, under its current structure, to ensure a harmonised interpretation of EU environmental law, it still does not necessarily make the case for a new EU institution. Indeed, if the aim is to ensure harmonised and effective application of EU environmental law, including through an effective system of environmental criminal justice, an idea could already be to have a defined 'environmental' Chamber within the ECJ[41] to deal with relevant cases by simply modifying its Rules of Procedure.[42] As already implied, its remit would rather not be limited to the application of the Directive 2008/99/EC, or Directive 2004/35, but to all EU environmental legislation, in order to ensure coherence.

If such an option were followed, it would be meaningful that the Chamber's jurisdiction would cover all relevant proceedings, including preliminary references, as well as infringement proceedings. As to what constitutes an 'environmental' case, the ECJ's alphabetical table of case-law subject-matters could already provide a useful guideline, since it already contains a quite extensive subject-matter entitled 'environment'. [43] In this case, no Treaty revision would be needed.

Under the TFEU, specialised courts may be set up. Article 257 TFEU provides that relevant legislation may be passed through the ordinary legislative procedure. Such courts would only be attached to the General Court to hear and determine at first instance certain classes of action or proceedings brought in specific areas. But it might be that environmental cases that today fall under the jurisdiction of the Court would henceforth be entrusted to a lower court formation that is attached to the General Court. This would be for instance the case with Article 267 (preliminary references), where the Court of Justice has insisted to keep them under its jurisdiction, or even with the majority infringement proceedings (Article 51 of the Statute) - competence for infringement proceedings normally lies with the Court of Justice. [44]

One could further imagine granting private applicants more favourable standing to attack the European Commission in case it decides, through the exercise of its margin of appreciation, not to bring a case against a Member State for a violation of EU environmental legislation. The European Parliament has recently called for 'a 'procedural code' in the form of a regulation under the new legal basis of Article 298 TFEU, setting out the various aspects of the infringement procedure'. [45] In this way, citizens and the public may contribute to the disperse and effective enforcement of EU environmental legislation by forcing the Commission to take action against negligent Member States.

Although polluters cannot be held directly liable, the ECJ case-law has constantly stated that a Member State may be found to infringe the Treaty through an omission, in case it does not take measures against acts of private individuals leading to an infringement of the

[41] The Court sits in chambers (or in a Grand Chamber, Article 251 TFEU) but there is no clear division of competences between the different Chambers (Article 16 of the statute of the Court does not contain any relevant specifications).

[42] These are established by the Court with the approval of the Council (Article 253 TFEU).

[43] p. 449 s. http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tm.pdf

[44] In order to modify the Statute of the Court (Protocol No 3 to the Treaty of Lisbon) legislation may be passed through the ordinary legislative procedure (Article 281 TFEU).

[45] European Parliament resolution of 25 November 2010 on the 26th Annual Report on Monitoring the Application of European Union Law (2008) (2010/2076(INI)), para. 11.

Treaty. [46]

Finally, a solution which does not require new structures but would commend a Treaty revision could consist in re-visiting the EU environmental competences, and grant the European Commission extended powers to regulate and sanction private entities for 'anti-environmental' behaviour, as it is the case in the field of competition policy. In that case, the rights of third parties (citizens, NGOs etc.) would also be more clearly defined, and Commission decisions, and omissions to sanction 'anti-environmental' behaviour, could be challenged before the EU courts - although again polluters could not be sued directly.

5. AN INTERNATIONAL ENVIRONMENTAL CRIMINAL COURT?

5.1. The ICC jurisdiction

The ICC is a permanent institution established by the Rome Statute of the International Criminal Court (hereinafter the 'Rome Statute'); the Statute entered into force on 1 July 2002. However, many countries have yet to sign and/or ratify the Statute, including India, China, Russia and the USA.

The jurisdiction of the ICC is "limited to the most serious crimes of concern to the international community as a whole". [47] At present, the ICC has jurisdiction over genocide, crimes against humanity and war crimes. [48]

The ICC is complementary to national criminal jurisdictions[49], that is, proceedings may only be launched when national courts are taking no action. [50] In this sense, the IAES proposal identifies the IECC as the 'default' option, if suing before national courts proves impossible. Furthermore, the ICC only has jurisdiction if the accused is a national of a State Party, and the crime took place in a State Party's territory.

5.2. The IAES proposal and other relevant options

The IAES proposes a definition of "environmental crimes against humanity" or "intentional environmental disasters" that would fit within the existing ICC framework. In particular, it proposes reinterpreting Article 7 of the Rome Statute, which defines crimes against humanity, to include an environmental offence.

The IAES proposal implies that this could be done by amending the 'Elements of Crimes'[51], in order to allow for para.(1)(k) to include environmental offences "causing great suffering, or serious injury to body or to mental or physical health".[52] However, there is an additional

[46] Case C-265/95, *Commission v. France,* 9 December 1997, ECR I-6959.
[47] Article 1 of the Rome Statute.
[48] Article 5 of the Rome Statute.
[49] Article 1 of the Rome Statute.
[50] Article 17(1)(a). For example, the Prosecutor's Office of the ICC noted that it could not take action against British forces in Iraq because, amongst other reasons, "national proceedings had been initiated with respect to each of the relevant incidents." (Letter of Prosecutor 9 February 2006).
[51] The 'Elements of Crimes' annex to the Rome Statute must be applied by the ICC (Article 21 (a) of the Rome Statute) and assists it in the interpretation and application of the definitions of crimes contained in the Rome Statute (Article 9(1) of the Rome Statute).
[52] Currently, Article 7(1)(k) reads as follows:

requirement for the acts covered by para. (1)(k) to be "of a similar character" to the acts listed as crimes against humanity under its previous headings (enslavement, extermination, torture, rape etc). According to the 'Elements of Crimes', "(i)t is understood that 'character' refers to the nature and gravity of the act." [53] There has been little case-law on how this could be interpreted, but in the past acts which have fallen within this category include forcible transfer of population, serious physical or mental injury, biological, medical or scientific experiments, enforced prostitution, or enforced disappearances. [54] It may thus be hard for environmental disasters to be considered 'of similar character' within the meaning of Article 7.

But there are further limitations linked to the definition of crimes against humanity. In particular, the requirement for an action to be "pursuant to or in furtherance of a State or organizational policy to commit such attack" raises problems, as environmental disasters generated by private persons. The 'Elements of Crimes' states that "(i)t is understood that 'a policy to commit such attack' requires the State or organization to actively promote or encourage such an attack against a civilian population." [55] There is therefore a strong argument that crimes against humanity can only be committed by, or on behalf of, the state, and not by individuals in their private capacity. The Chair of the Rome Conference Drafting Committee writes that Article 7 "does not refer to non-state actors." [56]

The ICC only has jurisdiction over crimes "committed with intent and knowledge" unless the Rome Statute states otherwise. [57] Early versions of the Rome Statute did define recklessness,[58] which suggests that it is theoretically possible to include crimes of recklessness, but the definition was removed from the final version. Therefore, although the IAES has proposed the creation of a crime of creating an "*intentional* environmental disaster" (emphasis added), environmental disasters would better be covered by enlarging the *mens rea* to serious negligence or recklessness.

Additionally, only natural persons can be prosecuted in the ICC.[59] Modification of the Rome Statute would be necessary to ensure that environmental crimes committed by legal persons fall within the jurisdiction of the ICC. However, a proposal[60] to give the ICC jurisdiction over legal persons was rejected for several reasons.[61] First, the inclusion of legal persons would detract from the Court's jurisdictional focus on assigning individual responsibility. Second, there would be problems relating to evidence, especially the need

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"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

53 'Elements of Crimes', above n. 51, para 29.

54 M Boot, revised by C Hall, 'Crimes against humanity', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart publishing, 2008, para 81.

55 'Elements of Crimes', above n. 51, para. 3.

56 M Cherif Bassiouni, *The Legislative History of the International Criminal Court*, Vol 1 (2005) at 151-152.

57 Article 30(1) of the Rome statute. An interesting exception is Article 28. Under Article 28, a military officer can be convicted when he fails to take all necessary and reasonable steps to avoid crimes he knows or should know are about to be committed by his forces (Article 28(a)). This is known as the doctrine of command responsibility. The mens rea here is different from a mens rea of intention; simply failing to act can be sufficient to be liable. However, Article 28 can be distinguished as an application of the general legal principle that a person who creates a dangerous situation assumes responsibility for the foreseeable consequences of that situation (*R v Miller* [1983] 2 AC 176).

58 U.N. Doc. A/CONF.183/C.1/WGGP/L.4.

59 Article 25(1) of the Rome Statute.

60 U.N. Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2 available at http://documents-dds-ny.un.org/doc/UNDOC/LTD/G98/710/71/pdf/G9871071.pdf?OpenElement

61 K Ambos, 'Article 25', in O. Triffterer (*ed*), above n. 54, p. 747.

for proof of a controlling mind (variants of which are necessary in many jurisdictions to establish the required *mens rea*). Third, the principle of complementarity, which states that the ICC must work with national systems, would render legal responsibility highly problematic because many legal systems do not use the concept of corporate liability.

An alternative method of incorporating environmental criminal liability is adding a new article that would define a new crime. More detailed definition could be provided in the 'Elements of Crimes'. This would allow the definition to be embedded within the useful system of the ICC, but release it from the constraints found in the definitions of the current crimes. The IAES suggests a crime of "intentional environmental disaster" or "environmental crimes against humanity". Therefore, Article 5[62] could be extended to include "(e) the crime of creating an intentional environmental disaster". A new Article would be inserted and would provide further definition. The IAES proposal does not further elaborate an eventual definition of such a crime.

Finally, the suitability of the ICC's current sanctions to environmental criminals must be evaluated. Article 77 of the Rome Statute states that the ICC can imprison convicted criminals for up to 30 years, or for life if that is justified by "the extreme gravity of the crime and the individual circumstances of the convicted person." [63] Convicted criminals can also be fined and have their proceeds forfeited. [64] However, Article 77 states that a criminal can only be fined in addition to being imprisoned. If legal persons were to fall within the jurisdiction of the ICC then reform would be advisable to allow the ICC to fine legal persons.

New environmental crimes could be brought within the jurisdiction of the ICC by an amendment to the Rome Statute. The process for amendments is set out in Article 121 of the Statute. It is possible to give the Court jurisdiction over new crimes by amending Articles 5 to 8. A two thirds majority of the members of the Assembly of States Parties is required to amend the Statute. [65] The 'Elements of Crimes' can also be amended by a two-thirds majority. [66] State Parties can indicate their acceptance of amendments by depositing instruments of acceptance or ratification with the Secretary-General of the United Nations. [67]. However, for amendments that do not relate to definitions of crimes, an amendment can only enter into force one year after seven-eighths of the State Parties accept the amendment.[68] This is unusual in international law, and means that the one-eighth of State Parties who do not accept an amendment will nevertheless be bound by it, unless they withdraw from the Statute altogether. However, a State Party will not be bound by an amendment that modifies or creates definitions of crimes unless it accepts the amendment [69]. This means that if an individual State Party does not ratify the amendment then the Court would not be able to exercise its jurisdiction if the crime had been committed by a

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62 Article 5 reads:
"1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression."

63 Article 77(1) of the Rome Statute.

64 Article 77(2) of the Rome Statute.

65 Article 121 (3) of the Rome Statute.

66 Article 9 (2) of the Rome Statute.

67 Article 121(4) of the Rome Statute.

68 Article 121 (4) of the Rome Statute.

69 Article 121 (5) of the Rome Statute.

national of that State Party or on the territory of that State Party[70].

The IAES proposal speaks also of an IECC as a 'twin' court to the ICC. If this reference were to mean that a new specialised court to judge environmental crimes should be created, this may be pursued in the following ways. First, a United Nations General Assembly resolution could create an environmental criminal court. It would require a simple majority but would be non-binding. Similarly, a resolution of the Security Council could create a new institution. This idea was rejected for the ICC as it was felt that the remit of the Security Council was not in complete alignment with that of the ICC. Alternatively, a new institution could be established through a multilateral convention. This is the way the ICC was created. It is complex and time consuming. A new protocol to the Rome Statute is perhaps the simplest alternative. This option would also allow the new crime to fit within the framework of the current ICC, removing the need for complex negotiations regarding the structure, remit, jurisdiction, funding etc. of a new institution. As the IAES notes, European Union Member States (all 27 of which have ratified the Rome Statute) could be encouraged to ratify the new protocol through the use of a European Parliament Resolution.

6. CONCLUSION

Different legal mechanisms can regulate actions that are dangerous to the environment in different ways. The IAES proposes the use of international and EU criminal jurisdictions to prevent and punish environmental crime, and puts forwards suggestions for relevant institutional reform.

The two levels of the reform proposed by the IAES, that is European and international, would correspond to different rationalities, and could be complementary to each other.

At the international level, a Court would act as a ‘default’ jurisdiction, and have a rather marginal effect on the application of national law. However, the debate on such a Court, and its eventual establishment, would raise the profile and visibility of environmental cases and would serve deterrence purposes. Furthermore, different ways of performing such an institutional reform would strike different types of balance between its feasibility and its effectiveness. Article 7, which defines crimes against humanity, may be modified by a two-third majority. But article 7 is unlikely to be a suitable vehicle for reform as it almost certainly governs only state actors and not private individuals- a wholly new definition might be more suitable to the purpose. Alternatively, a new crime might be inserted in the Rome Statute. However, as State Parties can choose not to be bound by new definitions of crimes, the Rome Statute is perhaps unlikely to provide universal protection for the environment. Although the IAES proposal does not explore the definition of an environmental crime, different issues merit to be debated, such as whether negligent or reckless acts should be covered, or the problematic exclusion of legal persons from the ICC jurisdiction. Further alternatives include the creation of a new international institution; an International Environmental Criminal Court. This could be achieved through a protocol to the Rome Statute, a UN resolution or a multilateral convention.

At the EU level, creating a new EECC would require a long and difficult Treaty revision. The creation of a specialised Chamber in the ECJ, or a specialised court attached to the General Court, with jurisdiction over environmental cases, could be a realistic medium-term goal.

[70] Article 121 (5) of the Rome Statute.

EU Directives requiring Member States to impose criminal penalties have been adopted, covering also crimes caused by negligence and imposing liability for corporations, but remain to be transposed; additionally, a special EU administrative law regime aims to ensure that polluters pay for prevention and restoration. All these instruments build upon a rather developed structure of environmental legislation.

Thus, in parallel with the institutional reform debate, it would be worth considering ways of enhancing EU environmental law application, as this often proves problematic. In this direction, improving conditions of access to justice for groups/ victims of environmental crimes would be useful, including, for instance, through granting civil party standing, or allowing collective/ class actions. A stricter control of the application by the Member States of EU environmental law could also contribute to the same effect. Granting environmental applicants standing to control the enforcement of EU environmental legislation by the Commission - this could be obtained either through secondary legislation on the modalities of the Commission's exercise of its margin of discretion in infringement proceedings, or more radically through a Treaty revision altering the nature of EU environmental competences. Further harmonisation of EU environmental criminal law could also be envisaged under the Lisbon Treaty.

And to link the two levels of discussion, EU and international one, individuals do not seem to be left without remedy in the EU institutional structure, if this functions effectively, and therefore a need for an international 'default' judicial mechanism is not readily apparent.

Finally, a reflection on the elements of an eventual definition of an environmental crime, at EU and international level, as well as procedural questions, including that of (collective) remedies, is still to be held, and remains central to holding polluters responsible both before international and EU judicial *fora*.

ANNEXE

PROFESSOR ABRAMI'S HEARING AT THE ENVI COMMITTEE PROPOSAL OF TWO HISTORICAL REFORMS: AN INTERNATIONAL ENVIRONMENTAL CRIMINAL COURT (IECC), A EUROPEAN ENVIRONMENTAL CRIMINAL COURT (EECC)

Honourable President, Honourable Members,

I would like to above all thank the President of the ENVI Committee, for having allowed me the honour as Executive President of the International Academy of Environmental Sciences (*Accademia Internazionale di Scienze ambientali* - IAES) to illustrate the contents and reasons for our Court Project in this prestigious setting.

I would also like to thank the Honourable Deputy Members of this Committee, for the attention which they have already dedicated and that, I hope, they will continue to manifest towards our project.

Following the letter of the 13th May 2010 sent by me to the ENVI Committee and the subsequent formalised invitation which the President of the ENVI Committee Hon Mr Jo LEINEN transmitted regarding this meeting, I would like to state the following:

1. THE REASONS FOR THE REFORMS

Problems deriving from the alteration of nature's resources have threatened human health throughout history. Over the centuries the relation between individuals and nature has been one of mutual aggression, where nature's response to man's intentional aggression was to poison the environment.

The recent disaster of the off-shore platform *Deepwater Horizon* is yet one more example of the urgency of an effective intervention to deal with the "environmental problem", and this intervention cannot be postponed. An effective system of monitoring, checking and sanctions can be the way towards an effective enforcement of justice.

In this sense, in people's consciousness there are two main needs:

- A growing need for a coherent and coordinated body of legal regulations, bringing more restrictive limitations in human activities that are inherently dangerous for the ecosystems.

- The adoption of transnational investigations and jurisdictional instruments meant to enforce environmental protection.

Pollutants are, in fact, becoming increasingly damaging, drastically altering environmental resources.

In such a context, some products, as in the case of Sevin, which publicly claimed to be harmless pesticides, were the cause of environmental disasters and human tragedies like

Bhopal, leaving over half a million wounded and/or contaminated victims and thousands of deaths.

For some time now, scientists have become conscious of the seriousness of the situation and thus began studying, in-depth, the health of the Planet.

Among the many studies, one worthy of mention is NASA's satellite space observation. The data, analyzed in San Francisco, in February 2001, by over 3000 scientists, addressed environmental issues to propose feasible solutions.

On that occasion, an environmental disaster map was presented, a first of its kind: "*The Atlas of Populations and the Environment*". The Atlas, compiled by monitoring, issued an alarming truth that individuals, in the years between 1600 and 2000, were responsible for environmental disasters, seriously threatening the health of Planet Earth and altering over half of its resources.

Yet such a reality seems to be in marked contrast with the so-called *sustainable development policy,* regarded as a universally valid principle and "formalized" internationally almost thirty years ago:

- It is necessary to recognize the twenty years spanning from 1972-1992 as the period of greatest relevance in which public awareness was heightened to regard "the environmental problem" no longer as "a local problem" (at municipal, regional or national level), but as "a planetary problem".

- It is necessary to consider the development of the "thirst" for *juridic-scientific* knowledge of preventive and repressive measures within a system of Justice that prescribes effective, proportionate and dissuasive sanctions.

    - Certainly, it is essential to have a full understanding of such a matter, in the light of the following principles; and these principles must be kept at the forefront of any discussions relating to the introduction of any new trans-national instruments:
    - The Polluter Pays principle;
    - The Precautionary principle;
    - The Prevention principle;
    - The Sustainable Development i.e. "a development which meets the needs of the present without compromising the ability of future generations to meet their own needs".
    - The principle that environmental damage should be rectified at source.

And it is also important:

- to adopt norms to guarantee an *effective justice system,* through *"proportionate, effective and dissuasive sanctions";*
- that Member States strengthen sanctions, and that they apply penal sanctions for criminal acts that damage the environment;
- That the national judges carry out prompt and effective investigations to determine responsibilities, followed by appropriate disciplinary action. This would discourage negligent and deliberate behavior (to see, B7-0044/2009, Motion for a resolution, 14 September 2009).

And it is also important:

- To realize that these aims are fundamental to the instiution of a European Environmental Criminal Court (EECC).

2. THE EUROPEAN ENVIRONMENTAL CRIMINAL COURT: THE REASONS FOR THE REFORMS

The reform would achieve important but different goals:

- to reaffirm and put into practice the principles of *effective justice* sustained by the EU principles mentioned above;
- to create a new EU Institution which could guarantee the juridical control of the use and/or abuse of environmental resources, and ensure a coherent European environmental criminal justice system, more suitable to deal with the current situation;
- it would constitute an important contribution of experience and ideas, even for the MPU of which the EU is part. It would assert that the EU recognized and enforced the key proposition that the environment is one of the key themes to be considered;
- it would be in accordance with the strong demand of millions of EU citizens (facing unpunished pollution-related problems) for justice in every case of environmental pollution. (for example the Aurul case, which provoked the last disaster in the Danube basin and which confirmed the fact that real protection of the ecosystem is non-existent)[71];
- Many marine disasters (for example, the Prestige and Erika cases) have caused huge damage not only to the environment, but also to different types of industries (marine life, tourism and accommodation);
- It would complete and be in accordance with, and not opposed to, the aims already approved by the EU criminal reform directive 2008/99/EC of the EP and of the European Council 19.11.08 on the protection of the environment through criminal law.

This directive is aimed at imposing criminal sanctions in member States in cases where conduct is deemed to constitute severe crimes against the environment.

Such a minimum level of harmonisation would permit the more effective application of environmental law, respecting the objective of preservation of the environment provided for in article 174 of the Treaty that constitutes the European Community. It is to be noted that within the EU there has been for years an awareness of illegal and often unpunished environmental aggression.

[71] On January 31st 2000 the pollution caused by a cyanide spill following a dam burst of a tailings pond in the Danube basin has highlighted the following aspects. This area (drainage basin embraces 13 Countries, 160 mil. people, 1/3 of mainland Europe) has been affected by the dam burst which caused the spill of 100000 cubic meters of toxic mud affecting Romania, Hungary and former Yugoslavia with devastating effects: water, the ecosystems (animals and plants of any sort). The EU in the IV Program of Environmental action acknowledged the last pollution of the Danube basin which confirmed the non existence of real protection of the ecosystem.

In particular the EU is aware of the increase in the number of such crimes and of the fact that this increase has been caused by the absence of harmonized criminal sanctions for such crimes within the member States of the EU.

The Directive 2008/99/EC on the protection of the environment through criminal law tends thus to guarantee a harmonized criminal justice system to deal with the preservation of the environment within all member states of the EU.

The directive is very clear and it affirms:

"*According to Article 174(2) of the Treaty, Community policy on the environment must aim at a high level of protection".*

"The Community is concerned at the rise in environmental offences and at their effects, which are increasingly extending beyond the borders of the States in which the offences are committed".

"Such offences pose a threat to the environment and therefore call for an appropriate response".

"Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment ".

"Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species".

3. INTERNATIONAL ENVIRONMENTAL CRIMINAL COURT: THE REASONS FOR THE REFORMS

The purpose of the directive and its necessity can clearly be understood when one considers the obligations on member States to put in place criminal sanctions to deal with conduct such as: the illegal elimination, deposit, transport, export or import of dangerous waste; the trading of illegal substances which reduce the ozone layer (e.g. hydrocarbon, used oils, purification mud, metals or electrical or electronic appliances' waste).

It is submitted that the EECC would form the natural competent Institution, to enforce the necessary the laws that will be approved by the 27 juridical systems of the member States, and to those laws into practice. The tribunal could intervene, as a "twin" Court of the ICC *(rectius,* IECC), in cases in which the national criminal court competent for the matter has failed to intervene. It is further submitted that the new Court, the EECC, would also have the function of harmonizing the diverse national laws regarding environmental matters, as well as being responsible for ensuring uniformity in the interpretation of the environmental criminal laws among the 27 member States.

The establishment of an EECC would eventually lead to the establishment of another Court, the IECC, described as follows:

- The EU in the time being can promote any act directed at urging the Review of the Rome Statute, which founded the ICC, to introduce a new criminal offence: namely, environmental disasters which are so heinous that they qualify as a crime against humanity. This would have the desirable effect of enlarging the jurisdiction of the ICC that would then operate as the IECC.

- The EU with its 27 members makes up almost a quarter of the signatory States to the Rome Statute, forming the basis of the jurisdiction of the International Criminal Court. Through the revision of the Statute new criminal offences can be introduced, and hence, the EU could have an important role in the direction, soliciting for example, through the founding of the EP Resolution, any initiative aimed at the implementation of the reform of the IECC, the International Environmental Criminal Court. The urgent need for these new institutions is demonstrated by the historical examples of so many severe environmental disasters where, previously, those responsible have gone unpunished. For example the criminal trial that followed the Bhopal disaster:

  - 30.000 victims;
  - Insignificant reparation of about 500 euros for each relative of the disaster victims and 100 euros for each intoxicated or poisoned person;
  - The person most responsible is still at large;
  - Insignificant penal sanctions given in 2010, that is 26 years after the disaster, attributed to managers for the crime of intentional murder without consideration for the environment. The fact that 26 years elapsed before the company was convicted of "substantial criminal irresponsibility", is a clear example of lack of justice, and a clear violation of the legitimate expectation of the victims and society that there should be an effective criminal sanction for such conduct within an reasonable period of time.

Likewise, in cases of marine pollution, a substantial absence of penal preservation can be noted. In fact, even if different conventions (Montego Bay 1982, Barcellona…) have treated the problem of sea pollution, it must be registered that, if on one side security standards exist, directives, compulsory controls, on the other hand there is no prevision of a third penal judge (hence not a national one) who could eventually sanction the irresponsible behaviour that caused an environmental disaster.

Now a "simple" question: it is necessary to ask a simple question: Whether, and in what terms, great environmental disasters which destroyed eco-systems and /or human lives can fall under the category of Crimes against Humanity?"

- to request the realization of an international criminal jurisdiction for the Environment as foreseen by the Rome Statute, according to Art 121, 122, 123, through the application of a revision procedure;

- To propose, through the amendments above-mentioned, the insertion of new forms of crime into the International Criminal Court Statute. Where, at last, an Intentional Environmental Disaster can be viewed as a Crime Against Humanity, and therefore apply trans-boundary codified measures to protect ecosystems;

- To amend Art. 7 of the Rome Statute, so that the Statute defines crimes against the humanity as follows:

> "*For the purpose of this Statute, „crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (...) or the other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".*

- To extend the definition of "attacks and other inhumane acts and widespread", in particular referring to the material element of the aggressive conduct, which involves both the "territorial" element -between two or more states- and the "temporal" element -that includes the harmful effects to the environment and/or the health of individuals. Noting that, as stated in Art. 7, crimes against humanity, has acquired a broader meaning and is no longer necessarily associated to armed conflicts.

4. THE POLLUTION CONTINUES: A WARNING AND THE NECESSITY OF CONTROL SYSTEMS FOR THE FUTURE

Alaska, March 24, 1989 (Oiltanker Exxon Valdez) - USA, Gulf of Mexico, April 20, 2010 (disaster due to the sinking of the off-shore oil platform *Deepwater Horizon):* the two largest environmental disasters of American history. Today it's even possible to verify directly on the Internet[72], and it's to be considered a sad opportunity, how environmental aggression represents a continuous fact, which cannot be stopped anymore by mankind, not even in the most technological advanced country.

5. THE PROPOSAL INTRODUCING REFORMS: AN INTERDISCIPLINARY SCIENTIFIC AND REGULATORY COMMITTEE OF EXPERTS WITH SPECIFIC TASKS

Having examining the circumstances that require the adoption of our proposals, we need now to proceed with specific initiatives to support a European Parliament Resolution. The resolution should propel formally and substantially for the creation of a new Communitarian Institution on one side, and to prepare, accumulate and make available for the EU Member States who signed in Rome for ICC of the adequate documentation to help them to fully recognize the intentional environmental disaster as a crime against Humanity:

- V.1 Enlarge the current competence of International Criminal Court, with the provision, in either the Treaty of Rome revision process or the alternative statutory procedure, of a new specific crime: Intentional Environmental Disaster.

- V.2 Prepare the European Criminal Court for Environment statute as a "twin court" of IECC;

- V 3 In order to achieve the above goals and objectives, the creation by ENVI Committee of a Scientific and Judiciary Commission is required; the Commission member should be experts and act as consultants with the following tasks:

    a. elaborate the Statute of the European Environmental Criminal Court (the European Environmental Criminal Court by law), with details specification of

[72] http://www.huffingtonpost.com/2010/05/20/live-gulf-oil-spill-video-feed_n_583682.html

area and legal instrument of prevention and repression of environmental infractions and any other provision required by its effective and efficient functioning;

b. rank different environmental emergencies within EU and UPM Member States, with specific attention also to health related issues, scientific and technological matters and either anthropological and cultural aspects;

c. clearly and unequivocally specify the concepts which are thought necessary to judge the severe environmental pollution matters and the evaluation of damage to people and the ecosystem, comprehending the said concepts relative to "intentional environmental disaster", classified as crime against humanity;

d. Indicate the forms and instruments of prevention and control of environmental disasters, as well as forms of environmental cleanup.

CONCLUSIONS

In light of the observations made here and the arguments developed above, the International Academy of Environmental Sciences hopes that this Committee welcomes our proposals, thus declaring its willingness to make its own human, professional and structural resources available, correlated to the realisation of two important reforms.

With regards to the latter, IAES makes available the Villa Herion on the Giudecca and the Office in Sant'Elena (at the ex -Convent *dei Servi di Maria*) in Venice, properties which the City of Venice has given in concession for the implementation of the Court Project; a project which is supported and encouraged by the City Administration.

We hope that the ENVI Committee will see fit to write a page in history with regards to the prevention and repression of environmental disasters which man has already condemned in his conscious before yet condemning them in the law.

Venice, 7th July 2010

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