

## CONCERNING THE ISSUE ON DETERMINING THE OBJECTIVE EVIDENCES OF THE “SEA POLLUTION” CRIME

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**Abstract.** The article is devoted to the analysis of problem issues of objective evidence of the crime "Marine pollution". The article deals with the study of international legal acts concerning the prohibition of pollution of the sea and their use in qualifying the crime provided for in Art. 243 of the Criminal Code of Ukraine.

**Key words:** *criminal law, sea, pollution of the sea, territorial sea, inland seawater, open sea.*

### Introduction

The struggle for the cleanliness of the Global Ocean, saving of marine flora and fauna has become a consequence of the increased intensity of international maritime shipping during the last decades. Any criminal infringement, having a certain effect on the material world, has its external side. Only an act reflecting in the outside world is considered as a criminal offense and causes damage or threatens to cause damage to the social values which are the environment. For this reason, the objective side is recognized to be an obligatory evidence of crime including the main external evidences of crime. The problems of determining the objective evidences of the “sea pollution” crime were the subject of research in the papers of such scientists as: P.S. Berzin, S.B. Gavrish, O.O. Dudorov, V.K. Matviychuk, M.I. Melnik, V.V. Stashis, V.Ya. Tatsiy, M.I. Havronyuk.

The purpose of this article is to study the international legal acts concerning the prohibition of the sea pollution and their application when qualifying the crime provided for in the Article 243 of the Criminal Code of Ukraine. Part 1 of Article 243 of the Criminal Code of Ukraine (hereinafter referred to as the Criminal Code) provides for criminal liability for the sea pollution within the internal sea or territorial waters of Ukraine or within the waters of the exclusive (marine) economic zone of Ukraine with materials or substances harmful to human life or health, or wastes as a result of violation of special rules if it created a danger to the life or health of people or living resources of the sea or could have prevented the legal use of the sea, as well as illegal discharge or disposal of the specified materials, substances and wastes within the boundaries of the inland sea or territorial waters of Ukraine or in the open sea [4].

In order to determine the essence and content of the meaning of the “sea pollution” let us refer to the analysis of international regulatory legal acts, in which the term “marine environment pollution” is used instead of the “sea pollution” since the international nature of the use of the Global Ocean determines the necessity of both delimitation and optimal combination of measures for preventing the pollution of the marine environment, which should be taken at the national and international levels.

The prohibition of marine environment pollution is provided for in the following conventions to which Ukraine is a party: the United Nations Convention for the Maritime Law 1982 [14], the Convention for the Prevention of Marine Pollution by Discharge of Wastes and Other Matter, 1972 [2], the International Convention for the Prevention of Pollution from Ships 1973, amended by the Protocol thereto in 1978 [7] (hereinafter referred to as MARPOL-73/78), the Convention for the Protection of the Black Sea against Pollution

1992 [3]. The Convention of 1972, MARPOL 73/78 and the Convention of 1992 provide for a direct prohibition of the marine environment pollution and the Convention of 1982 provides for an obligation of the states to protect and preserve the marine environment, establish the laws and regulations for preventing, reducing and controlling the marine environment pollution, as well as comply with international rules and standards in this field which definitely include specific pollution prohibition cases set forth by other conventions. The rules of the Convention of 1982 mainly constitute the jurisdictional rules, but only this Convention covers the issues related to criminal liability. The Convention of 1972 contains the prohibition of violation of its provisions and duties of the state to take appropriate measures for preventing the actions aimed to violation of provisions of the Convention and punishing for such acts. MARPOL-73/78 provides for a general requirement for sanctions in case of violation of the Convention. The Convention of 1992 contains the direction concerning the necessity to impose liability for any harm caused to the marine environment. Thus, none of the considered conventions directly provides for the establishment of criminal liability for the marine environment pollution. One should agree with the opinion of T.R. Korotkiy that the crime provided for in the Article 243 of the Criminal Code of Ukraine refers to the conventional crimes which is due to the establishment of responsibility by national law including criminal law by virtue of the obligations to be fulfilled under the convention [9].

Let us consider the objective evidences of crime provided for in the Article 243 of the Criminal Code of Ukraine. According to O.O. Dudorov, the main direct object of the crime is the established procedure for the use and protection of the sea, ecological safety of the marine environment. An additional object is human life and health, property and other amenities. The subject of the crime includes inland seas, territorial waters of Ukraine, waters of the exclusive (marine) economic zone of Ukraine and the open sea [12, p. 698]. When analyzing the international legal acts, P.S. Berzin notes that the direct object of the crime provided for in the Article 243 of the Criminal Code of Ukraine is established procedure for conservation, use, regeneration and protection of inland seas of Ukraine, open sea and territorial waters from pollution, as well as the life and health of people or marine living resources, treatment and recreation areas [1, p. 28].

Part 1 of Article 243 of the Criminal Code of Ukraine provides for two forms of committing a crime, namely: 1) violations of special rules which caused the pollution of the sea with harmful materials, substances and wastes and created hazard for the life or health of people or marine living resources or could have prevented the legal use of the sea; 2) illegal discharge or disposal of the specified materials, substances and wastes. Besides, the first form relates to the liability for pollution of the sea within the inland sea or territorial waters of Ukraine or within the waters of the exclusive (marine) economic zone of Ukraine, and the second - within the inland sea or territorial waters of Ukraine or in open sea. Qualifying evidences of a crime in its first and second forms (Part 2 of Article 243 of the Criminal Code) are such event as death or disease of people, mass mortality of the objects of animal and plant world, or other grave consequences.

When analysing the rules of the national laws, one should note that there is a collision which follows from the provisions of Article 2 of the Law of Ukraine “On the Exclusive (Maritime) Economic Zone of Ukraine”. In our opinion, the problem relates both to

determining the concept of the open sea according to Article 243 of the Criminal Code of Ukraine and disposition of the analysed article. Article 243 of the Criminal Code of Ukraine refers to the “sea pollution” and such term is also used in the title of this article. Let us analyze the etymological and semantic origin of such meanings as “sea” and “environment”. According to the Ukrainian dictionaries “sea” is a part of the ocean, a large water area with bitter-salty water which is more or less surrounded by land [10, p. 467]; “environment” is a conjunction of natural or social conditions suitable for living of any organism [10, p. 687]. According to the legal encyclopedia the “sea” is a part of the Global Ocean, which is more or less separated from it by land, seamounts or archipelago and differs from the open ocean by physical and geographical features, mainly hydrological regime [11]; “Marine environment protection” is a complex of international and national economic, sanitary, national and technical, legal and other measures aimed to prevent the pollution and eliminate the consequences of pollution of the seas and the Global Ocean [11].

Clause 4 of Article 1 of the Convention of 1982 and Part 1 of Article 2 of the Convention for the Protection of the Black Sea Against Pollution of 1992 contain a detailed and generally accepted definition of the term “marine environment pollution” which means the introduction, directly or indirectly, by a person of substances or energy into the marine environment, including estuaries which causes or may cause harmful consequences such as harm to living resources and life in the sea, hazard to human health, prevention of activities at sea, including fishing and other legal uses of the sea, reduction of the quality of the seawater used and worsening of recreation conditions.

According to sub-clause 2.15 of Clause 2 of the State Sanitary Rules and Regulations for discharging from the vessels of waste, oil-retaining, ballast water and garbage into water bodies (DSanPIN199-97) approved by the order of the Ministry of Health No 199 dated July 9, 1997, marine environment pollution means the introduction by human, directly or indirectly, of substances, microorganisms into the marine environment, including the estuarial areas of rivers, which cause or may cause harmful consequences; cause harm to the living resources and life at sea, create a hazard to human health, prevent the activities at sea, reduce the quality of seawater and worsen the recreation conditions [13].

Part XII of the Convention of 1982 is titled as “Protection and Conservation of the Marine Environment”. The pollution of the marine environment is referred to in Article 16 “Prevention of Marine Environment Pollution”, Article 26 “Marine Environment Pollution” of the Law of Ukraine “On the Exclusive (Maritime) Economic Zone of Ukraine”, sub-clause 2.15 of clause 2 of the State Sanitary Rules and Regulations for discharging from the vessels of sewage, oil-retaining and ballast water and garbage into water bodies which contain the definition of the marine environment pollution.

Similar articles in the Criminal Code of the Russian Federation (Article 252), the Criminal Code of Azerbaijan (Article 252), the Criminal Code of Kazakhstan (Article 330), the Criminal Code of the Republic of Armenia (Article 228), the Criminal Code of the Republic of Turkmenistan (Article 315) are called “Marine Environment Pollution” and the subject of such crimes is the marine environment including inland seas, the territorial and open seas and, accordingly, the marine environment of the relevant sea spaces [8, p. 56]. Consequently, the sea is not a legal category, and only the marine environment is exposed to pollution. The use of such term as “sea pollution” does not conform to international norms,

national laws or the laws of other states. Commonly accepted term is “marine environment pollution” but not the “sea pollution” [6, p. 22-26].

Thus, taking into account the fact that international acts constitute a part of national laws, it is necessary to bring our national laws into conformity with international regulatory legal acts by making appropriate changes. As it was noted in the Scientific and Practical Comments to the Criminal Code of Ukraine (edited by M.I. Melnyk, M.I. Khavronyuk), inland seawater, territorial waters of Ukraine, waters of the exclusive (marine) economic zone of Ukraine and the open sea should be considered as subject of a crime [12, p. 698]. The open sea is understood by O.O. Dudorov as a space of seas and oceans not forming a part of the inland and territorial waters of Ukraine or another state, which is not subject to any sovereignty and the use of which is governed by international legal rules [12, p. 698]. Thus, the exclusive (maritime) economic zone of Ukraine also relates to the open sea. But such a definition of open sea is outdated and does not include the existing classification of sea spaces, determination of a new category such as archipelagic waters, the issue on jurisdiction for protection and conservation of the marine environment of the exclusive economic zone, and also does not comply with international and national laws. Despite the fact that definition of the open sea is missed in the Convention of 1982, it is stated in Article 86 of this Convention that the provisions of Part VII should be applied to all parts of the sea which are not included into the exclusive economic zone or the territorial sea or the inland waters of any state, as well as to the archipelagic waters of the archipelagic states. Based on the analysis of international legal acts and national laws, the meaning of “marine environment” is much broader than such meaning as the “sea”, and therefore the subject of a crime according to Article 243 of the Criminal Code of Ukraine is the marine environment itself.

Violation of special rules when committing a crime according to Part 1 of Article 243 of the Criminal Code of Ukraine may involve: 1) actions expressly prohibited in protected shoreline belts along the marine environment (the use of persistent and strong pesticides, arrangement of landfills for household and industrial waste and sewage ponds, construction of industrial facilities, arrangements of pits for accumulation of household and waste water of amount of more than one cubic meter per day); 2) inaction related to the failure of the water consumer to take appropriate measures to prevent the pollution of the sea, in particular, when discharging into the sea a sewage containing causative agents of infectious diseases, in which case the amount of discharged pollutants exceeds the maximum allowable norms or contains substances for which no maximum allowable concentrations have been determined. The sea pollution in conjunction with violations of special rules will also take place when during sailing the wastes or harmful substances and materials are discharged within the maritime belt, as well as in case of burst or accidental discharge of harmful substances into the sea without obtaining a permission of the authorized bodies. Materials and substances are considered harmful if they, when entering the marine environment, may cause harm to human life or health, marine life, flora and fauna, and prevent legal use of the sea. These can be radioactive materials, household and sanitary sewage, crude oil, liquid fuel, sediments, residues and mixtures containing oil, pesticides, heavy metal salts, etc. [12, p. 699].

The term “wastes” covers all substances, materials and things which are formed as a result of human activities and not subsequently used at the place of their formation or detection, and which the owner gets rid of, intends or must get rid of by means of utilization or disposal. In this case, radioactive wastes are considered as material objects and substances, the activity of radionuclides or radioactive contamination exceeds the limits established by the current rules provided that the use of these objects and substances is not foreseen [12, p. 754].

According to peculiarities of the structure and the time of ending the crime, the crime referred to in Article 243 of the Criminal Code of Ukraine is formal and material, since when determining the crime as ended in its first form the sea pollution shall expose human life and health or living resources of the sea to danger, or cause harm to the treatment and recreation areas or prevent the legal use of the sea, and the crime in the second form shall be considered as ended from the moment of discharge or disposal of substances and wastes into the sea as referred to in Part 1 of Article 243.

The discharge or disposal of harmful materials, substances and wastes into the sea creates a crime provided that these actions are illegal meaning that they are performed in disregard for the requirements of the laws (for example, discharge of purified household sewage in the four-mile zone of coastal waters from the vessels). The discharge means any discharge from the vessels of pollutants or water containing the pollutants, including outflow, drainage, removal, spillage, leakage, pumping, separation or emptying. Disposal means storage or embedding of the materials in the container underseas. The discharge of the specified materials, substances, wastes may be carried out from the vessels, floating crafts, aircrafts, platforms, other artificial structures in the sea and from the shore (for example, from industrial enterprises, ports) [12, p. 699].

Special rules which are violated when committing a crime, as provided for in Part 1 of Article 243, differ in the sources of pollution. Special rules are applied to vessels and other floating crafts, aircrafts, platforms or other artificial structures in the sea. International conventions on the protection of the marine environment, as a rule, contain a clear differentiation of sources of pollution, since special international rules are applied to the vessels. Such practice was reflected in the Criminal Code of Ukraine in 1960. The sources of pollution are clearly differentiated into two main groups according to Part 1 of Article 252 of the Criminal Code of the Russian Federation, which provides for liability for pollution of the sea: “Pollution of the marine environment from land-based sources or as a result of violation of the rules of discharge or disposal from vehicles or artificial structures built in the sea ...” [5, p. 7].

Consequently, one should agree with the opinion of T.R. Korotkiy that Article 243 of the Criminal Code of Ukraine shall contain differentiation of the land-based (coastal) source of pollution of the marine environment in accordance with the international legal rules for the sources of pollution [9].

The term “pollution of the marine environment from land-based sources” has been established in international maritime law and is used in a number of conventions, including the United Nations Convention for the Maritime Law of 1982, the Convention for the Protection of the Black Sea against Pollution of 1992. Therefore, its introduction into the national laws of Ukraine will facilitate the achievement of the terminological unity of

national and international legal rules regulating the issues related to the prevention of the marine environment pollution.

Responsibility for these actions should cover all land-based sources of pollution and the types of pollution: pollution with untreated and uncleaned sewage, discharge or wastes from industrial, agricultural, utility and other enterprises, institutions and organizations. Part 3 of Article 243 provides for liability for failure of any specially responsible persons of marine vessels and aircrafts or other facilities and structures located at sea to notify the administration of the nearest port of Ukraine or another authorized body or person and also organization issuing permits for discharge in case of discharge for the purpose of disposal of any information about preparation for discharge or discharge which has been already carried out due to the urgent necessity or unavoidable losses within the inland sea waters and territorial waters of Ukraine or in the open sea of harmful substances or mixtures containing such substances exceeding the established norm, other wastes if it creates hazards to the life and health of people or living resources of the sea or could cause harm to treatment and recreation areas or prevent other legal use of the sea. Thus, the inactivity of the person specifically responsible for informing about the discharge of pollutants from the vessels and other facilities into the sea under conditions specified in Part 3 of Article 243 of the Criminal Code of Ukraine is considered to be a crime. The urgent necessity to discharge the harmful substances or mixtures means that such an act is compulsory and intended to prevent other possible harm. Such crime has a material composition and is considered to be ended if the failure to submit the relevant information to the appropriate recipients created a hazard for the life and health of people or living resources of the sea or could cause harm to the treatment recreation areas or prevent other legal use of the sea.

### **Conclusions**

Consequently, it is necessary to specify in Article 243 of the Criminal Code of Ukraine the types of spaces in which pollution may occur, for example, marine environment within the inland sea waters and the territorial sea; within the waters of the exclusive (marine) economic zone of Ukraine; in the open seas, with indication of a source of the marine environment pollution, for example, land-based source and pollution from vessels and other floating crafts, aircraft, platforms or other artificial structures at sea.

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