

Privilege or peril?

The rights of the shipmaster

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At the most recent congress of the Comité Maritime International (CMI), held in Vancouver in June 2004, it was decided that the Committee should commence work on an international study involving the increasing criminalisation of seafarers. This subject has also just been taken up by the IMO (see p10) and should be of interest to all involved in the maritime industry.

In fact, the criminalisation of seafarers has been an emerging problem for the shipping industry for some time but as those most involved had relatively little influence on maritime policy, the rest of the industry – shipowners, charterers, flag states, professional associations, maritime unions, underwriters, classification societies, as well as maritime lawyers – have practised a sort of denial that the problem was real. However, a number of recent high-profile cases have focused on the issue, bringing it to the attention of the unholy trinity: the media, the politicians and the authority. Perhaps even that would not have been enough if there had not been two additional ingredients in the mixture: the emerging global preoccupation with maritime security and the undeniable fact that criminalising seafarers discourages recruitment into a profession that is experiencing increasing shortages of skilled people.

An increasing number of recent maritime incidents have exposed significant weaknesses in the legal rights and responsibilities of seafarers. For those in command of vessels today, this causes special concern; and it indicates that the traditional privilege and honour associated with command appears instead to have become a risky and perilous burden. At a time when there is a growing shortage of well-trained mariners, this does not bode well for encouraging a new generation to consider the seagoing profession.

Not surprisingly, the practice of personally charging masters and ships'

officers criminally after a maritime accident appears to have originated in that most litigious jurisdiction – the United States – with the strange, but unsuccessful, prosecution of Captain Joseph Hazelwood, the master of the *Exxon Valdez*, in 1989. Since then the phenomenon has spread far and wide and masters and ships' officers are now regularly prosecuted and, frequently imprisoned worldwide. Prominent cases such as those involving the loss of the tankers *Erika* off France and *Prestige* off Spain come to mind, but there are many other cases involving imprisonment after prosecutions in Mexico, Venezuela, Norway, Netherlands, Canada, Australia, India, Pakistan and Japan. (A recent working paper entitled, 'Risk and responsibility for the Shipmaster', produced by IFSMA in London, provides a number of specific case studies.) Prosecutions and deprivation of liberty have also recently been extended to salvors as well as to pilots, such as the salvage crew in the *Tasman Spirit* case. Furthermore, there are some indications that many prosecutions are not even reported and it is not accurately known how many seafarers are languishing in jails worldwide. In many cases, even if the master or ships' officers or other seafarers are not jailed, they will have their identity documents confiscated so that they cannot leave the country 'pending trial', such as the *Virgo* case where Canadian authorities held the Russian master, second officer and one seaman for over 18 months.

It is not appropriate to discuss the actual technical aspects of the prosecutions involving any of the vessels. However, there are a number of common links between most cases:

1. The vessels involved were operating on legitimate international voyages. In other words, they were fully classed with reputable classification societies, had been appropriately inspected, and held all required certificates. It should be noted that whether we like or dislike flags of registry such as Malta, Bahamas, Panama, Liberia or Cyprus, they are legitimate flag states at this time.

2. All vessels involved were under the command of experienced, certificated

masters with command experience ranging from five to thirty-two years. Certificates were issued by major maritime states that have implemented STCW requirements.

3. The difficulties experienced by all three vessels occurred off the coasts of states with significant maritime traditions and experience, and well-established maritime administrations. Nevertheless, the response and actions taken by all the states involved were in breach of accepted international maritime law.

International law

It may be helpful to provide a brief overview of what aspects of existing international law, that may protect shipmasters (and other crew members), are actually in place today. At the highest global level the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), provides some specific guidance. UNCLOS codifies the long-established rule on who has penal jurisdiction over seafarers involved in an accident at sea. The convention states quite specifically that:

- '1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag state or the state of which such person is a national.

2. In disciplinary matters, the state which has issued a master's certificate or certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the state which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.'

This means, for example, that in the *Erika* case, only Malta and India had jurisdiction over Captain Mathur; in the *Virgo* case, only Cyprus and Russia had jurisdiction over Captain Ivanov; and in the *Prestige* case, the jurisdiction over Captain Mangouras rested solely with the Bahamas

and Greece. In other words France and Spain, in these incidents, acted totally against international law by jailing and/or confining the three masters. The problem in these cases was that the states that had jurisdiction either chose not to act or simply protested without taking any further action. That basically permitted the coastal states to act as they did.

In these cases India, Malta, Greece and the Bahamas could and, probably, should have instituted international legal proceedings through the International Tribunal of the Law of the Sea (ITLOS) requesting the immediate release of the masters involved. In a number of recent cases involving detained vessels, ITLOS was able to act very quickly. However, in the cases described above nothing was done. In fact, there was probably relatively little incentive for 'open registry' flag states, such as Malta or the Bahamas to do anything. This is despite the fact that under UNCLOS flag states do have certain legal responsibilities. For example, flag states are required to hold an inquiry into every marine casualty or incident of navigation on the high seas that involves a vessel under its flag that has caused serious damage or loss of life and personal injury.

However, there is no legal requirement to do anything else. Although there was more incentive for states such as India and Greece to protect their nationals, it was probably considered insufficient to act. This appears to indicate that masters who serve on 'flag of convenience' vessels, and who get into difficulties, are on their own, unless the shipowner is willing to protect them. This will be difficult when a single-ship company and an unidentifiable owner are involved – something that is often the norm today.

In the *Erika* and *Prestige* cases, France and Spain stated that they were taking action under areas of UNCLOS related to protection of the marine environment and claimed that the actions taken were, therefore, covered under international law. For example, the Spanish Government stated that its intervention actions were based on the authority given under UNCLOS Articles 56 and 73. Although the coastal state is given jurisdiction in its exclusive economic zone for the protection of the marine environment, it can only do so in conformity with other parts of the convention and with respect to the rights and duties of other states. This provision does not provide a blanket authority to do anything the coastal state wishes. Article 73 relates to the right to board vessels, but

is referring to the management of living resources and has, therefore, very little to do with boarding a tanker in distress. In other words these legal assertions had a very dubious base.

On the other hand, UNCLOS does provide coastal states with specific powers to take action when a major maritime accident threatens their coastlines and waters with serious pollution. Such powers include boarding, inspection, legal proceedings and detention of the vessel. However, even these powers are strictly limited by a number of specific and general enforcement safeguards:

- The duty not to endanger the safety of navigation or creating other hazards to a vessel, or bringing it to an unsafe port or anchorage.
- The requirement to only impose monetary penalties for pollution offences outside the territorial sea. Only monetary penalties may be imposed within the territorial sea unless the pollution resulted from a wilful act.
- That the rights of the accused should be considered in all aspects of any legal proceedings.
- That arrested vessels and their crews should be promptly released on the posting of a reasonable bond or other security.
- The requirement that violations of coastal state regulations in the Exclusive Economic Zone may not include imprisonment.

In addition, coastal states are also given specific rights to intervene when a ship on the high seas is involved in an accident that is likely to cause serious pollution damage to the coastal area. Although the relevant convention coastal states are provided with very wide powers to take action, the treaty also lays down very specific safeguards designed to ensure that the rights of the flag state, shipowner as well as master and crew are protected. It should be apparent that in the *Erika* and *Prestige* cases, one or more of these international law provisions were not followed. In both cases the rights of the shipmaster were, certainly, not considered. This also seems to be the problem with most other cases involving the criminalisation of seafarers.

■ This article is an extract from a substantially revised and condensed version of a background paper, 'Command: privilege or peril? The shipmaster's legal rights and responsibilities', presented to the Nautical Institute 12th International Command Seminar, London, May 2003 and published in the *WMU Journal of Maritime Affairs*, April 2004. A version of this paper was also delivered at the Ausmarine East Conference in Brisbane in October 2003. This was subsequently published in *Asia Pacific Shipping*, January 2004.

ICS highlights EU threat to maritime law

The International Chamber of Shipping last month highlighted shipowners' concerns about developments threatening the globally accepted system of maritime law.

ICS Chairman, Rolf Westfal-Larsen, said: 'Shipping is an international industry, which depends upon an international regulatory regime to be efficient. Politicians and rule makers must understand that the industry's safety and environmental record is set at risk whenever the global regulatory framework is disregarded. ICS is very concerned by one of the outcomes of the second reading of the draft EU Directive on Ship Source Pollution by the European Parliament Transport Committee. If the final directive retains its current form, and permits seafarers to be criminalised and threatened with imprisonment for genuine accidents, then it will be in direct conflict with the obligations of EU member states under the Marpol Convention.'

Marpol clearly states that pollution from ships is not a criminal action unless committed *'with intent to cause damage or recklessly and with knowledge that damage would probably result.'*

'The possibility of criminal sanctions for genuine accidents will clearly undermine accident investigations,' Mr Westfal-Larsen added. 'But the Marpol provisions also reflect the view of the global regulators that criminalising accidents is neither reasonable nor just, given the physical hazards that exist at sea, while the EU's intention to apply criminal penalties to ships and crew in territorial waters would appear to undermine EU plans to require ships that get into difficulties to use designated places of refuge.' The EU directive on places of refuge is intended to avoid a repetition of the circumstances that led to the break-up of the *Prestige* in 2002.

'The industry accepts the need for appropriate punishment for deliberate violations of environmental rules and supports the broad intention of the directive,' said Mr Westfal-Larsen, 'but only if the relevant EU institutions can make the small changes needed to bring the directive back into line with international law.'