

The Criminalization of Seafarers Involved in Marine Pollution Incidents



The Problem

- Increasing trend of treating marine pollution incidents as criminal acts
 - Affects Individuals
 - Affects Industry
 - Affects Marine Pollution

Overview

- Examples
- True Crimes vs. Regulatory Offences
- National and International Law
- Industry Response
- Consequences of Trend
- Possible Contributing Factors

What is “Criminalization”?

Two Aspects:

- Treating pollution incidents as “true crimes”
- Denial of procedural rights

Procedural Rights

- Right to silence
- Presumption of innocence
- Access to legal advice
- Reasonable bail
- No arbitrary detention
- Fair trial process

Seafarers uniquely vulnerable



The “Prestige”



“Scapegoating”

The “Tasman Spirit”

- “Karachi 8” held as “material witnesses”
- Then criminally charged and detained
- Held as “security” (a.k.a. hostages) for compensation

The “Hebei Spirit”

- South Korea, December 2007
- VLCC struck by passing crane barge
- Extensive oil pollution from cargo spill
- Master & Chief Officer detained 18 months

The “Full City”

- Norway, July 2009
- Bulk carrier grounded (lost power in storm and dragged anchor)
- 300 tons of oil spilled from bunkers
- Master & Third Officer detained until trial in May 2010

MARPOL and UNCLOS

- International regime for prevention of ship-sourced pollution
- Distinction between accidents and intentional acts

Certain discharges not MARPOL violations:

Annex I, Regulation 11(d)

... the discharge into the sea of oil or oily mixture **resulting from damage to a ship or its equipment**:

(i) **provided that all reasonable precautions have been taken** after the occurrence of the damage or discovery of the discharge **for the purpose of preventing or minimizing the discharge**; and

(ii) **except if** the owner or the master acted either with **intent** to cause damage, **or recklessly and with knowledge** that damage would probably result.

UNCLOS

Article 211

- National pollution prevention legislation must conform to international rules and standards, (i.e. MARPOL)

Article 230

- Violations in EEZ - only monetary penalties available
- Violations in the territorial sea - only monetary penalties unless "wilful and serious act"

Conflict of National Legislation with International Law

- Parties to UNCLOS and MARPOL obligated to conform to provisions

BUT - Canadian and EU legislation examples of non-conformance

EU Directive on Criminal Sanctions for Ship-Sourced Pollution

- EU Directive imposes penal sanctions
 - Threshold for liability - "serious negligence"
 - Applies in territorial sea, EEZ and on high seas

EU Directive challenged by Industry Coalition

On basis that:

- Contrary to MARPOL and UNCLOS; and
- Standard of “serious negligence” unclear

ECJ ruled that:

- EC not a party to MARPOL;
- UNCLOS obligations are between member states
- “serious negligence” sufficiently clear

Migratory Birds Convention Act, 1994

Amendments through Bill C-15 (2005) included:

- minimum penalties
- arrest and detention powers in EEZ
- strict liability offences with imprisonment
- vicarious strict liability offences

Bill C-16 - *Environmental Enforcement Act*

- Amends *Migratory Birds Convention Act* and *Canadian Environmental Protection Act*
 - Increases maximum monetary penalties to \$12 Million dollars per day
- Creates *Environmental Violations Administrative Monetary Penalties Act*

Responses to Criminalization

- Fair Treatment Guidelines
 - Effective July 1, 2006
 - Not binding
- IMO Casualty Investigation Code
 - In force January 2010
 - Parts I and II mandatory as per SOLAS

Will the Guidelines be Effective?

- “Accident” vs. “Incident”
- Voluntary vs. Mandatory
- Is even mandatory enough?

Tougher Penalties = Cleaner Seas?

- Majority of marine pollution from land
- Shipping industry a convenient target
- Criminalization could make things worse

Consequences of Criminalization

- Decreased recruitment and retention
- Crisis decision-making compromised
- Salvor reluctance

Negative Public Perceptions

- Sub-standard ships
- Flags of Convenience
- Diffuse ownership
- Ignorance of risks of ocean transport

ISF & ICS - "...the principle of criminalizing accidents is neither just nor reasonable given the hazards of the sea"



Conclusions

- Criminalization counter-productive
- Public perceptions must be altered
- Seafarer's plight will continue until industry beyond reproach

Discussion



The Criminalization of Seafarers Involved **in Marine Pollution Incidents**

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***Slide # 1
The Criminalization of Seafarers Involved in Marine Pollution
Incidents***

Good afternoon everyone, and a very warm welcome to all of you who have travelled to Halifax for this Assembly. A big thank you to the International Federation of Shipmasters' Associations - it's a pleasure and honour to be given the opportunity to speak to you today on the topic of criminalization of seafarers.

***Slide # 2
The Problem***

My job today is to discuss the treatment of marine pollution incidents as criminal acts. My hope is that this presentation can serve as a launching point for some productive discussion at the end of this session.

This trend of criminalization is condemned by the shipping industry and all those who support it for its negative effect on the individual seafarer, on the shipping industry, and ultimately, on the environment.

Slide # 3 Overview

I'll give you some background on the topic with a few examples of unfair treatment and provide an overview of the international regime for marine pollution prevention. We'll then look at some national legislation that conflicts with the international law, and the industry response to this trend. We'll consider the expected consequences of criminalization, and whether the goal of cleaner seas is furthered by tougher penalties.

Slide # 4 What is Criminalization?

The term "criminalization of seafarers" is used to describe the treatment of maritime incidents as "true crimes". It is also used as a blanket term to describe the denial of procedural and human rights in the investigation and prosecution of those incidents.

Although unfair treatment is not restricted to marine pollution incidents, our discussion will be limited to that context today.

Slide # 5 Procedural Rights

Seafarers have the right to due process, whether they are involved in accidental or intentional discharges. These rights include access to legal advice, the presumption of innocence, and the right not to be arbitrarily detained.

Slide # 6 Unique Vulnerability

Criminalization of seafarers is of great concern to the marine transportation community. From a practical perspective, seafarers are the single most valuable resource of the industry.

More importantly, from a human perspective, seafarers are a uniquely vulnerable group. They've been described as "...a special category of worker..." needing "... Special protection, especially in relation to contacts with public authorities."

The industry is quick to acknowledge that criminal liability is an appropriate response for intentional and reckless acts of pollution. However, the shifting of responsibility onto the individuals who just happen to be on the scene is unfair and inappropriate for accidents.

Two of the more notorious incidents of mistreatment are the oil pollution cases of "The Prestige" off the coast of Spain in 2002 and of "The Tasman Spirit" off the coast of Pakistan in 2003. These cases, although certainly not the first of their kind, served to raise the profile of the problem in the last decade.

Slide # 7
The “Prestige”

The case of “The Prestige” is an example of “scapegoating” the Master for pollution caused at least in part by failures of the coastal state in denying the vessel a port of refuge and dictating that it should be towed out to sea in heavy weather where it broke in two.

Before the vessel sank, Captain Mangouras had successfully evacuated his crew and had worked tirelessly to save the vessel. When he reached land however, he was interrogated and jailed. After three months, with bail posted in the amount of 3,000,000 EUROS, he was released, but obligated to stay in Spain and report daily to the police. More than two years after the incident, he returned home to Greece, but still has to report bi-weekly to the Greek authorities.

Slide # 8
Scapegoating

The injustice suffered by Captain Mangouras continues. In September 2010, the Grand Chamber of the European Court of Human Rights upheld the bail amount as reasonable, given the huge environmental damage caused. This is even though bail is supposed to be assessed by reference to Captain Mangouras and his assets. Clearly the Master did not have the means to post this amount of bail.

In so doing, the Grand Chamber continued the trend of applying a different standard in the context of marine oil pollution.

**Slide # 9
The “Tasman Spirit”**

The case of the “Tasman Spirit” is an example of seafarers being detained first, as “material witnesses”, and later as “security”, or some would say “hostages”, to ensure compensation to the coastal state, for the pollution damage caused by the incident.

The “Tasman Spirit” was a single-hulled tanker which ran aground in a dredged channel near Karachi, which was shallower than shown on the nautical charts. The master, crewmembers and the salvage master, referred to as the “Karachi Eight”, were detained for nine months.

**Slides # 10 and # 11
The “Hebei Spirit” and The “Full City”**

Two more recent examples are of the oil discharges associated with “The Hebei Spirit” in South Korea in 2007 and “The Full City” in Norway in 2009. While at anchor, the “Hebei Spirit” was hit by a crane barge and the “Full City” was grounded after losing power in a storm. In both cases the Master and a senior officer were detained for 18 and 12 months respectively.

These incidents both occurred after the passing of the IMO/ILO Fair Treatment Guidelines. Unfortunately, these are not the only such incidents post-Guidelines.

Slide # 12
MARPOL AND UNCLOS

MARPOL and UNCLOS serve as the international regime for the prevention of ship-sourced marine oil pollution.

Both MARPOL and UNCLOS distinguish between accidental and intentional discharges.

Slide # 13
Certain discharges not MARPOL violations

Accidental discharges of oil are not violations of MARPOL. These are defined to be discharges resulting from damage to a ship or its equipment, so long as all reasonable precautions are taken to prevent or minimize the discharge and so long as there is no intent or recklessness to cause damage.

Slide # 14
UNCLOS

Under UNCLOS, party states are obligated to protect and preserve the marine environment through legislation.

Article 211 provides that national pollution prevention legislation must conform to international rules and standards, which includes MARPOL.

Article 230 provides that only monetary penalties are available for violations in the EEZ, whether accidental or intentional, and that violations in the territorial sea can only be penalized monetarily, absent a “wilful and serious act”.

Article 230 also provides that the rights of the accused shall be observed.

Slide # 15
Conflict of National Legislation with International Law

Although coastal states have the sovereign right to legislate regarding marine pollution and to enforce the sanctions provided for in that legislation, these sovereign rights are constrained by UNCLOS.

Two of the more notorious examples of national legislation which does not conform to the dictates of UNCLOS or MARPOL, are the 2005 EU Directive and the Canadian MBCA and CEPA.

Slide # 16
***European Union Directive on Criminal Sanctions for
Ship-source Pollution***

The EU Directive on Criminal Sanctions for Ship-source Pollution entered into force in October 2005, and remains a source of considerable concern for industry and flag states.

The EU Directive purports to apply to the territorial sea, the EEZ and on the high seas. It imposes criminal liability with imprisonment as a penalty if a

pollution incident was committed with intent, recklessness or by “serious negligence”. This conflicts with Article 230 of UNCLOS, which provides for monetary penalties only beyond the territorial sea.

The standard of “serious negligence” is a lower threshold than that dictated in MARPOL, which provides that if there is not at least recklessness and knowledge, there is no violation.

The other concern regarding the standard of “serious negligence” is that courts may interpret it according to the seriousness of the pollution, rather than the seriousness of the act which resulted in the pollution.

Slide # 17
EU Directive Challenged by Industry Coalition

In 2005, a coalition of maritime interests including INTERTANKO, Lloyd’s Register and the ISU (the “Coalition”) challenged the validity of the EU Directive.

The Coalition argued at the European Court of Justice that the EU Directive was contrary to MARPOL and UNCLOS and that the term “serious negligence” was not sufficiently certain.

The basis of the Coalition’s challenge was that proper standards for the prevention of marine pollution must be established on a global basis and that international law must be upheld.

However, in June 2008, the ECJ ruled that as the EC itself (unlike its member States) is not a party to MARPOL, it is not bound by the Convention. The Court also took the view that although the EC is a party to UNCLOS, that Convention does not give individuals rights or freedoms on which they can rely against States.

The Court also upheld the term "serious negligence" as sufficiently certain.

The decision and the Directive continue to concern the industry.

Slide # 18
Migratory Birds Convention Act, 1994

In Canada, the offending legislation is the *Migratory Birds Convention Act, 1994* ("MBCA"), and the CEPA, as amended in 2005 and in 2009 by Bills C-15 and C-16.

The MBCA prohibits the deposit of any substance that is harmful to migratory birds in waters frequented by them.

The offending provisions include:

- the imposition of minimum penalties;
- extension of jurisdiction to the EEZ;
- creation of strict liability offences with imprisonment as a penalty; and
- creation of vicarious strict liability offences.

Like the EU Directive, the potential for imprisonment in the absence of intention or recklessness conflicts with Article 230 of UNCLOS.

Slide # 19
Bill C-16 – Environmental Enforcement Act

Bill C-16 served to increase the monetary penalties to \$12 million dollars per day. This certainly nullifies the argument used by those in favour of penal sanctions, who say that pollution fines are ineffective because they are “just the cost of doing business”.

Slide # 20
Responses to Criminalization

Fair Treatment Guidelines

In July 2006, the IMO "Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident" (the “Guidelines”), entered into force.

Critics, including the Company of Master Mariners of Canada, say that the Guidelines should apply to “maritime incidents”, rather than “maritime accidents”, as after all, due process is not only for the blameless.

The fact that the Guidelines are voluntary is said to be inadequate and that the rules must be mandatory if they are to serve as true protection.

IMO Casualty Investigation Code

Another recent development is the IMO Casualty Investigation Code, which entered into force in January 2010 and is mandatory through amendments to SOLAS. Among other things, the Code dictates procedural safeguards in respect of obtaining evidence from seafarers

Slide # 21 Will the Guidelines Be Effective?

The problem of criminalization though, doesn't appear to be one that can be solved through the imposition of guidelines and codes, given that countries like Spain have arbitrarily detained an EU citizen with the blessing of the European Court of Human Rights, and given that the EU and Canada are legislating in contravention of their international obligations. These are not countries where citizens live in fear of arbitrary detention or where human rights are routinely dismissed. And yet, the spectre of marine pollution seems to result in the rules being applied differently to seafarers.

Slide # 22 Tougher Penalties = Cleaner Seas?

Slide # 23 Consequences of Criminalization

Criminalization is expected to have negative ramifications on recruitment and retention of seafarers, decision-making in crisis situations and salvage response.

Bottom line? In attempting to “get tough on polluters”, coastal states may end up with more disastrous pollution, not less.

***Slide # 24
Negative Public Perceptions***

Sub-standard ships, flags of convenience and diffuse vessel ownership are a few aspects of the shipping industry that contribute to the negative perception of the industry, which results in seafarers being convenient scapegoats. These are the aspects of the industry, along with dramatic photos of oiled birds and devastated coastlines, that shape public perceptions regarding the shipping industry.

***Slide # 25
Reality Check – Photo & quote re: hazards of the sea***

What is needed is a fundamental change in the way that the world views shipping, and its value to the global economy. A fundamental change in the world’s understanding of the challenges and dangers which are the daily stuff of life at sea. A fundamental change in how the world sees seafarers, as brave, dedicated, hardworking professionals instead of as shadowy figures who dump oil in your backyard in the night. A fundamental change in the world’s understanding of the compensation

systems available to address the damage caused by spills. A fundamental change in the way the world views its own culpability for the state of our environment, instead of conveniently pointing the finger elsewhere.

Efforts are being made to address what has been referred to as the public's "Sea Blindness", such as the IMO 2010 "Year of the Seafarer". This initiative was intended to raise awareness among the general public of the indispensable services the shipping industry renders to society at large. These efforts must continue.

Slide # 26 Conclusions

There are no redeeming qualities to the policy and practice of criminalizing seafarers – it has the potential to hurt the individual seafarer, the industry and the environment.

Stakeholders are working hard to address the problem of criminalization by implementing guidelines and codes for fair treatment, challenging invalid national legislation, attempting to address sub-standard shipping and initiating programs like the Master Mariner Protect Benefit Scheme recently introduced by the IFSMA. These efforts make the issue of criminalization impossible to ignore, but so far, have not succeeded in effecting concrete change.

Slide # 27
Discussion

Thank you for your attention.