

**Protection of Masters:
Emerging Problems for
the Shipping Industry**

Prof Edgar Gold QC

Edgar Gold, CM, QC.

BA, LLB. (Dalhousie); PhD. (Wales); Dipl.Naut.(CCGC hc); FNI, MCIT; MCIArb.

Professor Gold grew up and went to sea in Australia, but settled in Halifax, Canada in the early 1960s. However, he is now based in Brisbane. He is a Queen's Counsel and was a Senior Partner with the law firm Huestis Holm in Halifax where he specialized in maritime, energy, environmental, and international commercial law.

He is a former President of the Canadian Maritime Law Association and a Titulary Member of the Comité Maritime International. Dr. Gold is a Master Mariner (UK and Canada) and served at sea for 16 years, including several years in command. He was Professor of Maritime Law and Resource and Environmental Studies at Dalhousie University, Canada's oldest English-language university, for 20 years, and continues to hold the position of Adjunct Professor there. He also holds appointments as Adjunct Professor at the University of Queensland, Faculty of Law, as well as the World Maritime University in Malmö, Sweden. He is also a former Executive Director of the Oceans Institute of Canada. He is Visiting Professor of Maritime Law and the Canadian Member of the Board of Governors at the IMO-International Maritime Law Institute, Malta.

Professor Gold has active experience in most regions of the world and has over 250 publications in the maritime law and policy field. He was awarded the Commander's Cross of the Order of Merit by the German Government and the Order of Canada by the Canadian Government in 1997.

**The Protection of Masters and Seafarers from
Criminalization:
Emerging Problems for the Shipping Industry**

By

Professor Edgar Gold*, CM, QC

Centre for Maritime Law, University of Queensland, Brisbane

Prepared for the

31st Annual Conference 'Navigating the Sea of Change'

The Maritime Law Association of Australia and New Zealand

Adelaide, South Australia

29 September – 1 October 200

* B.A., LL.B., Ph.D., F.N.I., MCIT, MCI Arb., Master Mariner (FG). Consultant and former Senior Partner with Huestis Ritch, Barristers and Solicitors, Halifax, NS, Canada. Professional affiliations include Adjunct Professor of Law and Associate, Centre for Maritime Law, University of Queensland, Brisbane, Australia; Adjunct Professor of Maritime Law, Dalhousie University, Halifax, NS, Canada; Adjunct Professor of Maritime Law, World Maritime University, Malmö, Sweden, Past-President, Canadian Maritime Law Association; Visiting Professor and Canadian Member of the Board of Governors, IMO-International Maritime Law Institute, Malta; Titulary Member, Comité Maritime International; Chairman, Nautical Institute (Qld).

The Protection of Masters and Seafarers from Criminalization: Emerging Problems for the Shipping Industry¹

Edgar Gold

Introduction

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 criminalization of seafarers. This subject has also just been taken up by the International Maritime Organization (IMO) and should be of interest to all involved in the maritime industry. In fact, the criminalization 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, i.e. shipowners, charterers, flag states, professional associations, maritime unions, underwriters, classification societies, as well as maritime lawyers, have practiced a sort of denial that there was a real problem. However, a number of recent high-profile cases have focussed on the problem and have brought 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 criminalizing seafarers discourages recruitment into a profession that is experiencing increasing shortages of skilled seafarers.

This presentation will establish that this is a real problem for the shipping industry, in Australia as well as elsewhere, and that all maritime interests need to focus on solutions sooner rather than later. An increasing number of maritime incidents have, in recent times, exposed significant weaknesses in the legal rights and responsibilities of seafarers. For those in command of vessels today, this causes special concern, and 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 appears to be a growing shortage of well-trained mariners, this does not bode well for encouraging a new generation to consider the sea-going profession. Yet it appears that this area has hardly been addressed. This presentation will also address the questions: what legal rights and responsibilities do shipmasters have today and how are such rights and responsibilities protected as well as enforced?

¹ This is a substantially revised and condensed version of a background paper entitled: "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 J. 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.

The Problem

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 Capt. 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 world wide. 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.² Prosecutions and deprivation of liberty have also recently been extended to salvors as well as to pilots.³ 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".⁴ (See also Appendix I)

International Law Aspects

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 classifications 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.

² A recent working paper entitled "Risk and Responsibility for the Shipmaster" produced recently by the International Federation of Shipmasters' Associations (IFSMA) in London, provides a number of specific case studies. Information is also provided in a paper presented at McGill University, Montreal in April 2003 by prominent New York maritime defence attorney Michael G. Chalos, entitled: "Should I go down with the Ship, or should I rot in Jail –A modern Master's Dilemma."

³ The salvage crew in the *Tasman Spirit* case in Karachi is still being held, whilst attempts to prosecute the Great Barrier Reef pilot under Australian environmental legislation has failed.

⁴ In the *Virgo* case Canadian authorities held the Russian master, 2nd officer and one seaman for over 18 months.

It may be helpful to firstly 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),⁵ provides some specific guidance. UNCLOS codifies the long-established rule on of who has penal jurisdiction over seafarers involved in an accident at sea.⁶ The convention states quite specifically that:⁷

- “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 Capt. Kumar and in the *Prestige* case the jurisdiction over Capt. 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 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 case examples 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.⁸ For example, flag states are required to hold an inquiry into every marine casualty or incident of navigation on the high seas that, involving a vessel under its flag has caused serious damage or loss of life and personal injury.⁹ 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.¹⁰ This

⁵ In force since 1994. See Institute of Maritime Law, *Ratification of Maritime Conventions* (London: Lloyd's Press, 1991-2003), Vol. I.1.170.

⁶ This principle was first established in 1927 by the Permanent Court of International Justice in the famous *Lotus* case. *France v. Turkey (The Lotus)* P.C.I.J. Ser A. No. 10 (1927). The principle was the set out in the *Convention on the High Seas 1958*, Art. 11, *Ratification of Maritime Conventions* note 14 above, Vol. I.1.100.

⁷ Article 97.

⁸ UNCLOS, Art. 94, ‘Duties of the Flag State’.

⁹ UNCLOS, Art.94(7).

¹⁰ In the *Prestige* case Greece made a number of official protests to Spain and the European Union, but there was no additional follow-up. It is not known if the Bahamas lodged any type of protest.

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,¹¹ it can only do so only 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.¹² 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 in UNCLOS including:

- 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.¹³
- 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.¹⁴
- That the rights of the accused should be considered in all aspects of any legal proceedings.¹⁵
- That arrested vessels and their crews should be promptly released on the posting of a reasonable bond or other security.¹⁶
- The requirement that violations of coastal state regulations in the Exclusive Economic Zone may not include imprisonment.¹⁷

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.¹⁸ Although the relevant convention coastal states are provided with very wide powers to take action, the treaty also lays

¹¹ UNCLOS, Art. 56(1)(b)(iii).

¹² UNCLOS, Arts 220 & 221.

¹³ UNCLOS, Art. 225.

¹⁴ UNCLOS, Art. 230 (1) & (2).

¹⁵ UNCLOS, Art. 230 (3).

¹⁶ UNCLOS, Art. 73(2).

¹⁷ UNCLOS, Art. 73(3).

¹⁸ *International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, 1969*(INTERVENTION 1969). Spain and France are both parties to the Convention.

down very specific safeguards designed to ensure that the rights of the flag state, shipowner as well as master and crew are protected.¹⁹ Without going into further details, 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 criminalization of seafarers.

The Legal Rights and Responsibilities of Seafarers

Judging from the many cases today, shipmasters today seem to have many responsibilities but few, if any, rights! This is at least partially due to the fact that ships' command operates under a number of customary rules, but very few that are set out formally. It can even be said that the other crew members of a vessel have more protected rights than their commanding officer, as their rights are protected under international law²⁰ and under the laws and regulations of most national maritime administrations. However, masters are often directly or indirectly excluded from such regulations. To some extent this is due to the fact that the master has traditionally been considered to be the direct link to the shipowner's management structure. The master is considered the agent for any act that may fall within the customary legal authority of the master, unless some legal limitations on such authority have been clearly stated.

What is this 'customary legal authority?' It has been stated with some authority that:

"The master is charged with the safety of the ship and cargo; in his hands are the lives of passengers and crew. His position demands the exercise of all reasonable care and skill in navigation, of at least ordinary care and ability in the transaction of business connected with the ship, and the constant use of patience and consideration in his dealings with those under his command or entrusted to his care."²¹

In other words, the liabilities of a master are practically unlimited and are co-extensive with the loss occurring through what will be considered to be any negligent or wrongful act by the master. In fact, a master is personally liable under all contracts he concludes in relation to the ship's employment, including contracts for repairs, supplies and other necessities.

This extraordinary responsibility and commensurate legal liability has been developed over a long period of time and originates from a shipping era when communications with shipowners were very difficult or even impossible. In modern times the master's authority has been somewhat curtailed due to the access of instantaneous communications with the shipowner. However, this reduction in authority relates more to the commercial aspects of ship operation. For example, the master's authority is now also frequently defined in and limited by specific clauses in printed forms of bills of lading and charterparties.

¹⁹ *INTERVENTION* 1969, Arts. III and V.

²⁰ By a large number of widely accepted international conventions as developed by the International Labour Organization (ILO). See also, K.X. Li & J. Wonham, *The Role of States in Maritime Employment and Safety* (Dalian: Dalian Maritime University Press, 2001).

²¹ H. Holman, *A Handy Book for Shipowners and Masters*, 16th Ed., (London: UK P&I Club, 1964) at 5.

Furthermore, in most ports shipowners have appointed agents to conduct the ship's business locally. Nevertheless, the general authority and legal responsibility of a shipmaster still includes all acts generally necessary for carrying out the voyage and for fulfilling carriage of goods by sea contractual obligations. Although the master is the shipowner's agent for all acts that are normally within his authority, if extraordinary events arise, the master automatically assumes significantly increased authority.²²

The master's legal authority and responsibility outlined above has been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master's authority and responsibility is something that is accepted in terms of customary law on a global basis. Nevertheless, it must be emphasized that these customary rules were not only developed in the sailing ship era, when communications were rudimentary, but also that they were principally created in order to assist shipping as a commercial enterprise. In fact, the master's liability has, for many years, been a 'legal fiction' as such liability is generally covered under a ship's protection and indemnity (P&I) insurance policy. This basically means that the master has total responsibility for anything that occurs on the ship or that involves the ship, but the liabilities arising out of such operation are covered under the owner's liability insurance. This has been commercially very convenient and has ensured that shipowners are not directly exposed to the repercussions from actions over which they had no direct control, except if such actions occurred with their "actual fault and privity"²³ or "...if it is proved that the loss resulted from his (the shipowner's) personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."²⁴ Unless such exceptions applied shipowners were able to limit their liability exposure for property and personal claims that arose from any accidents in ship operations.

This procedure also exposed the 'negligent' master to a form of 'double jeopardy'. For example, if the ship was involved in a collision for which it was eventually held to blame, it was likely that the master would lose his job whilst, at the same time, his certificate might also be suspended or even cancelled by the flag state's maritime authorities. Nevertheless, the industry and those in command of ships accepted this procedure as a calculated risk that was considered to be an incentive for safe operations. Shipmasters understood the system they operated in and knew that they would be protected against legal liability arising from operational accidents, but that they risked both their position and professional qualification if they were careless, reckless or irresponsible.

As already indicated, this system appeared to work reasonably well for many years. There were occasional accidents that exposed unacceptable reckless or irresponsible behaviour by shipmasters²⁵ or shipowners,²⁶ but the

²² Holman, note 21 above, at 6.

²³ Under the Limitation of Shipowners' Liability 1957 Convention, Art.1, and confirmed by numerous legal cases.

²⁴ Under the Convention on Limitation of Liability for Maritime Claims, 1976, Art.4.

²⁵ For example, *Lady Gwendolyn* [1965] 1 Lloyd's Rep. 276; *Grand Champion Tankers Ltd. v. Norpipe A/S (The Marion)* [1984] 2 Lloyd's Rep. 1 (H.L.).

legal system was generally able to respond positively in such instances and ensure that maritime law was well enough defined to deal with such incidents. However, all of this developed during a lengthy period in which shipping was operated by highly responsible, private family, or closely held public companies that were directly involved in the day-to-day operations of the ships they owned. Such ships were registered in major flag states with experienced maritime administrations that strictly enforced national and international safety regulations. The ships were operated by experienced, properly qualified masters and officers, who were supported by well-trained ratings. Most, if not all, crew members usually originated from the same country and, often from the same region or city. The shipowning company had a 'hands-on' management structure that frequently involved the principal owners themselves, who employed an experienced technical staff usually drawn from former masters and engineers on their ships.

So far the emphasis has been on the shipmaster's responsibilities and liabilities under this traditional system. Nothing has been said about the shipmaster's rights. In fact, there was little need. The master was generally protected by the shipping company he worked for through an employment contract or similar arrangement. If there were operational problems, the company stepped in to protect the master, either directly, or through the company's network of reliable agents, lawyers or P&I club. The flag state's maritime administration had certain regulatory responsibilities affecting the master's rights in terms of disciplinary actions either undertaken by the master or against the master. In such cases the shipmaster's rights were well protected. Apart from some general provisions in certain ILO conventions, there was no international legal regime affecting the rights of shipmasters. There appeared to be no need for it! It is hard to believe that such an uncomplicated system ever existed!

Seafarer Rights and Responsibilities in a Globalised Shipping Industry

By comparison, today's globalised²⁷ shipping world frequently consists of:

- Unidentifiable shipowners.
- Convoluted ship management systems.
- A great variety of open registry flags.
- Multi-national crews with commensurate communications difficulties.
- Inexperienced or poorly trained ships' officers often with 'dubious' qualifications.
- Overregulated administrative and inspection systems.
- Coastal states with a preoccupation, to the exclusion of almost everything else, of protecting the marine environment.
- Predominant commercial "bottom-line" orientation.

²⁶ For example, *The Princess Victoria* [1953] 2 Lloyd's Rep. 619; *Lady Gwendolyn*, above note 25.

²⁷ A searching inquiry recently outlined the many shortcomings of today's international shipping industry. See, International Commission on Shipping, *Ships, Slaves and Competition* (Newcastle, Australia: ICONS, 2000).

The global maritime system has undergone dramatic changes in a relatively short period of time and, as a result, shipmasters are today faced with operational realities that are almost totally at odds with a legal regime that was created long ago for a very different shipping industry. Although the new legal regime is international, extremely complex, and wide-ranging,²⁸ it has somehow neglected or overlooked to cover the rights and responsibilities concerning those actually operating and commanding ships today. Furthermore, this has caused, and is likely to continue to cause problems for shipmasters to the extent that maritime command, and the rights and responsibilities involved, may be seriously compromised, especially when maritime accidents occur.

There is no doubt that the globalisation of the shipping industry has also had many positive aspects. On the other hand, as already indicated, in terms of the human aspect of shipping, it has also caused significant difficulties. This has had a special effect on the rights and responsibilities of those who command ships today. In fact, it is probably fair to state that shipmasters today have significantly increased responsibilities in all aspects of ship operations, but that their rights have been significantly eroded. In terms of responsibilities masters today have lost the backup 'network' that existed in more 'traditional' times. Although masters today have virtually instantaneous contact with their owners or managers, this is often less helpful than it might appear. In many cases, relatively large shipping groups with very diverse ownership, ranging from investment companies to banks, are operated by fairly small management companies that must be almost totally 'bottom-line focused' if they wish to keep their business. Although there is nothing wrong with commercial performance in a competitive business, it also has a 'down-side' for shipmasters. In many instances the management company is only able to provide very minimal support, often from individuals who may not be very well trained in the industry. If something serious occurs during the voyage the master is as alone as he was during the sailing ship era—but without the power and authority he then had!²⁹

As already indicated, shipping is now one of the most highly regulated industries anywhere with rules emanating from international, regional, national and even industry levels. If one talks to any serving master today the main complaint will be paperwork, bureaucracy and more paperwork! Yet failure to carry out these legal responsibilities and related operational requirements can result in delay, detention, criminal liability³⁰ and in some regions even imprisonment.³¹ In addition, masters must be capable of operating vessels ranging from the very modern and complex, to elderly, tired and sub-standard, plus short port turn-around times, often unrealistic time schedules, and demanding charter contracts. Furthermore, most ships today operate with multi-

²⁸ See, for example, P. Boisson, *Safety at Sea—Policies, Regulations & International Law* (Paris: Bureau Veritas, 1999); P.K. Mukherjee, *Maritime Legislation* (Malmö: WMU Publications, 2002).

²⁹ This was very well outlined by Capt. W.E.R. Wingate, "Towards the Empowered Shipmaster," *Seaways*, September 2001, at 15-16.

³⁰ See, A.K. Bansal, "The 'Designated Person' and Criminal Liability". *Seaways*, September 2001, at 21-22.

³¹ Michael G. Chalos, "The Criminal Law and the Seafarer-A US Perspective". *Seaways*, January 2001, at 21-24; A.K. Bansal, "Time for Mandatory Insurance-The Criminal Law and the Seafarer". *Seaways*, November 200, at 7-8; C.J. Parker, "Criminal Law and the Seafarer". *Seaways*, October 200, at 7-8.

national crews with a variety of social and cultural problems. In many cases such crews may not be as well trained as they should be, and the certificates of deck and engine watch officers may, at times, be suspect. The master will have little or no control over the engagement of the crew, who may often be hired under terms that are less than basic.

During brief stays in port the master, who has usually no on-board administrative support, will be inundated with surveyors, inspectors, and other 'official' visitors representing dozens of agencies and institutions. Fatigue is another common complaint by shipmasters, especially during voyages to regions with heavy maritime traffic, adverse weather conditions, close port calls, or a combination of all of these. Yet in many cases masters rarely complain, as there is a well-founded fear that complaints may lead to dismissal or other sanction. Although there appears to be a shortage of experienced masters, it also seems that there is always someone who will take over! This aspect places almost intolerable pressure on masters, who must balance the safety of the vessel and the existing regulatory requirements, with the commercial interests and expediency of the owner. Many masters from developing states might find this especially difficult as they are likely to be especially fearful of losing their job if they don't comply with what may, at times, be unreasonable demands.

This aspect relates directly to remuneration for shipmasters and other seafarers today. This subject is not often discussed as it is generally considered to be something that is simply a private contractual arrangement and not something that professional associations should be come involved in. Nevertheless, as there may well be a clear link between effective command and the reward for holding such a position, it will be necessary to explore this aspect further. This must also be seen against the background of who is actually in command of ships today. We have already stated that the traditional style of ship management is a thing of the past. This is equally true for ship operations today. This is best illustrated by the following outline of the present composition of the world fleet:

GLOBAL DISTRIBUTION OF THE WORLD FLEET 2002³²

	TONNAGE³³	PERCENTAGE
PRINCIPAL OPEN REGISTRIES	402	48
DEVELOPED STATES	207	25
DEVELOPING STATES	185	22
OTHER	31	5

This table shows that at least three quarters of the world fleet is today operated under 'non-traditional' flags. It follows that an even higher percentage of ships may be under the command of masters drawn from 'non-traditional' states. In

³² UNCTAD, *Review of Maritime Transport 2002* (Geneva: UNCTAD 2003) at 25.

³³ In Millions DWT.

other words, the whole maritime system has changed to the extent that the developed states fleet is not only disappearing quickly, but that mariners drawn from such 'traditional' states are also less and less likely to be available.

This aspect has a direct bearing on this discussion, as it affects the rights and responsibilities of shipmasters. The major shift in the industry is, obviously, market driven, as the vessels under open registry flags and by developing states, are operated at significantly lower costs. Although it is not suggested that all vessels under such flags are operated under lower standards, some are. This is borne out by the annual statistics provided by the various port state control agencies.³⁴ However, such ships are also often under the command of masters who may well be insufficiently rewarded for what they are required to do. What is suggested is that there is a direct relationship between job satisfaction and job commitment. In other words, many masters are today given greatly increased responsibilities, with relatively modest rewards, but with even less protection of their rights.

As already indicated, the operation of ships today is more complex than ever and size, speed and advanced technology, combined with ever increasing regulatory demands³⁵ a competitive commercial world place a very high level of pressure on those in command of vessels today. For example, a modern container vessel or double-hull VLCC, fully loaded, may easily exceed a value of \$300 million. Large LNG carriers and cruise vessels may have a value more than double that amount. This can be compared to an industrial plant ashore, valued at \$200-\$400 million, that would have a large management structure, consisting of administrative, financial, planning, safety, security and legal staff, in addition to general employees. The managing director or chief executive officer, would have direct contact with upper management, and would have a reward structure consisting of excellent salary, various bonuses, retirement fund, car and other emoluments, possibly even share options, and contractually-agreed job security. If he or she makes a disastrous decision and is dismissed, there will probably be a significant contractual separation payment. Unless there is clear evidence of criminal negligence or illegal activity criminal prosecution is very rare and imprisonment even more unlikely. The owners/shareholders of the corporation have agreed to these conditions because they feel that it is good for business.

Yet it appears that the person who manages a 'floating plant', who has far greater responsibilities, is generally rewarded at the level of a lower-level technical manager, in the shore-based example given above. Furthermore, as outlined in this paper, in many cases, such a 'manager' has relatively little support, very few rights and almost no job security. Is this a problem that is linked to maritime safety as well as one that discourages the recruitment of persons with a high level of education and competence into the maritime industry? Why should the maritime industry be so different?³⁶ There does not seem to be an easy answer.

³⁴ See, for example, Edgar Gold, *Gard Handbook on P&I Insurance* (Arendal: Gard A.S. 2002) at 420.

³⁵ The entry into force of the International Ship and Port Facility Code (ISPS Code) on 1 July 2004 has placed an additional layer of maritime security responsibility on ships and their masters.

³⁶ See, Editorial, "Protecting Masters", *Lloyd's List*, 1 July 2001.

Conclusions

It is probably true that command at sea has become more of a peril than the privilege and honour it once was. It is not yet clear if the industry faces a crisis situation in this area. That will only become apparent:

- If there will continue to be major maritime accidents at regular intervals that have obvious human error aspects.
- If the *ISM Code* system proves to be inadequate.
- If the various port state control regimes are insufficient.
- If there is a 'real' shortage of adequately trained navigating and engineering officers.
- If the direct link between ship ownership, ship management and ship operation is further dissolved.
- If the trend of coastal states' legislation that uses criminal prosecution of seafarers involved in maritime accidents or pollution incidents as a political statement continues.³⁷
- If vessels are held up and otherwise delayed through criminal action against master and officers.

The industry needs to make some choices. For example, if ships' operational decision-making is to be no longer based on board but, instead, on shore, then the very convenient 'legal fiction' of making shipmasters responsible for almost everything has to be changed or abandoned. That is probably unlikely as it would upset the long-established, delicate balance that exists between ship operations, liability and hull insurance, and cargo risks. However, the industry needs to realize that they cannot have it both ways. They either have someone in command of ships who has specified legal responsibilities and who is commensurately 'backed up' by management and flag state, or someone who is simply the on-board manager of a movable plant called a ship. It is clear that the industry would opt for the former rather than the latter. But if this is so, then decisions need to be made on a number of aspects that directly affect responsible command. This would include as a minimum:

- Ships that fully meet international standards.
- Master, officers and crews that are trained to STCW requirements.
- Masters, officers and crews who are adequately rewarded with reasonable working conditions to an international standard for the work they do and the type and complexity of the ships they operate.
- Ship operations that meet *ISM* and *ISPS Code* standards.
- Registration of ships in states, including Open Registry States, that provide adequate supervision of international safety and labour standards and, at the same time, are prepared to intercede in case of accidents involving vessels under their flag.
- Clear linkages between ship management and ship operations.
- Adequate representation of ship and master in case of maritime accidents by management, liability underwriters and classification society.

³⁷ At this stage this trend seems to be strengthening with many states including Australia, Canada, the EU states and the US, promulgating new penal provisions in legislation, usual 'environmental' that attempts to bypass the UNCLOS provisions against imprisonment.

It is conceded that in the modern context this may be a tall order, even though the points made consist of the most basic legal requirements that are supposed to be in place already. However, it is also suggested that these standards are also good for business, as understood by most of the better operators who instituted such a system long ago. Nevertheless, it is suggested that it needs to be codified in some way or other. As is well known, the maritime industry has a number of codes that, although initially voluntary, have worked so well that they have become mandatory. What appears to be needed is an 'International Command Code' that spells out the legal, operational and commercial responsibilities and rights of those in command of ships today. Such a code could set out the basic legal responsibilities and rights of the various parties that are directly involved and include:

- The master.
- The shipowner, ship manager, ship charterer.
- The flag state.
- The port and/or coastal state.
- The various underwriters.

As already indicated, most of these rights and responsibilities are already set out under international law, traditional maritime law or customary commercial practice. As a result, there may be no need to create a new legal regime, but simply set out, in manageable form, what already exists. However, the code would be helpful to all involved as it would provide an accessible guide to what has to be done and what cannot be done in terms of command of ships. Although such a code would not be legally enforceable—at least initially—it could be quite persuasive, as any breach would be difficult to defend in any related legal action. In this respect it would be quite similar to the *ISM Code*, which states the obvious for well-run operations, but is necessary for those that are not. Most of all, a Command Code might, at the very least, provide a reassuring 'safety-net' for masters and other seafarers who are today often deprived of some of their most basic rights. It is hoped that the initiatives undertaken by the IMO, and supported by the CMI, will be taken up by the wider maritime world.

APPENDIX I

Notable Cases 1989-2003

1. *Exxon Valdez*. 1989. US flag VLCC. Major Pollution in US waters. Master jailed, prosecuted.
2. *Union*. 1995. Hong Kong flag bulk carrier. Ran aground off Japan. British Master arrested and subsequently fined,
3. *Al Hadhi*. 1996. Panamanian flag bulk carrier. Sank off India. Pakistani master arrested and detained in India for 10 months.
4. *Nissos Amorgas*. 1997. Greek flag VLCC. Grounding and pollution in Venezuelan waters. Vessel and master detained for 7 months by Venezuelan authorities. Final Decision pending
5. *Delta Pride*. 1998. Pakistani flag bulk carrier. Abandoned by bankrupt owners in Tampico, Mexico. Eventually anchored off Brownsville, Texas. Master and all crew members arrested by US authorities and detained for 6 months before being deported.
6. *Achilles I*. 1999. Greek flag bulk carrier. Vessel abandoned by bankrupt owners in Algiers. Vessel and Greek master detained indefinitely by Algerian authorities. Master escaped on another vessel.
7. *Erica*. 1999. Maltese flag tanker. Vessel broke up and caused serious pollution off France. Indian master charged and detained in France for 3 months.
8. *Tampa*. 2001. Norwegian flag container/Ro-Ro vessel. Entered Australian waters 'illegally' with over 400 rescued refugees. Vessel boarded by Australian forces and master threatened with criminal prosecution by Australian authorities. Vessel permitted to proceed after significant delay.
9. *Virgo*. 2001. Cyprus flag tanker. Allegedly involved in collision off US coast. Russian master, 2nd Officer and watch AB, held in Canada on US manslaughter extradition request for over 18 months. Decision pending.
10. *Prestige*. 2002. Bahamas flag tanker. Vessel broke up and caused serious pollution off Spain and France. Master arrested and jailed in high security prison for 4 months and then released but still detained in Spain. Decision pending.
11. *Vessel X*. 2003. Greek flag tanker. 4 Pakistani crew members deserted in Italy. Master arrested and jailed for two months without charge by Italian authorities.
12. *Dutch Aquamarine*. 2003. Dutch flag chemical tanker. Collision in English Channel. Dutch Second Officer charged with manslaughter, found guilty and jailed by British court. On Appeal.

THE PROTECTION OF MASTERS AND
SEAFARERS FROM CRIMINALIZATION:
PROBLEMS FOR THE SHIPPING INDUSTRY

Prof. Edgar Gold, CM, QC
Centre for Maritime Law, University of Queensland

31st Annual Conference, MLAANZ
Adelaide, South Australia
1 October 2004

THE PROTECTION OF MASTERS AND SEAFARERS FROM CRIMINALIZATION: PROBLEMS FOR THE SHIPPING INDUSTRY

Prof. Edgar Gold, CM, QC
Centre for Maritime Law, University of Queensland

31st Annual Conference, MLAANZ
Adelaide, South Australia
1 October 2004



The Problem

The increasing, widespread use of penal criminal sanctions by coastal states against masters and other seafarers involved in maritime accidents, pollution incidents, and other offences, despite the fact that such states generally have no or very limited jurisdiction to impose such sanctions.

NOTABLE CASES

Exxon Valdez, 1989. US flag VLCC. Major Pollution in US waters.
Master prosecuted and jailed

Union, 1995, Hong Kong flag bulk carrier. Grounded off Japan. British
master arrested and fined

Al Hadhi, 1996, Panamanian flag bulk carrier. Sank off India, Pakistani
master arrested and detained in India for 10 months

Nissos Amorgas, 1997, Greek flag VLCC. Pollution of Venezuelan
waters. Vessel and master detained for 7 months

Delta Pride, 1998, Pakistani flag bulk carrier. Abandoned by owners.
Anchored off Brownsville, Texas. Master and all crew arrested and
imprisoned by US immigration for 6 months before deportation



The Criminalization of Seafarers

NOTABLE CASES contd.

Achilles I, 1999, Greek flag bulk carrier. Abandoned by owners in Algiers. Vessel and Greek master detained indefinitely. Master escaped.

Erica, 1999, Maltese flag tanker. Vessel lost with serious pollution off France. Indian master charged and detained in France for 3 months.

Tampa, 2001, Norwegian flag container/Ro-Ro vessel. Entered Australian waters 'illegally' with over 400 rescued refugees. Vessel boarded and master threatened with criminal prosecution.

Virgo, 2001, Cyprus flag tanker. Allegedly involved in collision with US fishing vessel. Russian master and two crew members detained in Canada for 18 months on US manslaughter extradition request.

The Criminalization of Seafarers

NOTABLE CASES contd.

Prestige, 2002, Bahamas flag tanker. Denied refuge and lost off Spain with significant pollution. Greek master arrested and jailed for 4 months and still detained in Spain after release.

Vessel X, 2003, Greek flag tanker. 4 Pakistani crew members deserted in Italy. Master arrested and jailed for two months without charge.

Dutch Aquamarine, 2003, Dutch flag chemical tanker. Collision in English Channel. Dutch 2nd Officer charged with manslaughter, found guilty and jailed by UK court. On Appeal



The Criminalization of Seafarers

INTERNATIONAL LAW

HIGH SEAS: Criminal jurisdiction reserved solely to the flag state or state of nationality of the person involved

EEZ: Only limited jurisdiction of coastal states, including monetary penalties, but not imprisonment for pollution offences

TERRITORIAL SEA: National laws may be applied, but only monetary penalties for pollution offences. Arrested vessels and seafarers must be released promptly.

Additional Issues

- i. Flag states often take no action
- ii. States with jurisdiction over their nationals often take no action when foreign flag vessels are involved
- iii. Shipowners/Charterers/ Operators/P&I clubs may be reluctant to take action
- iv. Coastal states either ignore UNCLOS provisions or bypass such provisions by using other legislation, i.e. environmental, customs, immigration etc. as the principal motivation appears to be a political 'blame game'—often driven by the media
- v. Coastal states are now also targeting ancillary shipping services, i.e. pilots, salvors etc.



Required Action

- i. Action by the IMO and ILO
- ii. Action by NGOs, i.e. CMI, IFSMA, NI, ITF, IGP&I, IUMI
- iii. International Code or Convention that protects Seafarers from criminal action involving detention for 'offences' over which they have no direct control