FAIR TREATMENT OF SEAFARERS

Fair treatment of seafarers – International law and practice
by OLIVIA MURRAY

FAIR TREATMENT OF SEAFARERS INTERNATIONAL LAW AND PRACTICE*

BY OLIVIA MURRAY**

It is notorious that nowadays certain types of maritime accident, especially those involving pollution, can present criminal law authorities in coastal states with a difficult dilemma. The causes of these events are often complex and time-consuming to investigate. However, it is also common for media, political and public outrage to create expectations of swift and severe measures against those presumed to be responsible, typically members of the ship's crew. Foreign seafarers are entitled to return home unless charged with offences punishable by imprisonment. Prosecutors and courts may then face criticism at home for failing to act and criticism abroad if they take action considered unjustified by the evidence, or contrary to international law. In 2011, the International Maritime Organization (IMO) decided there was a need to promote awareness of the Guidelines on Fair Treatment of Seafarers which it had adopted in 2006. This article is published with that object in mind.

Introduction

The international maritime community has observed the vulnerability of seafarers in high-profile casualties, particularly those involving large-scale pollution. There is inevitably heightened political tension, given the anticipated public and media reaction to such events. The intensity of this reaction may be exacerbated by a lack of awareness of the well-established

* First published in The Journal of International Maritime Law published by Lawtext Publishing Limited www.lawtext.com, (2012) 18 JIML 2 pp. 150-164.

** Senior Associate, Ince & Co LLP, London; Chair, International Working Group on the Fair Treatment of Seafarers of the Comité Maritime International. While this article is entirely the responsibility of its author and is not an official CMI document, contributions to it from other members of the Working Group are gratefully acknowledged. The other members are: Giorgio Berlingieri, Italian Maritime Law Association; Michael Chalos, Chalos O'Connor LLP; Prof Edgar Gold, AM, CM, QC, PhD, FNI; David Hebden, Marine Casualty Surveyors; Kim Jefferies, Gard AS; Kiran Khosla, International Chamber of Shipping; Prof Proshanto Mukherjee, The World Maritime University; Colin de la Rue, Ince & Co LLP; Mrs Natalie Shaw, International Shipping Federation.

international compensation regimes for pollution from ships, such as the Civil Liability and Fund Conventions in relation to oil pollution from tankers and the Bunkers Convention, which covers fuel spills from most international trading ships. Concern has been expressed that a balance must be maintained between the legitimate concerns of authorities in such circumstances and the human rights of the individual.

However, the reasons behind what have sometimes been termed 'political' responses to such incidents are understandable. Local authorities will feel immense political pressure and, in many cases, real hardship will be endured by those suffering loss as a result of an oil spill.

While the position of seafarers involved in a serious casualty can be precarious, the decisions to be taken by coastal state law officers in such a case can be very challenging. Such an emergency may well be the first of its kind for the officials involved and may present them with the most complex set of circumstances they are ever likely to face. In cases of this nature, investigating authorities, prosecutors and courts have come under an unusual and sometimes unprecedented weight of public expectation that presumed offenders will be brought swiftly to justice. They have faced a difficult task in striking a balance which does justice to these expectations as well as to the accused.

When the accused is a foreigner and sailing under a foreign flag, the potential difficulties are compounded by international dimensions. At first, these may not appear obvious amid the furore at home. However, there are international laws designed to safeguard seafarers against controversial treatment in foreign proceedings and these apply particularly in pollution cases where seafarers have tended to be most exposed. On a number of occasions measures have been taken against them without it being evident that these safeguards were duly considered. This has had significant implications, given widespread awareness in the international maritime community of the importance of fair treatment to the morale and recruitment of seafarers, and due respect for international laws and standards.

Once measures of this kind have been initiated they are not always easily halted or reversed. A clear understanding of these safeguards is therefore important not only to do justice to the case, but also to avoid measures which may lead to unforeseen criticism, controversy or embarrassment on the international stage.

In October 2004, the Comité Maritime International (CMI) established an International Working Group on the Fair Treatment of Seafarers[1]. This was

[1] The CMI is a non-governmental organisation established in Antwerp in 1897 with the object of promoting the unification of maritime law. Its membership includes 50 National Maritime Law Associations with approximately 11,000 individual members, for the most part maritime lawyers and academics, as well as representatives from the shipping industry.

in response to an invitation to participate in the joint work in this field of the IMO and International Labour Organization (ILO), which led in 2006 to the international guidelines discussed in this article. With a view to raising awareness of these issues, this article will highlight key aspects of the legal framework relevant to this area. It is hoped that this will provide a useful reference point for those involved in these cases, both ship interests and local authorities alike.

Rights of the individual – international law

The Universal Declaration of Human Rights provides that everyone has the right to leave any country and return to their own[2].

This principle is particularly relevant to seafarers. Indeed, it is important to all who are engaged in international transport and whose work carries with it the prospect that any accident in which they are involved may occur in a foreign jurisdiction. Shipwrecks and similar accidents are often traumatic experiences and those involved are usually keen to return home to their families. However, their right to do so is not respected if they are held as security for claims while compensation arrangements are negotiated, or if they are required to remain for an unduly long period to assist with inquiries. This is particularly the case if they are accused of causing or contributing to the incident and are charged with a criminal offence.

While criminal proceedings are generally subject to the sovereign jurisdiction of the state where they are brought, those affecting seafarers commonly raise issues of international law. Given internationally recognised human rights, including those relating to freedom of movement, it is in principle difficult to justify measures restricting the liberty of the accused – which include withholding the accused's passport, or refusing an exit visa, let alone hotel arrest or detention in custody – unless there is at least a reasonable possibility that the accused could, if convicted, be punished by a term of imprisonment.

Criminal liability for the violation of international law to prevent pollution from ships

In the circumstances described above, important issues for foreign seafarers are whether they are likely to be charged with an offence and, if so, whether it is potentially punishable by imprisonment. These questions have come to the fore particularly in incidents involving pollution, as these have

---

[2] Universal Declaration of Human Rights 1948 art 13.

tended to stimulate relatively great media interest and relatively high public expectations of severe measures against those responsible.

Offences

Under the UN Convention on the Law of the Sea (UNCLOS), coastal states may adopt laws to prevent pollution in their territorial sea[3]. In the exclusive economic zone (EEZ), they may adopt such laws if they are in conformity with, and give effect to, international rules and standards adopted through the competent international organisation, ie the IMO[4]. The main international instrument in which these rules and standards are set out is the MARPOL Convention[5]. UNCLOS permits coastal states to legislate in their territorial sea independently of MARPOL or other international regimes, but many states have legislated in a uniform manner on the basis of MARPOL regulations.

MARPOL Annex I is the main source of international rules and standards to prevent oil pollution from ships. It contains regulations designed to reduce the risk of pollution resulting from accidents, such as by requirements for oil tankers to be constructed with double hulls, as well as rules to control intentional operational discharges of oil or oily wastes.

In the absence of adequate reception facilities in ports worldwide it has remained necessary for ships to undertake, and international law to allow, operational discharges of oily wastes at sea. The operational discharge controls of MARPOL Annex I apply not only to oil tankers in respect of their cargo tank washings and ballast operations, but to all types of vessel in respect of oily wastes from their machinery spaces. They include requirements for ships to be equipped with oil filtering equipment (oily water separators) and for details of various shipboard operations to be entered in an oil record book.

Sometimes the operational discharge controls have been accidentally breached, eg through the malfunction of oil filtering equipment. However, what has caused particular public concern is the fact that some seafarers and ship operators – albeit only a very small minority – have continued to make or condone illicit discharges in which the MARPOL controls have been knowingly violated. The correct handling of ships' oily wastes can be a time-consuming and laborious process, but this is no justification for rogue operations in which, for example, the process is accelerated by fitting so-called 'magic pipes' to bypass the filtering equipment.

---

[3] United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) art 211(4).

[4] ibid art 211(5).

[5] The International Convention for the Prevention of Pollution from Ships 1973, as amended by the 1978 Protocol to the Convention (MARPOL Convention).

Illicit intentional MARPOL violations of this kind are serious offences, involving a deliberate flouting of international law. By contrast, spills resulting from maritime accidents may involve no more than an error of navigation and in some cases have resulted more from causes external to the ship than from any fault of those on board.

Unfortunately, the technical issues involved are not matters of general public knowledge and the distinction between these different types of case is not universally understood. Public reaction to most incidents of pollution from ships, including genuine accidents, has tended to reflect outrage provoked by the publicity given to illicit violations. This has led in some cases to measures being taken against seafarers which both they and the international maritime community have found hard to understand.

International law recognises that very different considerations are involved in these different types of case and that seafarers require protection from prejudicial reactions. An accidental spill resulting from damage to the ship or its equipment does not involve a MARPOL violation and should not normally give rise to criminal liability in the absence of intent or recklessness[6].

However, not all coastal states have domestic laws in conformity with the Convention. Some have adopted laws which are more stringent in their territorial seas than MARPOL and which provide for criminal liability for pollution caused by negligence or serious negligence, despite the absence of intent or recklessness which MARPOL requires.

There are different views as to the validity of such legislation in international law. While they are within the sovereign powers of a coastal state under UNCLOS, such national laws may be contrary to other international treaties to which the state is party. This is particularly the case if the state has undertaken to legislate in accordance with the terms of those international treaties in line with other contracting states. One school of thought is that MARPOL is a classic instance of such a treaty and that contracting states cannot legislate in other terms unless they denounce the Convention. A rival view is that MARPOL stipulates only minimum standards and that contracting parties are free to legislate more stringently if they wish. This controversy came to a head with the adoption of EU Directive 2005/35/EC on ship-source pollution[7], the validity of which was challenged in the Court of Justice of the European Union (CJEU) in proceedings brought by a coalition of shipping industry bodies. The court ruled that the validity of

---

[6] MARPOL Annex I reg 4.2.

[7] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L255/11; published on 30 September 2005 and in force the following day.

the directive could not be assessed by reference to MARPOL, on the grounds that the EU itself (as distinct from its Member States) was not a party to the Convention[8]. It therefore declined to comment upon most of the substantive issues of international law which had been argued in the case[9].

Accordingly, although the validity of such laws may be open to question, there is a possibility that a maritime accident may give rise to criminal liability for pollution under the domestic laws of some coastal states when there would be no such liability under MARPOL.

The question then arises as to whether foreign seafarers charged with such an offence can be refused permission to return to their home country pending trial on the grounds that they could, if convicted, be sentenced to a term of imprisonment. The type of penalties which may be imposed is subject to important safeguards in international law.

Penalties

Contracting parties to MARPOL undertake to impose penalties on offenders which are adequate in severity to discourage violations of the regulations set out in the Convention. Beyond this, it does not prescribe any type or level of penalty which may or should be imposed.

In many systems of law, criminal legislation stipulates a maximum penalty but otherwise allows the court a wide discretion to decide on a level of punishment appropriate to the seriousness of the particular case. Clearly, an operational discharge carried out in deliberate violation of MARPOL regulations involves a far higher level of culpability than a leakage caused by accidental error in operating valves or pipes[10].While a custodial penalty may

---

[8] Case C-308/06 *R v Secretary of State for Transport, ex parte Intertanko* [2008] ECR I-4057 655-56.

[9] See further Colin de la Rue and Charles B Anderson *Shipping and the Environment* (2nd edn Informa 2009) 1117-27. The directive and CJEU decision have been strongly criticised by several commentators. See especially Jan Wouters and Philip De Man 'International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Cooperation Committee, Lloyd's Register and International Salvage Union v Secretary of State for Transport. Case C-308/06' [2009] 103(3) *The American Journal of International Law* 555-561; Mario Mendez 'The legal effect of community agreements: maximalist treaty enforcement and judicial avoidance techniques' (2010) 21(1) *The European Journal of International Law* 99; M Fang 'The analysis of criminalization of marine pollution from the adoption by the European Union of the Directive on ship-source pollution and on the introduction of sanctions for infringements' (2009) International Conference on Marine Pollution Liability and Policy Papers Collection 429; Marc A Huybrechts 'What happened with the European Directive 2005/35/EC?' (paper presented at the Seventh Annual International Colloquium on Pollution at Sea: Law and Liability Swansea September 2011).

[10] Exemption from criminal liability under MARPOL for accidental spills is limited to those which result from damage to the ship or its equipment.

be considered appropriate for a serious deliberate violation, an accident of the latter kind should normally result in no more than a fine[11].

Sentencing policies commonly provide for account to be taken of various other factors in addition to the culpability of the defendant's acts or omissions, including the seriousness of their consequences and any need for the penalty to exact retribution to reflect public sentiment, or to have a deterrent effect. Additional factors of this kind can loom very large when a serious shipping accident results in substantial pollution. A sad fact of maritime life is that reports of shipboard fatalities are generally limited to a few column inches in the trade press, while accidents in which no-one is hurt, but which result in an oil spill, have often been headline news. Regrettable as these latter events certainly are for the pollution they cause, they are also notoriously prone to stimulate emotive public responses which are not necessarily fair to the individuals caught up in them, especially if based on incomplete or premature conceptions of the relevant facts and if there are expectations of retribution which confuse accidental spills with deliberate violations.

In some parts of the world, public sentiments of this kind can weigh heavily on courts tasked with discretionary decisions on sentencing and freedom of movement pending trial. The need for safeguards to protect the rights of foreign seafarers in pollution cases is addressed in UNCLOS Article 230, which constitutes an internationally agreed balance between public concerns about pollution on the one hand and the recognised rights of the accused on the other.

Article 230 provides:

> Monetary penalties and the observance of recognised rights of the accused
>
> 1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
> 2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
> 3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognised rights of the accused shall be observed.

Article 230, therefore, bars coastal states from imprisoning foreign seafarers for any pollution offence beyond their territorial waters, or for one

---

[11] For examples of such cases see de la Rue and Anderson (n 9) 1099-103 and especially the *Laura D'Amato* case (spill in Sydney Harbour, August 1999).

within those waters unless involving a wilful and serious act of pollution. An accidental spill should therefore never result in a custodial penalty for a foreign seafarer, whether within or beyond the territorial sea. There has nonetheless been a series of cases in which seafarers have been detained for long periods after maritime accidents, despite these safeguards.

Cases

Concerns about fair treatment of seafarers and other defendants were brought to a head by a sequence of cases in the late 1990s and early 2000s in which criminal proceedings were brought against the masters and officers of ships involved in high-profile maritime accidents causing serious pollution. In some cases, these concerns were exacerbated by uncertainty surrounding the basis for allegations of wrongdoing on the part of the defendants; by an interest on the part of the coastal state authorities in deflecting criticism that failings on their own part had caused or contributed to the incident; and by complaints that the defendants were detained in circumstances which amounted to breaches of international law and of their human rights. To illustrate some of the key issues arising, a selection of these cases is set out below.

Nissos Amorgos (Lake Maracaibo,Venezuela, 1997)

The grounding of the Greek tanker *Nissos Amorgos* off the coast of Venezuela in 1997 provides an illustration of action being pursued with particular rigour when the actions or omissions of the coastal state authorities (or the safety of their ports) themselves are called into question.

At the time of the grounding, the *Nissos Amorgos* was carrying roughly 75,000 tonnes of Venezuelan crude oil of which some 3,600 tonnes were spilled. Criminal proceedings were brought against the master on charges of negligently causing pollution. He was required to remain in Venezuela for over a year before being permitted to return to Greece and resume work, provided that he undertook to return for his trial and reported regularly to Venezuelan embassies and consulates. However, his health had deteriorated to the extent that he was soon unable to continue work. The master was excused attendance at trial on grounds of ill health. He maintained that the damage to the cargo tanks that had led to the oil spill was substantially caused by the Republic of Venezuela's negligence but was sentenced in absentia in May 2000 to 16 months in prison. On appeal, the Maracaibo Criminal Court of Appeal held that the master had incurred criminal liability owing to negligence causing pollution damage to the environment but that, since more than four and a half years from the date of the criminal act had passed, the criminal action against him was time-barred. The appeal court held that this

decision was without prejudice to the civil liabilities of the owners which could arise from its finding that the pollution had been caused by a criminal act on the part of the master (albeit the proceedings were time-barred).

This incident highlights the difficulties which may ensue in jurisdictions where civil remedies result from findings of criminal acts or omissions. In such cases it may be felt that there is arguably an additional incentive to convict a seafarer in criminal proceedings if such a finding opens the door to civil remedies, despite the fact that a recognised compensation regime may be applicable to the case in question[12].

Erika (Brittany, France, 1999)

On 12 December 1999, the Maltese-flagged tanker *Erika* broke in two and sank some 60km off the coast of Brittany – within the EEZ of France. Almost 20,000 tonnes of her heavy fuel oil cargo of 31,000 tonnes were spilt affecting some 400km of shoreline. Nearly 7,000 claims arose from the incident relating to pollution preventive measures, the quantum of which exceeded the maximum available compensation under the CLC[13]. The incident also gave rise to considerable public outcry that the French major oil company had chartered a 25-year-old single hull tanker, which had sunk due to structural failure and the incident stimulated various proposals for legal changes, both in Europe and at international level.

The jurisdiction of states to legislate within their EEZ is limited to the adoption of laws conforming with international law[14] and proceedings may only be instituted with regard to violations of international laws to prevent, reduce and control pollution. However, the French legislation under which the defendants were prosecuted and convicted did not satisfy these criteria and there was no finding of a MARPOL violation.

Criminal charges were brought not only against the four defendants ultimately found guilty of offences under French law but also against other defendants, including the master of the ship. The master was arrested and prosecuted by the French authorities for endangering life and causing marine pollution on coming ashore after the incident on 12 December 1999. He was imprisoned until 23 December 1999 and not permitted to return to his home in India until February 2000. These charges were maintained until the end of a four-month trial in 2007 at which point the prosecution recommended in its closing speeches that most of the defendants be acquitted. While the charges

12 See further de la Rue and Anderson (n 9) 1104-06.

13 In the *Erika*, the CLC 1992 was applicable.

14 UNCLOS (n 3) art 211(5).

against the master were finally dismissed in January 2008, this was over eight years after the initial incident.

This case serves as a reminder of the considerable time that may elapse between an incident and judgment, which will inevitably have a detrimental impact upon those accused who will have the stigma of criminal charges hanging over them for several years and yet who may, ultimately, be acquitted[15].

Prestige (La Coruña, Spain, 2002)

The *Prestige*, loaded with 77,000 metric tonnes of fuel oil, developed a list off the coast of La Coruña, Spain in severe weather conditions on 13 November 2002. Despite the conditions, Captain Mangouras chose to stay on board. All the crew escaped without injury or loss of life and the master corrected the list and stabilised the vessel. After numerous attempts to make fast the tow (which parted several times due to the prevailing conditions) the tow line was successfully connected at midday on 14 November 2002. Both the master and salvors requested the Spanish authorities to grant the vessel refuge in sheltered waters. Both these requests were refused, a decision which has been the subject of much condemnation as it has been argued that granting the ship refuge was the best way to ensure that any further pollution was minimised[16] and that the authorities' actions turned the incident into a major environment catastrophe[17]. Instead, the authorities ordered the *Prestige* to proceed into the Atlantic in winter gale-force weather. Some six days after the initial incident, the *Prestige* broke in two and sank, with the loss of the ship and substantial pollution along many hundreds of kilometres of coastline.

The provision of places of refuge for ships in distress was an issue that was already being comprehensively reviewed within the IMO in the aftermath of the Castor incident in 2001[18]. The *Prestige* incident brought existing concerns into sharp relief and the IMO Guidelines on Places of Refuge for Ships in Need of Assistance were adopted in December 2003[19].

---

[15] See further de la Rue and Anderson (n 9) 1106.

[16] Bahamas Maritime Authority 'Report of the investigation into the loss of the Bahamian registered tanker *Prestige* off the northwest coast of Spain on 19th November 2002' paras 3.7 and 4.11.4.

[17] 'ISU warns that environmental salvage is undervalued' www.marinelink.com/news/-article/isu-warns-that-environmental-salvage-is/305238.aspx.

[18] See further de la Rue and Anderson (n 9) 911.

[19] IMO Resolution A.949(23) adopted on 5 December 2003. The CMI submitted a report to the IMO Legal Committee in April 2009 which attached a draft instrument on Places of Refuge, developed by the CMI and approved at the Plenary session of the CMI Conference in October 2008.

The master was immediately handcuffed when he had evacuated the vessel and arrested. He was charged with criminal offences relating to pollution and disobedience of the Spanish administrative authorities pursuant to the Spanish Criminal Code. Under international law[20], the master could only be imprisoned if he was found guilty of an offence involving a 'wilful and serious act of pollution'. However, he was transferred to jail where he remained for 83 days being released only upon payment of bail of 3 million under strict conditions, including the obligation to remain in Spain and report to a local police station every morning (including weekends). In March 2005, the master was allowed to return to Greece permanently with an undertaking to return to Spain for the trial. His treatment by the Spanish authorities has attracted much criticism, including from the European Parliament, further to a public hearing in March 2003[21]. Almost exactly 10 years after the incident, the master's criminal trial has been set to commence on 16 October 2012[22].

Tasman Spirit (Karachi, Pakistan, 2003)

This Maltese-flagged tanker grounded at the entrance to Karachi Port carrying 67,800 tonnes of Iranian crude oil and with 440 tonnes of heavy fuel oil in aft bunker tanks. Efforts to refloat the vessel were unsuccessful and salvors were engaged to tranship the cargo. During these operations the *Tasman Spirit* started to break up, eventually leading to a spill of some 34,000 tonnes of crude. In the aftermath of the casualty, it was suggested that the incident had been caused by the alleged failure by the Karachi Port Trust to maintain properly the dredged channel in which the vessel was navigating at the material time and that she was called into berth after high water and once priority had been given to smaller vessels[23]. The case is illustrative of a situation in which focus upon the alleged failings of the crew serves to deflect attention from suggestions that local authorities may be at fault. All the Greek crew on duty were detained (master, chief officer, chief engineer, second officer, second and third engineers and the helmsman) as well as the salvage master (who only attended after the vessel broke up). The 'Karachi 8', as they became known, were detained for almost nine months and were released only after intense political pressure and continued lobbying by many international organisations, as well as by the Greek Government and European Union[24].

---

[20] UNCLOS (n 3) art 230.

[21] Parliamentary report of the European Parliament tabled 15 July 2003 paras 49-50.

[22] See further de la Rue and Anderson (n 9) 1107-08.

[23] In August 2004, a report was published by the Pakistan Merchant Navy Officers' Association which concluded that the vessel had run aground owing to the corruption and negligence of top KPT officials, many of whom were nontechnical people. See further de la Rue and Anderson (n 9) 1108-09.

[24] See further de la Rue and Anderson (n 9) 1108-10.

IMO guidelines on the fair treatment of seafarers in the event of a maritime accident

The high-profile pollution incidents discussed above led to concerns on the part not only of shipping and seafaring bodies but also of human rights organisations, international legal bodies and governments that the recognised rights of seafarers were not being respected for domestic political reasons.

In 2005, a Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident was established. This resulted in a joint resolution[25] and, in 2006, the adoption of the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident (the Guidelines)[26]. The stated objective of the Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary. Guidelines are set out not only for the port or coastal state, but also for the flag state, the seafarer state, shipowners and for seafarers themselves. The guidelines applicable to the port or coastal state are concerned mainly with ensuring that any investigation which they conduct to determine the cause of a maritime accident that occurs within their jurisdiction is conducted in a fair and expeditious manner and that the human rights and other legitimate interests of seafarers involved are respected at all times. The Guidelines are not legally binding but are intended to establish international norms for governments and courts to take into account. In the context of pollution cases, the risk to seafarers of extended detention has been recognised in the Guidelines which provide, inter alia, that a port or coastal state should 'use all available means to preserve evidence to minimise the continuing need for the physical presence of any seafarer' and recognise that seafarers require special protection, especially in relation to contacts with public authorities. The guidelines recommend that they be observed in all instances where seafarers may be detained by public authorities in the event of a maritime accident (such detention includes any restriction on their movement by public authorities, imposed as a result of a maritime accident, for example preventing them from leaving the territory of a state other than their country of nationality or residence).

---

[25] Joint Resolution of the Assembly of the IMO and of the Governing Body of the ILO, IMO Resolution A.987(24), adopted 1 December 2005. As mentioned earlier, the CMI was invited to participate in the joint work in this field of the IMO and ILO, which led in 2006 to the Guidelines.

[26] Resolution of the IMO Legal Committee LEG.3(91), adopted 27 April 2006.

The 2008 Casualty Investigation Code

In 2008, the IMO Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident was adopted (the Code)[27]. The Code (which entered into force in January 2010) is designed to facilitate objective marine safety investigations for the benefit of flag states, coastal states, the IMO itself and the shipping industry in general. Its stated objective is the provision of a common approach for states to adopt in the conduct of marine safety investigations into marine casualties and marine incidents[28].

The Code recognises and addresses the potential difficulties faced by seafarers in the aftermath of a casualty. The preamble to the Code expressly refers to the Guidelines. Indeed, the Legal Committee of the IMO has expressly acknowledged that these should be implemented in tandem with the Code[29]. Furthermore, chapter 12 of the Code provides mandatory standards in relation to obtaining evidence from seafarers. In particular, this chapter provides, inter alia, that where a marine safety investigation requires a seafarer to provide evidence, this evidence 'shall be taken at the earliest practical opportunity' and that the 'seafarer's human rights shall, at all times, be upheld'.

Treatment of seafarers since adoption of the Guidelines

Since adoption of the Guidelines in 2006, the joint IMO/ILO Secretariat has sought to monitor their application by way of a request that any information concerning the mistreatment of seafarers be transmitted to the IMO[30]. Regardless of any such reports, however, it is clear, as discussed further below, that instances giving rise to concerns of potential unfair treatment of seafarers amongst the international maritime community continue to occur[31] and concerns as to the effectiveness of existing safeguards have been expressed.

---

[27] Resolution of the IMO Maritime Safety Committee MSC.255(84), adopted 16 May 2008.

[28] The benefits of uniformly applicable legislation is particularly topical given that the Maritime Labour Convention (MLC) 2006 is expected to come into force in the near future, once the additional required ratifications are obtained: www.tradewindsnews.com/weekly/w2012-01-06/article661873.ece. The MLC provides comprehensive rights and protection at work for seafarers worldwide in such areas as conditions of employment and health protection and includes reference to the protection of seafarers in foreign ports and to the measures to be taken if they are detained in the territory of a Member State. See also www.ilo.org/global/standards/maritime-labour-convention/lang-en/index.htm.

[29] IMO Legal Committee Report, LEG 97/15, dated 1 December 2010.

[30] Circular Letter 2825 dated 7 November 2007.

[31] BIMCO Study of the treatment of seafarers (Bagsværd Denmark BIMCO 2010) (also attached to IMO Doc. LEG 97/INF.3).

Effectiveness of safeguards in Article 230 of UNCLOS

In particular, concerns in relation to the application of Article 230 of UNCLOS were highlighted to the IMO by the CMI and co-sponsors at the ninety-seventh session of the IMO Legal Committee[32]. As has been noted above, Article 230 of UNCLOS bars coastal states from imposing sanctions, other than monetary penalties, for pollution offences by foreign vessels beyond their territorial waters. The same provision applies within territorial waters unless there has been a wilful and serious act of pollution. The CMI and co-sponsors expressed concern that seafarers may be vulnerable to charges brought where those charges fall outside Article 230 and, therefore, do not provide the seafarer with the safeguards of Article 230. If such charges are legitimately brought, there is little controversy. In practice, however, there have been occasions where the possibility of a custodial penalty should arguably have been ruled out under Article 230 but where seafarers have been detained on charges which in essence render the Article 230 safeguards ineffective. These charges will typically be unrelated to pollution, carry the potential for imposition of a custodial sentence, yet would not have been brought 'but for' the pollution. The net effect is that the safeguards under Article 230 providing for monetary penalties only may not always avail the seafarers as they should. For example in the South Korean *Hebei Spirit* case, discussed in further detail below, there was an attempt by the prosecution (subsequently endorsed by the Court of Appeal) to bring charges against the master and chief officer for damage caused to their own ship ('destruction of a vessel owing to occupational negligence'). Although it was their conviction on this particular charge which resulted in the custodial penalties imposed on them, it was clear that the severity of the sentence was intended to reflect not the damage to the ship but the pollution.

The decision to charge the crew with a non-pollution related offence carrying a custodial sentence effectively meant that the UNCLOS Article 230 safeguards were rendered meaningless. The Supreme Court has since set aside the earlier conviction for destruction of the vessel, holding that it was difficult to say that the extent of the damage to the *Hebei Spirit* arising from the collision amounted to 'destruction' as required under the relevant provision of the Criminal Code. To determine whether or not this argument is justified in a particular case, the following question can usefully be asked: Would the Court still be contemplating imposing a custodial sentence had there been no pollution? If the answer is 'no,' and a custodial sentence would not have been imposed 'but for' the pollution, it follows that it is the pollution, not the technical form of the charges, which accounts for the proposed penalty.

---

[32] LEG 97/6/1.

In such circumstances, given that Article 230 provides for monetary penalties only in respect of pollution from foreign ships, save in the case of wilful pollution in the territorial sea, this should preclude a custodial sentence. When it is recognised that it is generally the pollution, as opposed to other alleged conduct, that provokes public outrage, it can be appreciated how such a situation has developed and why the rights enshrined within Article 230 have been perceived as threatened. The challenge is how to ensure that the rights enshrined within Article 230 are not eroded. It may be considered that the first step is to raise awareness of this situation within countries that are party to UNCLOS. In so doing, it is hoped that those defending seafarers and seeking to rely upon Article 230 may be more alive to the problem and pre-empt and address any unjustified charges which render its restrictions ineffective. It was also noted that even in states not parties to UNCLOS, that Convention may be considered applicable as part of customary international law and therefore precedential in cases of detention following marine casualties[33].

The CMI and co-sponsors invited the Legal Committee to consider raising awareness of the provisions of Article 230, highlighting its effect and importance to those countries which are party to UNCLOS and encouraging compliance with their obligations under international law. Concern was also expressed regarding the adverse impact that the mistreatment of seafarers will have inevitably upon recruitment and retention of seafarers and, as a result, upon the safety of shipping generally.

Hebei Spirit 2007 (Daesan port, South Korea, 2007)

The *Hebei Spirit* case highlights the difficulties foreign seafarers may face, despite the introduction of the Guidelines, in the politically charged context of a major oil spill. In such circumstances, it is perhaps inevitable that the pressure of public expectation faced by coastal authorities, prosecutors, courts and local authorities may be hard to reconcile with preserving the rights of the seafarer. It has been suggested that the existence of a discretion (as to whether or not to prosecute for example), as opposed to the simple application of mandatory rules, only serves to exacerbate the unenviable position of the coastal state authorities, prosecutors and courts[34].

This tanker was struck by a giant crane barge while at anchor off Daesan port in South Korea in 2007. The collision resulted in some 11,000 tonnes of crude oil leaking into the Yellow Sea, the largest oil spill in South Korean

[33] See also the study by BIMCO on the treatment of seafarers dated 3 September 2010: LEG 97/INF.X.

[34] See further de la Rue and Anderson (n 9) 1114.

history. Despite having been acquitted of all charges relating to the oil spill by the first instance court, the master and chief officer from the tanker were initially refused permission to leave South Korea while an appeal was made against the judgment by the prosecutor and owners of the crane barge. Subsequently, the appeal court found the master and chief officer of the tanker guilty on two charges, one of causing pollution and the other of causing damage to the ship. In sentencing for the offence of causing damage to the ship, the appeal court took the pollution into account and sentenced the master and chief officer to jail terms of 18 and eight months respectively.

There was significant protest at these convictions across the maritime industry[35]. A letter from the London Embassy of the Republic of Korea strongly objected to the content of a press report into the incident stating that:

> hasty expressions and words were used that could very well disturb the foundation of the judicial and administrative institutions of a sovereign state. This very regrettable piece of writing did in fact undermine the honour and prestige of the Republic of Korea[36].

Subsequently, on 15 January 2009, South Korea's Supreme Court released the master and chief officer on bail pending their appeal. In April 2009, the South Korean Supreme Court annulled the Court of Appeal's decision to arrest the crew members of the *Hebei Spirit* and they were allowed to leave South Korea. The decision to arrest the masters of one of the towing tugs and of the crane barge was upheld and the fines imposed by the Court of Appeal confirmed. Having been released from arrest, the master and chief officer of the *Hebei Spirit* were finally able to leave South Korea in June 2009[37].

Mangouras v Spain: Grand Chamber of the European Court of Human Rights (ECtHR) judgment (28 September 2010)

On 28 September 2010, the Grand Chamber of the ECtHR delivered its judgment in the case of *Mangouras v Spain*[38]. This was a claim lodged in 2004 by the Master of the *Prestige*, Captain Mangouras, against the Kingdom of Spain.

Following the *Prestige* casualty, the Master of the *Prestige* was charged with criminal offences relating to pollution and disobedience of the Spanish administrative authorities pursuant to the Spanish Criminal Code. The

---

[35] '"Hebei Two" are jailed' Lloyd's List (London 11 December 2008) 1; '"Shocking" verdict' *Tradewinds* (London 12 December 2008).

[36] 'South Korean rebuttal to *Lloyd's List* opinion report' Lloyd's List (London 11 December 2008) 3.

[37] www.iopcfund.org/hebeispirit.htm; see also de la Rue and Anderson (n 9) 1112-13.

[38] *Mangouras v Spain* App no 12050/04 (ECtHR Grand Chamber judgment 28 September 2010).

Spanish Court granted bail to the master at the unprecedented figure of €3,000,000. The master was not in a position to pay such a sum and, consequently, was detained in a high security prison for 83 days. He was released when the insurers of the vessel put up bail on wholly humanitarian grounds, despite having no legal obligation to do so. Within Spain, the master challenged unsuccessfully the level of bail set as far as the highest court possible (the Spanish Constitutional Court). When deciding on the bail amount, none of the Spanish courts gave any consideration to his personal circumstances (other than his foreign nationality and lack of ties to Spain) nor provided any rational basis for the level of bail set. Instead, other considerations were paramount – notably the 'public unrest' and the alleged 'need to secure civil compensation'. Having exhausted all domestic remedies with respect to the amount of bail set, the master lodged a claim with the ECtHR alleging, inter alia, that the €3,000,000 bail set was excessively high and had been fixed without regard for his personal situation. As such, the master alleged that Spain had violated Article 5(3) of the Human Rights Convention (ECHR) – the right to liberty and security.

The ECtHR Chamber gave judgment on 8 January 2009, ruling that there had not been a violation of the ECHR and that the amount set was proportionate and reasonable[39]. Captain Mangouras sought, and was granted, leave to have the case referred to the Grand Chamber of the ECtHR. Numerous industry bodies, including the International Group of P&I Clubs also filed an Amicus Brief in support of the master's position.

The Grand Chamber of the European Court of Human Rights heard Captain Mangouras' case against Spain on the *Prestige* matter at an oral hearing in Strasbourg on 23 September 2009[40] and, on 28 September 2010, delivered a majority judgment[41] ruling that there was no violation of the ECHR by Spain[42]. The majority judgment has faced heavy criticism[43]; it has been suggested for example that the 'growing and legitimate concern' in

---

[39] *Mangouras v Spain* App no 12050/04 (Third Chamber judgment 8 January 2009 para 44). The most relevant provision of international law mentioned by the first instance court was referred to only in a quotation from a report of a European Council subsidiary body suggesting policy options including modification of art 230 'to state more clearly the possibility of imprisonment in the case of the most serious pollution breaches'.

[40] A full webcast of the hearing is available at www.echr.coe.int/ECHR/EN/Header/-Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20090923-1&lang=lang&flow=high.

[41] By 10 votes to seven.

[42] For the judgment and dissenting opinion see http://cmiskp.echr.coe.int/tkp197/-view.asp?action=html&documentId=874582&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

[43] 'Intertanko horrified at ECHR decision' www.maritime-executive.com/article/-intertanko-horrified-echr-decision.

relation to environmental offences as mentioned in the judgment[44] has clouded what should be a legal, not political, analysis of Spain's actions in this case and whether or not such actions constituted a breach of the ECHR. Similarly, the statement within the judgment that 'these new realities have to be taken into account in interpreting the requirements of Art 5(3)' might be considered revealing. Such a statement appears to suggest that because the concerns regarding pollution offences (and the desire to identify and punish those responsible for such offences) are legitimate, it is therefore acceptable to render the well-established safeguards concerning an individual's liberty meaningless. The clarity and detail of the strongly worded dissenting opinion would tend to suggest that opinion was sufficiently strong amongst the seven dissenting judges that they felt compelled to express their view in very clear terms that the approach taken by Spain was incompatible with Article 5(3) of the ECHR. The conflicting views of the majority and those dissenting is perhaps best left to the concluding paragraph of the dissenting opinion which reaches the heart of the matter:

> The majority conclude by stating that sufficient account was taken by the Spanish courts of the applicant's personal situation and that, in view of the disastrous environmental and economic consequences of the oil spill, the courts were justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant. We disagree. In our view, the approach of the Spanish courts in fixing the applicant's bail was not compatible with the principles established by the Court under Article 5 §3 of the Convention, the fundamental purpose of which is to ensure that no one is arbitrarily deprived of his liberty.

In summary, the majority judgment has serious implications for the right to liberty of individuals who have been accused, but not yet tried or convicted, of a criminal offence. While the shipping industry has expressed outrage and deep concern in respect of the Grand Chamber majority judgment, the potential ramifications extend far beyond the shipping industry – indeed to any industry where an individual's work involves some element of risk. Arguably, this judgment effectively permits authorities to hold employees to ransom for reasons related to the alleged civil liability of their employers.

The position in the United States

The position in the United States merits special mention as the US is not a party to UNCLOS. This has various implications of note in criminal proceedings against seafarers.

---

[44] John A C Cartner 'Have we lost sight of equal protection under the law?' *Lloyd's List* (London 13 October 2010) 6.

The first is that the US, although a party to MARPOL, does not have jurisdiction over MARPOL violations committed on the high seas. The jurisdiction of port states to institute proceedings in respect of such offences was created by UNCLOS Article 218 and in international law it exists only by virtue of that provision. There have consequently been a number of cases in which US port state control authorities have been unable to bring proceedings in respect of suspected MARPOL violations on the high seas, despite compelling evidence that these were committed.

This has not left the US Department of Justice (DOJ) without scope to intervene, as generally those responsible for such offences have sought to conceal them by actions in port which amount to obstruction of justice offences under US federal and state laws. Examples include the presentation of an oil record book containing false entries and the making of false statements to the competent investigating authorities[45].

A more significant consequence of UNCLOS not applying in the US is that the penalties which may be imposed for pollution offences are not subject to the restrictions of Article 230. Obstruction of justice offences carry high maximum penalties and in some cases jail sentences have been handed down on foreign seafarers involved in MARPOL violations on the high seas. UNCLOS would allow proceedings to be brought in such cases, but only monetary penalties to be imposed. Technically, the penalties imposed were for the obstruction of justice rather than pollution[46], but in practice the object of the shipboard investigations has been to uncover MARPOL violations and the express policy objective of the DOJ and the courts has been to stamp these out. It is therefore open to question whether jail terms in these cases are truly in line with international standards, although sympathy with those involved in deliberate violations may be limited unless there are genuine doubts about their guilt.

---

[45] See *U.S. v Petraia Maritime, Inc.*, 483 F. Supp. 2d 34, 39 (D. Me. 2007) (holding that '[t]he discharge itself and the contemporaneous failure to record it in the Oil Record Book (ORB) are acts that are *separate and distinct* from the acts that form the basis of the pending criminal charges' and citing *U.S. v Royal Caribbean Cruises Ltd* (11 F. Supp. 2d 1358, 1998 A.M.C. 1817 (S.D. Fla. 1998)) for the proposition that '[p]resentation of a false Oil Record Book seems more appropriately characterized as an essentially domestic law violation over which the United States properly has jurisdiction'); and *U.S. v Ionia Management S.A.*, 498 F. Supp. 2d 477, 487 (D. Conn. 2007) ('the gravamen of this action is not the pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port', quoting *Royal Caribbean* at 1371). Although both of these cases involved a violation of the Act to Prevent Pollution from Ships for failure to maintain an ORB for inspection upon entry into US waters and ports, rather than a prosecution under the False Statements Act, the underlying rationale of the decisions is the same, namely the knowing use or presentation of a false writing in the form of an ORB.

[46] In *U.S. v Abrogar*, 459 F.3d 430 (3d Cir. 2006), the Third Circuit implicitly recognised the distinction between the domestic law offence of maintenance and presentation of a false ORB in a US port and extraterritorial conduct (discharge of oily wastes) reflected in the false ORB entries, by holding that the latter did not constitute 'relevant conduct' for enhancement purposes in sentencing the defendant chief engineer for the former violation.

Of potentially greater concern is the possibility of accidental spills in US waters being penalised more severely than would be possible in jurisdictions where UNCLOS applies. As a party to MARPOL, the US should not (according to one school of thought) impose criminal liability for accidental spills resulting from damage to a ship or its equipment in the absence of intent or recklessness. In practice, it has been common for criminal charges to be brought under various federal and state statutes which create offences based on liability standards other than intent or recklessness, including gross negligence, negligence and in some cases, even strict liability. In such cases, there is not only an issue regarding the compatibility of domestic laws with MARPOL treaty obligations, but it is also clear that the imposition of a custodial sentence on a foreign seafarer would not be consistent with the human rights safeguards which apply in UNCLOS contracting states.

This being the case, there have been concerns about the length of time for which foreign seafarers have been required to remain in the US after an incident, not only when they are charged but indeed when the DOJ wishes them to remain available as a prosecution witness[47]. The US Courts have held that 30-45 days is the maximum time that a seafarer can be required to remain in the US when not facing charges and being detained only as a 'witness'[48]. However, given the freedom of movement recognised by the Universal Declaration of Human Rights, it is open to question whether the detention of foreign seafarers for this length of time against their will can ever be justified unless they are charged with an offence and the alleged offence is one for which a custodial sentence could be imposed without breach of internationally recognised standards.

While the reasons for non-ratification of UNCLOS by the US have been variously stated, it does not appear that these relate specifically to the provisions discussed above, nor that they reflect a policy of according less recognition to the human rights of seafarers than is the case in the rest of the international community. Assuming that those responsible for the administration of justice in such cases in the US are concerned to respect these rights to at least the same extent as elsewhere, the IMO Guidelines on Fair Treatment may be of interest and assistance.

---

[47] The removal of a seafarer's passport and seaman's book effectively means that the individual has no proper identification and may therefore be prohibited from entering many buildings with security, travelling on any mode of transportation that requires production of proper identification and carrying out any transactions that require it.

[48] See *In Re: M/V GAURAV PREM et al., 2011 U.S. Dist. LEXIS 153429 (S.D. Ala. 2011)*; see also *In re: Grand Jury Proceedings Re: Investigation of Blow Wind Shipping, S.A., 267 F.R.D. 32 (D. Me. 2010)* (ordering detained crew members be deposed and released in less than thirty (30) days); *United States v Maniatis, 2007 U.S. Dist. LEXIS 47543 (E.D. Cal. 2007); Aguilar-Ayala v Ruiz, 973 F.2d 411, 420 (5th Cir. 1992)* (holding material witnesses must be released within 45 days of being detained).

IMO Assembly adopts resolution regarding the fair treatment of seafarers – November 2011

The 27th Assembly of the IMO was held from 21 to 30 November 2011. Several resolutions were adopted[49] including one entitled 'Promotion as widely as possible of the application of the 2006 Guidelines on fair treatment of seafarers in the event of a maritime accident' (the Resolution)[50].This followed approval by the IMO Council in July 2011 of a draft resolution specifically relating to the Guidelines and reiterating the importance of the subject of the fair treatment of seafarers. The Resolution calls upon governments to give effect to the Guidelines and invites interested parties to assist in raising awareness of them. It is recognised that there is much to be done in this area and it remains to be seen whether the Guidelines result in consistency in the way seafarers are treated in the aftermath of a casualty.

Conclusion

A serious maritime accident, especially one involving pollution, is likely to have significant international dimensions, even though these may at first be obscured by a glare of focus on the domestic implications in the coastal state concerned.

If foreign seafarers are thought to have caused or contributed to the incident, their interest in being repatriated may appear a limited weight in the scales against a substantial public interest in the responsible parties being identified and penalised with due severity. However, the international community has made increasingly clear its resolve to ensure that the recognised rights of seafarers are duly respected and that international norms of fair treatment are observed.

Authorities responsible for the administration of criminal justice in coastal states need to be fully aware of these international dimensions, as well as of domestic implications, if undesired tensions and criticisms are to be avoided in international fora. Measures taken in oversight of these aspects are not always easily or quickly reversed.

The IMO Guidelines on fair treatment of seafarers do not establish legally binding commitments, but they do provide valuable guidance to all parties involved, including coastal state authorities who aspire to respect internationally established human rights and who wish to be seen to do so.

---

49 www.imo.org/MediaCentre/PressBriefings/Pages/62-A27-ends.aspx.

50 ibid A1056(27).