

UNIVERSITY OF CAPE TOWN
DEPARTMENT OF COMMERCIAL LAW – SHIPPING LAW UNIT

**HAS THE CRIMINALISATION OF THE MASTER
SUBVERTED THE AIM OF THE
INTERNATIONAL POLLUTION INSTRUMENTS
TO IMPOSE UNIFORMITY ON THE
CONSEQUENCES OF SHIP-SOURCE
POLLUTION?**

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CHAPTER 1 INTRODUCTION

I Aim

The aim of this dissertation is to question whether the objective of international pollution instruments to impose uniformity on the consequences of ship-source pollution is being subverted by the criminalisation of the Master following a maritime accident.

II Argument

It will be argued that while international pollution instruments relating to ship-source pollution are unambiguous in terms of the consequences it holds for the Master, it is the inconsistent application of international pollution instruments by states in the aftermath of a maritime accident that has led to the criminalisation of the Master and which ultimately subverts from the aim of the instruments to achieve uniformity.

III Background

Seafaring has always been a dangerous profession, and when prompted about the topic, most people will probably mention the ill-fated maiden voyage of the *Titanic*,¹ though more informed audiences may recount horrific ferry disasters such as the *Herald of Free Enterprise*, *Doña Paz*, and the *Estonia*.² Besides tragic loss of life, pollution from ships also has a dark history, and the world woke up to the reality of large-scale oil pollution from ships after the *Torrey Canyon* disaster in 1969.³ While shipping disasters leading to loss of life or pollution are devastating, it is a commonly accepted fact that tragedy and disaster is the most significant driver of change in the maritime industry.⁴ The sinking of the *Titanic* prompted the establishment of global safety standards for the maritime industry and led to the adoption of the SOLAS Convention,⁵

¹ For information on the sinking of the *Titanic*, see Amanda Onion, Missy Sullivan and Matt Mullen 'Titanic' *The History Channel* 9 November 2009, available at <https://www.history.com/topics/early-20th-century-us/titanic>, accessed on 24 October 2020.

² Neil Baird 'Fatal ferry accidents, their causes, and how to prevent them' (Doctor of Philosophy thesis, Australian National Centre for Ocean Resources and Security, University of Wollongong, 2018) 71-74, 80-82.

³ Tormod Rafgard *Tankers. Big Oil and Pollution Liability online: Tankers, Big Oil and Pollution* (2011) 48-57.

⁴ Edgar Gold 'Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie' (2005) 24(2) *University of Queensland Law Journal* 251 at 251.

⁵ For and overview of the SOLAS Convention, see IMO 'International Convention for the Safety of Life at Sea (SOLAS), 1974' available at <https://www.imo.org/en/About/Conventions/Pages>

while some of the most notorious pollution disasters⁶ resulted in significant amendments to international conventions which regulate shipping.⁷ Ships had to be constructed differently to make the transportation of oil at sea safer,⁸ and compensation regimes had to be adapted and enhanced to ensure that those affected by large-scale oil pollution are adequately compensated.⁹ As a result, large-scale ship-sourced oil pollution has decreased over the last 50 years.¹⁰ While ships have become safer, a new brand of environmental consciousness surfaced in the wake of the *Torrey Canyon* disaster¹¹ and is threatening to erode the traditional privilege and honour usually associate with taking command of an internationally trading vessel.¹²

Despite statistical evidence which has confirmed that the volume of ocean pollution from land-based sources is far greater than ship-source pollution,¹³ public sentiment following pollution from ships tends to be inconsistent with empirical data on ocean pollution, and speculation in the media often ignites the volatile situation.¹⁴ Amidst outrage from the public following pollution from ships, states are often under severe pressure to take action against the perceived perpetrators,¹⁵ and in the wake of a pollution disaster, those most closely linked to the ship are often blamed for the devastation ‘based on incomplete or premature conceptions of the relevant facts.’¹⁶

International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx, accessed on 24 October 2020.

⁶ Rafgard op cit note 3 at 13. Some of the most notorious tanker casualties the author deals with are the *Amoco Cadiz* (at 119-123), *Exxon Valdez* (at 195-207), *Erika* (at 280-299) and *Prestige* (at 302-304).

⁷ For a history of the IMO and the Conventions which regulates shipping, see IMO ‘Brief History of IMO’ available at <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, accessed on 11 September 2020.

⁸ For information on the prevention of pollution from ships, see IMO ‘International Convention for the Prevention of Pollution from Ships (MARPOL)’ available at [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx), accessed on 24 October 2020.

⁹ For information on the compensation regimes for oil pollution damage caused by spills from oil tankers, see ‘The International Oil Pollution Compensation Funds’ available at <https://www.iopcfunds.org/>, accessed on 11 September 2020.

¹⁰ ITOPF ‘Oil Tanker Spill Statistics 2019’ (2020) at 7, available at <https://www.itopf.org/knowledge-resources/data-statistics/statistics/>, accessed on 11 September 2020.

¹¹ Rafgard op cit note 3 at 12.

¹² Edgar Gold ‘From Privilege to Peril The Shipmaster's Current Legal Rights and Responsibilities’ (2004) 3(1) *WMU Journal of Maritime Affairs* 51 at 51.

¹³ Proshanto K. Mukherjee ‘The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective’ in Tafsir Malick Ndiaye and Rüdger Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes Liber Amicorum Judge Thomas A. Mensah* (2007) 463 at 464.

¹⁴ Edgar Gold ‘Bloodhounds’ op cit note 4 at 252.

¹⁵ Elisabeth Fontugne ‘Dismantling the Exxon Valdez: How Misunderstanding One Maritime Accident Led to the Criminalisation of an Entire Profession’ (2015) 46(2) *Journal of Maritime Law and Commerce* 201 at 202.

¹⁶ Olivia Murray ‘Fair treatment of seafarers – international law and practice’ (2012) 18 *Journal of International Maritime Law* 150 at 154.

Notwithstanding common misconceptions from the public and the media following a pollution disaster, the shipping industry is well regulated by the International Maritime Organisation (IMO),¹⁷ which is recognised as the ‘global standard-setting authority for the safety, security and environmental performance of international shipping.’¹⁸ Since shipping has a significantly international character, the industry can only operate effectively if IMO regulations and standards are agreed, adopted, and implemented by all State Parties in a uniform manner. This is especially relevant in cases of ship-source pollution, and IMO conventions consequently specify the conduct will constitute a violation of the rules¹⁹ and the manner in which states may deal with violations in relation to the geographical origin of the pollution.²⁰ The clean-up costs following an accident of ship-source pollution and the reinstatement of the marine environment are also comprehensively detailed in several IMO conventions to ensure that victims of pollution are duly reimbursed.²¹ Nevertheless, when ship-source pollution results in devastation to the marine environment, states often respond with inclemency, and the safeguards of UNCLOS²² seem to fly out of the proverbial window.

It has therefore become common practice amongst states to arrest the Master after a maritime accident without access to legal counsel or an interpreter,²³ leaving the Master vulnerable in a foreign jurisdiction surrounded by state actors set at ‘making

¹⁷ For the background on the IMO Convention of 1948 and the establishment of the IMO, see IMO ‘Convention on the International Maritime Organization’ available at <https://www.imo.org/en/About/Conventions/Pages/Convention-on-the-International-Maritime-Organization.aspx>, accessed on 11 September 2020.

¹⁸ For an explanation on the role of the IMO, see IMO ‘Introduction to IMO’ available at <https://www.imo.org/en/About/Pages/Default.aspx>, accessed on 20 September 2020.

¹⁹ MARPOL 73, Article 2 (3). Exemptions to the MARPOL rules are provided in MARPOL 73/78, Annex I, Regulation 4.

²⁰ For an explanation of the role of UNCLOS as framework Convention and in establishing rules governing uses of the oceans, see IMO ‘United Nations Convention on the Law of the Sea’ available at <https://www.imo.org/en/OurWork/Legal/Pages/UnitedNationsConventionOnTheLawOfTheSea.aspx>, accessed on 20 September 2020.

²¹ The International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted in 2001 and entered into force in 2008. See IMO ‘International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER)’ available at [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-\(BUNKER\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-(BUNKER).aspx), accessed on 21 September 2020. It provides for compensation for oil pollution from ships when the oil is carried as fuel in ships’ bunkers (as opposed to cargo). See also ‘Compensation for oil pollution from tankers’ op cit note 9.

²² UNCLOS Article 230 provides that only monetary penalties may be imposed on the Master after an incident of pollution.

²³ Edgar Gold ‘Fair Treatment of Seafarers in the Event of a Marine Accident: New International Guidelines’ in Tafsir Malick Ndiaye and Rüdger Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes Liber Amicorum Judge Thomas A. Mensah* (2007) 406 at 406.

him pay' and 'meting out justice' due to considerable domestic pressure.²⁴ While the sovereign rights and jurisdictional powers of states are not a matter of contention,²⁵ it is rather the practice of turning the Master into a criminal by making the action he took during the accident illegal²⁶— which is contentious. While the IMO recognised this unsettling practice²⁷ and responded in unison with the global maritime community to develop guidelines for seafarers to be treated fairly following a marine accident,²⁸ the uptake from states has been slow and Masters are still being criminalized.²⁹

The proliferation of the criminalisation of seafarers is often attributed to an apparent lack of knowledge of international treaty obligations by local law enforcement officials following a maritime accident, but, whilst this may be true to some extent, it is rather the dogmatic application of domestic laws which are inconsistent with the states' treaty obligations which present a challenge. The political pressure on local law enforcement officials who may have little or no experience in such cases will be extreme, and the situation may be compounded by the likelihood that the accused is a foreign seafarer on a foreign-flagged ship.³⁰ It is also inevitable that economic pressure to extract maximum compensation for damages to the environment in cases of pollution will tip the scales of justice heavily in the favour of the state, leaving the Master exposed to a foreign legal system that may not be keen to interpret or apply the provisions of the relevant conventions in the manner as intended by the IMO. Judicial decisions devoid of substance and reason have, however, not only sunk the careers of respected ship's Masters, but it also seems to indicate that the uniform application of international conventions is no longer amenable to some members of the international community.

²⁴ Colin De La Rue & Charles B. Anderson *Shipping and the Environment* 2 ed (2009) 1103.

²⁵ UNCLOS Article 2 & 211.

²⁶ Mukherjee op cit note 13 at 480.

²⁷ Efthimios Mitropoulos 'IMO: Rising to New Challenges' (2004) 3(2) *WMU Journal of Maritime Affairs* 107 at 110. The author was the Secretary-General of the IMO at the time.

²⁸ The IMO and the International Labour Organization (ILO) joined by industry, marine labour and legal groups came together in 2005 in an Ad Hoc Expert Working Group on the Fair Treatment of Seafarers. Several IMO/ILO Resolutions have since been adopted: A.987(24) was adopted on 1 December 2005, LEG.3(91) was adopted on 27 April 2006 and a renewed call for wide adoption was made in A.1056(27) on 30 November 2011.

²⁹ BIMCO 'Study of recent cases involving the International Practice of Using Criminal Sanctions towards Seafarers' adopted by the BIMCO Board of Directors in Singapore on 2 March 2006 (Rev 10 March 2006), available at https://www.vdks.org/pdf/bimco_study_march_2006.pdf, accessed on 28 September 2020. See also Seafarers Rights International publication 'SRI survey: Fair Treatment of Seafarers' revised November 2018, available at <http://ftp.elabor8.co.uk/sri/pdf/SRI-Survey-web.pdf>, accessed on 28 September 2020.

³⁰ Murray op cit note 16 at 151.

Although the recent pollution incident along the coast of Mauritius³¹ renewed the debate around the criminalisation of the Master,³² the most urgent question the maritime community faces at present is whether criminalisation subverts the aim of the IMO since it was established to ‘provide machinery for co-operation among Governments in the field of governmental regulation and practices.’³³ The stated mission of the IMO is to establish the ‘effective implementation of IMO’s instruments with a view to their universal and uniform application,’³⁴ and in cases where the Master is criminalized by the circumvention of IMO conventions by states, it is prudent to question whether such action undermines the aim and the mission of the IMO. The question not only affects Masters of internationally trading vessels, but it is also of vital importance to the maritime industry, which heavily relies on the uniform application of conventions to conduct their business without restraint. If standards are not uniformly applied by states, shipping companies will face costly delays in Ports and possible restrictions of trade. This will have a detrimental effect on their viability, and it will inevitably also have a knock-on effect on the recruitment and retention of suitably qualified seafarers. The question is, therefore, a vital one to ask to ensure the sustainability and growth of the maritime industry. If criminalisation indeed subverts from the aim and mission of IMO conventions to be applied uniformly, the IMO will have to take significant steps to re-iterate the importance thereof amongst states³⁵ since the organization can only remain viable if its conventions are applied in a uniform manner.

³¹ For information on the ‘M/V Wakashio’ which ran aground on 25 July 2020 off the east coast of Mauritius, see ITOPF News ‘Oil Spill in Mauritius’ *ITOPF* 11 August 2020, available at <https://www.itopf.org/news-events/news/article/oil-spill-in-mauritius/>, accessed on 29 September 2020.

³² For information on the arrest of the Master of the ‘M/V Wakashio’, see ITF News ‘ITF very concerned at Wakashio grounding, crew arrests’ *ITF Seafarers* 21 August 2020, available at <https://www.itfseafarers.org/en/news/itf-very-concerned-wakashio-grounding-crew-arrests>, accessed on 20 September 2020.

³³ IMO Convention of 1948, Article 1 (a). For the full text of the convention, see the United Nations Treaty Collection ‘Convention on the International Maritime Organization’ available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&clang=en, accessed on 13 January 2021.

³⁴ For further information on the Mission Statement of the IMO, see IMO ‘Brief History of IMO’ available at <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, accessed on 11 September 2020.

³⁵ Pauline Marchand ‘The International Law Regarding Ship-source Pollution Liability and Compensation: Evolution and Current Challenges’ (Abstract 2017-304) *2017 International Oil Spill Conference* at 9.

IV Focus and scope

The scope of this dissertation will be limited to maritime accidents and will focus on the subsequent actions of the state against the Master.

There are various definitions that exist in the maritime industry with reference to a maritime accident,³⁶ and it is, therefore, necessary to clarify at the outset which definition is of relevance throughout this dissertation:

‘ “maritime accident” means any unforeseen occurrence or physical event connected to the navigation, operations, manoeuvring or handling of ships, or the machinery, equipment, material, or cargo on board such ships which may result in the detention of seafarers;’³⁷

While it is of consequence that all seafarers are exposed to the perils of the sea, the Master is significantly more vulnerable than the rest of his crew due to his position and status on board. The Master is in command of the ship,³⁸ and since he has ‘overriding authority and the responsibility to make decisions with respect to safety and pollution prevention,’³⁹ his account of events will be crucial in any subsequent investigation following a maritime accident. The Master is also inextricably linked to the ship-owner as its representative or agent,⁴⁰ and states may be tempted to use the Master’s presence as leverage to garner an immediate response from the ship-owner. The Master is consequently most vulnerable to the retributive justice of states in the aftermath of a maritime accident, and this dissertation consequently only focuses on the criminalisation of the Master.

Taking from the definition of a maritime accident, it is apparent that such an event may well result in loss of life and/ or large-scale pollution, which are likely to lead to criminal and/ or civil charges being levelled against the Master. While it is therefore predictable that the result of a maritime accident will expose the Master to the domestic laws of the affected state, it is rather the criminalisation of the Master’s actions in instances where the relevant conventions exempt his actions as a violation

³⁶ Edgar Gold ‘Fair Treatment of Seafarers’ op cit note 23 at 412.

³⁷ IMO Resolution LEG.3(91) adopted on 27 April 2006, LEG 91/12, Annex 2, Section II (8), page 4.

³⁸ In accordance with the definition of a Master in the International Convention on Standard of Training, Certification and Watchkeeping for Seafarers (STCW) 1978, as amended in 2010, Annex I, Chapter 1, Regulation I/1, para 1.3.

³⁹ International Safety Management (ISM) Code para 5.2. The ISM Code became mandatory on 1 July 1998 and appeared as a new chapter (XI) to the International Convention for the Safety of Life at Sea (SOLAS), 1974. It was subsequently amended by resolutions MSC.99(73), MSC.194(80) and MSC.273(85).

⁴⁰ Edgar Gold ‘From Privilege to Peril’ op cit note 12 at 57.

of the rules – which lies at the crux of the question being posed. Although the three case studies presented herein only relate to the actions taken by states against the Master in the aftermath of a maritime accident that led to devastating pollution, it is not to be construed as an indication that cases in which the loss of life occurs, are not of equal relevance. Even though this dissertation only deals with maritime accidents which lead to pollution of the marine environment, it is the broader ramifications of criminalisation in both instances which guide the arguments presented herein.

V Structure

Chapter 2 identifies the ideal as prescribed in international conventions in terms of the actions which may be taken by states following a maritime accident, especially where pollution occurs as a result. State parties are obliged to enact conventions that they have ratified into their domestic legislation, and in an ideal world, Masters are to be treated in a manner that is consistent with the international treaty obligations of the state.

Chapter 3 identifies the reality faced by Masters in terms of the actions of states following a maritime accident in three case studies. State action is identified by analysing the extent to which economic- and political pressures shape the course of legal proceedings and judicial decisions against the Master, and the reality is found to be in stark contrast with the ideal. The application of domestic laws in-lieu of conventions to which the state is a party emerges as the key contributing factor in the criminalisation of the Master and indicates that state action is far removed from the aim and mission of the IMO to impose uniformity.

Chapter 4 analyses the ramifications when states do not interpret and apply international conventions in a uniform manner. The consequences of state action are analysed against the backdrop of strict liability and the right of the ship-owner to limit its liability since it represents a unique understanding between ship-owners, cargo owners, and Coastal States. The liability standards in key IMO conventions are identified and compared with the liability standards applied in the three case studies in the preceding chapter to analyse the extent to which states have diverted from their treaty obligations, as it not only leads to the unjust criminalisation of the Master, but it also violates the conventions to which they are party to and detracts from the vision of uniformity.

Chapter 5 concludes that the reality is far removed from the ideal and that the Master is highly likely to face criminalisation when states disregard their treaty obligations. The developing trend amongst states which insist that international conventions only set minimum standards and that they may impose stricter rules and sanctions, poses a significant risk to the Master as a professional mariner and subverts the aim of the international pollution instruments to achieve uniformity in application.

CHAPTER 2 THE IDEAL AS PRESCRIBED IN THE CONVENTIONS

I Introduction

Due to the international character of shipping, it is a widely held view that the shipping industry is best regulated by uniform international standards⁴¹, and to this end, the IMO was established⁴² with its main role being the creation of global standards for the safety, security and environmental performance of international shipping. Since shipping is vital to the sustainable economic growth of nations across the globe, international standards are aimed at ensuring that this vital sector remains safe, environmentally sound, energy-efficient, and secure.⁴³ International conventions however recognise that accidents are an inevitable reality⁴⁴ and prescribe the actions to be taken by states in the event of a marine accident to ensure uniform application of the conventions across jurisdictional boundaries. This chapter focuses on UNCLOS as framework convention and identifies the role of the IMO and the obligations of State Parties to enact conventions that they have ratified in their domestic laws. Thereafter, the main conventions as seen against the framework of UNCLOS will be identified, with specific reference to the obligations of State Parties towards the Master following a maritime accident – which represents the ideal world.

II United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS⁴⁵ is one of the most widely adopted conventions amongst maritime nations and includes several land-locked states.⁴⁶ As a framework Convention, UNCLOS provides in general terms the laws and regulations that states are to adopt in their national legislation for the safety of ships and for the prevention of pollution.⁴⁷

Since a maritime accident is likely to result in pollution of the marine environment, Part XII of UNCLOS is of particular significance as it imposes a specific

⁴¹ De La Rue & Anderson op cit note 24 at 807.

⁴² IMO op cit note 17.

⁴³ IMO Introduction op cit note 18.

⁴⁴ Sarah M. Kirby 'The Continuing Criminalisation of Seafarers: Where to go to from here?' in Aldo Chircop et al (eds) *The Regulation of International Shipping: International and Comparative Perspectives: Essays in Honor of Edgar Gold* (2012) 443 at 448.

⁴⁵ UNCLOS op cit note 20.

⁴⁶ For further information on the number of State Parties to UNCLOS, see 'Law of the Sea' available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed on 14 November 2020.

⁴⁷ De La Rue & Anderson op cit note 24 at 807.

duty on states to protect and preserve the marine environment.⁴⁸ State Parties are also obliged to take all measures to prevent, reduce and control pollution from any source in compliance with UNCLOS and by co-operating with other states to harmonize such measures.⁴⁹ The maritime zones⁵⁰ and the roles of the Flag State, Coastal State, and Port State are particularly significant since it determines the jurisdiction conferred onto states. Jurisdiction may be prescriptive or legislative and deals with the competence of a state to prescribe substantive standards or may be referred to in terms of enforcement which deals with the power of a state to prevent or punish any violation of its standards.⁵¹

(a) The Role of the Flag State

All states have the right to sail ships flying their flag on the high seas⁵² and are obliged to establish laws and regulations on the registration of ships in their territory. Ships, therefore, have the nationality of the state whose flag they are entitled to fly.⁵³

UNCLOS confers onto the Flag State both legislative⁵⁴ and enforcement jurisdiction⁵⁵ in all matters relating to ships who are entitled to fly its flag. The Flag State is responsible for ensuring that ships flying its flag complies with security and safety regulations and take relevant measures to prevent pollution.⁵⁶ The Flag State is compelled to achieve this by using ‘generally accepted international regulations, procedures and practices,’⁵⁷ which are accepted to refer to IMO rules and standards.⁵⁸ Flag States with significant tonnage on their ships register are parties to the principal IMO Conventions (such as SOLAS and MARPOL) and have enacted it in their domestic laws.⁵⁹ Flag States are primarily responsible for enforcing these regulations, but not all are equally driven to enforce stringent marine environmental regulations

⁴⁸ UNCLOS Article 192.

⁴⁹ UNCLOS Article 194(1).

⁵⁰ Maritime zones defined in UNCLOS: Territorial Sea (Article 2 & 3); Internal Waters (Article 8); Contiguous Zone (Article 33); the Exclusive Economic Zone (Article 55 & 57); Continental Shelf (Article 76); High Seas (Article 86).

⁵¹ Md Saiful Karim *Prevention of Pollution of the Marine Environment from Vessels – The Potential and Limits of the International Maritime Organisation* (2015) 31.

⁵² UNCLOS Article 90.

⁵³ UNCLOS Article 91.

⁵⁴ UNCLOS Article 94(1).

⁵⁵ UNCLOS Article 211(2) & 217.

⁵⁶ UNCLOS Article 94(3)(4).

⁵⁷ UNCLOS Article 94(5).

⁵⁸ IMO LEG/MISC.7 dated 19 January 2012 at page 10.

⁵⁹ De La Rue & Anderson op cit note 24 at 1053.

since the ships of several Flag States never visit the country, and they consequently do not pose a threat to the marine environment of the Flag State itself.⁶⁰

The obligations of the Flag State towards the Master of a ship who is flying its flag and which has been involved in a maritime accident are extensive. Since a marine accident is likely to result in loss of life or pollution or both, the accident is likely to be reported as a violation of IMO rules at the outset. The Flag State will consequently be obliged to immediately investigate any accident as reported by another state which involves any one of its ships, irrespective of where the accident occurred,⁶¹ and on the high seas, the Flag State has exclusive jurisdiction over such a ship.⁶²

Since the Master is responsible for the ship, it follows that he will be central to investigations into the accident. The Flag State has the primary responsibility to launch an investigation immediately after an accident and may request assistance from other states during its investigation. Should the investigation by the Flag State find that the Master has committed an offense or violated any of the IMO conventions, the Flag State is obliged to institute proceedings against him and decide on a penalty which conforms to its own laws and which is adequately severe to discourage violations in future.⁶³ The Flag State is therefore obliged to confer upon the Master the same rights as conferred upon its own nationals, with due cognisance of his procedural rights.⁶⁴ It is of consequence that the Master will be severely affected by the accident and that his personal life and his career may be at stake, and the Flag State is therefore obliged to ensure that the Master is treated fairly and that the relevant IMO regulations are observed during the investigation into the accident and during the subsequent actions by states.⁶⁵

⁶⁰ Karim op cit note 51 at 32.

⁶¹ UNCLOS Article 94(6)(7) & 217(6).

⁶² UNCLOS Article 92(1).

⁶³ UNCLOS Article 217(4)(5)(6)(8).

⁶⁴ Kirby op cit note 44 at 444.

⁶⁵ IMO Resolution MSC.225(84). The Code of the International Standards and Recommended Practises for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigations Code) adopted on 16 May 2008. The Code also considers the Guidelines on fair treatment of seafarers in the event of a maritime accident, adopted by IMO A.987(24) op cit note 28.

(b) The Role of the Coastal State

A Coastal State is a state with a sea-coastline⁶⁶, and as such, the state will have a distinct interest in adopting and enforcing legislation to prevent pollution, especially if the state is located close to a major shipping route.

A Coastal State has full sovereignty in its internal waters and territorial sea⁶⁷ and can either legislate in conformity with IMO standards or adopt more stringent standards. All states, however, have the right to innocent passage through the territorial seas of a Coastal State,⁶⁸ and the state may not impede the innocent passage of a foreign vessel in their territorial seas.⁶⁹ Coastal States are therefore required to enact laws that comply with UNCLOS and other rules of international law in this respect.⁷⁰ Coastal States therefore have unrestricted prescriptive or legislative jurisdiction over their internal and territorial waters, subject to the right of innocent passage of foreign vessels.⁷¹

In the Exclusive Economic Zone (EEZ), Coastal States have sovereign rights ‘for the purpose of exploring and exploiting, conserving and managing the natural resources⁷² but only enjoys ‘jurisdiction as provided for in the relevant provisions.’⁷³ The Coastal State therefore has prescriptive jurisdiction in the EEZ and is required to give effect to international law and to enact national laws which are in conformity with international laws and standards. This effectively means that a Coastal State may only enact legislation that conforms to MARPOL or other generally agreed international regimes in the EEZ.⁷⁴

The enforcement jurisdiction of a Coastal State with respect to the violation of pollution laws will differ depending on whether a vessel is voluntarily in one of its ports or offshore terminals, or whether it is navigating through waters which fall within the state’s jurisdiction.⁷⁵ If a vessel is voluntarily in a port, enforcement powers are extensive and will be exercised by the Ports.⁷⁶ If a foreign vessel is however exercising

⁶⁶ Erik J. Molenaar ‘Port and Coastal States’ in Donald R Rothwell et al (eds) *The Oxford Handbook of the Law of the Sea* (2015) 280 at 280.

⁶⁷ UNCLOS Article 2(1).

⁶⁸ UNCLOS Article 17.

⁶⁹ UNCLOS Article 24 & 211(4).

⁷⁰ UNCLOS Article 21.

⁷¹ Karim op cit note 51 at 31.

⁷² UNCLOS Article 56 (1)(a).

⁷³ UNCLOS Article 56 (1)(b)(iii).

⁷⁴ De La Rue & Anderson op cit note 24 at 814.

⁷⁵ Ibid at 1055.

⁷⁶ UNCLOS Article 218.

its right of innocent passage through the waters of a Coastal State, the state's enforcement jurisdiction is more restricted, and enforcement powers are referred to a Coastal State Control. The enforcement powers of Coastal States are subject to specific safeguards and will depend on whether a violation, actual or suspected, occurred in the territorial sea or the EEZ.⁷⁷

While a Coastal State has no jurisdiction on the high seas,⁷⁸ it retains jurisdiction to 'take and enforce measures beyond the territorial sea...to protect their coastline... from pollution or threat of pollution following upon a maritime casualty.'⁷⁹ The enforcement powers of the Coastal State are therefore extended to the high seas in recognition of the state's right to protect its interests and are set out in the Intervention Convention of 1969 and its Protocol of 1973.⁸⁰

The obligations of the Coastal State in respect of a Master following a maritime accident will therefore be to act within the scope of UNCLOS as enacted in their domestic laws. Even though a Coastal State has full sovereignty within its territorial sea and may have more stringent laws than observed internationally, the Coastal State still has a general obligation to respect the fundamental human rights⁸¹ of the Master, as it is widely accepted to form part of customary international law.⁸²

(c) The Role of the Port State

If a vessel enters a port or an offshore terminal of a state on a voluntary basis, it is subject to the enforcement jurisdiction of the Port State, and the exercise of these powers by the state is commonly known as Port State Control. The IMO recognized the significant contribution of regional agreements to the improvement of maritime

⁷⁷ De La Rue & Anderson op cit note 24 at 1062-3.

⁷⁸ UNCLOS Article 86. The high seas are all parts of the sea that are not included in the EEZ, the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

⁷⁹ UNCLOS Article 221(1).

⁸⁰ For further information on the Intervention Convention and its Protocol, see IMO 'International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969' available at <https://www.imo.org/en/About/Conventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx>, accessed on 16 November 2020.

⁸¹ For information on the universal declaration of human rights, see United Nations Human Rights - Office of the High Commissioner 'Universal Declaration of Human Rights' available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, accessed on 16 November 2020. Article 7 states that every person has the right to recognition as person before the law.

⁸² For further information human rights and customary international law, see United Nations Human Rights - Office of the High Commissioner 'The United Nations Human Rights Treaty System, Fact Sheet No.30/Rev.1' available at <https://www.ohchr.org/documents/publications/factsheet30rev1.pdf>, accessed on 16 November 2020. Confirmation of the UDHR forming part of customary international law is available on page 3.

safety and pollution prevention, and in 1991 the IMO adopted a resolution in recognition of the success of the Paris MoU⁸³ and invited states to consider similar regional agreements in the operation of Port State Control.⁸⁴ Regional agreements between Port States have resulted in a number of Memorandums of Understanding being concluded which cover all the world's oceans,⁸⁵ and it has become an effective means of monitoring and enforcing compliance with IMO standards specifically related to ship safety and pollution prevention.⁸⁶

Port State jurisdiction is however also extended to the high seas, and in the exercise of its Port State Control, the state may undertake investigations and institute proceedings in respect of any discharge from the vessel which violates international rules and standards.⁸⁷

The powers conferred onto a Port State when a pollution violation has occurred in the jurisdiction of another state or is likely to occur within its own jurisdiction are quite extensive, and in such instances, a Port State may investigate and bring proceedings against any vessel in conformance with its enforcement jurisdiction as stipulated in UNCLOS.⁸⁸

The obligations of the Port State towards the Master following a marine accident that causes pollution is the same as the obligations of the Coastal State since human rights are not limited by the geographical scope of maritime zones.

(d) Safeguards in UNCLOS

Due to the extensive enforcement jurisdiction granted to Coastal States and Port States in UNCLOS, constraints to these powers are included in the form of safeguards.

Article 73 provides that a Coastal State may board, inspect and arrest a vessel in the EEZ in the exercise of its sovereign rights, but this action is conditional on the prompt release of the vessel and the crew upon the posting of a reasonable bond or security. In such instances, the Coastal State is required to inform the Flag State promptly of the action taken and specify the penalties imposed.⁸⁹

⁸³ For more information on the Paris MoU, see Paris MoU 'A short history of the Paris MoU on PSC' available at <https://www.parismou.org/about-us/history>, accessed on 21 February 2021.

⁸⁴ IMO Resolution A.682(17) of 6 November 1991 on Regional Co-operation in the Control of Ships and Discharges.

⁸⁵ De La Rue & Anderson op cit note 24 at 1060.

⁸⁶ Ibid at 1055.

⁸⁷ UNCLOS Article 218 (1).

⁸⁸ UNCLOS Article 218(2)(3)(4).

⁸⁹ UNCLOS Article (1)(2)(4).

Part XII of UNCLOS deals specifically with the protection of the marine environment and actions taken by the Port State or the Coastal State in the event of a pollution violation are subject to the safeguards specified in section 7 of the same part. While Article 220 provides that a Coastal State may institute proceedings against a vessel in the light of clear objective evidence of a MARPOL violation, it prohibits the Coastal State from unduly delaying a vessel if suitable financial security for the release of the vessel is provided.⁹⁰

The most significant safeguards in UNCLOS are set out in Article 230, and it specifies that states may only institute fines for pollution violations. In the EEZ, only monetary penalties can be imposed for pollution violations, regardless of whether it was accidental or intentional.⁹¹ In the territorial sea, a state may only impose monetary penalties for pollution violations unless it was caused by a wilful act that caused serious pollution.⁹²

The safeguards as set out in UNCLOS are of extreme importance to the Master since it establishes that his rights are to be observed in any proceedings⁹³ and that the state is obliged to release him against the posting of security, the amount of which is linked to a maximum fine. Article 230 effectively bars states from imprisoning the Master for any pollution violation within or beyond their territorial waters unless it involves a wilful and serious act of pollution.⁹⁴

III IMO Conventions and domestic laws

(a) Purpose of the IMO and the role of Conventions

The purpose of the IMO is specified in Article 1(a) of the 1948 Convention:

‘To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.’⁹⁵

⁹⁰ UNCLOS Article 220(6).

⁹¹ UNCLOS Article 230 (1).

⁹² UNCLOS Article 230 (2).

⁹³ UNCLOS Article 230 (3).

⁹⁴ IMO LEG 97/6/1 dated 01 October 2010, para 6.

⁹⁵ IMO Convention of 1948 op cit note 33.

While the IMO uses several instruments to implement and improve the safety and security of shipping and to prevent marine pollution from ships, Article 2(b) specifically mandates the organization to, inter alia, draft conventions to achieve its purpose:

‘Provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary.’⁹⁶

IMO conventions therefore not only play a pivotal role in the functioning of the organization but also forms the basis of international maritime regulation in most parts of the world.⁹⁷

(b) Amendments to IMO Conventions

Technological developments and global events which affect the maritime industry often require conventions to be amended accordingly. Amendments were historically subjected to long delays due to the percentage requirement for entry into force,⁹⁸ and there was an urgent need for rapid change in the technical standards of shipping after the *Torrey Canyon* oil pollution disaster in 1967.⁹⁹ The IMO responded by introducing the ‘tacit acceptance procedure’ in 1971,¹⁰⁰ which provides for amendments to technical annexes of a convention to enter into force on a particular date unless, before that date, objections to the amendments are received from a specified number of State Parties. The tacit acceptance procedure proved to be an effective remedy and resulted in amendments entering into force within 18-24 months.¹⁰¹

(c) The Enactment of IMO Conventions in the domestic laws of State Parties

In acceding to an IMO convention, states undertake to enact the convention into their domestic legislation and to enforce it like any other law within its jurisdiction.¹⁰² The

⁹⁶ Ibid.

⁹⁷ De La Rue & Anderson op cit note 24 at 809.

⁹⁸ For further information on the entry into force requirements, see IMO ‘Conventions’ available at <https://www.imo.org/en/About/Conventions/Pages/Default.aspx>, accessed on 07 November 2020. Amendments usually required two thirds of State Parties to a convention to accept it, and in cases where a convention had many State Parties, the process was unduly delayed. An example is the amendments to the 1960 SOLAS Convention which was proposed between 1966 and 1963, but which never entered into force since it did not attract the required percentage of ratifications from State Parties.

⁹⁹ Rafgard op cite note 3.

¹⁰⁰ Karim op cit note 51 at 36.

¹⁰¹ For more information of the tacit acceptance of conventions, see IMO ‘Conventions’ available at <https://www.imo.org/en/About/Conventions/Pages/Default.aspx>, accessed on 07 November 2020.

¹⁰² For more information on the question whether the IMO implement legislation, see IMO ‘How does IMO implement legislation?’ available at <https://www.imo.org/en/About/Pages/FAQs.aspx>, accessed on 09 November 2020.

state thus honours its obligations under the convention by ensuring that private citizens are legally bound to comply with the convention.

The way in which a State Party enacts a convention will entirely depend on its legal traditions and constitutional requirements. In states of the continental legal tradition, conventions are published in an Official Gazette, after which it applies directly as national law. This is referred to as a monistic system, and in many of these states, conventions have been ranked as constitutionally superior to normal national statutes.¹⁰³ In states whose legal systems are based on English common law, conventions are enacted by using a dualistic system which means that the contents and provisions of the convention are contained in a national statute. During the drafting of national statutes, states invariably apply national legislative traditions, which may result in substantive differences between the text of the convention and the national statute.¹⁰⁴

A State Party to an IMO convention is therefore obliged to comply with the provisions of the convention in a similar fashion as to being legally bound by a contract, but the enforcement thereof is up to the other Member States,¹⁰⁵ in that states will ‘police’ one another in terms of compliance. While IMO conventions do prescribe the actions to be taken by states in the event of a maritime accident, the conventions do not infringe on the sovereignty of states by prescribing crimes and criminal sanctions. Even where a convention is the source of the rules and standards to be applied following a maritime accident, aspects of criminal law and procedure are up to individual states, including the penalties applicable when its statutory provisions are contravened by private citizens.¹⁰⁶

IV IMO Conventions and Obligations of State Parties after a marine accident

A marine accident may lead to loss of life, pollution, or both, and while IMO conventions mainly aim to prevent marine accidents, it also regulates how State Parties

¹⁰³ Måns Jacobsson ‘Uniform Application of the International Regime on Liability and Compensation for Oil Pollution Damage’ in Tafsir Malick Ndiaye and Rüdger Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes Liber Amicorum Judge Thomas A. Mensah* (2007) 421 at 423. States with a typically continental legal tradition are France, Italy, Portugal, Spain, most Latin American States and several States in North Africa.

¹⁰⁴ Ibid. States whose legal systems are based on English common law are Australia, Canada, India, Malaysia, New Zealand, the United Kingdom, Japan, the Republic of Korea and a number of States in Africa.

¹⁰⁵ For more information on the enforcement of IMO Conventions, see IMO ‘Conventions’ available at <https://www.imo.org/en/About/Conventions/Pages/Default.aspx>, accessed on 21 January 2021.

¹⁰⁶ De La Rue & Anderson op cit note 24 at 1074.

are to respond to such accidents and the compensation regimes applicable. It follows that State Parties to an IMO convention are obliged to respond to marine accidents in a manner that is consistent with their treaty obligations,¹⁰⁷ especially in cases where legal proceedings are instituted against the Master because of the accident.

(a) International Convention for the Safety of Life at Sea (SOLAS), 1974

The SOLAS Convention, together with its regulations and codes of practice, is the most important of all international treaties with regards to the safety of merchant ships.¹⁰⁸ While marine accidents may cite a breach of SOLAS regulations during subsequent investigations and legal actions, the convention only compels the Flag State to investigate a casualty to any one of its ships for the purpose of determining if any changes to the convention are to be considered.¹⁰⁹ SOLAS is nevertheless silent in terms of prescribed actions to be taken against the Master following a marine accident.

(b) International Convention for the Prevention of Pollution from Ships (MARPOL)

MARPOL is the most significant legal instrument which regulates the prevention of ship-source marine pollution.¹¹⁰ It provides for technical standards to eliminate intentional pollution by oil and other harmful substances and the minimization of accidental discharges.¹¹¹

(i) Operational Discharges

While MARPOL intends to eliminate intentional acts of pollution by prohibiting any discharge¹¹² of oil¹¹³ and other harmful substances,¹¹⁴ it allows for operational discharges under strict conditions.¹¹⁵ During permissible operational discharges,

¹⁰⁷ For information on treaty obligations, see United Nations Treaties ‘Vienna Convention on the Law of Treaties, 1969’ available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, accessed on 14 November 2020.

¹⁰⁸ For further information on SOLAS, see IMO ‘International Convention for the Safety of Life at Sea (SOLAS), 1974’ available at [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx), accessed on 31 October 2020.

¹⁰⁹ SOLAS Regulation I/21.

¹¹⁰ For information on the MARPOL Convention of 1973, and the Protocol of 1978, see IMO ‘International Convention for the Prevention of Pollution from Ships (MARPOL)’ available at [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx), accessed on 31 October 2020.

¹¹¹ MARPOL 73 at Preamble.

¹¹² MARPOL 73, Article 2, para 3(a).

¹¹³ MARPOL 73/78, Annex I, Regulation 1(1).

¹¹⁴ MARPOL 73, Article 2, para 2.

¹¹⁵ MARPOL 73/78, Annex I, Regulations 4, 15 & 34.

specialized items of equipment are to be used,¹¹⁶ and the degree of dilution and rate of discharge is to comply with permissible levels.¹¹⁷

Operational discharges exceeding permissible levels may be purely accidental due to ineffective equipment or crew error, or it may be intentional with the aim to flout international regulations.¹¹⁸ In either instance, the Master will have no defence available to him under MARPOL since exemption from liability may only be invoked for discharges as a result of damage to the ship or its equipment, and such discharges will be regarded as strict liability offences.¹¹⁹ The national laws of a state will determine whether a rule has been violated, and the Master of a vessel who has been charged with an illegal operational discharge will be subjected to the laws and sanctions of the Coastal State.¹²⁰ MARPOL specifies that State Parties are obliged to impose penalties for MARPOL violations within their domestic laws which are 'adequate in severity to discourage violations,¹²¹ but since domestic laws and the application thereof are based on the normative ethics of the state,¹²² a Coastal State may impose sanctions on a Master which are unexpectedly severe, even for a minor unintended violation.¹²³ In such instances, State Parties will not be in a position to assist a Master since it will encroach on the sovereignty of the state,¹²⁴ save for diplomatic efforts.

(ii) Accidental Discharges

MARPOL recognises the improbability of eliminating accidental discharges of oil and other harmful substances in the marine environment,¹²⁵ and as such, the convention explicitly provides for exemptions in certain circumstances.

The first exemption applies when a discharge is required to secure the safety of the ship or saving life at sea.¹²⁶ The second exemption is when a discharge occurs as a

¹¹⁶ MARPOL 73/78, Annex I, Regulations 13 & 14.

¹¹⁷ MARPOL 73/78, Annex I, Regulation 15.

¹¹⁸ Murray op cit note 16 at 152.

¹¹⁹ De La Rue & Anderson op cit note 24 at 1081.

¹²⁰ MARPOL 73, Article 4 (2)(a).

¹²¹ MARPOL 73, Article 4(4).

¹²² Simon Daniels *The Criminalisation of the Ship's Master. A new approach for the new Millennium* (Doctoral dissertation, Southampton Solent University [Validated by Nottingham Trent University], 2012) 11.

¹²³ De La Rue & Anderson op cit note 24 at 1081.

¹²⁴ Ibid at 1096.

¹²⁵ MARPOL 73 at Preamble. The wording of the text is significant in that the desired aim of the Convention distinguishes between the elimination of intentional pollution, as opposed to the minimization of accidental discharges.

¹²⁶ MARPOL 73/78, Annex I, Regulation 4, para 1.

result of damage to the ship or equipment, and all reasonable action was taken to prevent or minimise the discharge.¹²⁷ The third and final exemption is when a discharge is approved by the Administration to combat specific pollution incidents to minimise the damage from pollution.¹²⁸ MARPOL is however distinctly clear in that the exemptions do not apply if the owner or Master acted with intent to cause damage,¹²⁹ or if the owner or Master acted recklessly and with knowledge that damage would probably result.¹³⁰

The ordinary meaning of MARPOL, in the light of its object and purpose,¹³¹ indicates that a Master should not face incarceration or criminal charges for an accidental discharge as a result of damage to the ship or its equipment, in the absence of intent or recklessness.¹³²

(c) Applicability of Conventions in an ideal world

The Master as is invariably subjected to several jurisdictions due to the international character of his ship, and in the wake of a maritime accident, the articulation of UNCLOS as framework convention and the manner in which states enforce the provisions of IMO conventions will inevitably play out in the courts of the state where the accident occurred.¹³³ Depending on his Flag State, the Master may have a competent authority to back him when an accident happens, or he may find himself as a lone figure in a foreign country with unfamiliar legal traditions.

In the event of a marine accident, the Master will inevitably be subjected to rigorous scrutiny, but he may reasonably expect to be treated within the boundaries of these conventions, which presents an ideal world scenario.

(d) Domestic laws which depart from IMO Conventions

Masters are faced with a dilemma in the aftermath of a marine accident when the domestic laws of the state where the accident occurred depart from the ambit of IMO conventions. While some anomalies do exist in dualistic systems with regards to the interpretation and application of conventions at Port State level,¹³⁴ Article 27 of the

¹²⁷ MARPOL 73/78, Annex I, Regulation 4, para 2(1).

¹²⁸ MARPOL 73/78, Annex I, Regulation 4, para 3.

¹²⁹ MARPOL 73/78, Annex I, Regulation 4, para 2(2).

¹³⁰ MARPOL 73/78, Annex I, Regulation 4, para 2(2).

¹³¹ Vienna Convention, Article 31 (1).

¹³² Murray op cit note 16 at 153.

¹³³ Mukherjee op cit note 13 at 464.

¹³⁴ Jacobsson op cit note 103.

Vienna Convention prohibits a state from invoking the provisions of its own domestic laws as justification for its failure to perform a treaty.¹³⁵

In the aftermath of a maritime accident which leads to widespread pollution, sympathy is often reserved for the state whose marine environment and coastline are covered in pollutant, and who has seemingly suffered a great indiscretion at the hand of the Master. While the cause of the accident may be subject to speculation and scrutiny from the media and public with little to no knowledge of the maritime industry regulations, it is rather the failure of states to enact laws that are consistent with their treaty obligation which seriously detracts from the aim and mission of the IMO to achieve uniformity.¹³⁶ Domestic laws which are more stringent than international regulations have mainly occurred amongst states which have suffered from major pollution incidents along their coast, and they are commonly viewed as a contravention of international law.¹³⁷

Although the sovereignty of states is absolute, the common understanding amongst states when acceding to a convention is their acceptance of the terms thereof and the explicit agreement to enact the same in their national laws. When a state however fails to enact laws that are consistent with its treaty obligations, it can be argued that the state has subverted the aim and mission of the IMO and poses a threat to unity. The consequence thereof is devastating to the Master, who may reasonably expect to be treated in the manner as prescribed in the conventions.

¹³⁵ Vienna Convention, Article 27.

¹³⁶ De La Rue & Anderson op cit note 24 at 813.

¹³⁷ Ibid at 809.

CHAPTER 3 THE REALITY FACING THE MASTER

I Introduction

The ideal world scenario sets the standard in terms of the legislative jurisdiction of states and the penalties which may be imposed following a maritime accident, and while UNCLOS provides for variation amongst states in terms of national and regional laws,¹³⁸ unambiguous safeguards prevent states from overreaching their powers.¹³⁹

This chapter will analyse three maritime accidents and the subsequent actions taken by the state against the Master to establish how the ideal world scenario compares to reality. Anomalies between the two concepts will be rationalised against the backdrop of financial and political considerations in each case, and the extent to which it has contributed to the departure from the ideal world scenario as envisaged in the conventions.

II Cases

(a) *Erika*

In the early afternoon of 11 December 1999, the *Erika* was on passage from Dunkirk (France) to Leghorn (Italy) when she encountered heavy weather in the Bay of Biscay. The Maltese-flagged oil tanker, laden with a cargo of 30 884 tonnes of heavy fuel oil, began to list heavily. The Master initially managed to correct the list, but he decided (in consultation with the ship's managers) to deviate the vessel's course for Donges as a port of refuge. In the early hours of the morning of 12 December 1999, the ship broke her back, and the Master requested immediate assistance from the nearest coastal Maritime Rescue Co-ordination Centre. The vessel suffered major structural failure and broke in two, and she sank approximately 60 nautical miles off the coast of Brittany in the Bay of Biscay. No loss of life was suffered, and the Master and his crew were rescued by the French navy, but an estimated 19 800 tonnes of heavy fuel oil and bunkers were spilled into the ocean. The pollution was very difficult to contain due to the type of oil and because of the severe weather conditions and ended up polluting four hundred kilometres of the French coastline.¹⁴⁰

¹³⁸ Ibid at 807.

¹³⁹ Ibid at 1057.

¹⁴⁰ French Permanent Commission of Enquiry into Accidents at Sea (La Commission permanente d'enquête sur les événements de mer, CPEM) 'Report of the Enquiry into the sinking of the *Erika* off the coasts of Brittany on 12 December 1999' (2000) 7, available at http://www.bea-mer.developpement-durable.gouv.fr/IMG/pdf/RET_ERIKA_En_Site.pdf, accessed on 19 November 2020.

The Master of the *Erika* was arrested when he stepped foot on French soil after being rescued. The state criminally charged him for endangering life and causing marine pollution¹⁴¹, and he was imprisoned. He was only released from prison on 23 December 1999, but he was not permitted to return home to India until February 2000.¹⁴² As an Indian national, the Master could not read or speak French, and despite repeated demands, he was never provided with a translated version of the charges brought against him. He was also not allowed legal representation during questioning.¹⁴³ The criminal charges against the Master were maintained by the French authorities until the end of a four-month trial in 2007. In the closing arguments of the trial, the prosecution however recommended that the Master be acquitted, but the criminal charges against him were only dismissed in January 2008, more than eight years after the *Erika* sank.¹⁴⁴

The Port State (France), the Flag State (Malta), and India (the Master's country of nationality) were all State Parties to MARPOL and UNCLOS, and consequently had specific obligations towards the Master in accordance with their international treaty obligations. Since the vessel sank in the EEZ of France, their legislative jurisdiction is limited to the 'adoption of laws conforming with and giving effect to international rules and standards.'¹⁴⁵ The French legislation under which the Master was charged did not comply with this criteria, and there was never a finding of a MARPOL violation.¹⁴⁶ Even though the French courts contended that their national laws were compatible with MARPOL,¹⁴⁷ the safeguards in UNCLOS were never considered, and the state maintained criminal charges against the Master for more than eight years, effectively ending his command at sea.

Malta, as the Flag State of the *Erika*, had a duty to investigate the incident since it caused serious damage to the French coast¹⁴⁸ and was also obligated to ensure that no penal or disciplinary proceedings were instituted against the Master by any other

¹⁴¹ De La Rue & Anderson op cit note 24 at 1106.

¹⁴² Murray op cit note 16 at 156.

¹⁴³ UK Telegraph 'Master is one of the main victims,' Nautilus UK Telegraph May 2007 at 20 available at <https://www.yumpu.com/en/document/read/36227223/nautilus-p01-may-2007qxd-nautilus-international>, accessed on 19 November 2020.

¹⁴⁴ De La Rue & Anderson op cit note 24 at 1107.

¹⁴⁵ UNCLOS Article 220.

¹⁴⁶ Murray op cit note 16 at 156.

¹⁴⁷ Sophia Kopela 'Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: The *Erika* Case' (2011) 20(3) *Review of European Community & International Environmental Law* 313 at 314.

¹⁴⁸ UNCLOS Article 94(7).

party.¹⁴⁹ Malta did however not take any action to assist the Master, and neither did India, who had the right to step in to assist one of its nationals. Despite only Malta and India having jurisdiction over the Master, they did not step in to assist him when the French acted in contravention of their treaty obligations by jailing and confining the Master.¹⁵⁰

(b) Prestige

The *Prestige*, a Bahamian-flagged oil tanker laden with 76 972 tonnes of heavy fuel oil, ran into a winter storm on the 13th of November 2002 whilst transiting the Spanish EEZ on passage to Singapore. She was about 30 nautical miles off the Galician coast when structural damage to her starboard ballast tanks caused oil to start leaking from the bottom openings. The crew, except the Master and two other crew members who chose to remain on board, were rescued by the Spanish maritime authorities. On 14 November, a salvage team was landed on the vessel by helicopter, and as the weather progressively worsened, the Master requested permission from the Spanish authorities to allow the vessel with a place of refuge. The vessel was only 4.5 miles from the coast, but the Spanish authorities refused to grant the Master permission. He was ordered to restart the ship's engines, and they instructed the salvage team to tow the ship away from the Spanish coast under the guard of the Spanish navy. On 15 November, the Master and the other two crew members were evacuated from the vessel, and only the salvage team remained on board. On 18 November, the Portuguese navy prohibited the salvage team from continuing to tow the vessel in the direction of the Portuguese EEZ and forced them to alter course towards the high seas, where the seas were even rougher. On 19 November, after almost a week in extreme weather conditions, the *Prestige* broke in two and eventually sank about 133 nautical miles off the Galician coasts to a depth of some 3 500 metres, making the recovery of its cargo extremely difficult. It was estimated that 40 000 tonnes of heavy fuel oil were spilled into the ocean, blackening nearly 2 000 kilometres of coastlines from Galicia to southern France.¹⁵¹

The Master was immediately handcuffed after being evacuated from the vessel and summarily arrested. He was taken directly for interviewing for several hours by

¹⁴⁹ UNCLOS Article 97(1).

¹⁵⁰ Edgar Gold 'From Privilege to Peril' op cit note 12 at 54.

¹⁵¹ Veronica Frank 'Consequences of the *Prestige* Sinking for European and International Law' (2005) 20(1) *International Journal of Marine and Coastal Law* 2-3.

the local Spanish authorities, despite being severely sleep-deprived after his ordeal. He was remanded in custody for two days, after which he was charged with criminal offences relating to pollution¹⁵² and disobedience of the Spanish administrative authorities.¹⁵³ He remained in jail for 83 days before being released upon payment of bail of an exorbitant amount of 3 million Euros.¹⁵⁴ His bail was set under strict conditions, and he was not allowed to leave the country, and he had to report to a local police station every morning, including weekends. The Master was only allowed to return to his home country (Greece) in March 2005, and his criminal trial only commenced ten years after the accident.¹⁵⁵ The Master was found criminally responsible for serious disobedience to the Spanish authorities in 2013, and he was sentenced to nine months in prison. In 2016 the Spanish Supreme Court controversially revised the factual findings of the Spanish lower court and ruled that the 81-year old Master acted recklessly, and he was sent to prison for another two years.¹⁵⁶

The Spanish claimed throughout the legal proceedings to have acted within the scope of international law with reference to UNCLOS Articles 56 and 73,¹⁵⁷ but the reasoning of the state in terms of the applicability of these Articles remains unclear. Article 56(1)(b)(iii) clearly limits state action to the protection and preservation of the marine environment in the EEZ, and while Article 73(1) relates to the sovereign rights of states to board vessels, it is limited to the management of marine living resources and is hardly applicable to the boarding of a tanker in distress. Given that the *Prestige* sank in the EEZ, the national laws of the state had to conform to MARPOL and UNCLOS,¹⁵⁸ the only exception being that the state may consider imprisonment if the Master was found guilty of a ‘wilful and serious act of pollution’ in the territorial sea.¹⁵⁹ The *Prestige* was not in the territorial sea of Spain, and the contention that the Master acted wilfully seemed outrageous given the facts of the case and the legal arguments purported by the state was therefore dubious at best.

¹⁵² De La Rue & Anderson op cit note 24 at 1108. The charges were in accordance with Article 556 of the Spanish Penal Code.

¹⁵³ Articles 325 & 326 of the Spanish Penal Code.

¹⁵⁴ De La Rue & Anderson op cit note 24 at 1108. The bail was paid by P&I Club.

¹⁵⁵ Murray op cit note 16 at 156-57.

¹⁵⁶ Maritime Executive staff writers ‘Industry Shocked as 81-Year-Old Faces Jail’ *The Maritime Executive* 02 January 2016, available at <https://www.maritime-executive.com/editorials/industry-shocked-as-81-year-old-faces-jail>, accessed on 19 November 2020.

¹⁵⁷ Edgar Gold ‘From Privilege to Peril’ op cit note 12 at 55.

¹⁵⁸ UNCLOS Article 56(2).

¹⁵⁹ UNCLOS Article 230(2).

The actions of the state however went unchallenged on legal grounds by the Bahamas (as Flag State) and Greece (as country of nationality of the Master).¹⁶⁰ While the Bahamas submitted a report in which they concluded that the actions of the Master were ‘exemplary’¹⁶¹ and Greece made a diplomatic attempt to object to the treatment of the Master,¹⁶² neither of them took any firm legal action against the Spanish authorities and the Master was mainly supported by the international maritime community in the tumultuous years following the accident,¹⁶³ during which he was branded as a criminal, and his career effectively ended.

(c) *Hebei Spirit*

On 07 December 2007, the *Hebei Spirit* was at anchor at a pilot station near South Korea’s Port of Daesan. The Hong Kong-flagged tanker was laden with 260 000 tonnes of crude oil and awaiting orders from the port authorities to berth, when she was struck by a massive crane barge in a sequence of events that was most unfortunate. Several hours before the accident, and unbeknownst to the Master of the *Hebei Spirit*, the crane barge which struck his vessel was being towed by two tugs towards the same port. Due to deteriorating weather conditions, the towing convey lost control of the towing operation at about 04:00, and they decided to alter course closer to the shore to seek shelter. It only caused them to drift to the shore, and at 06:06, the Chief Officer of the *Hebei Spirit* called the Master to the bridge to inform him that the tow was a cause of concern. At 06:14, the Master sounded his ship’s horn to alert the tow of the impending danger and tried to call them on VHS but to no avail, and the port authorities were also alerted. The Master attempted to give the tow more sea room by paying out more anchor while moving slowly astern, but at 06:51, the crane barge broke its tow and was heading towards the port side of the *Hebei Spirit*. At 07:06, the crane barge

¹⁶⁰ Edgar Gold ‘From Privilege to Peril’ op cit note 12 at 54.

¹⁶¹ 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’ at para 4.12.5. Full report available at <https://www.bahamasmaritime.com/wp-content/uploads/2017/06/Prestige.pdf>, accessed on 20 November 2020. The report was only however only completed in November 2004.

¹⁶² Official Journal of the European Union, Doc. No. 2003/C 192 E/125. Emmanouil Bakopoulos, the representative for Greece at the European Parliament, submitted a Written Question (P-3642/02) to the Commission on 10 December 2002, in which he asked whether the Commission will make representations to the Spanish government to allow the Master his democratic rights. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:192E:0125:0126:EN:PDF>, accessed on 20 November 2020.

¹⁶³ EFT & ECSA Joint Press Statement ‘Stop the Criminalisation of Seafarers’ 03 May 2016, available at https://www.ecsa.eu/images/NEW_Position_Papers/Joint%20ETFECESA%20Press%20Release%20on%20Criminalisation%20of%20Seafarers.pdf, accessed on 20 November 2020.

struck the port side of the tanker, causing damage to the number 1, 3, and 5 cargo tanks. The Master attempted to manage the risk of explosion by ordering inert gas to be pumped into the damaged tanks, and he also transferred the oil in the damaged tanks to other tanks with spare capacity. He further also added ballast to the starboard tanks to minimise the outflow of oil from the damaged port tanks, but despite the measures taken, an estimated amount of about 10 900 tonnes of oil had spilled into the sea.¹⁶⁴ The spill had a devastating effect on the South Korean coast and on the fishing communities, and the Republic of Korea declared a state of disaster on the first day of the accident.¹⁶⁵

The *Hebei Spirit* accident occurred about five nautical miles off the South Korean coast¹⁶⁶, and the vessel was therefore well within the territorial sea of the Republic, which meant that the state had full sovereignty in the matter.¹⁶⁷ It was therefore entirely up to the state, in the exercise of its sovereignty, to take action against those involved in accordance with its domestic legislation. On 21 January 2008, the Public Prosecutor of the Seosan Branch of the Daejeon District Court (Seosan Court) commenced with criminal proceedings against the Master of the *Hebei Spirit*. He was not arrested at the time, but he was not permitted to leave Korea.¹⁶⁸ On 23 June, the Seosan Court delivered its judgment, and the Master was found not guilty, but on 26 June, the Public Prosecutor and the owners of the tugboats appealed against the judgment.¹⁶⁹ The Master was not allowed to leave the country pending the outcome of the appeal trial, much to the frustration and dismay of the international maritime community, which rallied in support of the Master.¹⁷⁰ On 10 December, the Criminal

¹⁶⁴ The Hong Kong Special Administrative Region, Marine Department, Marine Accident Investigation Section ‘Report of investigation into the Collision between the Hong Kong Registered ship “Hebei Spirit” and Korean Crane Barge “Samsung No. 1” on 7 December 2007’ 10 February 2009, pages 7-16, available at https://www.mardep.gov.hk/en/publication/pdf/mai071207a_f.pdf, accessed on 20 November 2020.

¹⁶⁵ For more information on the state of disaster, see the UN Office for the Coordination of Humanitarian Affairs ‘Rep. of Korea: Hebei Spirit Oil Spill OCHA Situation Report No. 1’ 14 December 2007, available at <https://reliefweb.int/report/rep-public-korea/rep-korea-hebei-spirit-oil-spill-ocha-situation-report-no-1>, accessed 21 November 2020.

¹⁶⁶ For detailed information of the accident, see International Oil Pollution Compensation Funds ‘Incidents involving IOPC Funds 2010’ (2011) 32, available at https://iopcfunds.org/wp-content/uploads/2018/12/2010_ENGLISH_INCIDENT_REPORT.pdf, accessed on 21 November 2020.

¹⁶⁷ UNCLOS Article 2.

¹⁶⁸ De La Rue & Anderson op cit note 24 at 1112. The Chief Officer was also charged and could also not leave the country.

¹⁶⁹ Incidents Involving IOPC Funds 2010 op cit note 166 at 37. The owners of the tugboats, Samsung Heavy Industries, were sentenced to a fine of KRW 30 million.

¹⁷⁰ IMO LEG 94/12 dated 31 October 2008, Annexes 12 & 13. Annex 12 is the Statement by the Comité Maritime International (CMI), which calls for the fair treatment of seafarers, and specifically notes

Court of Appeal (Daejeon Court) overturned the non-guilty judgement of the Seosan Court and found the Master guilty on two charges; one for causing pollution and the other for causing damage to his own ship. He was sentenced to 18 months imprisonment and arrested immediately. On being led out of the court to face his jail term, the Master was handcuffed and ceremoniously paraded in front of a crowd who applauded his sentence.¹⁷¹ While the local people were satisfied with the outcome, the international community was in an uproar.¹⁷² In April 2009, the 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 the Republic of Korea. In June 2009, the Master was finally released and left the Republic of Korea.¹⁷³

The Flag State (Hong Kong) had jurisdiction to investigate,¹⁷⁴ but the findings of the investigation were of no cause to the fate of the Master. The Hong Kong investigation concluded that the main contributing factor leading to the accident was the decision from the towing convoy to commence with the tow in adverse weather and that the actions taken by the Master after the collision complied with all relevant procedures.¹⁷⁵ The findings of the Hong Kong investigation was however never considered by the state in any of the court proceedings. India, as the state of nationality of the Master, attempted by all diplomatic means at their disposal to assist the Master, but to no avail.¹⁷⁶ It is not clear whether the Master returned to active sea service after his ordeal, but it adversely affected the maritime community worldwide.¹⁷⁷

concern over the treatment of Hebei Spirit Officers by the Republic of Korea. Annex 13 is the Statement by the International Chamber of Shipping (ICS), issued on behalf of BIMCO, ICS, ISF, INTERCARGO and INTERTANKO, the P & I Clubs and the International Transport Workers' Federation. The Statement also appeals to the Republic of Korea to release the Master (and Chief Officer).

¹⁷¹ De La Rue & Anderson op cit note 24 at 1113. The Chief Officer was also found guilty and receive a sentence of 8 months. He too was handcuffed and paraded in front of the crowd.

¹⁷² Seatrade Maritime News Report 'Nautical Institute's Wake: Hebei Spirit verdict is a tragedy for shipping' *Seatrade Maritime News* 22 December 2008, available at <https://www.seatrade-maritime.com/asia/nautical-institutes-wake-hebei-spirit-verdict-tragedy-shipping>, accessed on 21 November 2020. CP Wake, Chief Executive of The Nautical Institute, said the 'entire case and verdict seemingly fly in the face of any concept of "natural justice".'

¹⁷³ Incidents Involving IOPC Funds 2010 op cit note 166 at 37. The Chief Officer was also exonerated and released.

¹⁷⁴ UNCLOS Article 217(4).

¹⁷⁵ Hong Kong Investigation Report op cit note 164 at 27-28.

¹⁷⁶ LEG 94/12 op cit note 170 at Annex 7. In the Statement delivered the 94th session of the IMO Legal Committee, the Indian government desperately pleaded with the Republic of Korea to release the Master (and Chief Officer).

¹⁷⁷ Ibid at Annex 14. The Statement by the International Transport Federation (ITF) attested to the 'adverse impact criminalisation... is having on the seafaring community,' with specific reference to the Hebei Spirit case.

III Financial Considerations and Political Landscape

The case studies undoubtedly indicate that the reality is far removed from the ideal as specified in the conventions, but the analysis can only be completed by rationalizing why such a departure has emerged.

(a) *Financial Considerations*

In the wake of a marine accident that has caused devastating pollution to a state, immediate efforts will be focussed on the containment of the spill and subsequent clean-up efforts, which come at a high cost due to the expertise required to do so effectively. Compensation claims relating to the impairment of the environment have proven to be contentious and have led to varying interpretations as to the admissibility of claims. In all three case studies, the compensation for oil pollution damage reached enormous proportions, and the *Erika* and the *Prestige* brought about significant amendments to international compensation regimes.

At the time of the *Erika* disaster in 1999, financial compensation regimes for oil pollution damage caused by tankers were well established in IMO conventions.¹⁷⁸ It however changed when the *Erika* went down and caused widespread devastation to the French coastline, as it was evident that claims will far exceed the amount of compensation available under existing international compensation regimes.¹⁷⁹ France was devastated by the economic impact the accident had on their country, and other European nations with high stakes in shipping were equally apprehensive. As a consequence, the liability limits prescribed by the 1992 CLC were increased with the adoption of IMO Resolution LEG.1(82) on 18 October 2000.¹⁸⁰ This did however not quell the general anxiety amongst the IMO Member States, and in April 2000, the 1992

¹⁷⁸ The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund). This ‘old’ regime was amended in 1992 by two Protocols and the amended Conventions, known as the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention (1992 Fund), entered into force on 30 May 1996. For further information, see the IOPC Funds website, available at <https://iopcfunds.org/about-us/>, accessed on 22 November 2020.

¹⁷⁹ For more information, see IOPC Funds ‘Incidents involving the IOPC Funds – 2012’ (2013) at 6-7, available at https://www.iopcfunds.org/uploads/tx_iopcpublishations/incidents2012_e.pdf, accessed on 22 November 2020. At the time of the incident France was Party to the 1992 CLC and 1992 Fund. Claims submitted for compensation totalled €388.9 million, and payments of compensation had been made for a total of €129.7 million.

¹⁸⁰ Adoption of Amendments of the limits of Compensation in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971. The amendments entered into force on 1 November 2003. For further information, see the IOPC Funds website, available at https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf, accessed on 22 November 2020.

Fund Assembly established a Work Group to propose, inter alia, the creation of a third tier-fund to provide supplementary compensation. Agreement on the text of such a proposal was reached the next year,¹⁸¹ and it was submitted at the Sixth Session of the Fund Assembly on 19 October 2001. The Fund Assembly adopted the proposal, and the Director was instructed to submit the same to the Secretary-General of the IMO, requesting him to convene a Diplomatic Conference for consideration of the proposal.¹⁸² Although the efforts to increase the amount of compensation available to claimants under the compensation regimes were widely supported by the maritime industry, the judicial decisions by the French courts in the Erika case¹⁸³ had far-reaching consequences for Masters, ship owners, charterers, and classification societies.¹⁸⁴ The radical interpretation of the French courts regarding their jurisdiction under UNCLOS¹⁸⁵ and the application of liability standards which significantly differs from the liability criteria as established in MARPOL,¹⁸⁶ meant that defendants lost

¹⁸¹ 92FUND/A.6/4 dated 10 August 2001. Report on the Second and Third Meetings of the Third Intersessional Working Group of the 1992 Fund (92FUND/WGR.3/9) at page 5.

¹⁸² 92FUND/A.6/28 dated 19 October 2001. Record of Decisions of Sixth Session of the Assembly (Agenda Item 32) at para 6.25 & 6.26.

¹⁸³ IOPC/APR13/3/3/1 dated 28 March 2013. On 16 January 2008 the Criminal Court of First Instance in Paris found the ship-owner, the management company, the classification society RINA and TOTAL SA guilty of unintentional pollution. The Court also ordered them to jointly compensate civil parties (para 1.3). On 30 March 2010, the Paris Court of Appeal upheld the sentences, except for TOTAL SA who was exonerated from damage claims (para 1.4). On 25 September 2012, the Court of Cassation confirmed the findings of the Court of First Instance and confirmed the criminal liability of TOTAL SA (para 1.5).

¹⁸⁴ IOPC/APR17/4/6 dated 30 March 2017, paras 3.4 & 3.7. The French Supreme Court ruled that certain defendants were not entitled to benefit from the protection of the channelling provisions of the 1992 CLC, Article III (4), and even in the instance where it was allowed, the right to limitation was lost due to the Courts' finding that the defendants acted 'recklessly,' and they were held criminally liable for causing pollution.

¹⁸⁵ IOPC/APR13/3/3 dated 26 March 2013, para 4.6. The Erika sank in the EEZ of France and the defendants contested the jurisdiction of France in the matter, since UNCLOS provides that the jurisdiction of the Flag State (Malta) would prevail over that of the Coastal State (France). The Court of Cassation however recognised the jurisdiction of the French courts by relying on UNCLOS Articles 220 (6) & 228. Since Malta never instituted any proceedings the French Courts maintained that France retained jurisdiction; CRPMNTP130019 A1 *Technical Paper from the CPMR General Secretariat – Following the 'Erika' ruling by the French Court of Cassation, what steps should be taken at European and international level?* 16 May 2013, page 1. The judgment by the Court of Cassation was viewed as a radical interpretation of UNCLOS since it overrules the principle of the competence of the vessel's Flag State, and it's likely to be taken as a precedent for the jurisdictions of other States to overrule the principle of the competence of the Flag State.

¹⁸⁶ De La Rue & Anderson op cit note 24 at 1116-7. The Court of Cassation applied French Law No. 83-583 of 5 July 1983, despite arguments put forward by the defendants that the national law conflicts with MARPOL, and that the French Constitution (Article 55) provides that 'international conventions to which France is a party, prevails over French legislation with which they are in conflict'. The court however held that the law of 1983 is not in conflict with MARPOL and applied the liability standard of 'imprudence causing or contributing to pollution' to the case. The reasoning of the court that the French law of 1983 duly gave effect to 'generally accepted international rules and standards' as specified in UNCLOS Article 211 (5) was not fully comprehended by the international maritime community.

their right to limitation,¹⁸⁷ and it led to wide-ranging civil damages being awarded to claimants.¹⁸⁸ In another startling decision, the French courts also awarded compensation for pure environmental and moral damage to claimants.¹⁸⁹ The willingness of the French courts to circumvent international conventions in favour of national laws¹⁹⁰ and the application of liability standards which stood in stark contrast with the conventions caused great concern amongst key role-players in the maritime industry.¹⁹¹

While the maritime industry was still trying to come to terms with the *Erika* disaster, the sinking of the *Prestige* less than three years later gave rise to a considerable outcry. The Spanish were furious, and where the *Erika* ignited the flame of indignation amongst states with predominantly marine environmental concerns, the *Prestige* ignited a wildfire.

Though the Spanish coast of Galicia was the worst affected by the disaster, the pollution extended to Northern Spain, France, and even Portugal. It was evident that compensation claims were likely to break the maximum limits of the applicable compensation regimes.¹⁹² The urgent need for a third-tier of compensation to be established gained significant traction following the *Prestige* spill, and the 2003 Supplementary Fund Protocol was adopted on 16 May 2003 by a Diplomatic Conference held at IMO Headquarters and came into force on 3 March 2005.¹⁹³

¹⁸⁷ IOPC/APR13/3/3 op cit note 185 at 4.11.

¹⁸⁸ IOPC/APR17/4/6 op cit note 184 at 3.7.

¹⁸⁹ IOPC/APR13/3/3 op cit note 185 at 5.6. The Court of Cassation inevitably created jurisprudence by accepting claims for environmental damage using abstract models that are not admissible according to the provisions of the 1992 CLC, since Article I (6) carefully limits the concept of environmental damage.

¹⁹⁰ IOPC/APR13/3/3 op cit note 185 at 5.6. The French Courts made it clear that it was applying French law and not the 1992 CLC and Fund Conventions. It can reasonably be argued that the French Courts did so mainly due to economic considerations, since the Courts upheld French laws to determine liability for pollution and environmental damage consistent with French Laws was awarded to claimants.

¹⁹¹ IOPC/APR17/4/6 op cit note 184. The International Chamber of Shipping and International Group of P&I Associations submitted their concerns to the IOPC Funds.

¹⁹² Incidents involving the IOPC Funds 2012 op cit note 179 at 12-13. At the time of the incident Spain, France and Portugal were Parties to the 1992 CLC and 1992 Fund. Final admissible claims were estimated at £461 million. Compensation to the amount of £92 million was made to the Spanish Government, £4.5 million to individual claimants in France and £264 200 to the Portuguese Government.

¹⁹³ Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Supplementary Fund). For further information, see the IOPC Funds website, available at https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf, accessed on 22 November 2020.

In terms of judicial proceedings, the Spanish took a leaf from their French counterparts in their actions against the Master¹⁹⁴ and also undertook legal action against the classification society of the *Prestige* in the United States.¹⁹⁵ In 2013, the Criminal Court in La Coruña ruled that the Master was not criminally liable for damage to the environment,¹⁹⁶ but the decision was controversially reversed by the Spanish Supreme Court in 2016.¹⁹⁷ The IOPC Fund¹⁹⁸ and insurers¹⁹⁹ critically assessed the Supreme Court ruling since it threatened the delicate equilibrium which existed between shipping interests and Coastal States. As in the case of the *Erika*, the Spanish courts applied national laws in defiance of their international treaty obligations²⁰⁰ and similarly used liability criteria which is far removed from the liability standards established in key IMO Conventions.²⁰¹

The *Hebei Spirit* accident exposed the economic implications to states who are not a party to the Supplementary Fund. At the time of the incident, the Republic of Korea was a Party to the 1992 CLC and the 1992 Fund but had not yet ratified the Supplementary Fund. This meant that the total amount of compensation covered by the 1992 Fund was limited to 203 million units of account,²⁰² whereas it could have reached 750 million units of account²⁰³ if the Supplementary Fund was applicable. The number of claims received for compensation reached record numbers and stood in

¹⁹⁴ IOPC/APR16/3/2 dated 30 March 2016, Annex, para 7.1. In July 2010, upon conclusion of an investigation into the cause of the incident, the Criminal Court in Corcubión decided that the Master (and three other persons) should stand trial for criminal and civil liability.

¹⁹⁵ Gonzalo Caballero & David Soto-Oñate 'Environmental Crime and Judicial rectification of the Prestige Oil Spill: The Polluter Pays' (2017) 84 *Marine Policy* 213 at 216. Spain filed a lawsuit against the certification company of the Prestige, American Bureau of Shipping (ABS), but the court ruled in favour of the company.

¹⁹⁶ IOPC/APR16/3/2 op cit note 194 at 5.7. The judgment did not award any compensation to claimants since civil liability is derived from criminal action under Spanish law (para 5.1).

¹⁹⁷ Ibid at 5.11. The Supreme Court judgment set aside the judgment of the Criminal Court and the Master was found guilty of a crime against the environment, which meant that the Master also incurred civil liability (para 5.13.2), and the ship-owner (para 5.13.4) and insurer (London P&I Club) was consequently also held liable (para 5.13.6).

¹⁹⁸ Ibid at 7.3 The Director of the IOPC Funds viewed the Supreme Court action to be 'unfortunate.'

¹⁹⁹ Ibid. Submitted by the International Group of P&I Associations.

²⁰⁰ Caballero & Soto-Oñate op cit note 195 at 216. The criminal conviction of the Master was based on Spanish national law (Article 45 of the 1978 Constitution), in defiance of the safeguards in UNCLOS 230; IOPC/APR16/3/2 op cit note 194 at 7.5. The Supreme Court ruling that the London Club (insurer) had civil liability, is in breach of Article V (11) of the 1992 CLC. The judgment was reached by applying domestic law (criminal law, law of insurance and law of maritime transport) instead of the Convention.

²⁰¹ IOPC/APR16/3/2 op cit note 194 at 5.12.1. The Spanish Supreme Court stated that the Master committed a 'reckless crime against the environment' which is substantially departs from the liability standard established in MARPOL and the 1992 CLC.

²⁰² 1992 Fund, Article 4.4(a). The 'unit of account' is the Special Drawing Right as defined by the International Monetary Fund in accordance with 1992 CLC, Article V, 9(a).

²⁰³ Supplementary Fund, Article 4.2(a).

stark contrast with the number of claimants recorded following the *Erika*²⁰⁴ and the *Prestige*²⁰⁵ disasters. The Fund received 128 400 individual claims totalling KRW 2 611 billion,²⁰⁶ but 83 946 claims were rejected due to insufficient information provided by the claimants. Compensation to the amount of £95.2 million (KRW 167.2 billion) in respect of 37 108 claims was made by the Fund,²⁰⁷ but the economic impact on the Korean Government was immense.

Due to the high number of claimants, the Korean Government established several alternative compensation measures, and they also ended up passing a special law for the support of the victims of the *Hebei Spirit*.²⁰⁸ This case significantly differs from the *Erika* and the *Prestige* in terms of jurisdiction since the accident occurred within the territorial waters of the Korean Republic, and its sovereign rights prevailed.²⁰⁹ Although the Korean courts continued the trend in terms of the criminalisation of the Master,²¹⁰ they allowed a number of defendants the right to limit their liability in accordance with the 1992 CLC and 1992 Fund.²¹¹ The Korean Republic was commended for their co-operation with the IOPC Funds regarding compensation claims,²¹² and by the end of February 2020, all civil proceedings against the Fund were concluded.²¹³

(b) Political Landscape

The economic considerations as discussed in the preceding section can hardly be separated from the treacherous political landscape following a maritime accident that

²⁰⁴ Incidents involving the IOPC Funds 2012 op cit note 179 at 7. As of October 2012, 7 131 claims for compensation following the *Erika* spill had been submitted to the IOPC Funds.

²⁰⁵ Ibid at 14-15. The IOPC Funds received a total of 845 claims from Spain, 482 claims from France and a claim from the Portuguese Government.

²⁰⁶ Ibid at 98. KRW is the Republic of Korea Won, valued at 1757.01 unit of currency per £ as at 31 October 2012.

²⁰⁷ Ibid at 33.

²⁰⁸ Ibid at 32. At the June 2008 session of the 1992 Fund Executive Committee, the Korean Government informed the 1992 Fund that a special law for the ‘Support of affected inhabitants and the restoration of the marine environment in respect of the *Hebei Spirit* oil pollution incident’ was approved by the National Assembly in March 2008.

²⁰⁹ UNCLOS Articles 2 & 211(4).

²¹⁰ IOPC Funds ‘Incident Report: *Hebei Spirit*’ updated on 31 December 2020 at 6-7. The Master faced criminal charges and in June 2008 the District Court found him not guilty. In December 2008 the Criminal Appeal Court overturned this decision and the Master was arrested. The Supreme Court however annulled the Appeal Courts’ decision in April 2009, and in June 2009 the Master were released from arrest. The Incident Report is available at <https://iopcfunds.org/incidents/incident-map#3276-07-December-2007>, accessed on 20 January 2021.

²¹¹ Ibid at 7-8. The Limitation Court granted the bareboat charters of the Marine Spread (Samsung Heavy Industries) and the owners of the *Hebei Spirit*, the right to limit their liability.

²¹² Marchand op cit note 35 at 14.

²¹³ *Hebei Spirit* Incident Report op cit note 210 at 9.

results in large-scale pollution, but it is nonetheless presented as such for the purposes of analysis.

The intolerance of society towards pollution from ships has increasingly become more vitriolic, and highly publicised pollution disasters have tended to catapult the environmental consciousness of society to a heightened state of awareness.²¹⁴ In the wake of a marine accident that has led to large-scale pollution, public hostility increases directionally proportional to sensationalized media outrage and emotive statements from politicians who are often eager to find common ground with their voter-base. Prosecuting authorities in states are therefore often under extreme political pressure to act in a manner that is consistent with public expectations, which are expected to be swift and stringent.²¹⁵

In the case of the *Erika*, public outrage in France was centred around the decision of a French oil company to charter a 25-year old, single-hull tanker, which eventually sank due to structural failure.²¹⁶ The European community did not want a repeat of such devastation anywhere in European waters, and their response was swift and ambitious.²¹⁷ The *Erika* ‘packages’ were introduced by the European Commission (EC) and were proposed as new legal measures to promote maritime safety and improve compensation.²¹⁸ The Erika I package was adopted by the EC on 21 March 2000²¹⁹ and provided for vigorous Port State control measures,²²⁰ new rules on classification societies,²²¹ the accelerated phasing out of single-hull oil tankers.²²² In the same year, the Erika II package was adopted,²²³ which proposed three further safety measures, one of which led to the establishment of the European Maritime Safety Agency (EMSA).²²⁴ The Erika III package²²⁵ proposed a third-tier fund to compensate oil spill victims, but this was not pursued in light of the adoption of the IMO

²¹⁴ De La Rue & Anderson op cit note 24 at 1073.

²¹⁵ Ibid at 79.

²¹⁶ Ibid at 74.

²¹⁷ Eduard Somers and Gwendoline Gonsaeles ‘The Consequences of the Sinking of the M/S ERIKA in European Waters: Towards a Total Loss for International Shipping Law’ (2010) 41(1) *Journal of Maritime Law and Commerce* 57 at 60.

²¹⁸ De La Rue & Anderson op cit note 24 at 75.

²¹⁹ COM (2000) 142 final dated 31 March 2000.

²²⁰ Directive 2001/106/EC dated 19 December 2001. It entered into force on 22 July 2003.

²²¹ Directive 2001/105/EC dated 19 December 2001. It entered into force on 22 July 2003.

²²² Regulation (EC) No 417/2002 dated 18 February 2002. It entered into force on 01 September 2002.

²²³ COM (2000) 802 final dated 06 December 2000.

²²⁴ Regulation (EC) No 1406/2002 dated 27 June 2002. It entered into force in August 2002.

²²⁵ COM (2005) 585 final dated 23 November 2005.

Supplementary Fund Protocol in 2003.²²⁶ The unilateral measures taken by the EC to impose regional regulations, which was not in harmony with international conventions, was, however, only a hint of what was to come.

The sinking of the *Prestige* created even more antagonism towards the shipping industry, especially since it was yet another old, single-hull tanker, which sank due to structural failure.²²⁷ Even though maritime experts agreed that the disaster might well have been averted if Spain afforded the *Prestige* with a place of refuge,²²⁸ it was the shipping industry who bore the brunt of the public anger, even at the Presidential level.²²⁹ The French Minister asked the EC President, Romano Prodi, to speed up the introduction of EU laws to ‘punish those responsible for shipping disasters,’²³⁰ and on 05 March 2003, the EC published the first draft of such a proposed Directive.²³¹ The draft Directive came as a shock to the maritime industry, as it effectively altered the liability standard for accidental spills as prescribed in MARPOL²³² and imposes EU member states to institute criminal sanctions in such cases. The proposal drew the ire of a wide range of groups and interests within the maritime industry and was the subject of intense discussion in newspapers, journal articles by maritime legal practitioners, and at seminars and conferences.²³³ The overwhelming response was one of dismay at the stance the EC took in response to the *Prestige*, and not even strong opposition from within the European Parliament²³⁴ could sway the EC in a more sensible direction.

²²⁶ De La Rue & Anderson op cit note 24 at 75.

²²⁷ Ibid at 76.

²²⁸ Bahamas Maritime Authority Investigation Report op cit note 161.

²²⁹ Alex Duval Smith and Emma Baker ‘Chirac fury as Prestige oil slick hits French beaches’ *Independent* 4 January 2003, available at <https://www.independent.co.uk/news/world/europe/chirac-fury-as-prestige-oil-slick-hits-french-beaches-125515.html>, accessed on 23 November 2020. French President Jacques Chirac hit out at the “gangsters of the sea – captains, owners and contractors of ships” responsible for the massive oil spill which yesterday spread along France’s most precious Atlantic beaches and oyster beds.

²³⁰ Claude Canellas ‘French coast braces for oil disaster’ *The Guardian* 4 January 2003 available at <https://www.theguardian.com/world/2003/jan/04/oil.france>, accessed on 23 November 2020.

²³¹ COM (2003) 92 final dated 5 March 2003.

²³² Ibid, Article 6(1). The liability standard was altered to that of gross negligence, which is a substantially different liability standard as prescribed in MARPOL Annex I, Regulation 4(2).

²³³ De La Rue & Anderson op cit note 24 at 1119.

²³⁴ AS-0388/2003 dated 5 November 2003. On 27 March 2003 the President of the EU Parliament referred the proposed Directive to several Committees for opinion, and on 7 July 2003 Mr Peter Pex was appointed by the Committee on Regional Policy, Transport and Tourism appointed as rapporteur. The Report, known as the ‘Pex Report,’ specifically warns about the approach to ‘criminal sanctions against ships’ crew before guilt is established’ and warns against the ‘danger between conflict of legal regimes’ on page 18/33.

On 30 September 2005, the Directive was adopted,²³⁵ and while the phrase ‘gross negligence’ was replaced with ‘serious negligence,’²³⁶ it did not address the substantive concerns raised by the maritime industry regarding the unliteral amendment of liability standards. The Directive was vehemently opposed,²³⁷ and in an attempt to test the legal issues thereof, a coalition of maritime industry role players²³⁸ took the matter to the English High Court in December 2005,²³⁹ which was then referred to the European Court of Justice (ECJ).²⁴⁰ The INTERTANKO case aimed to secure a preliminary ruling on the legality of such a departure from internationally accepted laws and treaty obligations, but the ECJ disappointingly did not rule on the substantive elements of the case,²⁴¹ and the *status quo* remains. Despite calls from the shipping industry for states to depart from the approach as adopted in the EC Directive,²⁴² it was of no effect and is now forms part of the domestic laws of EU member states.

The political landscape was equally treacherous when the *Hebei Spirit* accident happened five years later, and public hostility and political pressure resulted in inexplicable actions from the prosecuting authorities.²⁴³ While the actions of South Korea may have satisfied the demands of the South Korean society, the rest of the world was appalled by what was regarded as a travesty of justice in the case against

²³⁵ Directive 2005/35/EC dated 30 September 2005, amended by Directive 2009/123/EC dated 21 October 2009. For the text of Directive 2005/35/EC, see EUR-Lex Document 02005L0035-20091116, available at <https://eur-lex.europa.eu/eli/dir/2005/35/2009-11-16>, accessed on 24 November 2020.

²³⁶ *Ibid* Article 4.

²³⁷ Judge Thomas Mensah ‘Sovereign Rights in Legislation of Member States under UNCLOS and MARPOL’ in ‘The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry’ Eighth Cadwallader Annual Memorial Lecture *London Shipping Law Centre* 04 October 2005 at 23-30. For more information about the lecture, see https://www.shippinglbc.com/wp-content/uploads/2019/03/8_cad.pdf, accessed on 24 November 2020.

²³⁸ The industry role players were the Independent Tanker Owners (INTERTANKO), the International Association of Dry Cargo Shipowners (INTERGARGO), the Greek Shipping Co-operation Committee, Lloyd’s Register and the International Salvage Union.

²³⁹ Case C-308/06 *International Association of Independent Tanker Owners (INTERTANKO) and Others v Secretary of State for Transport*.

²⁴⁰ (2008) ECR I-4057. Judgment – Case C-308/06 dated 3 June 2008.

²⁴¹ *Ibid* at I-4119-4125. The ECJ contended that the validity of the Directive could not be judged by reference to MARPOL or UNCLOS.

²⁴² Epaminondas Embiricos ‘The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry’ Eighth Cadwallader Annual Memorial Lecture *London Shipping Law Centre* 04 October 2005 at 33. For more information about the lecture, see https://www.shippinglbc.com/wp-content/uploads/2019/03/8_cad.pdf, accessed on 24 November 2020. Mr Embiricos was Chairman of the Greek shipping co-operation committee at the time, but acted as advocate for the shipping industry at the lecture.

²⁴³ De La Rue & Anderson op cit note 24 at 1112.

the Master.²⁴⁴ The political pressure surrounding the case was immense, and while the Korean government was not only faced with the wrath from the industry at IMO meetings,²⁴⁵ it also received numerous diplomatic requests from the Indian government to release the Master.²⁴⁶ The political interplay between the moral principles of the Korean people in demanding that the accused be held accountable,²⁴⁷ in comparison with the expectation of the global maritime community for the fair treatment of seafarers,²⁴⁸ was a painful process that lasted more than two years. If the will of the people was to ‘make the Master pay,’ the truth is that the Korean government paid a similarly high price in terms of compensation alone – and the travesty was that neither the Master nor the Korean government emerged as the victor in the end. The Master’s career was effectively grounded as a result of the criminal charges brought against him,²⁴⁹ and the Korean government opted to stand last in the queue in terms of compensation to ensure that claims are settled.²⁵⁰

IV The Reality in contrast with the ideal: The Master as criminal and uniformity lost

In all three case studies, the reality stands in stark contrast with the ideal world scenario. Upon analysis in this chapter, it emerges that state action in the wake of a pollution disaster is highly motivated by economic considerations and political pressure(s) that often evolve contemporaneously with the moral values of its citizens. In all three case studies, the Master was blamed for the accident, which led to extreme public hostility and outrage, and prosecuting authorities were under immense pressure to ensure that judicial findings satisfy the righteous demands of the public and the expectations of compensation from victims of the disaster. The Master stood as the central figure in legal proceedings, not only as Commander of the stricken vessel but

²⁴⁴ Keith Wallis and Marcus Hand Furious ‘Reaction from international shipping community at South Korean court decision’ *Lloyd’s List* 11 December 2008. The ITF’s maritime coordinator, Stephen Cotton articulated the industry’s outrage in a comment to *Lloyd’s List* when he said ‘this is not justice. [it] is incomprehensibly vindictive and will impact on all professional mariners.’

²⁴⁵ LEG 94/12 op cit note 170 at Annexes 8, 11-15.

²⁴⁶ Media Briefing ‘Questions on detention of the Indian Sailors in South Korea’ by the Ministry of External Affairs: Government of India, 19 December 2008, available at https://mea.gov.in/media-briefings.htm?dtl/4804/Questions_on_detention_of_the_Indian_Sailors_in_South_Korea, accessed on 24 November 2020.

²⁴⁷ Daniels op cit note 122 at 19.

²⁴⁸ LEG 94/12 op cit note 170 at paras 6.1-6.19.

²⁴⁹ *Hebei Spirit* case op cit note 169.

²⁵⁰ 92FUND/EXC.41/9/1 dated 30 May 2008, para 5.2.1.

also because of his inextricable link to the ship-owner and other commercial entities involved in the management and operation of the ship. States consistently applied national laws commensurate with the demands of society,²⁵¹ instead of considering the ordinary meaning of the relevant IMO conventions as enacted in its national laws and applying it in a manner that is consistent with their treaty obligations. Judicial decisions by states which substantially depart from the ambit of the conventions detract from the aim and mission of the IMO to establish and uniformity, and it consequently leads to disharmony amongst states. While the Master emerges as criminal in a flawed system of justice in the aftermath of a maritime accident,²⁵² state action which significantly departs from the intent and purpose of the international instruments which they themselves have helped to articulate and by which their states are bound – derails the vision of uniformity of the IMO.²⁵³

²⁵¹ Daniels op cit note 122 at 161.

²⁵² Ibid at 148.

²⁵³ Mukherjee op cit note 13 at 496.

CHAPTER 4 THE RAMIFICATIONS OF THE DEPARTURE FROM UNIFORMITY

I Introduction

The Master is frequently faced with perils at sea, and even more so after a maritime accident since it has become commonplace for states to detain the Master in the aftermath of such an accident. It follows from the previous chapter that states are often under considerable pressure to act against the Master after a maritime accident that has caused wide-spread pollution, which has given rise to a heavy-handed approach against Masters in high-profile cases. It is during the legal proceedings in the national courts of states affected by the pollution that the maritime industry has witnessed the application of domestic laws, in lieu of prevailing international treaties, to punish the Master according to the demands of society and the political consciousness which prevails at the time. This chapter will compare the liability standards prescribed in the conventions with the liability standards applied in the three case studies in the preceding chapter to establish the extent to which the states have diverted from their treaty obligations and the ramification it holds for the Master.

II Strict Liability in Civil Liability Conventions

(a) Background

Marine pollution laws are a relatively modern field of law since most of them only came into being after the first major tanker casualties in the late 1960s. Prior to 1967, liability for maritime accidents which results in oil pollution was mainly based upon the common law of torts or delict,²⁵⁴ and the 1957 Brussels Limitation Convention was the only limitation regime in place at the time.²⁵⁵

In March 1967, the sinking of the *Torrey Canyon* along the Isles of Scilly in the United Kingdom (UK) led to the most devastating pollution in the world at the time,²⁵⁶ and it was apparent that the existing legal principles were not adequate to deal with the

²⁵⁴ De La Rue & Anderson op cit note 24 at 7.

²⁵⁵ For more information on the Brussels Limitation of Liability Convention which was concluded on 10 October 1957 and amended by a Protocol on 21 December 1979, see United Nations Treaties available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201412/volume-1412-I-23642-English.pdf>, accessed on 03 January 2021. For information on the subsequent 1976 London Convention on the Limitation of Liability for Maritime Claims (LLMC) and its 1996 Protocol, see United Nations Treaties available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201456/volume-1456-I-24635-English.pdf>, accessed on 03 January 2021.

²⁵⁶ De La Rue & Anderson op cit note 24 at 10.

damage caused by pollution from these ships.²⁵⁷ In April 1967, the British Government requested the Inter-Governmental Maritime Consultative Organization (IMCO)²⁵⁸ to consider changes to the international law, which governs liability for oil pollution, and Working Groups I and II was appointed. Shortly afterward, the Comité Maritime International (CMI) established a committee to examine the private law aspects of the case, and a draft convention was adopted at a CMI Conference in Tokyo during March-April 1969. The CMI draft convention was proposed to the IMCO Legal Committee for consideration in May 1969, but the Legal Committee remained divided on the question of whether liability should be strict or based on fault. The Legal Committee, therefore, adopted its own draft convention, with alternative provisions to the CMI text on issues that remained undecided. This draft convention was submitted for consideration at the International Legal Conference on Marine Pollution Damage held in Brussels from 10-28 November 1969.²⁵⁹

(b) Civil Liability Conventions of 1969 and 1992

The purpose of the Brussels Conference was to consider two draft conventions relating to the public law and private law issues, which became apparent after the Torrey Canyon disaster.²⁶⁰ Following extensive deliberations, the draft convention on oil pollution damage was adapted and eventually adopted as the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC),²⁶¹ and in many parts of the world, it is still regarded as the backbone of oil pollution liability laws.²⁶²

A key feature of the 1969 CLC was the introduction of strict liability on the part of the ship-owner for oil pollution damage from a tanker, regardless of fault.²⁶³ In 1969 the imposition of strict liability on the owner was not the norm in the industry, and the concept faced stern opposition. Many delegations favoured liability based on fault with

²⁵⁷ Ibid at 12.

²⁵⁸ For more information on the establishment of IMCO in 1948, see IMO 'Brief History of IMO' available at <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, accessed on 12 January 2021. In 1982, IMCO became the International Maritime Organisation (IMO).

²⁵⁹ De La Rue & Anderson op cit note 24 at 12-13.

²⁶⁰ Ibid at 14-15. The draft convention dealing with public law was related to the measures which could be taken by coastal states on the high seas in response to oil pollution casualties. The draft convention dealing with private law was related to oil pollution damage.

²⁶¹ 1969 CLC op cit note 178, available at [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx), accessed on 12 January 2021.

²⁶² A total of 32 states are still signatories to the convention, information available at <https://www.wcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties.pdf>, accessed on 03 January 2021.

²⁶³ 1969 CLC, Article III (1).

a reversal of the burden of proof, and it was after a compromise was reached on specific exceptions²⁶⁴ that strict liability was eventually accepted by the delegates. Since the liability of the ship-owner no longer depended on blame or fault, claimants were exonerated from the burden of proof, and the owner is liable even when the incident occurred without his fault.²⁶⁵

The 1969 CLC was amended by the 1992 Protocols on 27 November 1992, and the 1992 Civil Liability Convention (1992 CLC) entered into force on 30 May 1996.²⁶⁶ The concept of strict liability was not altered by the 1992 CLC since it proved to be an effective provision and contributed to the efficient handling of claims without the cost and delays associated with litigation over issues of fault.²⁶⁷

(c) Exemptions from Strict Liability

The ship-owner will only be exempted from the imposition of strict liability if he can prove that the damage:

- ‘(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.’²⁶⁸

In practice, exceptions from strict liability have only featured in very rare cases.²⁶⁹

III Limitation of Liability in Civil Liability Conventions

(a) Right to Limitation

While strict liability was an innovative concept in 1969, the right of the ship-owner to limit his liability was already well established in the maritime industry. The right of the ship-owner to limit his liability²⁷⁰ formed part of a ‘package-deal’ negotiated in

²⁶⁴ 1969 CLC, Article III (2).

²⁶⁵ De La Rue & Anderson op cit note 24 at 98.

²⁶⁶ 1992 CLC op cit note 178, available at <https://iopcfunds.org/about-us/legal-framework/1992-civil-liability-convention/>, accessed on 03 January 2021.

²⁶⁷ De La Rue & Anderson op cit note 24 at 15.

²⁶⁸ 1992 CLC, Article III (2).

²⁶⁹ De La Rue & Anderson op cit note 24 at 99.

²⁷⁰ Insurers also enjoy the right of limitation in accordance with 1969/ 1992 CLC, Article VII (8).

Brussels, and each civil liability convention reflected the principal limitation convention, which was applicable at the time it was adopted.²⁷¹

(b) Limitation ceilings set by the 1969 CLC and 1971 Fund

The 1969 CLC set the limitation ceiling at 2 000 francs for each of the ship's tonnage, limited to a maximum of 210 million francs.²⁷² Since consensus could not be reached during the 1969 Conference on the relief to ship-owners in terms of the higher limits of the CLC, it was agreed that a supplemental fund should be established to contribute to the cost of pollution claims.²⁷³

IMCO consequently convened a Diplomatic Conference in 1971 where the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund) was adopted. The 1971 Fund called for an intergovernmental body to be established to administer the fund, which brought the International Oil Pollution Compensation Fund (IOPC Fund) into being.²⁷⁴ The fund was to be financed by contributions levied on oil receivers in contracting states to apportion the financial burden for oil pollution between ship-owners and cargo-owners. The 1971 Fund would pay compensation when the claims for oil pollution damage would exceed the limit of the ship-owner's liability under the CLC, and the amount payable by the 1971 Fund was subject to a limit of 450 million gold francs.²⁷⁵

(c) Limitation ceilings increased under 1992 CLC and 1992 Fund

Notorious tanker incidents in the 1970s and 1980s resulted in extensive claims for compensation for pollution damage²⁷⁶ and created fears that the limitation ceiling set by the 1969 CLC would be insufficient to deal with claims resulting from a major oil spill. The IMO held a Diplomatic Conference in April 1984 to address the issues, and

²⁷¹ De La Rue & Anderson op cit note 24 at 113. In case of the 1969 CLC it was the 1957 Limitation Convention. In case of the 1992 CLC it was the 1976 London Convention on the Limitation of Liability for Maritime Claims (1976 LLMC).

²⁷² 1969 CLC, Article V (1).

²⁷³ De La Rue & Anderson op cit note 24 at 17. A resolution was adopted at the 1969 CLC requesting IMCO to convene an International Conference no later than 1971 to establish a second-tier fund.

²⁷⁴ For further information on the legal framework of the IOPC Funds, see Legal Framework 'The Old Regime: the 1969 Civil Liability Convention and the 1971 Fund Convention,' available at <https://iopcfunds.org/about-us/legal-framework/the-old-regime-1969-clc-and-1971-fund-convention/>, accessed on 03 January 2021.

²⁷⁵ De La Rue & Anderson op cit note 24 at 17-18. The conference took place in Brussels from 29 November to 18 December 1971.

²⁷⁶ Ibid at 29. Most notably the sinking of the Amoco Cadiz on 16 March 1978, and the Tanio disaster on 7 March 1980.

while all participants agreed that compensation limits required revision, no consensus could be reached on the amounts to which it should be raised. Delegates agreed to Protocols (1984 Protocols) to amend the existing regime, but its entry into force was dependent on the ratification of the 1969 CLC by the United States (US).²⁷⁷

After the US enacted the Oil Pollution Act of 1990²⁷⁸ in response to the Exxon Valdez disaster,²⁷⁹ it became apparent that the 1984 Protocols are unlikely to enter into force. At a Diplomatic Conference convened by the IMO in November 1992, the 1984 Protocols were re-affirmed and re-embodied in what is now known as the 1992 Protocols. The 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention (1992 Fund)²⁸⁰ adjusted the limitation ceilings and considerably increased the prospect of compensation to victims of oil pollution damage from tankers.²⁸¹

The liability limits of both the 1992 CLC²⁸² and the 1992 Fund²⁸³ were increased by the decision of the IMO Legal Committee and came into effect on 01 November 2003. The 1992 CLC limits are currently set at SDR 4.51 million for ships up to 5 000 gross tonnage; SDR 4.51 million plus SDR 631 for every tonne above 5 000 gross tonnage; subject to an overall maximum of SDR 89.77 million.²⁸⁴ The compensation payable by the 1992 Fund is limited to SDR 203 million and includes the sum actually paid by the shipowner or his insurer under the 1992 CLC.²⁸⁵

(d) Conduct barring Limitation

Although the ship-owner has the right to limit his liability, certain parameters were set in terms of conduct which will bar his right to limitation and significantly differs in the civil liability conventions.

²⁷⁷ Ibid at 29-30.

²⁷⁸ 33 USC Ch.40, available at <https://uscode.house.gov/view.xhtml?path=/prelim@title33/chapter40&edition=prelim>, accessed on 23 January 2021. The Act was signed by President George Bush on 18 August 1990.

²⁷⁹ For more information on the Exxon Valdez disaster, see the National Oceanic and Atmospheric Administration (NOAA) Incident News Report 'T/V Exxon Valdez,' available at <https://incidentnews.noaa.gov/incident/6683>, accessed on 03 January 2021.

²⁸⁰ 1992 CLC and 1992 Fund op cit note 178.

²⁸¹ De La Rue & Anderson op cit note 24 at 117.

²⁸² 1992 CLC, Article V (1). The 'unit of account' referred to is the Special Drawing Right (SDR) in accordance with Article V (9)(a). The limits were initially set at SDR 3 million for ships up to 5 000 gross tonnage; SDR 3 million plus SDR 420 for every tonne above 5 000 gross tonnage; subject to an overall maximum of SDR 59.7 million.

²⁸³ 1992 Fund, Article 4(4)(a). The initial limit was set at SDR 135 million.

²⁸⁴ IMO LEG.1(82) dated 18 October 2000.

²⁸⁵ IMO LEG.2(82) dated 18 October 2000.

(i) 1969 CLC

In the 1969 CLC, the ship-owner shall not be entitled to limit his liability if the incident occurred as a result of his actual fault or privity.²⁸⁶ The same rule applied under the 1957 Limitation Convention²⁸⁷ but proved to be quite readily ‘broken’ due to court decisions that progressively broadened the concept.

The words ‘actual fault or privity’ involve blameworthiness on the part of the owner himself. If an employee of the owner, such as the Master, commits a breach of duty, it does not constitute ‘actual fault’ on the part of the owner, and he would not be deprived of his right to limit his liability.²⁸⁸ Court cases in the UK however broadened the interpretation of ‘actual fault’ and ruled that owners had a duty to exercise a level of supervisor and control over their ships and cannot rely on their lack thereof to benefit from their right to limitation.²⁸⁹ The decision of the UK Court of Appeal in *The Eurysthenes (1976)*²⁹⁰ also created a legal precedent for the meaning of ‘privity’ and held that the ship-owner would be privy to a wrongful act if it were done with his express consent or knowledge. The interpretations of the courts however created great concern within the maritime industry since it seemed that the right to limitation in the 1969 CLC was too easily lost.

(ii) 1992 CLC

The 1992 CLC provides that:

‘The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.’²⁹¹

Conduct barring limitation in the 1992 CLC mirrored the words of the 1976 LLMC²⁹² and considerably lowered the prospect of limitation being lost by the ship-owner. A claimant who wishes to deprive the ship-owner of his right to limitation will bear the burden of proof.

²⁸⁶ 1969 CLC, Article V (2).

²⁸⁷ 1957 Limitation Convention op cit note 255 at Article 1 (1).

²⁸⁸ De La Rue & Anderson op cit note 24 at 793.

²⁸⁹ *The Lady Gwendolyn* [1965] 1 Lloyd’s Rep. 335; *The Marion* [1984] Lloyd’s Rep. 1, HL.

²⁹⁰ [1976] 2 Lloyd’s Rep. 171, CA.

²⁹¹ 1992 CLC, Article V (2).

²⁹² 1976 LLMC op cit note 255 at Article 4.

If the claimant can prove that the accident occurred as a result of the personal act or omission by the defendant, the ship-owner may be deprived of his right to limitation. In cases where the owner is a corporation, limitation may be lost if the act or omission is committed by the *alter ego* of the company, as held by the House of Lords in 1915.²⁹³

Another option available to the claimant is to prove intent on the part of the defendant. Intent is the state of mind of someone who aims to bring about a particular consequence,²⁹⁴ and the claimant will have to prove that the defendant intended the consequences of his action if the consequences were a virtual certainty and the defendant recognised it as such.²⁹⁵ Intent is one of the main forms of *mens rea*²⁹⁶ and may be difficult to prove beyond any reasonable doubt.

If the claimant can, however, prove that the defendant intended to cause damage, it may be sufficient. Different interpretations of the concept have emerged in various national laws, but if direct evidence of the defendant's state of mind proves that he acted with the purpose of causing damage, limitation may well be lost.²⁹⁷

Another option available to a claimant lies in the concept of 'recklessly and with knowledge that damage would result' since it provides an alternative to intent. The fact that the word 'and' combines recklessness with knowledge is significant. The definition of recklessness is usually subjective and requires that the defendant was aware of the risk associated with the particular action, but deciding nonetheless to continue with the action even though it is unreasonable to do so.²⁹⁸ The provision is therefore to be read and interpreted as a whole without giving the word 'recklessly' an isolated meaning.

The right of limitation under the 1992 CLC was thus much more secure since it will only be in rare cases that the ship-owner's right to limitation will be broken.²⁹⁹

²⁹³ *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, HL. In accordance with same principles as developed in cases concerned with the 1957 Limitation Convention.

²⁹⁴ Jonathan Law (ed) *A Dictionary of Law* 9 ed (2018) 112.

²⁹⁵ *R v. Woollin* [1999] 1 AC 82, HL.

²⁹⁶ Jonathan Law (ed) *A Dictionary of Law* 9 ed (2018) 135. *Mens rea* is the state of mind of a person at the time of committing an offense and requires the defendant to have knowledge of certain circumstances as part of the *mens rea*. It not relevant to civil offenses, but it is central in evidence during criminal cases.

²⁹⁷ De La Rue & Anderson op cit note 24 at 802.

²⁹⁸ *R v. G* [2003] 1 AC 1034, HL.

²⁹⁹ De La Rue & Anderson op cit note 24 at 801.

(e) 'Channelling' Provisions

The civil liability conventions provide that only the ship-owner and its insurer bear liability for pollution damages, and they are consequently the only parties who have the right to limit their liability. It was recognised that this right would be undermined if claimants had recourse outside the scope of the conventions, and to prevent unlimited claims in tort against the ship-owner or other parties, the conventions 'channel' oil pollution claims to the ship-owner. The channelling provisions in the two conventions, however, differ significantly from each other.

(i) 1969 CLC

The channelling provisions in the 1969 CLC exclude the ship-owner from liability for pollution damage beyond the scope of the convention, and his servants or agents are similarly excluded from liability.³⁰⁰ The convention nonetheless provided scope for claims to be brought against various other parties connected with the ship, as was effectively demonstrated by the litigation in the *Amoco Cadiz* case.³⁰¹ The exclusion in the 1969 CLC is however absolute, since it bars any claims against the ship-owner and his servant or agents, regardless of the seriousness of their alleged conduct.³⁰²

(ii) 1992 CLC

The channelling provisions in the 1992 CLC widened the scope of parties excluded from liability for oil pollution.³⁰³ Besides the ship-owner, his servants, and agents as, a wider range of organisations and people associated with the management and operation of a ship is included, together with those who would assist in salvage operations and anyone who takes preventative measures in terms of pollution. While it therefore appears that the 1992 CLC provides a higher degree of protection to shipping operators, it significantly differs from the 1969 CLC in that the exclusion from liability is not absolute. If it can be proven that the damage resulted from the defendant's conduct, which is the same as the conduct which will bar limitation to the ship-owner,³⁰⁴ exemption from liability will be lost.

³⁰⁰ 1969 CLC, Article III (4).

³⁰¹ De La Rue & Anderson *op cit* note 24 at 108.

³⁰² As opposed to circumstances specified in the 1992 CLC in which the conduct of the defendant may deprive him of immunity from legal action.

³⁰³ 1992 CLC, Article III (4).

³⁰⁴ 1992 CLC, Article III (4), V (2). Conduct barring exclusion from liability is the same as conduct which will bar limitation on the part of the ship-owner.

IV Liability Standards in other key IMO Conventions

The determination of liability following a maritime accident is embedded in concepts that fall within the purview of civil and criminal law. In cases where a maritime accident results in wide-spread pollution along the coast of a proud maritime nation with high stakes in economic activities such as fishing and tourism, public hostility towards the perceived offenders may tend to blur the line of reasoning on the part of the local authorities and the judiciary. Key IMO conventions however provide State Parties with clarity in terms of the applicable liability standards following an incident of pollution along their coast, and by virtue of ratification, State Parties are required to enact the same in their national laws and to apply it in accordance with their treaty obligations.

(a) UNCLOS

As ‘framework convention’ UNCLOS does not comprise of detailed rules relating to vessel-source pollution standards but rather lays out general provisions. UNCLOS Part XII deals specifically with the protection and preservation of the marine environment and consistently calls for national laws to conform with ‘generally accepted international rules and standards.’³⁰⁵ In terms of marine pollution, MARPOL will consequently apply, and matters relating to liability following a maritime accident will be dealt with in accordance with the relevant MARPOL regulations. While the Safeguards in Article 230³⁰⁶ is worth mentioning in terms of jurisdiction and permissible action that states make take following an incident of pollution, it only refers to penalties that states may impose on offenders and does not purport to prescribe liability standards.³⁰⁷

(b) MARPOL

As the key IMO Convention to prevent pollution from ships, the liability standards set by MARPOL are of great significance where a maritime accident results in wide-spread pollution. MARPOL prohibits any discharge of oil,³⁰⁸ and violations are consequently regarded as strict liability offences for which ship-owners will be held liable, regardless of any fault on their part. An exception however applies in the event

³⁰⁵ UNCLOS Articles 211, 217, 218 & 220.

³⁰⁶ Article 230 specifically deals with monetary penalties which may be imposed by a State following an incident of pollution, and the observance of recognized rights of the accused.

³⁰⁷ UNCLOS Article 230 (2) permits monetary penalties only for violations of pollution laws in the territorial sea, except in cases of a wilful and serious act of pollution.

³⁰⁸ MARPOL 73/78, Annex I, Regulations 15 & 34.

of an accidental discharge of oil which resulted from damage to the ship or its equipment.³⁰⁹ In such cases, no liability is borne by the ship-owner or the Master, unless it can be proven that they:

‘acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.’³¹⁰

The wording of this section is very similar to conduct that would bar limitation to the ship-owner in the 1992 CLC³¹¹ and provides for unambiguous liability standards which are to be applied in cases of accidental oil spills. It follows that if there is no violation of MARPOL, no liability can be incurred by the ship-owner or Master.

V Liability Standards applied in Case Studies

The liability standards as set out above will be contrasted with the liability standards applied in the three case studies discussed in Chapter 3.

(a) Erika

On 12 December 1999, the *Erika* sank some 60 nautical miles of the coast of Brittany, spilling 19 800 tonnes of heavy fuel oil, which affected the West Coast of France.³¹²

(i) Applicable IMO Conventions

In terms of UNCLOS, even though the *Erika* sank in the EEZ of France, Malta was the Flag State of the vessel and had prevailing jurisdiction over the matter. Malta accordingly held the primary right to investigate and ‘institute proceedings’ in respect of an alleged violation.³¹³ Even though France was permitted to ‘institute proceedings’ for a violation in the EEZ that caused ‘major damage to their coastline,’³¹⁴ French jurisdiction was limited to national laws which conform with and give effect to ‘generally accepted international rules and standards.’³¹⁵

French pollution laws accordingly had to comply with MARPOL. Since the discharge of oil from the *Erika* was deemed as an accidental discharge due to damage to the ship or its equipment, there was supposedly no violation of MARPOL.³¹⁶

³⁰⁹ MARPOL 73/78, Annex I, Regulation 4 (2).

³¹⁰ MARPOL 73/78, Annex I, Regulation 4 (2)(2).

³¹¹ 1992 CLC, Article V (2).

³¹² Incidents involving the IOPC Funds 2012 op cit note 179 at 6.

³¹³ UNCLOS Article 217 (4).

³¹⁴ UNCLOS Article 220 (6).

³¹⁵ UNCLOS Article 211 (5).

³¹⁶ MARPOL 73/78, Annex I (4)(2).

In terms of compensation for pollution damage from a tanker, the ship-owner was entitled to limit his liability. At the time of the incident, France was party to the 1992 CLC and 1992 Fund, and the maximum amount available for compensation was SDR 135 million.³¹⁷ The channelling provisions also protected several classes of people from civil liability.³¹⁸

The liability standards in MARPOL and the 1992 CLC are nearly identical, and in any criminal and civil proceedings aimed at attaching liability, it would have to be proven that the pollution happened due to the personal act or omission of the ship-owner or the Master, ‘committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.’³¹⁹

(ii) French Approach

It was clear from the onset of the *Erika* disaster that claims would far exceed the available liability limits of the 1992 CLC.³²⁰ In French law, a criminal conviction entails a corresponding civil liability, and the decisions of the French courts and its interpretation of the applicable conventions remain controversial.³²¹

The French courts contended that the fact that Malta had not instituted any proceedings meant that France has jurisdiction in the matter and could therefore impose penalties for offenses committed in their EEZ.³²²

Criminal charges were laid against the Master and several other defendants³²³ for ‘imprudence causing pollution,’ which is a violation under French pollution laws (law of 1983).³²⁴ During judicial proceedings, defendants argued that the law of 1983 is in conflict with MARPOL since the liability standard of ‘imprudence’ is significantly differs from the convention, and that it could also not apply to the EEZ since it is national law rather than an international regime.³²⁵ The French courts

³¹⁷ IOPC/APR13/3/3 op cit note 185 at Annex page 1, para 4.3.

³¹⁸ 1992 CLC, Article III (4).

³¹⁹ MARPOL 73/78, Annex I, Regulation 4 (2) & 1992 CLC, Article V (2).

³²⁰ Incidents involving the IOPC Funds 2012 op cit note 179 at 6-7.

³²¹ José Juste-Ruiz ‘European Courts Go beyond the IMO Conventions on Civil Liability for Oil Pollution Damage’ *Miepelan eBulletin* 05 April 2013 at 2-3, available at <http://www.miepelan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=138&Article=European-Courts-Go-beyond-the-IMO-Conventions-on-Civil-Liability-for-Oil-Pollution-Damage>, accessed on 13 January 2021.

³²² IOPC/APR13/3/3 op cit note 185 at 4.6.

³²³ De La Rue & Anderson op cit note 24 at 1116. Criminal charges were laid against 15 defendants.

³²⁴ For more information on Article 8 of Law No. 83-583 of 05 July 1983, see Legifrance – the public service for the dissemination of law, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000692487>, accessed on 26 February 2021.

³²⁵ De La Rue & Anderson op cit note 24 at 1106.

however argued that the law of 1983 is not in conflict with MARPOL³²⁶ and that it complies with the jurisdiction as conferred by UNCLOS.³²⁷ The French courts (Court of First Instance, Paris Court of Appeal, and Court of Cassation) found the ship-owner, the management company, the classification society RINA and TOTAL SA guilty of unintentional pollution. Since the four parties incurred criminal liability, they were held jointly and severally liable for the damage caused by the incident and ordered to compensate the civil parties.³²⁸

The channelling provisions as provided in the 1992 CLC are designed to avoid the subversion of the compensation provisions but do not to absolve people from accountability for criminal actions. Even though the channelling provisions were applied inconsistently by the various courts, the Court of Cassation finally held that all four parties who claimed liability in accordance with Article III (4) could enjoy the channelling of liability unless they had committed an inexcusable fault which caused the damage. The Court however found that all four parties were guilty of ‘recklessness’ as defined by the 1992 CLC, and could therefore not benefit from the channelling provisions.³²⁹ The Court of Cassation applied the French law on civil liability, which allows full compensation for damage suffered by the victims.³³⁰

The liability standards applied in the *Erika* stood in stark contrast with the liability standards of the applicable conventions. While the French courts contended that the law of 1983 was not in conflict with MARPOL, such an argument is quite unsatisfactory, taking that the French liability standard of ‘imprudence’ significantly differs from the liability standards of ‘intent and recklessly with knowledge’ in MARPOL. The judgement of the French Supreme Court confirmed the criminal liability of the parties, which entails a corresponding civil liability. In civil proceedings, the Courts again lowered the liability standard, and the parties were held liable for damages according to national law.

The liability standards of both MARPOL and the 1992 CLC were subverted by the French courts, and their actions seemed to have been deliberate. The notion was confirmed by the French Supreme Court’s argument that ‘international law conditions

³²⁶ Ibid at 1116-7.

³²⁷ IOPC/APR13/3/3 op cit note 185 at 4.9.

³²⁸ IOPC/APR13/3/3/1 op cit note 183 at 1.3, 1.4 & 1.5.

³²⁹ Ibid at 3.4 & 3.5.

³³⁰ Ibid at 4.2.

to prosecute non-intentional sea pollutions were too conciliatory with actors in charge of a ship thus its intention was to deliberately not refer to MARPOL Convention.³³¹ The liability criteria applied in the *Erika* were disproportionately altered to secure a criminal conviction, and it resulted in wide-ranging civil damages, including pure environmental damage, which was not admissible under the 1992 CLC and the 1992 Fund, being awarded to claimants.³³² While sincere empathy was had with the local communities affected by the devastating pollution, the judicial findings of the French courts posed a threat to the stability of the existing compensation regimes.³³³

(b) Prestige

On 19 November 2002, the *Prestige* sank some 260 kilometres West of Spain, spilling approximately 63 300 tonnes of heavy fuel oil that affected Spain, France and Portugal.³³⁴

(i) Applicable IMO Conventions

In terms of UNCLOS, the *Prestige* sank within the EEZ of Spain, and since the Bahamas was the Flag State of the vessel, they had jurisdiction over the matter.³³⁵ In response to the oil spill, Spain could ‘institute proceedings’ due to the damage caused by the pollution,³³⁶ but their jurisdiction was limited to national laws which conform with and give effect to ‘generally accepted international rules and standards.’³³⁷

In accordance with UNCLOS, Spanish pollution laws had to comply with MARPOL. The discharge of oil from the *Prestige* was accidental since the vessel was damaged and broke in two, and presumably, no violation of MARPOL occurred.³³⁸

The *Prestige* was an oil tanker, and the ship-owner was entitled to limit his liability according to the CLC limits. Spain was Party to the 1992 CLC and 1992 Fund, and the maximum amount available for compensation was SDR 135 million.³³⁹ The channelling provisions also protected several classes of people from civil liability.³⁴⁰

³³¹ EU Handbook ‘Addressing Environmental Crimes and Marine Pollution in the EU - Legal guidelines and case studies’ (2013) at 28. Available at <https://www.dadinternational.org/publications/2-non-categorise/28-addressing-environmental-crimes-and-maritime-pollution-in-the-eu-1>, accessed on 03 January 2021.

³³² IOPC/APR17/4/6 op cit note 184 at 3.7.

³³³ IOPC/APR13/3/3 op cit note 185 at 5.2.

³³⁴ Incidents involving the IOPC Funds 2012 op cit note 179 at 12.

³³⁵ UNCLOS Article 217 (4).

³³⁶ UNCLOS Article 220 (6).

³³⁷ UNCLOS Article 211 (5).

³³⁸ MARPOL 73/78, Annex I (4)(2).

³³⁹ IOPC/APR16/3/2 op cit note 194 at Annex page 1, paras 4.1 & 4.3.

³⁴⁰ 1992 CLC, Article III (4).

The liability standards in MARPOL and the 1992 CLC are almost indistinguishable and were set at a ‘virtually unbreakable right to limit liability.’³⁴¹ In order to negate this limitation right, it has to be proven that the pollution happened as a result of the personal act or omission of the ship-owner or the Master, ‘committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.’³⁴²

(ii) Spanish Approach

Under Spanish law, the criminal court decides on criminal liability and on civil liability derived from the criminal action, and civil claims may therefore be submitted in criminal proceedings.³⁴³ If the criminal court however rules that there was no crime, it meant that civil liabilities would also be subject to limits.³⁴⁴

The Spanish reasoned that their action was based on the authority afforded to Coastal States in UNCLOS Articles 56 and 73.³⁴⁵ While Article 56 does provide that the Coastal State has jurisdiction in its EEZ for the protection of the marine environment,³⁴⁶ it also specifies that the Coastal State ‘shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of this Convention.’³⁴⁷ The reference to Article 73 is unpersuasive at best since it is only applicable to the management of living resources in the EEZ.³⁴⁸ The Flag State (Bahamas) however never challenged Spain’s jurisdiction, and the Master was charged with committing an environmental crime in accordance with Spanish national laws.

Spanish law makes provision for environmental crimes, and the Master and two others were criminally charged in accordance with Articles 325 and 327 of the Spanish Criminal Code.³⁴⁹ In 2013 the Criminal Court ruled that none of these parties were criminally liable for damage to the environment, but the Master was found guilty of disobedience, and he was sentenced to nine months in prison. In 2016 the Supreme Court however ‘corrected’ the lower court’s ruling and found the Master guilty of

³⁴¹ IOPC/OCT16/11/1 dated 20 October 2016, para 3.2.22.

³⁴² MARPOL 73/78, Annex I, Regulation 4 (2) & 1992 CLC, Article V (2).

³⁴³ IOPC/APR16/3/2 op cit note 194 at Summary of incident, page 1.

³⁴⁴ Caballero & Soto-Oñate op cit note 195 at 216 – 218.

³⁴⁵ Edgar Gold ‘From Privilege to Peril’ op cit note 12 at 55.

³⁴⁶ UNCLOS Article 56 (1)(b)(ii).

³⁴⁷ UNCLOS Article 56 (2).

³⁴⁸ UNCLOS Article 73 (1).

³⁴⁹ Caballero & Soto-Oñate op cit note 195.

reckless criminal damage to the environment, and he was sentenced to two years' imprisonment.³⁵⁰ The criminal proceedings in Spain were based on environmental crimes, and no reference was made to a MARPOL violation as per se, and the convention was effectively side-stepped by the strict application of Spanish national laws.

The Supreme Court also affirmed the civil liability of the Master, ship-owner, the insurer (London P&I Club), and the 1992 Fund. The court recognised the channelling provisions of Article III (4) but ruled that the environmental damage occurred due to the Master's recklessness with the knowledge that the damage could occur, and he was held liable for civil damages. The ship-owner was found to have subsidiary civil liability, but the court ruled that the ship-owner acted recklessly and with knowledge that damage would probably result and could therefore not claim his right to limitation as provided by Article V (2). The London P&I Club was found to have civil liability up to the limit of its insurance policy, and while the Court recognised the insurers' right to limitation, it applied domestic law due to the insurer's lack of procedural diligence. The 1992 Fund was found to have strict liability with the limits provided in the Convention.³⁵¹

In terms of the criminal proceedings against the Master, the Supreme Court found that the Master had breached his duty of care, with recklessness and without due cognisance of the risk to the environment.³⁵² The ruling of the Supreme Court was highly unexpected since the Master was acquitted by the Criminal Court, and even though several parties appealed the ruling, the probability of the appeal's success was deemed to be poor since the facts proven in the Criminal Court were not going to be questioned in the Supreme Court.³⁵³ The Supreme Court however reviewed the established facts but derived vastly different legal conclusions, inconsistent with those of the trial court, and without re-hearing the evidence of the accused.³⁵⁴ The liability standard was significantly altered to recklessness to secure a criminal conviction against the Master, and the same was done during the subsequent civil liability proceedings. The Court held that the conduct of the Master and the ship-owner was

³⁵⁰ *Ibid* at 216 – 218.

³⁵¹ IOPC/APR16/3/2 *op cit* note 194 at 5.13.1 – 5.13.8.

³⁵² *Ibid* at 5.12.2.

³⁵³ Caballero & Soto-Oñate *op cit* note 195.

³⁵⁴ IOPC/APR16/3/2/1 *op cit* note 194 at 3.1 – 3.2.

akin to the prescribed conduct in the 1992 CLC, which will deprive them of its protection, and they were consequently held liable for civil damages without limitation.³⁵⁵ While the Spanish contended that it acted with the scope of the international liability regime,³⁵⁶ the facts do not support such a conclusion since it lacks substance and reasoning and set a dangerous precedent for cases of oil pollution in other jurisdictions.³⁵⁷

The alteration of liability standards to derive a judicial decision that favours the state, and the awards of damages beyond the defined parameters of the liability conventions, significantly impacted the maritime industry.³⁵⁸ The ‘unbreakable’ liability standards in the IMO conventions appeared to have been diluted by the application of liability standards which could hardly be regarded as criminal in the absence of intent, and presented serious challenges to the viability of the civil compensation regimes and to vulnerable seafarers. The treatment of the Master indicated a worrying trend amongst states to criminalize the Master after a maritime accident, but despite urgent calls for the fair treatment of seafarers,³⁵⁹ it was disproportionately offset by the harsh reaction from the EU to draft regional policies which imposed criminal sanctions for accidental oil spills.³⁶⁰ The delicate balance between Coastal States with marine environmental concerns and Flag States and maritime nations with significant maritime interest³⁶¹ was thrown into disarray by the *Prestige* spill, and the equilibrium has not been restored to date.

(c) *Hebei Spirit*

On 7 December 2007, the *Hebei Spirit* was involved in a collision about five nautical miles off the coast of Taean, causing a spill of approximately 10 900 tonnes of crude oil, which affected the West coast of the Republic of Korea.³⁶²

³⁵⁵ Ibid at 5.13.2 – 5.13.5.

³⁵⁶ IOPC/APR16/9/1 dated 27 April 2016, para 3.2.25.

³⁵⁷ IOPC/APR16/3/2/1 op cit note 194 at 4.8 – 4.11.

³⁵⁸ Ibid. Comment submitted by the International Group of P&I Associations on the Judgment of Spanish Supreme Court highlighted the implications thereof for the maritime industry. The document was widely supported by other key players in the industry in subsequent meetings (see IOPC/OCT16/11/1 op cit note 341).

³⁵⁹ IMO A.987(24) op cit note 28.

³⁶⁰ Directive 2005/35/EC dated 30 September 2005.

³⁶¹ De La Rue & Anderson op cit note 24 at 79.

³⁶² Incidents involving the IOPC Funds 2012 op cit note 179 at 30.

(i) Applicable IMO Conventions

In terms of UNCLOS, the *Hebei Spirit* accident occurred five nautical miles off the Port of Daesan in an anchorage position as directed by the Daesan Vessel Traffic Information Service (VTIS).³⁶³ Since the vessel was within the territorial waters of Korea, it meant that their sovereign rights prevailed,³⁶⁴ and they have the right to ‘adopt laws and regulations for the prevention, reduction, and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage.’³⁶⁵ As Flag State of the vessel, China was required to provide for an immediate investigation into the accident.³⁶⁶

Korean pollution laws would prevail in the exercise of their sovereign rights. In terms of MARPOL, the discharge of oil from the *Hebei Spirit* was accidental since its port cargo tanks were ruptured by another vessel while the vessel was at anchor, and it can be held that no MARPOL violation occurred.³⁶⁷

At the time of the accident, the Republic of Korea was Party to the 1992 CLC and the 1992 Fund but had not yet ratified the Supplementary Fund Protocol. It therefore meant that the total amount available for compensation under the 1992 CLC and the 1992 Fund was limited to 203 million SDR.³⁶⁸

(ii) Korean Approach

The *Hebei Spirit* case is significantly different from the two previous case studies in that the sovereignty of the Republic of Korea reigned supreme. The [South] Korean criminal legal system distinguishes between serious offences and less serious offences, and crimes of a violent nature are distinguished from property-related crimes.³⁶⁹ Since Korea is not a common law country, its legal system provides that factual aspects of a case are ascertained with definite and final authority at the appellate court. In the case where a prosecutor appeals against the decision of the trial court, the process of determining the facts of the case is extended, and the defendant is required to appear at the court of appeal.³⁷⁰

³⁶³ Hong Kong Investigation Report op cit note 164 at 7.

³⁶⁴ UNCLOS Article 2.

³⁶⁵ UNCLOS Article 211 (4).

³⁶⁶ UNCLOS Article 217 (4).

³⁶⁷ MARPOL 73/78, Annex I (4)(2).

³⁶⁸ IOPC/APR16/3/5 dated 24 March 2016, Annex I, paras 4.1 & 4.2.

³⁶⁹ Daniels op cit note 122 at 20.

³⁷⁰ LEG 94/12 op cit note 170 at Annex 9.

While the sovereignty of Korea was not in dispute in the *Hebei Spirit* case, it was rather the failure of the state to adhere to the provisions of UNCLOS Article 230 as highlighted in several IMO documents,³⁷¹ which was cause for concern amongst the international community. After the trial court (Seosan Court) found the Master not guilty of the criminal charges brought against him, it was reasonably expected that he would be allowed to return to his home in India. An appeal was however lodged against the verdict, and the Master was not allowed to leave Korea pending the appeal trial. The appellate court (Daejeon Court) subsequently overturned the decision of the trial court and found the Master guilty on two charges, and he was summarily arrested.³⁷² Despite impassioned pleas from the Indian government and maritime industry partners,³⁷³ Korea persisted in its approach based on national laws and their sovereign jurisdiction.³⁷⁴ Renewed calls were made for seafarers to be treated fairly after a maritime accident, and for accident investigations to comply with the Casualty Investigation Code.³⁷⁵ Despite intense external political pressure, the Korean courts did not take the provisions of Article 230 into account at any point, and the Master was only allowed to leave the country after the Korean Supreme Court annulled the appellate courts' decision in June 2009.³⁷⁶

The criminal charges against the Master did not relate to pollution but were rather for property-related offences of criminal damage.³⁷⁷ The Master was charged for wilfully damaging his own ship, and his custodial sentence was related to this charge – which is a non-pollution-related offense.³⁷⁸ The MARPOL provisions did therefore not come into play in the court proceedings, and the Korean courts consequently did not consider the text of the convention in their judicial findings.

The Korean courts recognised the rights of the ship-owner of the *Hebei Spirit* and Samsung Heavy Industries (SHI), who owned and/ or operated the Marine Spread (the crane barge and the two tugs), to limit their liability in accordance with Article V (2) of the 1992 CLC.³⁷⁹ The Korean Courts rendered decisions in respect of 127 483

³⁷¹ IMO A.987(24) & LEG.3(91) op cit note 28.

³⁷² IOPC/APR16/3/5 dated 24 March 2016, Annex I, paras 9.1 – 9.4.

³⁷³ LEG 94/12 op cit note 170 at paras 6.6 & 6.9 – 6.15.

³⁷⁴ Ibid at para 6.7.

³⁷⁵ Ibid at para 6.18.

³⁷⁶ IOPC/APR16/3/5 dated 24 March 2016, Annex I, paras 9.5 – 9.6.

³⁷⁷ Daniels op cit note 122 at 21.

³⁷⁸ Murray op cit note 16 at 159.

³⁷⁹ IOPC/APR16/3/5 dated 24 March 2016, Annex I, paras 1.3 & 10.1 – 10.2.

claims for compensation, and a total of KRW 432.9 billion (£299 million) has been awarded to the claimants. The amount available for compensation in respect of the *Hebei Spirit* incident (KRW 321.6 billion) was not sufficient to pay all claims in full, but the decision by the Korean government to stand last in the queue made it possible for all claimants to be compensated. After entering into a bilateral agreement with Korea, the 1992 Fund has paid the remaining compensation available for this incident, and by the end of 2019, claims for compensation were all but concluded.³⁸⁰

The *Hebei Spirit* case perhaps best illustrates how the normative ethics of society can shape the course of judicial processes within a state.³⁸¹ The indignation of the Indian government in terms of the treatment of the Master³⁸² was echoed by several other governments and industry role players,³⁸³ but since the sovereign rights of Korea were absolute,³⁸⁴ efforts to appeal for a fair judiciary process was limited to diplomatic interventions at an inter-governmental level, and heated debates within the confines of IMO Legal- and Maritime Safety Committee meetings.³⁸⁵

The fact that the criminal charge against the Master was for a non-pollution-related offence carrying a custodial sentence meant that the UNCLOS Article 230 safeguards were meaningless,³⁸⁶ and the defence could also not raise arguments with reference to the liability standards in MARPOL. The Korean government called on other states and observers to respect their sovereign rights and reminded them that it was absolute and cannot not be contested.³⁸⁷ Interventions from other governments and the international community which called for the release of the Master were therefore limited to renewed calls on states to comply with the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident,³⁸⁸ since it is also specifically referenced in the Casualty Investigation Code.³⁸⁹ Although these calls proved to be a popular debating point at IMO/ ILO meetings, it did little to aid the release of the Master of the *Hebei Spirit* in Korea. The appellate court judgement found the Master to have acted negligently in causing the collision with the crane

³⁸⁰ Hebei Spirit Incident Report op cit note 210 at 10.

³⁸¹ Daniels op cit note 122 at 108.

³⁸² LEG 94/12 op cit note 170 at Annex 7; IMO MSC 86/26/Add.2 dated 25 June 2009, Annex 28.

³⁸³ LEG 94/12 op cit note 170 at Annexes 8, 11 – 14.

³⁸⁴ UNCLOS, Article 2.

³⁸⁵ LEG 94/12, LEG 97/15, MSC 86/26 & MEPC 60/16.

³⁸⁶ Murray op cit note 16 at 159.

³⁸⁷ IMO MSC 86/26 dated 12 June 2009, para 1.11.

³⁸⁸ IMO A.987(24) op cit note 28.

³⁸⁹ IMO MSC.225(84) op cit note 65 at Preamble.

barge,³⁹⁰ and the severity of his custodial sentence was made with reference to the devastation of the resultant pollution along the Korean coast, and had little to do with the actual damage to the *Hebei Spirit*. The fact that simple negligence in itself resulted in a custodial sentence highlighted the serious peril facing the Master when his actions are criminalized by the watering down of liability standards, albeit in national laws relating to pollution or any other laws which the judiciary sees fit to satisfy the demands of society. This was illustrated by the public humiliation of the Master when he was paraded in front of a cheering crowd after his sentencing in the appellate court,³⁹¹ which only served to seal the fate of the Master as a criminal following a maritime accident.

VI Departure from Uniformity as the Master's peril

The concept of liability is deeply embedded in the business of shipping as the industry cannot survive without people who are willing to take the inherent risk of putting a vessel out at sea and the insurance industry who is willing to insure such an endeavour. Liability is therefore not only an essential element within contract law, but it is also an indispensable component of widely adopted IMO conventions.

Liability standards in the conventions as discussed above are consequently very clear, with the aim of eliminating any ambiguity which may occur when states are in the process of enacting domestic laws as part of the ratification process of IMO conventions. Since it is essentially liability that will determine the findings in judicial proceedings, conventions provide specific guidance in terms of actions that would render parties liable in the event of a maritime accident. The clarity provided by the conventions has however been thrown into disarray by the inconsistent application of the conventions in a manner that significantly departs from the aim of the IMO to establish uniformity.

States are overwhelmingly driven by public or political demand for retribution in the wake of a maritime accident,³⁹² as evidenced in the three case studies. In the cases of the *Erika* and the *Prestige*, the analysis has shown that the alteration of liability standards was strongly connected to attempts to secure compensation beyond

³⁹⁰ IMO MSC 86/26/Add.2 op cit note 382.

³⁹¹ Keith Wallis and Marcus Hand ‘“Hebei Two” are Jailed’ *Lloyd's List* 11 December 2008. Available at <http://www.lloydslist.com/ll/sector/regulation/article49267.ece>, accessed on 12 January 2021.

³⁹² Epaminondas Embiricos op cit note 242 at 33.

the 1992 CLC and 1992 Fund limits. In the case of the *Hebei Spirit*, the conventions were circumvented by charges unrelated to pollution.

In all three case studies, the states reacted in a manner that is inconsistent with their treaty obligations. Despite authoritative opinion on the ranking of national laws which are in conflict with a convention,³⁹³ the states applied national laws in defiance of their obligations as State Party to the conventions. The criminalisation of the Master is consequently rooted in the fact that the states consistently failed to apply the relevant conventions in a uniform manner, which has not only led to punitive measures being introduced by states in the wake of a maritime accident, but which have also highlighted the systemic failure of the IMO to compel states to apply its conventions in a uniform manner.

³⁹³ ECLI:EU:C:2007:689, paras 107-8. Opinion of Advocate General Kokott delivered on 20 November 2007, available at, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=69879&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5147944>, accessed on 23 February 2021.

CHAPTER 5 CONCLUSION

It follows from the previous chapters that Masters often face criminal and civil charges in the aftermath of a maritime accident, which is a predictable consequence after any accident which causes damage.

What is however unpredictable, is the manner in which states have departed from their treaty obligations in the aftermath of a maritime accident. In an ideal world, states would adhere to the guidelines of the relevant IMO conventions and give heed to the safeguards of UNCLOS, but the analysis has shown that the reality is far removed from the ideal. States often circumvent or ignore the provisions of the conventions, and while the reasoning behind state action is strongly linked to financial and political motives, it is apparent that states are becoming less and less inclined to rank their treaty obligations above their national laws.

In all three case studies, judiciary rulings consistently ranked national laws over that of international conventions, the reasoning of which was not compatible with the understanding of the international maritime community.³⁹⁴ The Vienna Convention is ostensibly clear in that states ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty,’³⁹⁵ yet this did not change the outcome for the Master in any of the three case studies.

The emergence of the Community as a standards regulator and the extent of regional agreements which set higher standards than the conventions,³⁹⁶ is an indication that the uniform model of the IMO is under threat. The extent of criminalisation of the Master is merely a snapshot of the varied approach amongst states when it comes to the uniform application of conventions, and while the criminalisation of the Master remains an extremely contentious issue,³⁹⁷ it is apparent that states are becoming less and less amenable to accepting IMO conventions as the governing international standard, and even less inclined to apply it in a uniform manner.

States are no longer constrained by their membership status to the IMO and are becoming increasingly adamant in the manner in which they intend to treat pollution

³⁹⁴ De La Rue & Anderson op cit note 24 at 1115.

³⁹⁵ Vienna Convention op cit note 135.

³⁹⁶ EU Directive op cit note 235.

³⁹⁷ Seafarers Rights International survey op cit note 29 at 63.

offenders, especially in the maritime context. The stand-off between states with environmental concerns and who support stringent criminal prosecution even for accidental pollution regardless of fault, and the maritime industry, who vehemently opposes the departure from the carefully drafted IMO conventions, presents a threat to the viability of the IMO. State action which is inconsistent with its treaty obligations clearly subverts from the IMO's aim and mission to establish the universal and uniform application of international pollution instruments, and if the current status remains unchallenged, it not only poses a significant risk to Masters as professional mariners – but it poses an existential threat to the IMO itself.

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