

Seventh Cadwallader Annual Memorial Lecture

Criminalization in Shipping: Human Pawns in Political and Legal Games

Keynote speech by Efthimios Mitropoulos, Secretary-General of the International Maritime Organization, London, 6 October 2004

Lord Steyn, Vice-Chairman of the IMO Council, Ladies and Gentlemen,

Good evening. It gives me great pleasure to be here this evening for the seventh in this series of annual lectures given in the memory of the distinguished Professor F.J.J. Cadwallader, particularly so in view of the theme that has been chosen for this session. It is a topic that is close to my heart and upon which I have spoken on several occasions already this year.

Let me first of all declare my personal interest in the subject. I am very proud of my maritime roots, coming as I do from Galaxidi, a historic town that was once a major maritime power in Greece, during the era of the tall ships. Today, there are only a few shipowners left in Galaxidi, but still many seafarers. In particular, many captains and engineer officers hail from the town. I come from a long line of seafarers and I started my own career as a Merchant Navy Officer. I have seen the sea; I think I can understand what the sea can do to a ship; I can reasonably understand the human behaviour under adverse and severe conditions at sea; and I can understand the consequences of human error. To me, the sea means love, respect and fear, and those who go to sea for their livelihoods - and in so doing provide a service to us all - deserve our utmost respect, consideration and protection.

And, having laid that set of cards on the table, let me also confirm that I am, of course, a law-abiding citizen, and I believe that anyone who deliberately breaks or flouts the law deserves to be punished. Moreover, I have every sympathy for all those who have been the victims of accidents, in particular serious pollution incidents. Such incidents can ruin lives and livelihoods and literally rip the heart out of a community and I understand the need both to discourage violations of pollution laws and make sure that proper compensation is awarded to all those who suffer as a result of an accident.

And so to the subject of this evening's lecture, Criminalization in Shipping. As you will no doubt have inferred from my opening remarks, it is my firm belief that what is needed, not exclusively in the particular case we are to debate this evening but in all aspects of life, is a proper balance - something along the lines of my ancient ancestors' call for the "golden mean" or that we should do everything in moderation. And my concern over recent months has been that the balance may be swinging just a little bit too far in one direction.

There can be no doubt about the increasing trend to initiate criminal proceedings following maritime mishaps. Two cases, in particular, have become causes célèbres and have done more than any others to highlight this issue. Above all, they have drawn attention to the terrible plight of seafarers who become caught up in such incidents.

On a foul and storm-lashed winter's day in November 2002, the tanker '**Prestige**' suffered a structural failure and subsequently sank off the coast of Spain facing the Atlantic, in the process spilling thousands of tons of oil into the sea in what became one of Europe's worst pollution disasters. Those bald facts belie a human drama of immense proportions. The master of the '**Prestige**' fought bravely to save his ship and his crew. According to reports, he was on continuous duty for 51 hours after the incident began; with his chief engineer and chief officer he spent three hours in atrocious conditions trying to make fast a tug and helping the salvage team; and, when it proved impossible to get the lifeboats away, he helped to organise the evacuation of his ship by helicopter which saved the lives of the entire crew - a successful operation which added to the credit the maritime community very rightfully accords to the Spanish SAR authorities for their dedication, commitment and professionalism - characteristics that they so often admirably display in line with the highest traditions of the sea.

What happened next is well known to all those residing in Jerusalem. The moment the master of the ill-fated tanker set foot on dry land he was detained and has not been allowed to return home since.

At this point I should offer a caveat. I am not a lawyer, and I do not intend to comment in any way on the legal aspects of this particular case. I offer these facts purely to demonstrate that the case is anything but clear cut, and to raise the question of whether, in the light of the ambiguity that clearly exists, the '**Prestige**' master should be treated in a different way.

Moving on to the second cause célèbre: in the summer of 2003, another oil tanker, the '**Tasman Spirit**', was proceeding, with the assistance of an experienced pilot, to a berth in the port of Karachi. She was fully laden and had been called in on a falling tide, in a channel in which silting was known to have been a problem in monsoon conditions. And, as history has well recorded, the '**Tasman Spirit**' ran aground, broke in half and spilled a substantial amount of her cargo.

This time it was not just the Captain who was arrested, but also six members of the crew. Later, the salvage master, who did not even arrive on the scene until after the ship had broken, was also detained to make up the last of what became known throughout shipping as the "Karachi Eight". The whole of the shipping world breathed a sigh of relief and gratitude when the eight were allowed to return home in April this year - but this was only after more than eight months of detention, an ordeal which drove one of the men to such depths that he reportedly attempted to take his own life.

Now then, don't you think we have to ask ourselves:

- Is this right?
- Is this fair?
- And is it in the interests of shipping?

None of these is an easy question to answer because this is a complex and multi-faceted issue. Each case must be looked at on its own merits; each is different, and generalizations are very difficult to make and should, prudently, be avoided.

However, generalize we must, and I have gone on record several times already to express my very real concern about plans in various countries to introduce new legislation that would impose criminal sanctions against those found responsible for pollution by ships for what is essentially negligent conduct.

The frustration and the anger of the victims of accidents and of those whose coasts and livelihoods are damaged by catastrophic pollution incidents is understandable and, of course, we can all sympathize with this. I am not suggesting that those who deliberately (or "wilfully and seriously", to use the words of UNCLOS) commit an act of pollution and/or knowingly flout pollution standards such as MARPOL should escape appropriate punishment; indeed MARPOL requires that the penalties to be imposed for such behaviour shall be adequate in severity to discourage such violations. But any move to criminalize polluters for serious negligent conduct, such as the reported original proposal for an EU directive on ship-source pollution and the introduction of sanctions for infringements, could constitute a significant departure from the status quo.

When I addressed the ad hoc Committee on Maritime Safety of the European Parliament in early January, I suggested that the IMO conventions have not been drafted with the aim of requiring criminal sanctions for non-compliance and, therefore, any move to criminalize polluters, particularly for negligence, would constitute a significant departure from the established philosophy in the formulation of relevant IMO instruments. This view is reinforced by the fact that MARPOL does not specify the form that sanctions should take and the UNCLOS Convention limits sanctions to monetary penalties except for wilful and serious acts of pollution in the territorial sea.

Regardless of whether or not a way can be found to tiptoe gently through the legal minefield, there can be no doubting the detrimental impact such moves will have on masters and seafarers, particularly if it includes the prospect of imprisonment. I have a number of deep concerns in this respect.

Most immediate, of course, is the direct concern I think we all share for the seafarers under detention, their families and their loved ones. We can only begin to imagine how dreadful it must be to endure a prolonged period of detention in a foreign country, separated from your family, without

any charges having been proven against you. You may not have the protection of your home country's legal system, quite possibly no representation - legal or otherwise - and no idea when your ordeal will end.

My next concern is for the impact these cases have on the general morale of other seafarers all over the world as a whole, who may justifiably fear for their future livelihoods when they see the fate that has befallen their professional colleagues. In our global society today, we live in what is increasingly becoming a "blame culture". In many industries, however, - and shipping is no exception - wise counsels have tried to keep the blame culture at bay. Instead, we (that is maritime people) encourage an open approach, embracing near-miss reporting and a culture in which we learn from mistakes and mishaps. The trend towards criminalization is hardly going to help in this respect. It is certainly not going to encourage seafarers to co-operate fully and openly with casualty inquiries or accident investigations.

I think we should also be very concerned by the detention of personnel involved in salvage operations. There can be little doubt that the prospect of criminal proceedings might have a detrimental effect on the willingness of salvage and clean-up specialists to respond quickly to any pollution incident and that would certainly be counterproductive. I read recently that the International Salvage Union has announced that it will oppose the provision of salvage services in jurisdictions detaining salvage personnel 'without reasonable cause' and has also lent its support to wider industry efforts opposing the introduction of criminal sanctions for accidental marine pollution.

And, finally, I am seriously worried about the negative impact acts of detention may have on the global campaign to attract new recruits to the maritime profession, particularly now when, as we are all aware, there is a shortage of quality officers and a strong possibility of a shortage of ratings as well in the not too distant future.

It is against considerations - and concerns - like these, that I appeal to the European Union members to choose the IMO channel to analyse and examine all the repercussions of the contemplated legislation to criminalize polluters in case it departs from the provisions of the MARPOL Convention before any action is taken at the regional level and then the Organization is caught in a *fait accompli* situation. Of course, if the matter is brought to IMO and the IMO members, having, in their wisdom, assessed all the relevant repercussions, decide to embrace the essence of the contemplated legislation, the IMO legislative regime will have to be revised accordingly - in which case, we will, at least, have avoided confusing the industry with different regimes applying in different parts of the world.

Many observers have noted recently that shipping has something of an image problem and I believe very strongly that this is an area on which we need to pay attention, doing whatever we can to improve the industry's public perception. We should perhaps start by working, methodically and systematically, to make people stop nurturing the creeping perception that tends to hold shipping responsible every time something goes wrong in the transport system; and pass a "guilty" verdict even without trial, as so often happens, ignoring or occasionally deliberately forgetting what we all owe to it. Assisting those politicians who may know little about shipping to understand the industry's peculiarities and complexities would not, in this respect, be a bad idea so that, should an accident happen, they do not rush to direct their wrath at shipping, requesting its head on a plate - instead of coming forward with constructive proposals to rectify any identified weaknesses and shortcomings. Shipping should no longer be treated as the scapegoat against which to turn so that people who apparently know little about the industry may be seen as doing something, anything (as, for example, in the case of pollution incidents irrespective of their causation, even when such incidents may be attributed to *force majeure* instances) because such people consider it easier to seek legislation condemning the industry when their energies should, for better results, be directed towards the real sources of problems such as, in the example of pollution, the land-based sources. And when action is deemed necessary to enhance safety, security and environmental protection, this should be done in a balanced manner and with a due sense of proportionality; in accordance with international law and the provisions of conventions regulating such matters as the design, construction, equipment and manning of ships along with those addressing protection and preservation of the marine environment issues. In order, however, to protect the industry from outside threats, we should simultaneously work together assiduously to put our house in order. Only then will we maintain the moral high ground to defend the industry against unjustified and unfair accusations. To succeed in this, we must be pro-active in taking all necessary measures to prevent accidents happening in the first place and providing quality services in all respects, thereby removing any excuse from the general public thinking maliciously against shipping and politicians acting in a

manner that is assessed to be unjust and excessive. And whatever we contemplate to do in the fields of maritime safety, security and environmental protection, we should attempt it through the IMO channels.

Ladies and gentlemen, notwithstanding the complex and delicate nature of the subject of tonight's lecture, IMO is, at present, doing something positive to address it, and I believe this is a cause for optimism. Following a proposal by a number of countries and non-governmental organizations¹ that the Organization, in co-operation with ILO, should consider the development of appropriate guidelines based not only on the principles of UNCLOS - the United Nations Convention of Law of the Sea - but also on the fact that unwarranted detention is a violation of basic human rights, our Legal Committee agreed, in April of this year, to begin work on the development of guidelines on the fair treatment of seafarers in situations such as those I outlined earlier on. It also endorsed a proposal to establish a joint IMO/ILO Working Group on the matter.

I am also encouraged by reported European moves to establish mutually recognized non-custodial alternatives to pre-trial detention that could see those caught up in such situations at least allowed to undergo pre-trial supervision in their own country, where this is within the European Union. I hope such initiatives can be moved forward to fruitful conclusions and perhaps provide a blueprint for some kind of international solution in the future.

I do not think any of you will disagree that anyone who deliberately breaks the law - and by this I mean acts such as deliberately by passing the oily water separator or knowingly falsifying discharge records - deserves to be punished. But surely anyone who is inadvertently caught up in an accident deserves a better fate than those which we have observed lately? This also begs the question of how those who have acted negligently should be treated; whatever the answer, the first step must be to establish what objective we want to achieve as a result of that treatment. And we should bear in mind that, if too harsh a line is taken, we may discourage exactly the sort of high-calibre people that we need in positions of responsibility for safety and pollution prevention. Today's ships represent very high value assets and, because of their size and the nature of the cargoes they carry, have the potential of incurring unimaginable destruction, both on human lives and the environment. Should we entrust them to individuals who come to the sea because they do not have anything better to do ashore?

We can all understand the need felt by those who suffer the effects of pollution - not to mention those who represent them politically - to do all they can to secure proper compensation. But an internationally agreed mechanism to provide such compensation is well established, and there should be no need to resort to what I have seen described as tantamount to hostage taking.

Ladies and gentlemen, I should like to commend the organizers of this event for selecting such a thought-provoking subject, one which I am sure the panellists will relish the chance to consider, each from his or her own unique viewpoint.

While the title is broad, I have no doubt that it will provoke discussion on a range of diverse yet inter-related topics and very much look forward to the debate that will follow.

As I said before, I am full of sympathy for the communities and industries that have paid a high toll in the aftermath of a serious casualty, and I recognize, as we all must, the complexity of the issue and respect fully the independence of the judiciary in countries which, having suffered in many ways as a result of accidents, are determined to discourage violations of safety and anti-pollution rules through an effective system of reasonable sanctions. Whatever the answer to this, we should not, however, allow seafarers and salvors to become pawns in political and legal games.

And a last word: I am deeply concerned at the international repercussions in case there seems to be a wide degree of legal uncertainty regarding the status of the detainees and the preservation of basic human rights involving their welfare. In conclusion, I should like to return to the points I made at the beginning: we need to find a proper balance - and we need to do what is right, what is fair, and what is in the interests of shipping. And whatever we decide to do, which might affect shipping engaged in international voyages, let us do it through IMO.

Ladies and gentlemen, thank you.

¹Fair treatment of seafarers LEG 88/12

Submitted by Cyprus, Greece, the Philippines, Poland, the International Chamber of Shipping (ICS), the International Shipping Federation (ISF), the International Confederation of Free Trade Unions (ICFTU), BIMCO, the International Federation of Shipmasters' Associations (IFSMA), the International Salvage Union (ISU), the International Association of Independent Tanker Owners (INTERTANKO) and the International Association of Dry Cargo Shipowners (INTERCARGO).