

**COMMAND: PRIVILEGE OR PERIL?**  
**The Shipmaster's Legal Rights and Responsibilities**

**BACKGROUND PAPER**

**Prepared by**

**Professor Captain Edgar Gold\*, C.M., Q.C., LL.B., Ph.D., F.N.I.**

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\* Consultant and former Senior Partner with Huestis Ritch, Barristers and Solicitors, Halifax, NS, Canada. Professional affiliations include: Adjunct Professor of Maritime Law, Dalhousie University, Halifax; Adjunct Professor of Law, University of Queensland, Brisbane, Australia; Past-President, Canadian Maritime Law Association; Visiting Professor and Canadian Member of the Board of Governors, World Maritime University, Malmö, Sweden, and IMO-International Maritime Law Institute, Malta; Member, Roster of Experts, Asian Development Bank, Manila; Senior Associate, International Oceans Institute of Canada.

## COMMAND: PRIVILEGE OR PERIL? The Shipmaster's Legal Rights and Responsibilities

Edgar Gold

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### Introduction

A number of high profile, as well as lesser-known maritime incidents, have in recent times, focused the shipping industry's attention on the legal rights and responsibilities of shipmasters in a number of ways. For those in command of vessels today, such cases cause concern, and seem to indicate that the traditional privilege and honour associated with command, appears instead to have become a risky and perilous burden. At a time when there appears to be a growing shortage of well-trained mariners, this does not bode well for encouraging a new generation to consider the sea-going profession. Yet it appears that this area is only being addressed in a piecemeal sort of fashion. Even seminars such as this often only discuss problems rather than becoming actively involved in seeking and pressing for solutions.

This background paper will firstly address the question: what legal rights and responsibilities do shipmasters have today and how are such rights and responsibilities protected as well as enforced. In order to provide a practical focus, four case studies, which have been directly concerned with this issue will be examined. This will be followed by an examination of such aspects of international maritime law and traditional maritime law and commercial custom that affect the subject. Finally the paper will also attempt to draw some conclusions.

### Four Case Studies

By way of background, it will be helpful to focus on three high profile cases, as well as one lesser-known case:

1. *Erika*: this was a well-publicized tanker accident that occurred off the French coast in December 1999. It involved a 24-year old 37,000 DWT, Italian-owned, Maltese flag product tanker that foundered and subsequently caused heavy oil pollution. The vessel was fully classed by RINA.<sup>1</sup> The Indian master, Capt. Kumar was arrested and imprisoned for some time by French authorities. The RINA report removed all responsibility from class and placed the blame for the accident on master and crew.<sup>2</sup>

2. *Virgo*: this is a case that has received very little publicity even though it should have! It involved a modern 28,000 DWT, Russian-owned, Cyprus-flag product tanker, built in 1995, that was allegedly in a collision in international waters in August 2001 with a US-flag fishing vessel that involved loss of life on the fishing vessel.<sup>3</sup> The vessel was arrested and held in a Canadian port subsequent to a request by the US government. The master, Capt. Vladimir Ivanov, was arrested and imprisoned by Canadian authorities, together with the ship's 2<sup>nd</sup> Officer and the AB who had been on lookout duty when the accident apparently occurred. The arrest was based on a criminal law extradition request by the US authorities. The master and the two crew

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<sup>1</sup> The Italian classification society.

<sup>2</sup> See, Nils Bjorn Mortensen, "The *Erika* Incident". *BIMCO Review* 2001, at 44.

<sup>3</sup> See, Tony Gray, "Virgo Arrests breaks Sea Convention". *Lloyd's List*, 20 August 2001.

members were eventually released from jail but not permitted to leave Canada. The vessel was released after a surety amounting to US\$ 13.5 million was deposited. Capt. Ivanov and the other two crew members remained confined in Canada for over 18 months. They were then permitted to return to Russia after a \$100,000 bond was posted to ensure their return for further legal action in Canada. If Canada agrees to extradition they could face manslaughter charges in the United States.

3. *Tampa*: this is another high profile case involving a modern Norwegian-flag ro-ro container vessel, under the command of Capt. Arne Rinnan who responded to a request to go to the assistance of a boat overloaded with refugees that was in distress in international waters north of Australia.<sup>4</sup> The *Tampa* eventually picked up some 433 refugees. The vessel was, obviously, not suited to accommodate these 'passengers', many of whom were ill. Furthermore, some of the refugees also categorically refused to cooperate with the ship's staff. Capt. Rinnan requested assistance to offload the refugees from the closest states, Australia and Indonesia. However, he could not persuade either country to cooperate. He found himself in a desperate situation and eventually headed for Christmas Island, which is part of Australia. Although he was ordered not to enter Australian waters, he felt that he had to. The vessel was subsequently boarded by Australian military commandos who took over the ship. The Australian authorities subsequently offloaded the refugees, when arrangements to place them with third states could be made.

4. *Prestige*: this is the most recent, high-profile case with repercussions that are still ongoing at this time. The *Prestige* was a 26-year old Greek-owned, Bahamas flag Aframax tanker that sank in heavy weather off the coast of Spain, causing serious oil pollution, after being refused access to a place of refuge in order to undertake salvage operations, and after the vessel was effectively taken over by Spanish maritime authorities. The master, Capt. Apostolos Mangouras, who had remained on board after evacuating most of the crew, was forcibly removed by the Spanish military and subsequently jailed for over three months unless bail of EUR 3 million were paid. He was eventually released, but on a bail amount that was significantly lower.

It is, of course, not appropriate to discuss the actual technical aspects of any of these cases. However, there are a number of common links between all four case examples:

1. All four vessels were operating on legitimate international voyages. In other words, they were fully classed with reputable classification societies, had been appropriately inspected, and held all required certificates. It should be noted that whether we like or dislike flags of registry such as Malta, Bahamas or Cyprus, they are legitimate flag states at this time.

2. All four vessels were under the command of experienced, certificated masters with command experience ranging from five to thirty-two years. Certificates were issued by major maritime states that have implemented STCW requirements.

3. The difficulties experienced by all four vessels occurred off the coasts of major developed states with significant maritime traditions and experience, and well-established maritime administrations. Nevertheless, the response and actions taken by all four coastal states were in breach of accepted international maritime law.

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<sup>4</sup> See press reports: Kevin Chinnery, "Captain Courageous", Lloyd's *Maritime Asia*, October 2001; Tony Wright, "Rescuing the Truth". *The Bulletin*, 26 February 2002.

## International Law Aspects

It may be helpful to firstly provide a brief overview of what aspects of existing international law, that may protect shipmasters (and other crew members), are actually in place today. At the highest global level the *United Nations Convention on the Law of the Sea, 1982 (UNCLOS)*,<sup>5</sup> provides some specific guidance. *UNCLOS* codifies the long-established rule on of who has penal jurisdiction over seafarers involved in an accident at sea.<sup>6</sup> The convention states quite specifically that:<sup>7</sup>

- “1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or the State of which such person is a national.
2. In disciplinary matters, the State which has issued a master’s certificate or certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

This means that in the *Erika* case only Malta and India had jurisdiction over Capt. Kumar; in the *Virgo* case only Cyprus and Russia had jurisdiction over Capt. Ivanov, and in the *Prestige* case the jurisdiction over Capt. Mangouras rested solely with the Bahamas and Greece. In other words France, Canada/United States, and Spain, in the three incidents, acted totally against international law by jailing and/or confining the three masters. Furthermore, the United States has no legal right in their extradition demand in the *Virgo* case.<sup>8</sup> The problem in these three cases was that the states that had jurisdiction either chose not to act or simply protested without taking any further action. That basically permitted the coastal states to act as they did.

In these cases India, Malta, Russia, Cyprus, Greece and the Bahamas respectively could and, probably, should have instituted international legal proceedings through the International Tribunal of the Law of the Sea (ITLOS) requesting the immediate release of the masters involved and, in the *Virgo* case, also the release of the ship. In a number of recent cases, involving detained vessels ITLOS was able to act very quickly. However, in the cases described above nothing was done. In fact, there was probably relatively little incentive for ‘open registry’ flag states, such as Malta, Cyprus or the Bahamas to do anything. This is despite the fact that under *UNCLOS* flag states do have certain legal responsibilities.<sup>9</sup> For example, flag states are required to hold an inquiry into every marine casualty or incident of navigation on the high seas that involving a vessel under its flag that has caused serious damage or loss of life and personal injury.<sup>10</sup> However, there is no legal requirement to do anything else. Although there was more incentive for states such

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

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

<sup>7</sup> Article 97.

<sup>8</sup> Although the US has not yet accepted *UNCLOS*, it is party to the *High Seas Convention*, which, as indicated, contains the same provisions.

<sup>9</sup> *UNCLOS*, Art. 94, ‘Duties of the Flag State’.

<sup>10</sup> *UNCLOS*, Art.94(7).

as India, Russia and Greece to protect their nationals, it was probably considered insufficient to act.<sup>11</sup> This appears to indicate that masters who serve on 'flag of convenience' vessels, and who get into difficulties, are on their own, unless the shipowner is willing to protect them. This will be difficult when a single-ship company and an unidentifiable owner are involved—something that is often the norm today.

In the *Erika* and *Prestige* cases France and Spain stated that they were taking action under areas of *UNCLOS* related to protection of the marine environment, and claimed that the actions taken were, therefore, covered under international law. For example, the Spanish Government stated that its intervention actions were based on the authority given under *UNCLOS* Articles 56 and 73. Although the coastal state is given jurisdiction in its Exclusive Economic Zone for the protection of the marine environment,<sup>12</sup> it can only do so in conformity with other parts of the convention and with respect to the rights and duties of other states. This provision does not provide a blanket authority to do anything the coastal state wishes. Article 73 relates to the right to board vessels, but is referring to the management of living resources and has, therefore, very little to do with boarding a tanker in distress. In other words these legal assertions had a very dubious base.

On the other hand, *UNCLOS* does provide coastal states with specific powers to take action when a major maritime accident threatens their coastlines and waters with serious pollution.<sup>13</sup> Such powers include boarding, inspection, legal proceedings and detention of the vessel. However, even these powers are strictly limited by a number of specific and general enforcement safeguards in *UNCLOS* including:

- The duty not to endanger the safety of navigation or creating other hazards to a vessel, or bringing it to an unsafe port or anchorage.<sup>14</sup>
- The requirement to only impose monetary penalties for pollution offences outside the territorial sea. Only monetary penalties may be imposed within the territorial sea unless the pollution resulted from a wilful act.<sup>15</sup>
- That the rights of the accused should be considered in all aspects of any legal proceedings.<sup>16</sup>
- That arrested vessels and their crews should be promptly released on the posting of a reasonable bond or other security.<sup>17</sup>
- The requirement that violations of coastal state regulations in the Exclusive Economic Zone may not include imprisonment.<sup>18</sup>

In addition, coastal states are also given specific rights to intervene when a ship on the high seas is involved in an accident that is likely to cause serious pollution damage to the coastal area.<sup>19</sup> Although this convention provides coastal states with very wide powers to take action, it also lays down very specific

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<sup>11</sup> In the *Virgo* case Russia and Cyprus both sent diplomatic notes of protest to Canada and the US, but there was no further follow-up. In the *Prestige* case Greece made a number of official protests to Spain and the European Union, but there was no additional follow-up. It is not known if the Bahamas lodged any type of protest.

<sup>12</sup> *UNCLOS*, Art. 56(1)(b)(iii).

<sup>13</sup> *UNCLOS*, Arts 220 & 221.

<sup>14</sup> *UNCLOS*, Art. 225.

<sup>15</sup> *UNCLOS*, Art. 230 (1) & (2).

<sup>16</sup> *UNCLOS*, Art. 230 (3).

<sup>17</sup> *UNCLOS*, Art. 73(2).

<sup>18</sup> *UNCLOS*, Art. 73(3).

<sup>19</sup> *International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, 1969*(*INTERVENTION 1969*). Spain and France are both parties to the Convention.

safeguards designed to ensure that the rights of the flag state, shipowner as well as master and crew are protected.<sup>20</sup> Without going into further details, it should be apparent that in the *Erika*, *Prestige* and *Virgo* cases one or more of these international law provisions were not followed. In all three cases the rights of the shipmaster were, certainly, not considered.

The *Tampa* case is a little more complicated as the situation faced by Capt. Rinnan is not as well covered under international law. It is a long-established custom of the sea that masters must assist those in distress at sea. This is also a requirement under the national maritime laws of most states. Furthermore, it is also codified under *UNCLOS*, which confirms this duty, and also sets out a number of related provisions.<sup>21</sup> The difficulty that arises is that once the rescue has been successfully undertaken who will take responsibility for those rescued, especially if they happen to be refugees, asylum seekers or illegal immigrants? Although the United Nations has developed some guidelines administered by the UN High Commissioner for Refugees, there are no clear international legal requirements and the matter is basically left to the 'soft law' of voluntary state acquiescence. In the *Tampa* case, the vessel was requested by the Australian authorities to go to the assistance of a boat in distress. On arrival at the scene Capt. Rinnan found over 400 asylum seekers that had to be taken on board. Although these people had apparently originated in Indonesia, the vessel was by then much closer to Australian territory. However, Australia refused to accept this 'human cargo'. When requested, Indonesia also refused.

At this stage Capt. Rinnan, who was acting in compliance with international as well as Norwegian law and, of course, in the best tradition of the sea, was faced with an impossible dilemma. He had over 400 persons on board. Some were ill or highly pregnant, others threatened violence if he turned back to Indonesia. The vessel was certainly not designed to care for so many persons and it would have been a breach of international and Norwegian regulations to carry such 'passengers' for any length of time. As a result, the master decided to enter Australian territorial waters against the instructions of the Australian authorities. As we know, when he did he was boarded and his vessel was taken over by the Australian military until the refugees could be removed. The master was not jailed or otherwise ill-treated. In fact, he was honoured by his country and by a number of other states and institutions for what he did. Nevertheless, he was placed in an almost impossible situation by doing what he had a duty to do. It is, therefore, not surprising that it is frequently stated that some ships now 'look the other way' when encountering boats in distress at sea as the repercussions of acting humanely appear to be quite intolerable. This situation is closely related to that of stowaways who cause similar difficulties for ships, their masters and owners. These are urgent political, economic and social problems that need legal solutions put in place at the international level sooner rather than later.

### **'Traditional' Legal Rights and Responsibilities**

Judging from the case examples given, shipmasters today seem to have a lot of responsibilities but few, if any, rights! This is at least partially due to the problem that ships' command operates under a number of customary rules, but very few that are set out formally. It can even be said that the other crew members of a vessel have more protected rights than their commanding officer, as their rights are

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<sup>20</sup> *INTERVENTION 1969*, Arts. III and V.

<sup>21</sup> *UNCLOS*, Art. 98.

protected under international law<sup>22</sup> and under the laws and regulations of most national maritime administrations. However, masters are often directly or indirectly excluded from such regulations. To some extent this is due to the fact that the master has traditionally been considered to be the direct link to the shipowner's management structure. The master is considered the agent for any act that may fall within the customary legal authority of the master, unless some legal limitations on such authority have been clearly stated. What is this 'customary legal authority?' It has been stated with some authority that:

"The master is charged with the safety of the ship and cargo; in his hands are the lives of passengers and crew. His position demands the exercise of all reasonable care and skill in navigation, of at least ordinary care and ability in the transaction of business connected with the ship, and the constant use of patience and consideration in his dealings with those under his command or entrusted to his care."<sup>23</sup>

This is further emphasized by another authoritative statement that the master:

"...is a servant in law, an agent both for his principal, the shipowner, and to some extent the owner of the goods he is carrying. If his ship is under charter and the charterparty so stipulates, he must obey the instructions of the charterer in respect of the employment of the vessel. He is also the commander of men, his crew, and he occupies a position of special trust, a fiduciary relationship with his owners. He is absolutely responsible for the safety of the ship and remains in command regardless of whether or not his ship is in charge of a pilot at any given time."<sup>24</sup>

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

This extraordinary responsibility and commensurate legal liability has been developed over a long period of time and originates from a shipping era when communications with shipowners were very difficult or even impossible. In modern times the master's authority has been somewhat curtailed due to the access of instantaneous communications with the shipowner. However, this reduction in authority relates more to the commercial aspects of ship operation. For example, the master's authority is now also frequently defined in and limited by specific clauses in printed forms of bills of lading and charterparties. Furthermore, in most ports shipowners have appointed agents to conduct the ship's business locally. Nevertheless, the general authority and legal responsibility of a shipmaster still includes all acts generally necessary for carrying out the voyage and for fulfilling carriage of goods by sea contractual obligations. Although the master is the shipowner's agent for all acts that are normally within his authority, if extraordinary events arise, the master automatically assumes significantly increased authority.<sup>25</sup>

The master's legal authority and responsibility outlined above has been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master's authority and responsibility is something that is accepted in

<sup>22</sup> By a large number of widely accepted international conventions as developed by the International Labour Organization (ILO). See also, K.X. Li & J. Wonham, *The Role of States in Maritime Employment and Safety* (Dalian: Dalian Maritime University Press, 2001).

<sup>23</sup> H. Holman, *A Handy Book for Shipowners and Masters*, 16<sup>th</sup> Ed., (London: UK P&I Club, 1964) at 5.

<sup>24</sup> C. Hill, *Maritime Law*, 4<sup>th</sup> Ed., (London: Lloyd's Press, 1995) at 495.

<sup>25</sup> Holman, note 5 above, at 6.

terms of customary law on a global basis. Nevertheless, it must be emphasized that these customary rules were not only developed in the sailing ship era, when communications were rudimentary, but also that they were principally created in order to assist shipping as a commercial enterprise. In fact, the master's liability has, for many years, been a 'legal fiction' as such liability is generally covered under a ship's protection and indemnity (P&I) insurance policy. This basically means that the master has total responsibility for anything that occurs on the ship or that involves the ship, but the liabilities arising out of such operation are covered under the owner's liability insurance. This has been commercially very convenient and has ensured that shipowners are not directly exposed to the repercussions from actions over which they had no direct control, except if such actions occurred with their "actual fault and privity"<sup>26</sup> or:

"...if it is proved that the loss resulted from his (the shipowner's) personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."<sup>27</sup>

Unless such exceptions applied shipowners were able to limit their liability exposure for property and personal claims that arose from any accidents in ship operations.

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

As already indicated, this system appeared to work reasonably well for many years. There were occasional accidents that exposed unacceptable reckless or irresponsible behaviour by shipmasters<sup>28</sup> or shipowners,<sup>29</sup> but the legal system was generally able to respond positively in such instances and ensure that maritime law was well enough defined to deal with such incidents. However, all of this developed during a lengthy period in which shipping was operated by highly responsible, private family, or closely held public companies that were directly involved in the day-to-day operations of the ships they owned. Such ships were registered in major flag states with experienced maritime administrations that strictly enforced national and international safety regulations. The ships were operated by experienced, properly qualified masters and officers, who were supported by well-trained ratings. Most, if not all, crew members usually originated from the same country and, often from the same region or city. The shipowning company had a 'hands-on' management structure that frequently involved the principal owners themselves, who employed an experienced technical staff usually drawn from former masters and engineers on their ships.

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<sup>26</sup> Under the Limitation of Shipowners' Liability 1957 Convention, Art.1, and confirmed by numerous legal cases.

<sup>27</sup> Under the Convention on Limitation of Liability for Maritime Claims, 1976, Art.4.

<sup>28</sup> For example, *Lady Gwendolyn* [1965] 1 Lloyd's Rep. 276; *Grand Champion Tankers Ltd. v. Norpipe A/S (The Marion)* [1984] 2 Lloyd's Rep. 1 (H.L.).

<sup>29</sup> For example, *The Princess Victoria* [1953] 2 Lloyd's Rep. 619; *Lady Gwendolyn*, above note 10.



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

### **Rights and Responsibilities in a Globalized Shipping Industry**

Many attending this Seminar grew up in the system just outlined, but some younger colleagues will find it hard to believe that such an uncomplicated system ever existed!<sup>30</sup> By comparison, today's globalized shipping world frequently consists of:

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

The maritime system has undergone dramatic changes in a relatively short period of time and, as a result, shipmasters are today faced with operational realities that are almost totally at odds with a legal regime that was created long ago for a very different shipping industry. Although the new legal regime is international, extremely complex, and wide-ranging,<sup>31</sup> it has somehow neglected or overlooked to cover the rights and responsibilities involved in commanding ships today. Furthermore, this has caused, and is likely to continue to cause problems for shipmasters to the extent that maritime command, and the rights and responsibilities involved, may be seriously compromised, especially when maritime accidents occur. Whether this assessment reflects what is generally felt by shipmasters today is something that this Seminar is, obviously, addressing.

There is no doubt that the globalisation of the shipping industry has had many positive aspects. On the other hand, as already indicated, in terms of the human aspect of shipping, it has also caused significant difficulties. This has had a special effect on the rights and responsibilities of those who command ships today. In fact, it is probably fair to state that shipmasters today have significantly increased responsibilities in all aspects of ship operations, but that their rights have greatly diminished. In terms of responsibilities masters today have lost the backup 'network'

<sup>30</sup> A searching inquiry recently outlined the many shortcomings of today's international shipping industry. See, International Commission on Shipping, *Ships, Slaves and Competition* (Newcastle, Australia: ICONS, 2000).

<sup>31</sup> See, for example, P. Boisson, *Safety at Sea—Policies, Regulations & International Law* (Paris: Bureau Veritas, 1999); P.K. Mukherjee, *Maritime Legislation* (Malmö: WMU Publications, 2002).

that existed in more 'traditional' times. Although masters today have virtually instantaneous contact with their owners or managers, this is often less helpful than it might appear. In many cases, relatively large shipping groups with very diverse ownership, ranging from investment companies to banks, are operated by fairly small management companies that must be almost totally 'bottom-line focused' if they wish to keep their business. Although there is nothing wrong with commercial performance in a competitive business, it also has a 'down-side' for shipmasters. In many instances the management company is only able to provide very minimal support, often from individuals who may not be very well trained in the industry. If something serious occurs during the voyage the master is as alone as he was during the sailing ship era—but without the power and authority he then had!<sup>32</sup>

As already indicated, shipping is now one of the most highly regulated industries anywhere with rules emanating from international, regional, national and even industry levels. If one talks to any serving master today the main complaint will be paperwork, bureaucracy and more paperwork! Yet failure to carry out these legal responsibilities and related operational requirements can result in delay, detention, criminal liability<sup>33</sup> and in some regions even imprisonment.<sup>34</sup> In addition, masters must be capable of operating vessels ranging from the very modern and complex, to elderly, tired and sub-standard, plus short port turn-around times, often unrealistic time schedules, and demanding charter contracts. Furthermore, most ships today operate with multi-national crews with a variety of social and cultural problems. In many cases such crews may not be as well trained as they should be, and the certificates of deck and engine watch officers may, at times, be suspect. The master will have little or no control over the engagement of the crew, who may often be hired under terms that are less than basic.

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

This aspect relates directly to remuneration for shipmasters today. This subject is not often discussed as it is generally considered to be something that is simply a private contractual arrangement and not something that professional

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<sup>32</sup> This was very well outlined by Capt. W.E.R. Wingate, "Towards the Empowered Shipmaster" *Seaways*, September 2001, at 15-16.

<sup>33</sup> See, A.K. Bansal, "The 'Designated Person' and Criminal Liability". *Seaways*, September 2001, at 21-22.

<sup>34</sup> Michael G. Chalos, "The Criminal Law and the Seafarer-A US Perspective". *Seaways*, January 2001, at 21-24; A.K. Bansal, "Time for Mandatory Insurance-The Criminal Law and the Seafarer". *Seaways*, November 200, at 7-8; C.J. Parker, "Criminal Law and the Seafarer". *Seaways*, October 200, at 7-8.

associations should be come involved in. Nevertheless, as there may well be a clear link between effective command and the reward for holding such a position, it is useful to explore this aspect a little further. This must also be seen against the background of who is actually in command of ships today. We have already stated that the traditional style of ship management is a thing of the past. This is equally true for ship operations today. This is best illustrated by the following outline of the present composition of the world fleet:

**GLOBAL DISTRIBUTION OF THE WORLD FLEET 2002<sup>35</sup>**

	TONNAGE <sup>36</sup>	PERCENTAGE
<b>PRINCIPAL OPEN REGISTRIES</b>	<b>402</b>	<b>48</b>
<b>DEVELOPED STATES</b>	<b>207</b>	<b>25</b>
<b>DEVELOPING STATES</b>	<b>185</b>	<b>22</b>
<b>OTHER</b>	<b>31</b>	<b>5</b>

This table shows that at least three quarters of the world fleet is today operated under 'non-traditional' flags. It follows that an even higher percentage of ships may be under the command of masters drawn from 'non-traditional' states. In other words, the whole maritime system has changed to the extent that the developed states fleet is not only disappearing quickly, but that mariners drawn from such 'traditional' states are also less and less likely to be available.

This aspect has a direct bearing on this discussion, as it affects the rights and responsibilities of shipmasters. The major shift in the industry is, obviously, market driven, as the vessels under open registry flags and by developing states, are operated at significantly lower costs. Although it is not suggested that all vessels under such flags are operated under lower standards, unfortunately some are. This is borne out by the annual statistics provided by the various port state control agencies.<sup>37</sup> However, such ships are also often under the command of masters who may well be insufficiently rewarded for what they are required to do. What is suggested is that there is a direct relationship between job satisfaction and job commitment. In other words, many masters are today given greatly increased responsibilities, with relatively modest rewards, but with even less protection of their rights. This is best illustrated by the following comparison of the starting salaries paid to masters from states that are major suppliers of seafarers:

**STARTING ANNUAL SALARIES OF MASTERS 2002<sup>38</sup>**

<b>Philippines</b>	<b>US\$ 60,000</b>
<b>India</b>	<b>49,200</b>
<b>Sri Lanka</b>	<b>46,200</b>
<b>Bangladesh</b>	<b>40,800</b>
<b>China</b>	<b>24,132</b>
<b>Indonesia</b>	<b>13,908</b>

Although these figures represent minimum starting salaries, they should illustrate that there is a significant variance not only between the salaries paid to

<sup>35</sup> UNCTAD, *Review of Maritime Transport 2002* (Geneva: UNCTAD 2003) at 25.

<sup>36</sup> In Millions DWT.

<sup>37</sup> See, for example, Edgar Gold, *Gard Handbook on P&I Insurance* (Arendal: Gard A.S. 2002) at 420.

<sup>38</sup> Including basic salary, overtime/bonus, and other emoluments. *Lloyd's List Maritime Asia*, March 2003, at 15-17.

masters from 'traditional' states and those from the states shown, but also amongst the major seafarer supplier states. It is often suggested that these payments are quite adequate in terms of the economies of the states from where these masters originate. However, that appears to ignore the fact that these masters are in command of vessels that operate internationally. It is not suggested that universal salaries for shipmasters are either achievable or even appropriate, but the differences that presently exist are far too great.<sup>39</sup> In other words, should we expect such masters to meet the same demands and responsibilities as their colleagues from 'northern' states, who earn significantly more, for doing exactly the same job? If the answer is 'no', then the industry will not only be facing increased safety problems, but the overall standard of shipmasters will further decrease as the job will be attracting fewer and fewer persons that should be attracted.

This may be an area that this Seminar and/or future Nautical Institute Command Seminars should address. In doing so, such a seminar or conference might well examine the rewards for command generally, as there seem to be some serious discrepancies between responsibility and reward in the industry generally. For example, a modern container vessel or double-hull VLCC, fully loaded, may easily exceed a value of \$200 million. Large LNG carriers and cruise vessels may have a value more than double that amount. This is comparable to an industrial plant ashore, valued at \$200-\$400 million, that would have a large management structure, consisting of administrative, financial, planning, safety, security and legal staff, in addition to general employees. The managing director or chief executive officer, would have direct contact with upper management, and would have a reward structure consisting of excellent salary, various bonuses, retirement fund, car and other emoluments, possibly even share options, and contractually-agreed job security. If he or she makes a disastrous decision and is dismissed, there will probably be a significant contractual separation payment. The owners/shareholder of the corporation agree to these conditions because they feel that it is good for business. Yet it appears that the person who manages a 'floating plant', who has far greater responsibilities, is generally rewarded at the level of a lower-level technical manager, in the shore-based example given above. Furthermore, as outlined in this paper, in many cases, such a 'manager' has relatively little support, very few rights and almost no job security. Is this a problem that is linked to maritime safety as well as one that discourages the recruitment of persons with a high level of education and competence into the maritime industry? Why should the maritime industry be so different?<sup>40</sup>

### General Conclusions

What conclusions can be drawn from what has been said? It is probably true that command at sea has become more of a peril than the privilege and honour it once was. It is not yet clear if the industry faces a crisis situation in this area. That will only become apparent:

- If there will continue to be major maritime accidents at regular intervals that have obvious human error aspects.
- If the *ISM Code* system proves to be inadequate.
- If the various port state control regimes are insufficient.
- If there is a 'real' shortage of adequately trained navigating and engineering officers.

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<sup>39</sup> There is an analogy in aviation, where the regional differences in payments to pilots-in-command are much smaller.

<sup>40</sup> See, Editorial, "Protecting Masters", *Lloyd's List*, 1 July 2001.

- If the direct link between ship ownership, ship management and ship operation is further dissolved.

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

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

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

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

As already indicated, most of these rights and responsibilities are already set out under international law, traditional maritime law or customary commercial practice. As a result, there is no need to create a new legal regime, but simply set out, in manageable form, what already exists. However, the code would be helpful to all involved as it would provide an accessible guide to what has to be done and what cannot be done in terms of command of ships. Although such a code would not be legally enforceable—at least initially—it could be quite persuasive, as any breach

would be difficult to defend in any related legal action. In this respect it would be quite similar to the *ISM Code*, which states the obvious for well-run operations, but is necessary for those that are not. Most of all, a Command Code might, at the very least, provide a reassuring 'safety-net' for masters who are today often deprived of their rights.

These are ideas that, obviously, require significant further development and they are simply offered in the hope that this Seminar specifically, and the Nautical Institute generally, may wish to do so. This would follow on from the 'Empowering the Shipmaster' project first outlined<sup>41</sup> in 2001 and commenced in the same year.<sup>42</sup> Given the international composition of its membership, its wide network of contacts with other marine professional bodies, its demonstrated ability to carry out useful research projects, and its high level of credibility in the wider maritime industry, the Nautical Institute appears to be well placed to focus on this important task.

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<sup>41</sup> The Nautical Institute, "Plans for the Future-Strategic Projects 2001-2006", at 4.

<sup>42</sup> See, Edgar Gold, "Empowering the Shipmaster". *Seaways*, July 2001, at 9-11.