THE LONDON SHIPPING LAW CENTRE

Forum for Shipping, Trade and Maritime Safety

The Eighth Cadwallader Annual Memorial Lecture

The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry

TRANSCRIPT OF THE LECTURE

Chairman - The Rt. Hon. The Lord Hoffmann

Speakers:
The Rt. Hon. Sir Anthony Clarke – Master of the Rolls

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Director General Maritime Transport, European Commission

Judge Thomas Mensah
Judge of the International Tribunal for the Law of the Sea (r'td)

Mr Epaminondas Embiricos
Chairman - Greek Shipping Co-operation Committee

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The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry

Address and welcome by the Founding Director of the LSLC – Dr Aleka Mandaraka-Sheppard

My lords, ladies and gentlemen.

Welcome to the Eighth Cadwallader Lecture and thank you all for coming. I will set the scene, then introduce our eminent panellists.

This memorial lecture is about corporate criminalisation, its extra-territorial jurisdiction, and sovereign rights of states in the event of conflicting legislation. As many of you know, the subject follows last year's lecture on criminalisation of seafarers.

Let us begin by reminding ourselves of the broad purpose of the Cadwallader event. Apart from its educational value, it acknowledges what great people leave behind in life: The greatest of all gifts is to instil in others inspiration and courage in what we do, as the late Professor Cadwallader most certainly did.

I would also like us to pay tribute to the memory of Professor Hardy Ivamy, who recently passed away. He and Cad were a team in the teaching of shipping law at UCL since the early 60's. Many of you here were taught by both and benefited from reading Professor Ivamy's books.

I also want to refer to the recent loss of Lord Donaldson, who inspired many; his initiative in promoting safer ships and cleaner seas marked a tremendous movement in quality shipping.

In 1998, he delivered the inaugural Cadwallader lecture on "The ISM Code; the road to discovery". He pointed out that the ISM was designed to discover and eliminate sub-standard ships, and to encourage new, improved methods of ship operation in pursuit of safer ships and cleaner seas.

At that time, we did not anticipate that in 7 years we would be discussing serious issues of criminalisation. And here we are to discuss these issues.
Criminalisation turns the spotlight on the rights and risks of an industry, which has taken significant steps in the direction of safer ships. Yet, it finds its achievements rather discounted and is obliged to confront legislation that causes great concerns within the industry. You are aware of such concerns and you will learn more today.

But I should emphasise this: it is absolutely vital that the fundamental principle of traditional criminal law, that is proof of culpable conduct, must be observed as the essential touchstone in dealing with criminalisation. Laws violating this principle by permitting a lower test of criminal liability must be resisted and changed.

So we hope, and shall not give up hope, that legislators will bear this in mind, for the purpose of justice, fairness and harmonisation of laws. Nothing is final until it's perfect, as Winston Churchill once said in the House of Commons: "**to improve is to change, to be perfect is to change often".**

My Lords, ladies and gentlemen, I would like now to introduce the chairman of this event:
Lord Hoffmann, as you know, is one of the UK's best known Law Lords, and has presided over several important human rights cases. Lord Hoffmann, thank you for being here to lead the proceedings and to keep order, as emotions with regard to criminalization, in this context, can often run high!

Next, I would like to congratulate our Vice President and first speaker, Sir Anthony Clarke, upon his appointment as The Master of the Rolls and Head of Civil Justice. He commenced his duties yesterday. Sir Anthony, we wish you every success. You have kindly agreed to speak about the Corporate Manslaughter Bill. Having been leading counsel to P&O in the Herald of Free Enterprise case, and having conducted the inquiry into the Marchioness disaster, you have a unique insight to share with us. There will be interesting points of comparison between this Bill and the EC Directive.

Our second speaker is Mr Fotis Karamitsos, Director of Maritime Transport at the European Commission. His subject, of course, is the Directive and the Framework

Decision, which were officially published last Friday. He has been closely involved in maritime safety and the environment and has worked at the Commission for many years.

We appreciate your efforts, Mr Karamitsos, in promoting quality shipping, and your willingness to reflect upon the industry's point of view on criminalisation.

Our third speaker, Judge Thomas Mensah, is a world expert on the law of the sea having served as a judge and president of the International Tribunal. He is consulted by intergovernmental bodies on treaty matters. Dr Mensah, your task tonight is to explain to us treaty law and the sovereign rights of member states in relation to the EC Directive.

Our last speaker, Mr Pandy Embiricos, chairman of the Greek shipping co-operation committee, comes from a traditional shipping family of long standing, going back to 1765. Mr Embiricos, you are well known to all of us, not only for your vast experience in shipping, but also for your immense contribution to the wider shipping industry having held many leading positions in various organizations. You are the advocate for the industry tonight.

Tonight's proceedings promise a spirited and constructive dialogue. Please participate in the forum discussion. I shall now hand over to Lord Hoffman.

Lord Hoffmann

Ladies gentlemen, I am greatly honoured to have been asked to be the Chairman of this Eighth Cadwallader Lecture and the symposium which will follow. But I could not help thinking that there might have been some mistake because I have very little acquaintance with shipping law as most of you, I am sure, will know. In fact, the only shipping case that I can actually remember was about 12 years ago when in the Court of Appeal we had a case on general average and it occurred to me that cases on general average were as frequent as eclipses of the sun and so, instead of just agreeing with John Hobhouse, I let myself go a bit and went into the subject. But that is about, the only occasion.

So from the point of view of shipping law I feel like, perhaps, a fish out of water is the wrong metaphor in the circumstances, a cat in water might be rather more appropriate. I sympathise with the President of the United States who, when asked, "Mr President, what do you think of Rowe and Wade?" replied "Well Chuck, I believe that they should be able to get out of New Orleans any way they like".

Now, fortunately the duties of the Chairman at this stage are not particularly onerous since Aleka has already been considerate to tell you of the subject of the Lecture and to introduce all the speakers. So I am excused from that task. I will however come into my own gradually as the evening goes on because I am expected to see to it that the speakers do not exceed their allotted time limits and in the end when the discussion is thrown open to the floor for questions and comment to see that there is fair play and that fist-fights do not break out. So, until that time, I will do no more than call upon the Master of the Rolls to give the Eighth Cadwallader Lecture on the new Corporate Manslaughter Bill .

Sir Anthony Clarke MR

CORPORATE MANSLAUGHTER

1. I have been asked to speak on corporate manslaughter for 10 minutes. I have no qualifications to do so. When I was conducting the Thames Safety Inquiry and then the MARCHIONESS Inquiry in 1999 and 2001 respectively, I was asked to express a view on proposals for the introduction of a Corporate Manslaughter Bill. I declined to express such a view, no doubt out of what was perceived as cowardice. However, I did act as counsel for the owners of the HERALD OF FREE ENTERPRISE at the inquiry into her loss conducted by the then Admiralty judge Mr Justice Sheen. The owners and a number of their employees were subsequently prosecuted for manslaughter. The owners sensibly instructed Sydney Kentridge QC to defend them. That was a good decision on their part because he persuaded the trial judge, Mr Justice Turner, that they had no case to answer.

2. However, the case was important because, while on the one hand it established that a corporation could be convicted of the common law offence of manslaughter, on the other hand it led to a later decision of the Court of Appeal (Criminal Division) which in effect limited the circumstances in which such a prosecution could succeed. That was *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182, in which the court held that in order to succeed the prosecution must prove gross negligence on the part of an individual who (as Lord Justice Bingham had put it in an earlier case) could be identified as "the embodiment of the company itself". In the absence of gross negligence on the

part of such an individual the prosecution must fail. This principle has been called the identification principle.

3. I have always been somewhat surprised by that limitation because, while I can see that that approach may be appropriate in the case of a negligent act, I have never fully understood why a company could not be found guilty of a grossly negligent omission. However that may be, that decision undoubtedly limited the crime of corporate manslaughter at common law. As a result, I think I am right in saying that the only convictions that have been obtained have been in the case of small companies with very few directors.

4. There followed much debate and detailed consideration by the Law Commission and a draft Corporate Manslaughter Bill was finally presented to Parliament in March 2005. The Bill is not limited to companies. You will see that it extends to government departments, which may perhaps be the reason for the delay in producing a draft Bill. However that may be, it is sufficient for our purposes to focus on its provisions in so far as they relate to companies. As I read the Bill, if enacted it will effect the following changes to the law on corporate killing:

    i. By clause 1(1) a company will be guilty of the offence of corporate manslaughter if "the way in which any of [its] activities are managed or organised by its senior managers –

        a. causes a person's death, and

        b. amounts to a gross breach of a relevant duty of care owed by the [company] to the deceased.

ii. Criminal liability will thus not be based on the identification principle. It will arise where there has been a relevant breach of duty in the way in which the company's senior management has organised or managed the company's activities.

iii. The ambit of the duty of care remains essentially unchanged (see clause 4).

iv. The threshold for liability will, however, no longer be gross negligence but rather a gross breach of the duty of care, which is defined as "conduct falling far below what could reasonably be expected of the company in the circumstances" (see clause 3).

v. A specific duty is imposed on juries as to what they must consider when deciding this issue (see clause 3(2)). They must consider whether the evidence shows a failure to comply with health and safety legislation or guidance and, if so, how serious was the failure to comply and whether or not senior managers knew or ought to have known there was a failure to comply, whether they were aware or ought to have been aware that the failure to comply posed a risk of death or serious harm and whether they sought to cause the company to profit from that failure.

vi. The common law offence of manslaughter for gross negligence insofar as it applies to corporations will be abolished (see clause 13).

vii. Conviction will give rise to an unlimited fine (see clause 1 (4)). Additionally the power will exist for the court to require remedial action by the company (clause 6) and failure to comply with such an order will give rise on indictment to an unlimited fine, or on summary conviction to a maximum fine of £20,000.

5. The new offence is intended to cover English and foreign registered companies but it does not create any extra-territorial jurisdiction: see clause 16 and paragraphs 55 and 56 of the explanatory notes.

6. It can be seen that the focus will no longer be on the embodiment or alter ego of the company. Conviction will not depend upon identifying a specific person or persons in that category who were guilty of the relevant breach of duty. The Bill focuses on the nature of the companies' activities (and thus its acts or omissions) and the way those activities are managed or organised by its senior managers. By clause 2, a person is a "senior manager" if he plays a significant role in (a) the making of decisions about how the whole or a substantial part of the company's activities are to be managed or organised or (b) the actual managing or organising of the whole or a substantial part of those activities.

7. It can thus be seen that the Bill makes a considerable change to the circumstances in which a company can be convicted of manslaughter. It remains to be seen how the detailed provisions of the Bill will be construed if it becomes an Act but it plainly increases the risk of conviction very considerably,

as was undoubtedly intended. There are however, two features of it to which it seems appropriate to draw attention. The first is the comparison between the position of a company under the new Bill and its position under the Health and Safety of Work Act 1974 ("the 1974 Act"). The second is the effect of the Bill on the criminal liability of individuals.

8. As to the first, so far as I can see, in terms of exposure to criminal liability and thus to financial penalty, the position of a company is worse under the 1974 Act than it would be under the Bill. In paragraphs 14.44 and following of the Thames Safety Inquiry interim report, in which (as I am sure you will all recall) I set out in some detail how prosecutions could be brought under sections 2 and 3 of the 1974 Act. I said this:

> "14.44 Thus, the primary duties are placed upon those who conduct undertakings. To my mind, the most important duties are contained in section 2(1) and 3(1) of the HSWA, which provide as follows:
>
> > " 2(1) It shall be the duty of every employer to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all his employees.
> >
> > 3(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."
>
> The reason why these duties seem to me to be so important is that they are expressed in general terms and are of wide general effect. Although they are expressed in terms of the duties of an employer, they are in fact directed to every person who conducts an undertaking, which is a wide expression covering any business including the operation of a ship. Section 3(2) expressly imposes the same duty upon the self employed as is imposed on an employer by section 3(1).
>
> ….
>
> 14.47 In my opinion, one of the most important sections of the Act is section 40, which provides, so far as relevant, as follows:

> "In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something… so far as is reasonably practicable, it shall be for the accused to prove… that it was… not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement"

The importance of this section is, perhaps obvious. In the context of the operation of a vessel, which of course includes its navigation, all the prosecution has to do under section 3(1) or (2) is to show that the operation or navigation is carried out in such a way that a person's safety was exposed to risk: see eg *R v British Steel Plc* [1995] ICR 586 and *R v Associated Octel Co Ltd* [1996] 1 WLR 1543. The prosecution must satisfy the criminal standard of proof but, in the case of almost all casualties, that burden will be easy to discharge because the accident itself will ordinarily be sufficient to establish that the undertaking has not been conducted in such a way as ensure that people's safety has not been exposed to risk.

14.48 It is then for the accused to show, on the balance of probabilities, that it was not reasonably practicable to "do more than was in fact done to satisfy the duty" to ensure that persons not in their employment are not exposed to risks to their safety. That will often be difficult to do …

14.51 In the vast majority of cases, especially cases where there has been a serious incident or casualty, it will be impossible to establish the defence and the employer will be criminally liable under section 3(1). It follows that a prosecution under section 3 will, in very many such cases, succeed. This is, I think, of some significance because, to my mind, sections 2 and 3 of the HSWA have made a significant contribution to efforts to inculcate a safety culture into industry generally. In recent times, they have led to substantial fines and it is now, I think, appreciated by those who conduct undertakings of all kinds that a failure to ensure that they are conducted safely is likely to lead to prosecution and large penalties. Yet the sections have never, as far as I am aware, been applied to the maritime operation of ships, although I see no reason why they should not be so applied.

14.52 In my opinion, section 3 of the HSWA would be a valuable tool in the armoury of the prosecuting or regulatory authorities trying to maintain high standards of safety both on the Thames and, indeed, on other inland waterways and UK waters generally."

9. I am not sure whether, since I wrote that report in 1999, any shipowners have in fact been prosecuted under section 2 or 3 of the 1974 Act but I can see no

reason why they should not be prosecuted under it in an appropriate case. Thus in every case in which a corporation, say a shipowner, might be prosecuted for corporate manslaughter under the new Act, if the Bill is enacted in its present form, that corporation could more easily be prosecuted under the 1974 Act. A conviction would be more likely and, since the penalty in each case is a fine, in a case where the court is satisfied that there was a gross breach of the relevant duty of care of the kind envisaged by clause 1(1) of the Bill, it is not clear to me at present why the fine would not be the same after conviction for an offence under section 2 or 3 of the 1974 Act as it would be after conviction for corporate manslaughter.

10. The fines imposed under the 1974 Act have been substantial. For example a fine of £2 million was imposed on Thames Trains for its part in the 1999 Ladbroke Grove rail crash and, much more recently, in August of this year a Scottish court fined Transco £15 million for its failure to maintain a leaking gas main which resulted in a fatal explosion.

11. In these circumstances I wonder how much use will in fact be made of the new offence of corporate manslaughter, but that is not for me to say. An important purpose of both the 1974 act and the new offence of corporate manslaughter is to inculcate into shipowners and others a culture of safety to which everyone surely aspires.

12. As to individuals, the Bill does not seek to alter the law at all. There is no individual liability arising out of the new offence of corporate manslaughter.

The Introduction to the draft Bill makes this clear at paragraphs 47 to 48 as follows:

> "We are clear that the need for reform arises from the law operating in a restricted way for holding organisations themselves to account for gross negligence leading to death. Our proposal to tackle this focuses on changing the way in which an offence of manslaughter applies to organisations, and this is a matter of corporate not individual liability. We do not therefore intend to pursue new sanctions for individuals or to provide secondary liability.
>
> However, this does not mean that individuals will not be accountable for their actions in these cases. They will remain liable to prosecution for individual offences, including gross negligence manslaughter and under health and safety law, where it can be shown that their personal conduct amounts to an offence. . ."

Thus by clause 1(5) it is provided that an individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter.

Conclusion

9. The above is a very limited overview of the Corporate Manslaughter Bill. It remains to be seen whether it will be enacted in its present form. Finally, it is important to note that the Bill is concerned only with criminal liability. It makes no changes to the measure of damages recoverable from either companies or individuals as a result of a fatal accident.

Lord Hoffmann
Many thanks to Sir Anthony Clarke for that illuminating Lecture. Next, Mr Karamitsos who will speak to us on the European Directive

FOTIS KARAMITSOS

1. **Importance of Shipping for the EU**

The European Commission's objective in shipping policy is to promote quality shipping, provide a level playing field for our quality minded operators competing in the Global market, thus improving the competitiveness of the EU fleet. At the same time we have to protect our 70.000 kms of coastal patrimony.

Our policy responds to the needs of European industry, but also of European Citizens. Ignoring their needs is not an option.

- Over the last decade, shipping has gradually been included as an important asset in the economic policy and law making of the European Union and its Member States. **Shipping is a key factor in the EU's economic life** and a fundamental element in our international trade relations. It would be worth mentioning here that the EU is the largest trading area in the world accounting for more than 20% of world trade[1] and that 90% of the Community's external trade, and about 40% of intra-community trade, is carried by sea.

- The **EU registered trading fleet** totals 8.690 vessels, representing more than 24% of the world tonnage. At the same time the share of the EU controlled fleet amounts for 38% of the world tonnage, while the EEA residents (EU plus Norway & Iceland) control some 43% of the world trading fleet.[2]
Around 30% of the total seafarer workforce, that is about 220,000 seafarers, are EU citizens, currently employed essentially on EU vessels. Employment in the wider European maritime sector and related industries, including notably shipping company offices,

[1] European Commission, DG TRADE Website.
[2] European Commission, DG TREN, Maritime Vade Mecum, April 2005.

agencies, shipyards, equipment manufacturers, maritime services, ports and terminals is estimated to be around 3 million people.

Therefore very high political and economic importance of shipping for Europe underlines the necessity of an active policy approach by the EU and its Member States. An approval that takes into account its global nature of business and reflecting the new world market, the economic and regulatory environment.
The EU has become, as a matter of fact, a major player in the shipping regulatory environment.

- The European Community is more and more actively involved with shipping issues covering a wide range of topics namely: maritime safety and maritime security and the protection of the marine environment but also the human element and its role in the broad maritime cluster, cabotage regulations, competition and liberalisation rules, research and financing, and last but not least, market access for maritime services and maritime external relations. Those who are familiar with the Brussels "machinery" will agree with me that competences in all these areas, transferred by law on an EU level, are growing day by day increasing the EU's impact and influence on the international maritime scene.
  Incentive measures are in place which aim at promoting EU shipping, such as the Community guidelines on state aid to the maritime sector and the "tonnage tax "schemes", the multimillion € funding related to the Motorways of the sea, the Marco Polo programme, Transeuropean Transport Networks or Short Sea Shipping programmes, all aiming at moving more cargo from the congested roads to the sea.

2. **EC and EU** - I will come to this later on; beforehand I owe you a few words about the EU system itself for those of you who may not be familiar with it. The following information would be a precondition for a better understanding of the remaining parts of my speech.

The Commission is to prepare draft legislation. EP and Council - or Council alone – are to examine it and after a (long) negotiation process, to jointly adopt it. The legislation as adopted is the final product, which might not reflect the Commission's original proposal. Commission's role is to explain, defend and control the application of the EU legislation as ultimately adopted.

I wish to give you some further information on the characteristics of the European legislation.

- We have EC legislation like Directives or Regulations which are adopted jointly by EP and Council through co-decisions. This is the traditional Community system which proves its efficiency with the ultimate intervention of the EC Court of Justice, which ensures that in the interpretation and application of the EC treaty, the law is observed. We do not hesitate at all to take Member States to the Court and there is a long list of cases already in the Court for certain elements, like for example, not respecting our directive on imposing the application of the rules on the places of refuge, or lately with the "reception facilities" (for residues of engines, etc.)

- And we have **EU legislation like Framework Decisions** which are adopted unanimously by the Council only: this is the classic intergovernmental cooperation method with no monitoring system to ensure strict compliance. Just like IMO Conventions.

3. **Positive/negative** - It is no news to say that Europe is perceived in two ways:

- as a positive force when giving urgency to the implementation and enforcement of IMO Conventions and helping to improve the performance of its Member States when harmonising provisions (e.g. avoiding 25 MS dif. Legislation or giving incentives to industry).

- a less positive force when we take initiatives that push International legislation to move forward e.g. phasing out of single Hulls tankers or with e.g. criticisms that the EU wants to "criminalise" seafarers. All

this comes from a misperception. Criminalisation was the subject-matter of last year's Caldwallader lecture. Now I would understand that time has gone by and misunderstandings and emotions have been put aside.

4. **New legislation on ship source pollution: its status** - My role in this panel is to give you an overview of this new piece of legislation with a first emphasis on its present and future status.

4.1 **present status** - First there are two legal instruments: a Directive and a complementary Framework Decision (refer to my words earlier on the Community and the inter-governmental working methods); they were adopted formally the same day and were published last week in the Official Journal of 30 September. Member States will have to implement the two texts by April 2007.

4.2 **future status** - I will be longer on this point. I have now to refer to what appears to be the key provision of the set of legislation: the provision whereby Member States are required to impose criminal sanctions for serious offences.

At the time when the two instruments on ship source pollution were negotiated, there was a dispute between on the one hand the Commission and the European Parliament and on the other hand the Council. This dispute had to do with the adoption by the Council in 2003 of a Framework Decision on the protection of the environment through criminal law. The Commission and European Parliament claimed that this Framework Decision must be annulled since it should be for an EC instrument not an EU instrument to require Member States to use criminal sanctions for violations of EC environment law. In a nutshell, the question was: where should the splitting be between Community and intergovernmental?

This dispute was referred to the Court of Justice.

Pending the Court ruling, the negotiations on the ship source pollution proposal, which started in 2003, were threatened to be blocked but the

legislator decided ultimately to proceed with the adoption of the texts along the following lines:

The directive provides in its Article 4 that discharges are regarded as infringements, whilst the Framework Decision provides in its Article 2 that the infringements are regarded as criminal offences. In other words, the "incrimination" does not appear in the Community instrument, but in the intergovernmental instrument instead: the same splitting as for the environmental case referred to the Court.

Now the Court issued its ruling on the 13 September 2005 in this environmental case.

The Court confirmed the position of the Commission. Although, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, that does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures that relate to the criminal law of the Member States; measures which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

This reasoning appears to be transposable to other policy areas like maritime transport indeed.

The Commission has not made up its mind yet, but it may be appropriate to amend the Directive with a view to align it with the Court ruling.

This will be a kind of "reformattage à droit constant", with no change on the substance elsewhere in the texts.

The consequence would be at the end of the day that we would have the means – which we do not have right now - to ensure that all over Europe, the same dissuasive sanctions would be applicable in case of pollution, and be controlled by the European Court of Justice.

5. **The case with accidental discharges** - I have to address now the core provision on the definition of illegal discharges.

5.1 **Objective** - Throughout the negotiation on this legislation, we had very clearly in mind the objective: to set up a dissuasive scheme where all operators are actually sanctioned if at fault. Responsibilise not criminalise!

There are two elements:

- The intention is to cover the whole chain of responsibility and liability. This is a key point in our legislation which is not properly addressed by international standards.

- The unacceptable behaviours are strictly defined, in a way which is in line with modern penal law: intention, recklessness or serious negligence. Here I insist that the word "serious negligence" was agreed upon by all Governments (Ministers of Justice and of Transport and of Environment) who considered this was in line with their national terminology.

But we had to make sure this objective is legally feasible under international standards.

5.2 **International standards on the substance** - You might be familiar with MARPOL which, in its Annex I Regulation 11, clarifies the conditions under which the owner and the master are to be sanctioned. This leads me to address the following:

(a) MARPOL only speaks about the owner and the master: does it leave untouched the rest of the transport chain who could have caused or contributed to the pollution? In other words: what about the chain of liability?

Now, the directive fills in the regulatory gap by establishing that sanctions for pollution infringements will be applicable to any party found responsible, the master, the owner, the manager, the charterer,

the classification society, the port authority - so I think this is something to keep in mind.

(b) MARPOL envisages that in the case of an accident the master or the owner of the ship can be sanctioned, but in very limited cases, only if the owner or the Master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result. This threshold is virtually unbreakable. These are the words of our colleagues from the IMO on their webpages.

All this contrasts with the situation in existing national law. We have found that in most European and third countries' legislation when implementing MARPOL in the internal and territorial water the liability test is lowered, using serious or even simple negligence.

5.3 **International standards on jurisdiction** - This leads us to the key question of "what is feasible under international law?" The international law: what does it say about all this?

We have MARPOL which does not address the issue of legislative and enforcement jurisdiction. This is well explained in the guide published by the IMO: "MARPOL - how to do it?", a Manual on the practical implications of ratifying, implementing and enforcing MARPOL: "*the Law of the Sea affects how MARPOL is implemented and enforced*".

This reflects Article 9 (2) of MARPOL which reads "*Nothing in the present convention shall prejudice*" the Law of the Sea.

We have the Law of the Sea Convention and in particular its Article 211(4). This Article clarifies the rights of coastal States within their territorial sea: they can adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels. Article 211(5) adds that beyond territorial sea coastal States can only apply international rules and standards.

Just as the reminder the question as to how far a coastal state may deviate from Marpol in its territorial sea was discussed vividly during the conference

adopting Marpol in 1973, but the matter was eventually left for the conference negotiating UNCLOS to resolve.

Both the draft Marpol article on this issue and the eventual compromise which was accepted in UNCLOS (Article 21) distinguished between rules related to construction, design, manning and equipment on the one hand and other types of rules on the other.

While coastal states may not exceed the international rules of the former category, there is no similar restriction with respect to other kinds of rules for the protection of the marine environment. The directive, obviously, does not deal with construction, design, equipment or manning.

5.4 **Architecture** - How has this whole "Architecture" been applied into the new EC legislation?

- First, within the territorial sea, **all operators are liable if** they cause pollution, recklessly or by serious negligence.

- Beyond the territorial sea, for the master and the shipowner and also we have added the crew (see Article 5(2) of the directive and the somehow redundant Article 2(2) of the Framework Decision), which is not exclusively mentioned in the MARPOL, the full MARPOL text applies, that is to say we have to have caused pollution with intent or recklessly and with knowledge that damage will be caused in order to be prosecuted.

- In addition beyond the territorial sea, for all other operators "recklessness or serious negligence" applies; so if the classification society has done something wrong with serious negligence, causing pollution, then they are prosecutable.

6. **Criminal sanctions for corporate bodies** – There are many elements in the two texts which might be of interest to you; which have to do with judicial cooperation for instance. Dr Sheppard asked me address also the issue of sanctions for corporate bodies.

First there is indeed the rule that legal persons are liable for offences committed for their benefit by any person acting either individually or as part of an organ of the legal person, which have a leading position within the legal person. This is not a rule where by all MS must admit criminal liability of legal persons. There may be another “horizontal” initiative in the future.

Second, there are the provisions which harmonise the level of financial penalties. The Framework decision aims at the approximation of the level of all sorts of penalties: financial penalties, custodial penalties, vis-à-vis individuals and vis-à-vis legal persons (NB custodial for legal persons are not applicable). But this area of financial sanctions for legal persons is the one where the most significant progress is made. This is somehow very positive because (a) prison sentences are not always the penalties that fit the crime and (b) it is more legitimate to deal with legal persons rather than members of the crew. Furthermore, this is the first time in an EU instrument that the level of fines are harmonised.

The rules apply irrespective of which flag the ship is flying (somebody can be stricter only for own flag).

Currently, the level of fines differs greatly from one Member State to another (from a minimum of 2.500.000 € for Belgium to 15.000 € for Latvia!).

The Commission in its original proposal suggested to approximate fines by a reference to a certain percentage of turnover assets. Member States did no go down that route: they agreed on a system of minimum ranges for maximum sanctions with two minimum levels of fines:

- One of a maximum of at least between 150.000 € and 300.000 €

- one of a maximum of at least between 750.000 € and 1.500.000 € in the most serious cases, including at least intentional cases, leaving the possibility for the Member States that could not apply this method to revert to a certain percentage of the turnover.

You understand that with this legislation, the level of fines has been successfully increased in a number of Member States.

7. **A final word on imprisonment**!

Different penalties may be applied (administrative or penal), but everything must respect art.230.1 of UNCLOS.

There is this specific reference in article 4(8) of the framework decision to the international requirement that only monetary penalties may be imposed unless the pollution is both wilful and serious, a fact which most people writing on this “criminalisation of seafarers” instrument incidentally fail to report.

Judge Thomas A. Mensah

SOVEREIGN RIGHTS IN LEGISLATION OF MEMBER STATES UNDER UNCLOS AND MARPOL

International law grants competence to, and imposes an obligation on, flag States as well as coastal and port states to take measures, including the adoption of laws and regulations for the prevention, reduction and control of marine pollution from ships.

The 1982 Convention on the Law of the Sea gives the right and power to a coastal or port state to adopt laws and regulations for the control of pollution from ship-borne substances and to take measures for the enforcement of such laws and regulations against foreign ships when they are operating within the areas of their jurisdiction or when they voluntarily enter into their ports (Articles 211, 217, 218, and 220).

The general powers and rights of coastal and port States under the 1982 Convention are given more specific implementation in the 1973/78 MARPOL Convention. The provisions of the MARPOL Convention apply between States Parties to that Convention, but subject to the condition that the provisions are compatible with the relevant provisions of the 1982 Convention or other applicable principles of general international law.

The 1982 Convention on the Law of the Sea obliges (and empowers) a coastal state to adopt laws and regulations to prevent pollution by foreign vessels in its territorial sea (article 211, paragraph 4) and in its exclusive economic zone (article 211/5)

MARPOL empowers and obligates every State Party thereto to "prohibit" any violation of the requirements of MARPOL. Each State party is required to establish sanctions under its laws for such violations. MARPOL further stipulates that the "penalties specified under the law of a party shall be adequate in severity …and shall be equally severe irrespective of where the violation occurs" (Article 4).

But the power to legislate under MARPOL is subject to certain limitations and constraints. These limitations and constraints are to be found mainly in MARPOL

itself. But, because MARPOL is a special instrument implementing the provisions of an "umbrella convention", the provisions of MARPOL are subject to the over arching principles contained in UNCLOS.

The main limitations and constraints on the right of the coastal state to enact legislation on vessel-source pollution, as set out by UNCLOS, are the following:

(a). The legislation of a coastal state in respect of ships flying its flag must "AT LEAST have the effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference" (Article 211(2) of UNCLOS). In respect of the prevention of marine pollution from ships the specific parameters set out in the MARPOL represent the "generally accepted international rules and standards established by the competent international organization" This means that a coastal state is free, if it wishes to impose more stringent requirements and standards to ships flying its flag. However, the coastal state is not entitled to apply such additional standards to the ships of other States, even when those foreign ships are operating within its territorial sea.

(b). The legislation of a coastal state "in the exercise of (its) sovereignty within (its) territorial sea shall …not hamper innocent passage".

(c). The legislation of the coastal state for the purpose of enforcement …in respect of its exclusive economic zone must "conform and give effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

(d). A coastal state may establish only monetary penalties for violations committed by foreign ships within its territorial sea, except in cases of a *wilful and serious act of pollution of the territorial sea*.

(e). A coastal state can establish only monetary penalties for violations committed by foreign ships where such violations are committed *outside the territorial sea.*

In addition, where the coastal state is a Party to a special international agreement (convention, treaty etc) its legislation must be compatible with the specific parameters set out in that special agreement.

The main parameters set out in MARPOL are the following:

a. A discharge for the purposes of the Convention includes "any release, howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying".
b. In respect of the prevention of pollution by oil and noxious chemical substances, the definition of "discharge" is further qualified by the exceptions in Regulation 11 of Annex I to the Convention and Regulation 6(b) of Annex II (exceptions). These provide that the relevant regulations (Regulations 9 and 10 of the Annex I and Regulation 5 of Annex II) shall not apply to discharges that result from "damage to a ship or its equipment" except "if the owner or the Master acted *either with intent to cause damage, or recklessly and with knowledge that damage would probably result"*.

The effects of these provisions are the following

i. a discharge of oil or oily mixtures or a discharge of noxious liquid substances into the sea does not come within the purview of MARPOL except in the specific circumstances stipulated in Regulation 11 of Annex I and Regulation 6 of Annex II, i.e. unless the owner of the ship or the Master of the ship acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.
ii. where the conditions for the application of MARPOL do not exist, there cannot be a "violation" of the requirements of MARPOL and, consequently, the measures taken by a State cannot be justified by reference to MARPOL

The provisions in the EC Directive and Council Framework Decision on Ship-source pollution differ from the provisions of MARPOL in two significant areas, namely, as regards (1) the parties which may be held accountable for violations; and (2) the

conditions under which pollution resulting from an accidental discharge from a ship may be considered as an illegal discharge and hence subject to penalties.

1. The parties which may be held liable for violations

The EC Directive and Framework Decision provide that, in addition to the owner of the ship and the Master, other persons may be held criminally responsible for accidental pollution. These persons include the manager of the ship, the charterer of the ship and the classification society of the ship. There is no equivalent provision in MARPOL. Regulation 11 of Annex I and Regulation 6 of Annex II identify only the owner of the ship and the Master as the persons whose conduct and motivation are to be taken into account in determining when an accidental discharge is covered on not covered by the Convention,. However, there is no specific provision to the effect that these are the only persons or parties that can be held responsible for violations of the requirements of the Convention.

Does the silence in MARPOL give the right to a coastal state to legislate to impose responsibility on other parties for pollution resulting from an accident to a vessel? According to the EC, there is a "regulatory gap" in the MARPOL regime that needs to be filled, and the Directive fills the gap by "establishing that sanctions for pollution infringements will be applicable to any party found responsible". This position cannot be lightly dismissed. For there appears to be some justification for the view that the purpose of Regulation 11 of Annex I (and Regulation 6 of Annex II) is not to list the persons who may be held responsible for pollution resulting from a maritime accident, but rather to define the conditions under which the exception provided by the Regulation does not apply. On that reading, it may be argued that if and to the extent that the exception does not apply, the question of who may be held liable should be left to the applicable national law. It would appear, therefore, that the EC Directive cannot be faulted solely on the ground that it extends criminal liability to persons other than those specifically mentioned in MARPOL.

However, this issue may not be particularly significant in this context if the Directive is found to be defective in other more important respects. Thus, for example, if the criteria for violation in the Directive were to be deemed to be incompatible with those

specified under MARPOL, the question as to what parties may be held liable for violations would not be that important. For if there is no violation there may not be much point in discussions the question concerning the persons or entities that can or should be held liable for a violation.

2. The nature and basis of violations under the EC Directive

In the case of an accidental pollution of the sea, MARPOL expressly provides that it is only applicable if the discharge was due to the wilful act reckless act of the owner or the Master. The implication is that, in the absence of such wilful or reckless act, MARPOL does not apply and there can, therefore, be no violations of its requirements.

The EC Directive adopts the criterion of MARPOL in respect of pollution occurring outside the territorial sea, i.e. there is a violation only if the shipowner or the Master acted with intent or recklessly in the knowledge that damage would probably result. But, with respect to pollution in the territorial sea, the EC Directive adopts a test of liability that is lower than what is adopted in MARPOL. For while MARPOL specifies that a violation occurs (the Convention applies) only if the party involved "acted with intent or recklessly and with knowledge that damage would probably result, the EC Directive is applicable if the party involved "acted with intent or recklessly *or with serious negligence*". The EC seeks to justify this deviation from the MARPOL norm by stating that the lower violation threshold is only applicable in relation to discharges in the territorial sea. In particular, it is claimed that both UNCLOS (article 211(4)) and MARPOL (article 9(2)) "give the right to the coastal state to enact, in the internal waters and territorial sea, measures which are more stringent than those applicable in international law".

But there is no basis either in MARPOL or in UNCLOS for the claim that a coastal State has the power to enact laws that deviate from the parameters specified under international law. It is, of course, true that Article 9, paragraph 2, of MARPOL reserves the possibility that a coastal state may be entitled to enact laws that go beyond the provisions of MARPOL, but this reservation applies only if the laws so enacted are in accordance with the applicable provisions of UNCLOS. In relation to

national laws for the prevention of pollution from ships, UNCLOS does not give to coastal state the broad sweep of legislative powers that is claimed by the EC Directive. The only case in which UNCLOS permits a state to impose more stringent requirements than those provided for internationally is when the state legislates for vessels flying its own flag. This is the effect of Article 211(2) which provides that a state's legislation in respect of vessels flying its flag "shall *at least* have the same effect as that of generally accepted international rules and standards…" No such extended power is available to a state when it legislates for vessels of other states. Indeed, one of the cardinal principles of the law of the sea enshrined in UNCLOS is that the laws of a coastal state should not have the effect of hampering innocent passage of foreign ships in its territorial sea. Thus , Article 211(4) of UNCLOS, on which is the Directive appears to base itself, provides expressly that the laws and regulations adopted by a coastal state in exercise of its sovereignty within its territorial sea for the prevention, reduction and control of marine pollution "shall ……not hamper innocent passage of foreign vessels." In this connection, it is worth noting that pursuant to Article 19, paragraph 2(h) of UNCLOS, the only act of pollution which can deprive a foreign ship of the right of innocent passage in the territorial sea is an "act of *wilful and serious* pollution contrary to this Convention". Hence, in the absence of a wilful and serious act of pollution, passage by a foreign vessel in the territorial sea of a coastal state must be considered to be "innocent passage". The EC Directive, on the other hand, lowers the requirement for the application of sanctions to a discharge from a foreign vessel involving, inter alia, "serious negligence" .This lower criterion is not to be found in either MARPOL or UINCLOS. In doing this the EC Directive adopts a standard whose effect is to hamper innocent passage of a foreign vessel through the territorial sea.

It appears, therefore, that the Directive impinges on the principles and standards established not only in MARPOL but also in UNCLOS. In particular, implementation of the Directive by a member state of the European Union which is also a Party to MARPOL will have the effect of complicating the obligations of that State vis a vis other States Parties of MARPOL who are not members of the EU. In particular, a member State of the EU which enacts legislation to implement s the Directive, would be in breach of its obligations to another State Party to MARPOL if it seeks to apply sanctions to the vessel of that other State for a discharge that results solely from "

serious negligence". Such a sanction would be exacted against a discharge that does not constitute a violation under MARPOL, and for which the sanctioning State would have no authority under international law as contained in UNCLOS.

This will be so regardless of whether the sanction is being applied by a port state against a ship that is voluntarily its port or installation or whether sanction is to be applied against a vessel that is navigating within the territorial sea or the exclusive economic zone, or whether action is requested of the flag state (or another port state) by a coastal state whose legislation is alleged to have been violated by the vessel in questions. In each case the issue will be whether the legislation that is claimed to have been violated can properly be applied to the vessel in accordance with the provisions of either MARPOL or UNCLOS.

It would thus appear inevitable that a member state of the EU which implements the EC Directive in its entirety will face a difficult legal problem in its relationship with other Parties to MARPOL and UNCLOS who are not member states of the EU. In particular, the EU member state will be put in the situation in which it has to discharge conflicting obligations under the EU Directive and the international regimes, respectively. And, of course, the obligations of the EU member state under MARPOL or UNCLOS cannot be displaced merely because it is also obliged to implement the EU Directive. As far as other parties to MARPOL and UNCLOS are concerned, they will be entitled to expect the EU member state to respect its treaty obligations in accordance with international law, and the fact that it is also required to implement the EC Directive will not be sufficient to relieve it of its obligations to other States or to vessels flying the flags of those other States.

The question arises as to how the conflict between the test of criminality set by the EC Directive and the criterion established in the regime of MARPOL and UNCLOS would be resolved. Where the dispute arises between a EU member State and another state and both states are parties to MARPOL, the dispute would be subject to the dispute settlement procedure provided under that Convention. Article 10 of MARPOL provides that "any dispute between two or more parties to the Convention concerning the interpretation or application of the present Convention shall, if settlement by negotiation between the Parties involved has not been possible, and if these Parties do

not otherwise agree, be submitted upon request of any of them to arbitration as set out in Protocol II to the present Convention." The procedure for such arbitration is set out in Protocol II. Article X(1) of the Protocol provides that the award of the Tribunal " shall be final and without appeal". It further states that the parties "shall comply" with the award.

A problem might arise in a case where all the parties to the dispute are Parties to both MARPOL and UNCLOS. In that case the issue will be whether the dispute falls within the area of jurisdiction of the dispute settlement provisions of MARPOL only or could also be brought within the dispute settlement mechanism of UNCLOS. As is well known, UNCLOS contains, in Part XV thereof, a comprehensive and in some cases compulsory mechanism for the settlement of disputes concerning the interpretation or application of provisions of the Convention. At the moment there is no complete agreement regarding the extent to which the dispute settlement mechanism of UNCLOS may displace the dispute settlement procedures in other and more specific treaties that are related to the subject matter of UNCLOS. In the *Southern Bluefin Tuna Cases* between Australia and New Zealand on the one part and Japan on the other, the International Tribunal for the Law of the Sea (ITLOS) and the Annex VII Arbitral Tribunal (the Tribunal) reached different conclusions on the issue whether a dispute that involved the interpretation of the provisions of a special (trilateral) agreement between the three States and also the provisions of UNCLOS should be settled through the procedures of the trilateral agreement or through the procedures of UNCLOS. A similar issue arose in the MOX Plant case between Ireland and the United Kingdom. This case, which is currently pending, involves, at least in part, the issue whether the violations alleged by Ireland against the UK are violations of EC law that must be determined within the EU legal process or are violations of UNCLOS and , as such, are susceptible to resolution under the mechanism established in Part XV of UNCLOS.

In the present case, the issue may turn out to be not so important since, whatever the approach adopted, there appears to be a clearly delineated procedure for dispute settlement if a dispute arises when the legislation enacted by a EU members state in implementation of the EC Directive is in conflict with the obligation of the member state under either MARPOL or UNCLOS or both.

Epaminondas Embiricos
Acting as advocate for the industry

We are all aware that the EU Directive on Criminal Sanctions for Ship Source Pollution has been formally adopted, despite concerns that the policy behind it is misconceived, that it is unnecessarily harmful to the Maritime Industry, and that it is contrary to International Law.

I should like, therefore today, to examine four fundamental questions.

1: What are the objectives of the Directive?

2: Does it fulfill or further those objectives?

3: Does it have harmful side effects? and

4: Does it, as has been alleged, place EU Member Sates in breach of their Treaty obligations under MARPOL, and does it, therefore, constitute an illegality?

First let me outline the objectives of the directive. The Commission has said that the international scheme needs improvement to tackle the causes of marine pollution and that a level playing field must be created for quality owners and operators. The Commission goes on to say that both seafarers and responsible operators will benefit from the Directive which will enable the elimination of the **small minority**, that is, the substandard or rogue operators, who presently tarnish the image of the Shipping Industry. To seek to accomplish the foregoing the Commission has introduced a test of negligence whereby accidental pollution will be criminalized. The Commission states that thereby only rare cases, where the responsible party is considered to have acted intolerably, and must be condemned for that, will become criminal cases. Finally the Commission has stated that the Directive will 'responsibilize' the industry.

Now let us examine whether the Directive will help in achieving the goals outlined by the Commission.

The first objective, which I mentioned, was to improve the international regime, relating to marine pollution, and to create a level playing field. To achieve this aim

the Directive creates a unilateral EU regime, which, as we shall see, is contrary to, and is in breach of the MARPOL Convention. It seems to me a statement of the obvious that the international regime can only be improved, and a level playing field fostered, by international action taken through the IMO. Unilateral EU action cannot hope to improve an international regime, nor create a level playing field, in an international industry, such as shipping, where vessels, of all nationalities, trade all over the world. The Directive will fail in achieving its first objective.

The second objective is the elimination of the substandard or rogue operator. The Commission has openly acknowledged that the Directive was driven by political sentiments expressed in immediate reaction to the "Prestige". The intent of the Directive was to be a deterrent against marine pollution. The Commission, as I have already mentioned, sought to achieve this aim by criminalizing negligence in cases of accidental pollution, contrary to MARPOL, which provides that a criminal offence will occur only if the pollution results from intentional or reckless conduct. The Commission has said that, despite appearances, it is not its desire to criminalize the seafaring profession but, rather, to rid the seas of rogue operators. This laudable aim, however, is in no way furthered by the Directive. Let me explain. MARPOL provides that operational discharges, involving deliberate releases of oil from a ship into the sea, in circumstances which are not permissible under International Law, constitute criminal offences. MARPOL also provides that other discharges of oil are unlawful and attract criminal sanctions **except** where, **first of all,** they result from damage to a ship or its equipment, **secondly,** there has not been a failure to take all reasonable precautions after the occurrence of the damage for the purpose of preventing or minimizing the discharge and, **lastly,** where the Owner and the Master have acted neither with intent to cause the damage nor recklessly and with knowledge that the damage would probably result.

It should be clear from the foregoing that pollution caused by the rogue operator is already a criminal offence under MARPOL. What the Directive does, is to criminalize accidental discharges due to negligence. This will affect, not the rogue operator, whose conduct is, by definition, reckless and intentional, but rather the ordinary seafarer who has suffered a temporary lapse. Thus, the Directive contributes

nothing new towards the elimination of the substandard or rogue operator and therefore fails in meeting its second objective.

The third objective is to responsibilize the industry. This is the Commission's phrase. I assume they mean that they wish to make the maritime players more responsible. Will criminalizing negligence accomplish this goal? I fear not. Unfairness, **and the Directive is unfair**, does not encourage responsible behaviour. Even prior to the Directive, in cases of pollution from ships, it has been very plain that criminal proceedings have been driven overwhelmingly by public or political demand for retribution, which has resulted in actions and measures totally out of proportion to culpability. Masters and seafarers have been taken into custody without good cause, for political motives, and even before any investigation has taken place. In particular, it has been noticeable that Masters have been prosecuted, with disproportionate zeal, in cases where the authorities themselves are exposed to criticism. The highly charged atmosphere of public outrage, following a pollution incident, does not engender fairness. The Directive, in criminalizing negligence, has created a regime, which will result in a disproportionate threat and unfairness towards those caught up in **genuine** accidents. This is hardly conducive to the fostering of responsible behaviour. The Commission has failed to recognize the excellent and continuously improving safety record of the shipping industry, which is clearly borne out by statistics which DGTREN should be well aware of. The Commission has failed to understand that the way to achieve its aim is through **positive measures**, such as education, and **international initiatives**, like the ISM code, rather than through the threat of incarceration and the creation of a blame culture. Thus the Directive fails in its third and final objective. Indeed, nothing positive or helpful flows from the Directive.

Now let us examine whether the Directive has harmful side effects.

The Prime Minister of Malta, Mr. Lawrence Gonzi, is quoted to have said, at a recent Ministerial Meeting: "Malta believes that the present Directive is not in consonance with International Maritime Law……. At a time when Europe - and the rest of the world – is facing a crisis of seafarer shortage, this Directive can only serve to de-motivate further any potential seafarers from taking a maritime career." The effect of

the Directive on seafarers is indeed of great concern. The criminalization of negligence in the Maritime Industry will surely result in driving existing seafarers from the profession, while being a serious disincentive to those young men and women, who might otherwise have considered a career at sea. Yet, maintaining and recruiting good seafarers is crucial to safety at sea and the protection of the environment.

The Directive therefore, instead of enhancing safety and the prevention of marine pollution will have exactly the opposite effect. These harmful consequences are compounded by the risks created by the Directive for salvors. In fact, the President of the International Salvage Union recently said: "We could reach the point where salvors will refuse to intervene without immunity from prosecution." The Directive is likely to create a situation where salvage services become scarce in European waters.

Now it must be said that the words used by the Commission for the test of criminality are "serious negligence". Unfortunately, however, the addition of the word "serious" adds nothing to the word "negligence". Serious negligence is not defined in the Directive nor does any clear legal precedent exist. The Commission tends to convey the **false** notion that serious negligence involves acts or omissions involving culpability at an intermediate level, between ordinary negligence and recklessness. In fact, no such level of culpability is recognized by law and it would be difficult if not impossible to define. In practice, serious negligence will tend to be found when ordinary negligence has caused or contributed to serious consequences. As virtually all pollution is nowadays considered serious, the Directive will, in practice, result in criminal sanctions for pollution caused by **ordinary negligence**. It will result in disproportionate and unfair treatment of the accused, which will be out of all proportion to the culpability involved. Serious negligence will form the foundation of an unfair regime based on a blame culture. This is particularly so because vagueness and subjectivity are most dangerous in the context of major oil spills, given the degree of discretion which will be left to the decision maker, in circumstances when the decision has to be made under a glare of publicity, in a climate of ill informed public outrage. Thus, we can dismiss out of hand the Commission's contention that only rare cases will become criminal.

The term “serious negligence” is vague, subjective and ill defined. Yet, it is a fundamental principal that criminal law must be clear and specific. Thus, the term “serious negligence” is **legally defective** and inconsistent with the global regime. It is imprecise, subjective and lacks clarity and will therefore be most prejudicial to the accused in the climate of public sentiment commonly experienced after a pollution incident. In all these ways the Directive will foster unfairness.

We should also be concerned that the Directive undermines the IMO, by unilaterally introducing a regime in the EU, which is in breach of the MARPOL Convention. This constitutes a great disservice to the Shipping Industry and thus to world trade and the world economy. Shipping, which operates in the four corners of the world, can only function properly if its regulation is agreed to internationally, through the auspices of the IMO, rather than regionally and/or unilaterally. It must be recognized that undermining the IMO is tantamount to undermining safety at sea and the protection of the environment.

I hope it is clear, from the foregoing, that the Directive not only fails to fulfill its stated objectives, but is dangerous and harmful to safety at sea, the environment and the maritime industry, and is contrary to a fundamental principle of criminal law.

I shall now turn to the last question. Does the Directive challenge the international legal order and conflict with the Treaty obligations undertaken by the European Union Member States, which are signatories to the MARPOL Convention?

Let us first consider in what ways the Directive conflicts with MARPOL.

I have already mentioned that MARPOL makes it clear that a discharge into the sea of oil or oily mixtures does not constitute a breach of International Law when it is accidental, resulting from damage to a ship or its equipment. In such cases, a violation of MARPOL is committed only if there has been a failure to take all responsible precautions, after the occurrence of the damage, for the purpose of preventing or minimizing the discharge, or if the Owner or the Master acted with intent to cause damage, or recklessly and with knowledge that damage would probably result.

It is important to understand that provided the master and owner have acted neither recklessly, nor with intent, MARPOL provides an exemption from criminal liability to anyone who may be prosecuted for the pollution, since no offence has been committed.

The Directive, on the other hand, imposes criminal liability on all the maritime players, if they have been seriously negligent, wherever the pollution may occur. The MARPOL exemption is applied only beyond territorial waters and furthermore only to the master, owner and crew, if they have acted neither recklessly nor with intent.

Thus, the Directive's conflict with MARPOL is not only in respect of the test of criminal liability of the owner and master for pollution in the territorial sea. A conflict exists in the territorial sea and extends beyond it to the Exclusive Economic Zone and the High Seas, in respect of criminal liability imposed on defendants other than the master and the owner. Shipmanagers, charterers, salvors, classification surveyors and countless others are put at immediate risk of criminal prosecution in circumstances in which no offence has been committed under MARPOL.

A distinction has long been recognized in International Law between operational discharges and accidental pollution. The Commission seems to have confused these two distinct elements. The Commission states that illicit discharges continue to take place without the offenders being brought to justice. Having rightly alluded to this unacceptable practice and the need to combat rogue operators, responsible for it, the Commission mistakenly applies its proposed measures to all instances of ship source pollution, and to all maritime players, thereby creating a seriously deficient and dangerous regime.

Now, it is important to recognize that MARPOL lays down uniform rules, rather than minimum standards, which must be applied to all foreign vessels by a contracting state. The MARPOL Convention states clearly in its Preamble that it is establishing rules of universal purport which are to apply in territorial waters as well as in other parts of the sea. Whereas it is not uncommon for International Conventions to allow an option for contracting states to legislate differently from certain specified

provisions, and whereas an option of this kind is indeed contained in MARPOL Article 14, this option does not apply to Annexes 1 and 2 of the MARPOL Convention, **which are therefore obligatory**, and which contain the provisions relating to accidental pollution, which are at the centre of the current controversy.

The Commission seeks to justify the Directive's departures from MARPOL by stating that it makes full use of the Community's rights under UNCLOS whilst complying with the Member States' obligations under MARPOL. It is worth analyzing this statement, so as to see whether it can be sustained.

The Commission relies on MARPOL Article 9(2) and UNCLOS Article 211(4). MARPOL Article 9(2) simply provides that nothing in the MARPOL Convention shall prejudice the debate at the UN Conference, which subsequently led to the UNCLOS Convention; and indeed there is no conflict between MARPOL and UNCLOS. UNCLOS Article 211(4) provides that coastal states may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution. Yet it is precisely in the exercise of their sovereign rights that the EU Member States agreed to be bound by the terms of MARPOL. It is important to note that there is nothing in UNCLOS, which even purports to change MARPOL or effect it in any way. Thus, the Commission's argument that the implementation of the Directive by the Member States is a legitimate exercise of sovereign rights under UNCLOS, is invalidated by the fact that such sovereign rights were already freely exercised when the Member States entered into a binding agreement with other States, which created the MARPOL Convention.

I should also make reference to the MARPOL Conference itself. Considerable debate took place during the Conference on proposals to allow coastal states a degree of flexibility to depart from MARPOL Regulations in certain defined cases. These proposals were defeated, as they would in effect have undermined the whole point of the Conference – to agree a balance between the interests of flag and coastal states. To ensure that his balance is maintained, the Convention makes it clear that the domestic laws of contracting states must follow the obligatory annexes in their entirety. There is therefore no doubt that coastal states cannot simply adopt

provisions that suit them whilst changing others that do not. The very essence of uniform international rules is to establish standards which are mutually agreed, in the sense that contracting states are both entitled and obliged to apply them to each others ships and nationals, as well as their own.

It follows that the Directive will result in the Member States breaching their MARPOL Treaty obligations, contrary to international law. Thus, the Directive constitutes an illegality.

Let us recap the position. The Directive neither fulfills nor furthers its stated objectives, nor does it have any positive or beneficial contribution to offer. On the other hand, the Directive does have serious negative side effects and will be harmful to safety at sea, the prevention of marine pollution and the maritime industry. Furthermore, it places EU Member Sates in breach of their MARPOL Treaty obligations and is contrary to international law. Now, this is all not really that surprising since, by the Commission's own admission, the Directive was driven, not by sound rational thought, but by political sentiment and expediency, following the "Prestige". We are human and mistakes do happen. A serious mistake has been made and it is time to put it right. The Directive must be reversed. Not to do so, would border on recklessness.

Forum Discussion

Lord Hoffmann

Well thank you Mr Embiricos. I don't think that anyone will be able to complain that you did not make your position clear. Mr Karamitsos is clearly entitled to a right of reply. But as there may be some more hostile comments from the audience, and I detect it from the strength of the applause that that is likely, I think that it might be better to defer that reply so that he can deal with all the criticisms at once, at the end. Now I am going to throw the matter open to the floor and anyone can ask a question of any member of the panel. You are not confined to questions, if you wish to make a speech you may do so once it does not go on for too long I should think that anybody can say what has to be said in 2 or 3 minutes at the most.

The matter is now thrown open. Can I also ask that, although you may be extremely well-known, could you please identify yourselves when you get up to speak.

Aline De Bievre – Shipping Correspondent on IMO affairs

I have a question for Dr Mensah, if I may. You have stated very clearly that there can be no doubt that the EC Directive is in breach of both MARPOL and UNCLOS. Unfortunately, you have no time left to illuminate us on International Dispute Resolution – namely, on what the outcome would be of a dispute arising between states as a result of the fact that the EC Directive is a law-less piece of law? May we however not assume that the outcome of any such dispute would be in favour of the State siding with international law and therefore in favour of the illegally criminalised seafarer? Or, are we wrong to assume that this type of outcome of the dispute is not a foregone conclusion and must we instead assume that international dispute resolution is such a complex affair that clear decisions are extremely difficult to obtain?

I am raising these questions because, I for one, fail to understand why so far no seafarer criminalisation case, as far as I know, has been brought before the International Tribunal for the Law of the Sea. Must we conclude that a Tribunal is either powerless to enforce the over-arching principles of the Law of the Sea, or that

it is faced with such complex dispute resolution standards that no one has the appetite for bringing a case to the Tribunal? Thank you very much.

Lord Hoffmann

Well now Dr Mensah, that is a very good practical question - a ship-owning company is convicted under the Directive in the Crown Court at Bury St. Edmunds – you say that that is contrary to international law. What does he do about it?

Judge Mensah

Well it is a very, very good question; she asks whether or not the international judicial system does have an appetite; I think I can answer the first question: it is a foregone conclusion that the party that is in violation of its obligations will be condemned by the Court. But it is not a foregone conclusion as to which party is in violation and that will be the very purpose of any litigation. But to come to your second question, I think the issue really is whether or not the court has an appetite; As you know, the Law of the Sea Convention provides that disputes may be submitted at the request of the States involved to either the International Court of Justice in the Hague, or the International Tribunal for the Law of the Sea in Hamburg, or to an arbitral tribunal established under Annex 7 to the Convention. It is entirely the responsibility and the right of each member state under 287 of the Convention to determine the procedure for dispute settlement that it wishes to adopt. And the Convention provides that where 2 States involved in the dispute have not chosen the same system either the Court in The Hague or the Tribunal in Hamburg, then they are obliged to go to arbitration and there is a procedure for the setting up of the tribunal. But whether the case concerned will go to the Tribunal or to the Court, that is to say whether they will admit that there is a dispute between them, is entirely a matter for the sovereign decision of those countries. And no court, apart from criminal cases, not even a domestic court, can decide to deal with a dispute between 2 parties who have not come to the conclusion that they want to come to it. And the reason why so far no case has come is because the seafarers who are criminalised cannot go to either the Hague or Hamburg and the states whose nationals may be criminalised are at the moment unwilling or are unable, for reasons best known to them, to make use of the procedure which exists. That is the whole crux of the matter.

Lord Hoffmann

Thank you very much. I think that is a complete answer to the question. Next question please.

José Alcantara – Maritime lawyer –Spain

I speak only for myself (not for the Spanish Government – whether past or present). When looking at what the EU is trying to achieve, a distinction has to be made between the concepts of 'law' and 'justice.' In the Erika II communication, the Commission seemed to want to create a European version of the US Oil Pollution Act 1990. This was evident from their intended aims (which included the imposition of unlimited liability on shipowners for pollution arising from gross negligence).

It is clear that the proposed Directive will penetrate many Member States' domestic legislation. In Spain, for example, environmental crime is enshrined within the Constitution as well as being covered by domestic law. The new Directive will simply be another dangerous weapon in Member States' hands. For example, charterers and operators, whilst not targeted in civil law under CLC 92, will nevertheless be subject to criminal sanctions under the Directive. Other parties may be held criminally liable for "serious negligence"(whatever that might be!), yet will still be able to limit their liability under CLC 92. This is clearly inconsistent.

One other point that seems to have been forgotten, is that, in many European legal systems, a civil, pecuniary liability is attached to criminal offences. This system, in conjunction with the European Directive, will now allow private claimants to use the Directive in the criminal courts in order to claim compensation where there is "serious negligence" for accidental discharges. My question is: does the Directive really have anything to do with justice against seafarers or other involved parties?

Gregory Timagenis - Maritime lawyer Greece

I have one question for Lord Justice Clarke and one comment on criminalisation and pollution. My question is this: I assume that the new Corporate Manslaughter Bill does not intend to affect in any way the existing legislation on manslaughter by individuals. Am I correct.?

Sir Anthony Clarke MR

That is correct.

Gregory Timagenis

Or is it possible in practice to affect in some way the standards on the basis we judge the negligence or the due diligence by the officers of the organisation, like the senior manager or other officers? And my comment on criminalisation of pollution is this: We have seen in various cases criminal charges against Masters in all major accidents. What is one of the most irritating things for the shipping community is the long detention of the seamen during the investigation stage. It may take one, two or three years of custody, until we find whether he did something intentionally or wilfully or not. I think this is something very important to be addressed. The detention cannot last for very long; release should be possible on bail and then he should be able to attend the trial represented by a lawyer without necessarily being physically present; of course the penalties, I think to some extent this is taken care of, should be monetary, unless we have some very serious and wilful pollution. I thank you.

Sir Anthony Clarke MR

I am sure the rules about bail vary radically from one State to another. But so far as individual criminal liability is concerned, certainly the new proposed Bill will make no difference whatever. As far as I am aware it is very rare for individuals to be prosecuted for manslaughter but individuals are sometimes prosecuted under Health & Safety legislation, although in the most recent prosecution, in the most recent rail case, they were all acquitted.

Henrik Ringbom – Researcher at the Scandinavian Institute of Maritime Law - Norway

As a legal researcher I am thrilled by the level of legal argument that has been presented here and in that context, I have a question for Judge Mensah. As was mentioned earlier, whether or not a state can really go beyond the provisions of MARPOL in areas under its jurisdiction was one of the major issues being discussed in the negotiations of MARPOL. Eventually this matter was left to the UN Third Conference of the Law of the Sea and it resulted, as in a previous proposal in MARPOL, it resulted in a differentiation between rules on construction, design,

equipment and manning (CDEM) of ships and other sorts of environmental rules. The latter category was according to Article 21 of the Law of the Sea Convention under the State's jurisdiction to prescribe for its territorial sea, while CDEM standards were not - and since this Article was not mentioned in the presentation, I would be interested to hear whether that might have any effect on the conclusion?

Another related issue concerning innocent passage; which, if I understand Judge Mensah correctly, was the main reason for claiming that this Directive is not in conformity with the Law of the Sea.

Would the fact that the enforcement of this rule is taking place in ports affect the issue in any way at all? I don't know the situation about this, but, somehow, it could be thought that the right of innocent passage is a very physical right for a ship to proceed in the territorial sea. I would be curious to hear your views on these two issues. Thank you.

Judge Mensah

Well you are absolutely right when you say that at the Conference in 1973, the MARPOL Conference, there was considerable discussion about proposals that would have given to coastal States the right to apply stricter requirements on foreign ships within their area of jurisdiction. You must remember that in 1973, there was nothing called the Exclusive Economic Zone; it was merely the territorial sea and it was at that time a 3 mile territorial sea. The Conference decided, and that is what is provided for in Art. 9.2, that since the Conference was dealing with the general programme, it would not be wise or practical to touch on those details. So they left it, they said nothing would prejudice the right of the Convention to decide those broad issues which could not be decided. Now, the 1982 Convention addressed the point; it gives to the coastal States the right, not only in Article 21, not to deal with standards for equipment, construction equipment and manning; it also deals with the question of innocent passage and, as I mentioned, if you look at Article 211(4), the Article, which the EU bases itself on, actually deals with and says that "coastal states may in the exercise of sovereignty within their territorial state, adopt laws and regulations for the prevention of pollution from foreign vessels, including vessels exercising their right of innocent passage, but only after 4 sentences it states: "such laws and regulations shall be in accordance with Part 11 of Section 3 not hamper the innocent passage of foreign vessels. The Convention is very clear; a ship is entitled to innocent

passage within the territorial sea, it loses the right for innocent passage if it is engaged in wilful and serious pollution. If it does not, it is entitled to innocent passage. Therefore, if you say that even when it is not guilty of wilful and serious pollution, and it has committed an offence quite clearly, you are doing something which will hamper innocent passage and that was something that was left to the Convention and the Convention has dealt with it in express terms. You can see that when it gives a right to a State to enact stricter legislation, it says in "its territorial sea", the Convention is quite clear "you are allowed to apply stricter rules **to your ships**"; that is a sovereign right and no one can stop you. And you are given a right to control your ships wherever they may be. So if a ship of the UK is in Ghanian waters and it breaches UK law, it is subject to UK law. The UK has got a right to apply stricter standards to a UK ship wherever it may be. What the UK cannot do under the Law of the Sea Convention is to apply stricter law than the international Rules to a ship flying the flag of Ghana merely because it happens to be within the UK territorial sea. That is what we are talking about.

Dimitrios Capaitzis – Naval Architect

I am a navel architect and therefore a layman to legal matters. My question is are we out to catch the culprits or are we out to remedy exposure to the risks of dangers of the sea. We have pollution, we catch the captain; now by extension we want to catch the company, the owner, the charterer etc.; at some stage we will catch the naval architect, who has helped in the building of the ship. I have not heard anyone to say that they will catch the Coast guard, who has arrested the ship, or a builder who may have built a safe ship but forgotten something, or has built too big a ship for the mores of the sea, or the repairer or indeed the Classification Society. We never hear of anyone being caught in those areas and I have never heard of a captain of an oil rig being called to justice. Equally, and this is my question, do we prevent or do we catch the thief? Equally, I am addressing myself to the rule makers and the Law makers; perhaps, they should get some advice from laymen like myself and prevent themselves from being criminalised in making unusual laws.

Lord Hoffmann

I am sure Mr Karamitsos has the general drift of your question and will deal with it in due course.

Captain Costas Stylianos – Andros Maritime, London

I am responsible for the safety of the navigation, the safety of the people and the environmental protection. I would like to ask where we stand in Europe with regard to reception facilities in the various ports for oil residues, and also where we stand with regard to the ports of refuge. This question is for Mr Karamitsos.

Lord Hoffmann

He will make a note of it.

Mr George Tsavliris – Salvor - Tsavliris (London) Ltd.

First, I would like to thank the speakers and, in particular, Mr Pandy Embiricos my close friend and colleague. I am not trying to generalise or differentiate between the presentations of the other speakers. I do feel, however, that Pandy did put the issue across in such an impeccable and clear-cut way.

The second issue is a question for Mr Karamitsos. Following on from Mr Capaitzis' suggestion, as a salvor, it may be an opportune moment, whilst I am here together with some of my shipping colleagues and my naval architecture friends, perhaps to create a universally-fitting set of handcuffs, so that they could be readily available for all of us rather than having to take measurements for size. The point being that the way the proposed legislation stands at present, at some stage in our career, we will all be subject to some form of criminal proceedings. I, particularly being a salvor, perhaps, am exposed to more risk. The other question is, although I have seen a lot of complicated arguments raised by the speakers, I would like to get one clarified definition of what we mean by 'gross negligence' as against what we mean by 'serious negligence'. In my limited experience, I mean in legal terms, I think 'gross negligence' has been more defined in law. Now we bring in the element of serious negligence which would be more confusing. Most importantly, I would have thought that, in law, what would amount to serious negligence would be a matter of opinion rather than a matter of fact. Food for thought. Thank you very much.

Robert Gay – Solicitor – Hill Taylor Dickinson

A question for Judge Mensah. Suppose the UK enacted the Corporate Manslaughter Bill; if for example the owners of a ship were prosecuted for running down a little fishing boat in British territorial waters and it had not been done intentionally or recklessly or with knowledge that a fishing vessel was likely to be hit, would that be a violation of the right of innocent passage?

Judge Mensah

Well it depends, because there are so many reasons for losing the right of innocent passage; it could be conduct prejudicial to the security, conduct prejudicial to the health regulations; certainly there is no reference to conduct that will amount to negligent damage to persons. And therefore if the flag state of the vessel felt, and I think that they will have good reason to, I am not able to say that in all cases they inevitably will, if they felt that the action taken was contrary to the Law of the Sea Convention and if they were disposed to bring an action, then they could certainly do because the Convention says "if a coastal state in the exercise of its sovereign rights within its area goes beyond what is permitted under the Convention, then there is a dispute and that dispute will then go before the Court". I can say at this stage, because 3 days ago I ceased to be a judge on the Tribunal for the Law of the Sea, so all I can say is that they will either have to go before the Tribunal for the Law of the Sea or to the International Court of Justice or to an arbitral tribunal.

I believe that it is very important and I must say that when I was at the Court I was a little surprised that after the Prestige incident and after other incidents, nobody ever thought of seeking the views of a Court that had been established by the very same States and supported by the financial contributions of the same States; now that I am no longer there, I can say that in the light of the heat that has been generated, I believe that it is also very important to remember that, unlike many treaties in the world, the Law of the Sea Convention is one of the few treaties which has the European Community as a separate member state. The EC itself is a State party to the Convention and therefore I think that with all the heat that has been generated it will be in the best interests of all concerned, if the matter were to be presented to the International Tribunal for the Law of the Sea for a clarification, which I think would not only be useful for the states and their shipping industry but would, hopefully, be

of interest also to the Commission because they would then know a little more what the limits of their powers are and that, I think, would be something very useful.

Nicholas Kalyvas - Hellenic Register of Shipping

I would like to ask, after the introduction of the term "serious negligence", what is now the remaining negligence - the permissible human mistake - and how will it be considered by the various courts in the Member States. Thank you.

Lord Hoffmann

The time for drinks draws on and there is time for one or two more questions before I ask Mr Karamitsos to wind up the debate.

Philip Embiricos

My name is Philip. I am Greek, I have the name of one of the speakers and it is not Karamitsos . By now you must know who I am. As the law of the blood prevents me from asking embarrassing questions to one of the speakers, I will direct my efforts to Mr Karamitsos. Mr Karamitsos, you have said that this new legislation is going to improve safety. Now as a poor technical person, I would like to ask you two questions in this respect.

The first one is that as we have heard from the Prime Minister of Malta, this type of legislation is going to discourage seafaring which means that seafaring will go from traditional nations to new nations which have not got such traditions so there is an increased risk of accidents and also there is a problem of less communication, so that is one of the big problems. The second problem that I see and that we have also learned from American legislation is that by over - criminalising people you get people not to talk to any authorities but to talk to lawyers. And I thought that the purpose of safety is to try to limit the number of accidents and casualty investigation is one of the most important tasks with which we should go ahead and this type of action is going to minimise this quest.

Lastly you said that you want to 'responsibilise' the actors in shipping. But as somebody else said you have very carefully avoided the national or local authorities

and I think that is something that ought to be put into the system. Thank you very much.

Lord Hoffman

Thank you members of the audience. Now I think this is the point at which Mr Karamitsos goes down the list of all the questions that have been directed at him.

Sir Anthony Clarke MR

Would I be allowed to say one word before he does that. We've obviously got large numbers of representatives of the shipping industry here. We have not so far heard from any representative of the next of kin of those who may have lost their lives in a very serious disaster. I think if there were somebody here, they would say that the purpose of a criminal statute was to help to inculcate a culture of safety in the relevant industry. They would say that that was the purpose of the Health and Safety at Work Act, and that indeed is the purpose of the new Corporate Manslaughter Bill. I just feel that that is a point which should be made because there does not appear to be any representatives from that quite powerful group here this evening .

Lord Hoffmann

Thank you. Now Mr Karamitsos.

Answers to questions by Fotis Karamitsos

Indeed it has been a very interesting debate. It is not the first time I have been in such debates, but it is the first time I have seen such a lively audience, I have to admit, and this was indicative at the end of the applause the last speaker got. I think he has made a very good case. Now, let me emphasise, as I said in my speech, that the legislation produced is not the Commission's legislation. The European Commission made its proposal, and the final text is the product of the European Community, represented by its member states, and the European Parliament, which by a large majority, adopted this text. The text is substantially different from the original Commission's proposal. But, of course, I have to defend here the final adopted text. Of course, the fact that 300 people in the audience are against this text is evident and I may have to address their misgivings.

I think it was made clear that there are two differences on this text vis à vis the international regime: The first difference concerns the intention to 'responsibilise' the whole transport chain. We don't want to let only the captain and the shipowner to be responsible for pollution damage caused. I don't want to prejudge what the findings of the Erika accident will be at the end, but, , there maybe somebody else found responsible by the courts, not the owner, not the captain. So in this first element, there is a lacuna in the International System. I think Judge Mensah explained this a little bit and indeed we may have to come together at the IMO now that we have this Directive, and say: ok, you have to improve the International System to include everybody in the chain of responsibility; to 'responsibilise' all the others, even the designer of the ship, even the classification society, even the maintenance man down in the shipyard, or somebody else. I think it is important in that respect - by distributing the potential responsibility - to 'responsibilise' everyone, and this is something about which, I think, there was not any dispute during the discussions in the Parliament.

The second issue is in relation to the differences between the Directive on the one hand and MARPOL and UNCLOS on the other. I am not a lawyer, but the advice of the lawyers of the three institutions, the Commission, the Council and the European Parliament was not what our international Judge said. I mean it is a business for lawyers, indeed. One solution to find the answer is for those that dispute the legality of the texts to go to the International Court of Justice and ask: is the Directive against UNCLOS and MARPOL? I am not a lawyer, but when I read article 211(4)(5), I ask myself why is there this differentiation between the territorial seas and the extra-territorial seas? I think it is important also to make reference to how all member states - not only the EU, but US, Canada and Australia - treat this kind of "contradiction" between MARPOL and UNCLOS. Clearly, in many of these cases, the criterion is 'simple negligence' that applies to the territorial sea. I can tell you, we have checked all the member states' legislation and all of them, already, if the argument we heard today is true, then all of them might be infringing their obligations under MARPOL! But it is not for me to judge, it is for the courts to judge. On the other hand I think there is a misrepresentation, which has grown. I think it has been said, sometimes, that on the one hand we have "reckless behaviour" and on the other we have just "negligence". But to be precise, on the one hand we have "recklessness

with knowledge that damage would be done" and on the other we have "gross or serious negligence". Our lawyers have said that gross or serious negligence are the same. Although for us this is not an issue, there is a differentiation certainly between negligence and gross or serious negligence. With 'serious negligence' we got a higher threshold, otherwise we would not have it there. I haven't heard of any case and we haven't been advised of any case that the intentional or reckless and with knowledge of the damage test has ever been challenged in a court. It is extremely difficult to do that; so for that reason the member states decided to lower the threshold. Don't forget Europe is, as I said earlier, seventy thousand kilometres of coast. In these seventy thousand kilometres there are many people who are very keen to protect their interests. My colleague from Spain expressed what the feelings in Spain were after the Prestige and the same it is, I can tell you, in other member states. When the Prestige happened, even in Denmark, the reaction was much greater than was in other member states. They see all the oil transporters passing through their door and they are afraid of what may happen to them; so there it was, indeed, where the whole uprising of the European population started. We are not talking about manslaughter here, but still, I think, that people that suffer from pollution by losing their livelihood are feeling very very sensitive about these things.

So I believe there is this very big difference between the gross negligence and recklessness with knowledge that damage will be done. I think we should keep this difference and not talk only about reckless behaviour. Indeed, it is the intention of the legislator. So I would say to Mr Embiricos in that respect that the matter is not so simple; it is indeed complicated and the fact that gross negligence has been chosen, in particular, with respect to the territorial sea has been much discussed.

Now it is said that the Directive is unilateral; I don't think so; it is something that fully respects the international obligations of the member states. All of them are contracting parties to UN Law of the Sea as well as the European Community; so we believe we have respected our obligations under the UN Law of the Sea and under MARPOL. How do we interpret article 9(2) of MARPOL and articles 211(4) and 211(5) of UNCLOS and the other provisions? This is something about which other people have different opinions but, as I said, the long discussions in the Council and the Parliament have produced the present results.

With regard to the risks of the salvage operators, I think we may be too scared about something which has not been intended. I wouldn't say that the Directive as it is done aims to catch the salvage operator who is called after the accident; so you cannot say that the salvage operator, in principle, has aggravated the reasons of the accident; we haven't heard that before; I see your point Mr Tsavliris, but it is not the intention of the Directive that the salvage operators will be part of the chain. To come back to Mr Embiricos's point, I made it explicit in my speech that the Port Authorities are part of the chain as well; everybody in a Port Authority found responsible can be found guilty by the judge as long as they have contributed to or are responsible for the accident and the pollution. This is made absolutely clear in the text.

Whether the Directive undermines IMO, this is a big, big issue. We don't believe that, and we have always said so. If you look at the thirty pieces of Community legislation on safety, security and environmental protection, they are transposing the IMO Conventions. The Community law imposes them on the member states. We have the Court of Justice to apply the legislation. We have taken member states to the Court concerning the ports of refuge; last week I saw a list of about 5 or 6 member states, which had not fulfilled their responsibilities vis à vis their port reception facilities. We are going to take them to Court unless these things are being corrected. So I think, as I said last time when I was in this room two years ago, and I will say it again, the European Union is the biggest support of IMO in that particular respect. We don't believe we have done something against MARPOL. Indeed we have to come together and improve MARPOL on two aspects: the one is to enlarge the chain of responsibility and the second is to cover the captain, the seafarer and the owner under the same conditions as are covered under the Directive, because the seafarers are not explicitly referred to in MARPOL. Our legislation now includes the sea faring side under the same conditions of Article 9(b).

With regard to questions about discouraging seafarers, the problem of lack of officers and seafarers in Europe has nothing to do with this piece of legislation. I think we give a bad service to the seafarers, if we exaggerate what we have in this text. Lack of seafarers in Europe has its roots in other reasons . We are discussing this with the current Presidency of the Union, with the UK. We are going to address it again but the

matter is much deeper. It has to do with a way of life of the European youth; it has to do with the salaries these people are getting if they are going on ship, or if they are going on land, and many other reasons. If we want really to bring seafarers on board our vessels we have to join forces; the governments, the local authorities, the shipowners and everybody to make it possible for new people to come on board. I just want to mention what Danish shipowners have done in conjunction with the government and how they get every year a number of cadets: they pay for them, they train them and they keep them afterwards on board the ships with good salaries. I think that is something to keep in mind. Indeed, it is true that we want to protect them; it is true that, if we make too much incorrect and bad publicity about the Directive, which protects them more than the current national legislation, we will scare them. As I said, in the current national legislation the simple negligence criterion in territorial waters applies in almost all member states and throughout the world. At least here, we have analysed the laws of the member states, I can give you a whole list.

In conclusion, Mr Chairman, I know that this piece of law has created certain difficulties. I know that this piece of law has perhaps been misrepresented on its effects. I believe, and indeed we hope, that it will 'responsibilise' the people involved in shipping more and it is not our intention to put them in jail. As I said before, look at the text and you will see that no seafarer will be put into jail because there is full respect of Article 230 of UNCLOS. It is clearly written down in the Framework Decision in Article 4.8 and in Article 6 dealing with corporate responsibility that the offence is punished in line with UNCLOS with fines only, nobody is put into jail. I have tried to give answers to some of the questions.

Lord Hoffmann

Thank you very much, I am sure that you all agree that it has been a very lively debate. Like the Master of the Rolls, I also regret the absence of anyone to speak for the drowned persons or the oil-soaked penguins. But there it is, it has been extremely lively all the same and I ask you, in conclusion, to thank the four speakers that we have heard this evening.