

## CHAPTER 12

# THE SHIPMASTER AND THE ENVIRONMENT

*“How inappropriate to call this planet Earth when it is clearly Ocean.”*

Arthur C. Clarke, *Nature* (8 March 1990).

**§ 12.0 Pollutions from Vessels in Context.** Pollutions from vessels<sup>1</sup> arise through either operational or accidental discharges. The public awareness of accidental discharges from the *Torrey Canyon* (1967) and the *Amoco Cadiz* (1978) released a wave of regulation in Europe designed to prevent marine pollution

1. Conventions and protocols relevant to pollution matters are: International Convention for the Prevention of Pollution of the Sea by Oil 1954, as amended, 1971 (Great Barrier Reef) Amendments, 1971 (Tanks) Amendments; Convention on Liability of Operators of Nuclear Ships and Additional Protocol 1962; International Convention on Civil Liability for Oil Pollution Damage 1969; Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969; Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969; Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969; (TOVALOP) Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution 1969, as extended by the 1987 Supplement, Incorporating Amendments; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969; Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil 1973, as amended; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, as amended; Protocol of 1976 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971; Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971; Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971; Protocol of 2000 to the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971; Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992; (CRISTAL) Contract Regarding a Supplement to Tanker Liability for Oil Pollution 1971 as amended; (HNS 1996) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; Convention on the Prevention of Marine Pollution by Dumping of Waters and Other Matter 1972, as amended; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, as amended; (MARPOL 1973) International Convention for the Prevention of Pollution from Ships 1973; (MARPOL Protocol 1978) Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships 1973, as amended; Optional Annex III as amended; Optional Annex IV; Optional Annex V as amended; (MARPOL Protocol 1997) Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships 1973, as Modified by the Protocol of 1978; 2005 Amendments; Offshore Pollution Liability Agreement 1974; (Basel Convention 1989) Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, as amended; 1995 Amendment; (Basel Protocol 1999); Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and their Disposal 1999; International Convention on Oil Pollution Preparedness, Response and Co-operation 1990; Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000; International Convention for the Control of Harmful Anti-fouling Systems on Ships 2001; and International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004.

and to punish those who pollute severely. A similar wave was released in the United States with the *Exxon Valdez* (1989). Those regulations affect the shipmaster and are far from being neutral. The main international convention regulating pollution from vessels is the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) and its 1978 Protocol, which cover all forms of pollution from ships except dumping or solid waste.

**§ 12.1 The Growing Exposure of the Shipmaster to Criminal Sanction as a Result of the Rise of Environmental Regulation.** The hybrid status of the shipmaster as commander of the ship, as agent of the owner and as an employee-servant of the owner-master makes the owner and his liability insurer the natural recipients of compensation claims. The shipmaster has become the subject of an ever-increasing criminalisation for his acts under various domestic environmental statutes supported by international conventions.<sup>2</sup> By making environmental statutes stricter and by increasing the lengths and costs of punishments available, a shipmaster or crew member may find that what once would have been considered an act of innocent and simple negligence will place him in the most stringent and unforgiving area of the criminal law.<sup>3</sup> The new interpretation of civil negligence in these cases has nearly made the pollution of navigable waters criminal *per se*. Under the statutes, the usually recognized and understood phrases “failed to perceive a substantial and unjustifiable risk” or “a gross deviation from the standard of care of a reasonable person”<sup>4</sup> or “gross negligence so extreme that it is punishable as a crime”<sup>5</sup> are abandoned and a mere proof of “simple negligence” may be sufficient for a zealous prosecutor to obtain a conviction under a particular act. Negligence may not even be a factor if the person is charged under a strict liability statute.<sup>6</sup> These environmental laws ease the burden of proof resting with the government for

<sup>2</sup>. See Edgar Gold, *Command: Privilege or Peril? The Shipmaster's Legal Rights and Responsibilities*, (Background paper, 2003); “It is the ship which has caused an offence or pollution and not the owner. Therefore the maximum that can happen to the owner is that he may have to abandon his ship in the hands of those who have suffered from any of it. Before the *Torrey Canyon* spilled nearly 90,000 tons of oil, when she stranded on Sudbury Reef in 1967, there were no known cases of shipmasters being charged criminally. In this case, it was reported that the shipmaster of the *Torrey Canyon* tried to save two hours of steaming time by taking a shorter route to avoid four days berthing delay. In the process, the ship ran aground due to insufficient depth of water en route. Many beaches on both coasts of the English Channel were polluted and millions of dollars' worth of loss to fisheries and other civil and marine infrastructure [resulted].” See also Rémond-Gouilloud, *Anatomie d'un Monstre Marin: la Loi du 5 juil. 1983 Réprimant la Pollution des Mers par les Hydrocarbures* [*Anatomy of a Sea Monster: The Statute of 5 June 1983 Regulating Marine Pollution by Hydrocarbons*], DMF 703 (1983) (Fr.). In the wake of the *Amoco Cadiz* oil spill, the French legislature adopted a Law on 2 January 1979 making the shipmaster the scapegoat of marine pollution. The shipmaster was exposed to FF 5m (double in case of repetition) and five years imprisonment. For Ms Rémond-Gouilloud, the focus of the repression on the shipmaster was excessive and unrealistic. The Law of 2 January 1979 was later repealed but the current statutory instrument, adopted on 5 July 1983 remains very severe with the shipmaster.

<sup>3</sup>. See Rémond-Gouilloud, *Anatomie d'un Monstre Marin: la Loi du 5 juil. 1983 Réprimant la Pollution des Mers par les Hydrocarbures* [*Anatomy of a Sea Monster: The Statute of 5 July 1983 Regulating Marine Pollution by Hydrocarbons*], DMF 703 (1983) (Fr.).

<sup>4</sup>. NY PENAL LAW § 15.05 (2009) – definition of criminal negligence.

<sup>5</sup>. BLACK'S LAW DICTIONARY (7th edn., 1999).

<sup>6</sup>. Thomas Russo, *Criminal Liability in Maritime Accidents*, 7 USF MAR. LJ 151 (1994).

proof of *mens rea* and *mens culpa* and often even remove the burden of proof altogether if the government is prosecuting under a strict liability theory and statute.<sup>7</sup> In the case of a hydrocarbon pollution, this means that the government must show only that the spill was caused by the failure to exercise due care on the part of the individual or the company. Even where the spill occurred because of a lack of equipment or a lack of functioning equipment, even if that equipment were not required by law, prosecutors have cited that lack of equipment as negligent for purposes of criminal sanctions.<sup>8</sup> Further, the shipmaster is often subject to detention under material witness statutes, sometimes in gaol, even when not charged, because of the court's perceived risk of flight by a shipmaster because of his work.<sup>9</sup> Of all the conventions listed *supra* only MARPOL is both exclusively concerned with prevention of pollution and concerns the shipmaster. SOLAS, which also contains relevant prescriptions regarding the shipmaster, is dealt with in Ch. 10, Shipmasters and Safety and Seaworthiness.

**§ 12.1.1 MARPOL.** MARPOL was adopted at the International Conference on Marine Pollution convened by the IMO in 1973 to replace the 1954 Oil Pollution Convention found inefficient after the oil spill caused by the *Torrey Canyon* (1967). MARPOL 73/78 sets out basic definitions. Harmful substances include “any substance which, if introduced into the sea, is likely to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”.<sup>10</sup> Discharge covers intentional and unintentional releases from a ship, including “any escape, disposal, spilling, leaking, pumping, emitting or emptying”, [but not dumping within the meaning of the 1972 London Convention], releases directly arising from exploration and exploitation of seabed mineral resources, or releases for certain scientific research.<sup>11</sup> MARPOL lays out

7. David G. Dickman, *Preparing for the Worst Scenario: Criminal Enforcement of Environmental Laws in the Maritime Context*. American Law Institute, SE72 ALI-ABA 1 (2000).

8. David G. Dickman, *Preparing for the Worst Scenario: Criminal Enforcement of Environmental Laws in the Maritime Context*. American Law Institute, SE72 ALI-ABA 1 (2000) [“cited that lack of equipment as negligence for purposes of the Clean Water Act criminal sanctions”]. See also D. Nixon, E. Golden & L. Kane, *The Legacy of the North Cape Spill: A New Legal Environment for the Tug and Barge Industry*, 4 OCEAN & COASTAL LJ 209, 215–18 (1999).

9. E.g. in this respect the treatment of the shipmasters of the *Prestige* and the *Erika*. The *Prestige* sank on 19 November 2002, because of plating failures in weather. The shipmaster, jailed in Spain and released after 83 days on an exorbitant bail of €3 million, was not allowed to go home to Greece even though no case of error of judgement had been determined nor was there any talk of criminal negligence warranting arrest. The Maltese-flagged, 25-year-old *Erika* broke in two and sank in the Bay of Biscay in 1999 in poor visibility, gale-force winds and up to six metres swell, while *en route* from Dunkirk to Livorno laden with 31,000 mt of fuel oil. Media and the international maritime community praised the master for his seamanship which ensured rescue of all 26 crew members by helicopters from the ship's life rafts and the sinking stern section of the ship. The master was arrested in France. Released under international pressure, he was not allowed to go home to India until February 2000. The shipmaster remained so traumatized by his treatment that he did not appear before the First Instance court in Paris during the *Erika* trial in May–June 2007. See *Hebei Spirit*, *supra*. The criminalisation problem extends beyond pollution. Prosecutors see easy case victories against seamen for various reasons. See *Virgo*, *supra*.

10. MARPOL 73/78, Art. 2(2).

11. MARPOL 73/78, Art. 2(3).

certain exceptional circumstances where the discharge of oil is acceptable.<sup>12</sup> MARPOL covers ships flying the flag of a party or operate under the authority of a party, but it does not apply to warships or state-owned ships used only on governmental non-commercial service.<sup>13</sup> MARPOL mandates the parties to adopt national legislation prohibiting any violation of its requirements and establishing sanctions for such violations and to accept certificates from other parties of MARPOL as their own certificates.<sup>14</sup> A ship in the port or offshore terminal of a state party may be subject to an inspection to verify the existence of a valid certificate unless there are “clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate.”<sup>15</sup> Where a vessel is found non-compliant, the inspecting party must ensure that the ship does not sail “until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment.”<sup>16</sup> MARPOL 73/78 requires parties to apply the Convention to ships flying flags of non-party states so as to ensure that “no more favorable treatment is given to such ship”.<sup>17</sup> MARPOL 73/78 also provides for the detection of violations and enforcement, such as in-port inspections to verify whether ships have discharge harmful substances, the communication and information to the IMO, and technical cooperation.<sup>18</sup> MARPOL defines detailed standards covering oil (Annex I), chemical and liquefied gases in bulk (Annex II), dangerous goods in bulk and packaged form (Annex III), sewage (Annex IV), garbage (Annex V), atmospheric pollution (Annex VI).

**§ 12.1.2 *The Shipmaster’s Duties under MARPOL.*** Whenever an incident occurs to a ship or a defect is discovered which caused or may have caused a discharge, the shipmaster must establish a detailed report and communicate it to the appropriate authorities.<sup>19</sup> Regulation 26 of Annex I of MARPOL requires that all ships carry on board a so-called Shipboard Oil Pollution Emergency Plan, intended for use following any accidental discharge of oil, cargo or bunkers. In addition, Regulation 16 to Annex II of MARPOL requires ships certified for the carriage of a noxious liquid substance in bulk to carry a so-called Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances.<sup>20</sup> The plans must be made available to assist the crew in dealing with an unexpected discharge and to set in motion the necessary actions to stop or minimize the discharge and to mitigate its effects. The plan must include guidance to assist the shipmaster in meeting the demand for a major discharge. The plans must also include the procedure to be followed by the shipmaster to report an oil pollution incident. General principles for reporting incidents

12. E.g. for oil pollution, *see* MARPOL 73/78, Annex I, reg. 4.

13. MARPOL 73/78, Art. 3(1) and (3).

14. MARPOL 73/78, Art. 5(1) and (2).

15. MARPOL 73/78, Art. 5(2).

16. MARPOL 73/78, Art. 5(4).

17. MARPOL 73/78, Art. 5(4).

18. MARPOL 73/78, Art. 6, 8, 11 & 17.

19. Protocol I to the MARPOL Convention: Provisions Concerning Reports on Incidents Involving Harmful Substances.

20. The International Chamber of Shipping provide model SOBEP and SMPEP.

involving marine pollutants and other harmful substances, including packaged dangerous goods, were adopted by IMO in Assembly Resolution A. 851(20) in 1997. These principles extended the requirement to make reports on incidents involving damage, failure or breakdown of a ship, its machinery or equipment where such failures could give rise to a significant threat of pollution.

**§ 12.1.3 Shipmaster's Liabilities under MARPOL.** MARPOL instituted a strict liability scheme toward shipowners. Very little is said, however, about the shipmaster's liability. But the shipmaster is expressly referred to in the exception provided by Regulation 4 of Annex I of the Convention, which excludes the owner's and shipmaster's liability under MARPOL for discharges resulting from damage to a ship or its equipment, unless they acted with intent or recklessness.<sup>21</sup> The express reference to the shipmaster in the exception makes it clear that he was seen as a potential defendant, along with the owner. However, whereas the justification for imposing strict liability on the owner is clear, considering he is the person taking the risk of operating the ship over which he has the ultimate control, and the one whose activity is insured, allowing the shipmaster to be liable regardless of his fault seems an oddity. But most national legislation encompasses the shipmaster among the scope of persons subject to charges under a strict liability basis. In this respect, the Australian courts have found an equitable compromise, finding the shipmaster liable for a strict liability offence, but exercising discretion to dismiss the charge against him in view of his lack of fault.<sup>22</sup> But the lack of clear guidance in the Convention subjects the shipmaster to a disparity of regimes,<sup>23</sup> so it is fair to say that the shipmaster's fate hinges entirely on the laws of the arresting state. The broad language provided by the MARPOL Convention can have grave implications regarding the shipmaster.<sup>24</sup>

**§ 12.2 UNCLOS 1982.** UNCLOS 1982 provides that coastal states have the right to enforce pollution standards to maintain marine resources and to preserve and protect the marine environment within their exclusive economic zones.<sup>25</sup> Port

21. MARPOL 73/78, Annex I, reg. 4.2.

22. *Filipowski v. Fratelli D'Amato Srl and Ors* [2000] NSWLEC 50; *Thorneloe v. Filipowski* [2002] NSWCCA 213; *Filipowski v. Island Maritime Ltd* [2006] NSWLEC 750 cited in COLIN DE LA RUE & CHARLES ANDERSON, SHIPPING AND THE ENVIRONMENT 1077-8 (2009).

23. Which are detailed in Part III.

24. Just prior to the turn of the century, the maritime press buzzed with reports that the United Arab Emirates (UAE) was considering the death penalty for shipmasters found guilty of polluting the area's waters. The UAE was only considering the death penalty for shipmasters found guilty of *wilful* acts of pollution, but the term "wilful act" has not been internationally defined and is still a hazy term in national and local laws. *Shipmasters in Trouble*, INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATIONS. NEWSLETTER NO. 24, (Paul Owen ed., International Federation of Shipmasters' Associations, London, UK, Sept. 1999).

25. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (Hornbook Ser., West Pub., 1994); LOS Convention, Art. 211(2) and (5). The international law of the sea also upholds the authority of the coastal state to bring proceedings against an offending foreign vessel that is violating international or coastal state norms or pollution norms or standards. A coastal state also may enforce national and international pollution control standards against ships that come into its ports or exclusive economic zone and may undertake reasonable inspections of such vessels.

states may also enforce pollution standards and, when the evidence warrants, they may also institute proceedings with respect to ship discharges occurring on the high seas. Cooperation with the flag state is necessary whenever practicable.<sup>26</sup> The Convention provides coastal states with specific powers to take action when a major maritime accident threatens their coastlines and waters with serious pollution.<sup>27</sup> Such powers include boarding, inspection, legal proceedings and detention of the vessel. However, even these powers are strictly limited by a number of specific and general enforcement safeguards in the CLOS Convention, including:

1. the duty not to endanger the safety of navigation or create other hazards to a vessel, or bring it to an unsafe port or anchorage;<sup>28</sup>
2. the requirement to only impose monetary penalties for pollution offences outside the territorial sea. Only monetary penalties may be imposed within the territorial sea unless the pollution resulted from a willful act;<sup>29</sup>
3. that the rights of the accused should be considered in all aspects of any legal proceedings;<sup>30</sup>
4. that arrested vessels and their crews should be promptly released on the posting of a reasonable bond or other security;<sup>31</sup>
5. the requirement that violations of coastal state regulations in the Exclusive Economic Zone may not include imprisonment.<sup>32</sup>

UNCLOS 1982, Article 97 provides the highest general level of international law establishing rules on who has penal jurisdiction over seafarers involved in an accident at sea, including those exercising the right of innocent passage.<sup>33</sup>

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the shipmaster or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag state or the state of which such person is a national.
2. In disciplinary matters, the state which has issued a shipmaster's certificate or certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the state which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.<sup>34</sup>

<sup>26</sup>. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (Hornbook Ser., West Pub., 1994). See also LOS Convention, Art. 218.

<sup>27</sup>. United Nations Convention on the Law of the Sea, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference. Arts. 220 & 221. United Nations, NY, 1983.

<sup>28</sup>. *Ibid.*, Art. 225.

<sup>29</sup>. *Ibid.*, Art. 230(1) & (2).

<sup>30</sup>. *Ibid.*, Art. 230(3).

<sup>31</sup>. *Ibid.*, Art. 73(2).

<sup>32</sup>. *Ibid.*, Art. 73(3).

<sup>33</sup>. *Ibid.*, Art. 97.

<sup>34</sup>. *Ibid.*

Coastal states are given specific rights to intervene when a ship on the high seas is involved in an accident that is likely to cause serious pollution damage to the coastal area.<sup>35</sup> Although UNCLOS 1982 provides coastal states with very wide powers to take action, it also lays down very specific safeguards designed to ensure that the rights of the flag state, shipowner as well as shipmaster and crew, are protected.<sup>36</sup> As seen over nearly the past two decades, it is becoming common practice to immediately detain the shipmaster whenever there is a breach of coastal state laws or port regulations, when a collision or stranding occurs, and especially where there is a pollution incident or maritime accident anywhere near a coastal state's territory.<sup>37</sup>

**§ 12.3 Domestic and Regional Legislations.** The domestic and regional legislations share the common feature that, during the criminal investigation of a maritime incident, the focus of the investigation for criminal liability is first on the shipmaster and crew members, then on the owners or managers and eventually the corporate officers of the organizations concerned. Evidence gathered during an investigation in anticipation of a civil or administrative enforcement action can be used in criminal prosecutions.<sup>38</sup>

**§ 12.4 United States.** The United States is a member of many of the international conventions and has implemented Acts much like the international conventions to which the United States is not a party:

1. The Oil Pollution Act 1990 (OPA 90);<sup>39</sup>
2. Comprehensive Environmental Response, Compensation and Liability Act 1980<sup>40</sup> (CERCLA or Superfund); Superfund Amendments and Reauthorization Act 1986 (SARA);

<sup>35</sup>. International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties 1969.

<sup>36</sup>. *Ibid.*, Arts. III & V. See also Edgar Gold, *Command: Privilege or Peril? The Shipmaster's Legal Rights and Responsibilities*, (Background Paper, 2003).

<sup>37</sup>. A. K. Bansal, *Shipmaster as Captain, Manager and Scapegoat*, INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATIONS. NEWSLETTER NO 40, (Paul Owen ed., International Federation of Shipmasters' Associations, London, UK), Sept. 2003. See also D. Nixon, E. Golden & L. Kane, *The Legacy of the North Cape Spill: A New Legal Environment for the Tug and Barge Industry*, 4 OCEAN & COASTAL L.J. 209, 215–18 (1999).

<sup>38</sup>. David G. Dickman, *Preparing for the Worst Scenario: Criminal Enforcement of Environmental Laws in the Maritime Context*. American Law Institute, SE72 ALI-ABA 1 (2000).

<sup>39</sup>. OPA 90 is the current United States implementing statute of MARPOL 73/78. OPA 90 did not repeal prior statutes, nor did it pre-empt the right of states to pass their own laws on oil pollution from ships, and this right has been widely used by coastal states. The *Exxon Valdez* incident in 1989 is what prompted the US to quickly enact pollution prevention and punishment statutes. OPA 90 makes the "responsible party" for a vessel from which oil is discharged strictly liable for removal costs and damages. OPA 90 was arrived at only after various other United States acts and legislation had been adopted, namely: Federal Water Pollution Control Act (FWPCA); Trans-Alaska Pipeline Authorization Act (TAPAA); Outer Continental Shelf Lands Act Amendments (OCSLA); and, the Deep-water Port Act (DWPA).

<sup>40</sup>. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.

3. The Clean Water Act 1977 (formerly Federal Water Pollution Control Act Amendments of 1972);
4. The Refuse Act;
5. The Migratory Bird Act.<sup>41</sup>

The United States has largely favoured strict liability regimes regarding oil spill and other vessel source pollution incidents.<sup>42</sup> In the event of an oil spill, a responsible party must not only manage the cleanup of the oil and incur the civil liability resulting from the spill, but must also protect itself from the criminal liability that now exists due to the available and willing use of strict criminal liability laws by the federal government and coastal states. As stated by the US Coast Guard's environmental enforcement directive, a company, its officers, employees and mariners, in the event of an oil spill "could be convicted and sentenced to a criminal fine even where [they] took all reasonable precautions to avoid the discharge".<sup>43</sup> The United States environmental protection against environmental pollution from ships rests largely on the Coast Guard, which is the lead federal agency for the initial investigation of pollution incidents that occur in the coastal zone. The increased scrutiny of vessels has resulted in the US Coast Guard discovering that many "Oil Record

<sup>41</sup> *Statement of American Waterway Operators*, US Senate Committee on Environment & Public Works Hearing Statements (2003). available at [epw.senate.gov](http://epw.senate.gov). The Migratory Bird Treaty Act (MBTA) provides that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . .", a violation of which is punishable by imprisonment and/or fines. Prior to the *Exxon Valdez* oil spill in 1989, the MBTA was primarily used to prosecute the illegal activities of hunters and capturers of migratory birds, as the Congress originally intended when it enacted the legislation in 1918. In the *Exxon Valdez* case itself, prior to the enactment of OPA 90, the MBTA was first used to support a criminal prosecution against a vessel owner in relation to a maritime oil spill, and this "hunting statute" has been used since against the maritime industry. The Refuse Act was enacted over 100 years ago at a time well before subsequent federal legislation essentially replaced it with comprehensive requirements and regulations specifically directed to the maritime transportation of oil and other petroleum products.

<sup>42</sup> Strict liability statutes do not require the government to prove negligence or intent and, instead, only require the government to prove that the prohibited act occurred. The fact that the pollution act or oil spill was accidental makes no difference at all. Strict criminal liability imposes criminal sanctions without requiring a showing of criminal knowledge, intent or even negligence. Similarly, the Migratory Bird Act, only requires the government to show that just one, single migratory bird was harmed or killed as a result of spilled oil or some other pollutant *See* David G. Dickman, *Preparing for the Worst Scenario: Criminal Enforcement of Environmental Laws in the Maritime Context*, American Law Institute, SE72 ALI-ABA 1 (2000).

<sup>43</sup> *Criminal Enforcement of Environmental Laws*, US Coast Guard Commandant Instruction M16201.1 of 30 July, 1997. *See also*, David G. Dickman, *Preparing for the Worst Scenario: Criminal Enforcement of Environmental Laws in the Maritime Context*, American Law Institute, SE72 ALI-ABA 1 (2000): "Vessel owners, operators, and crewmembers who do not understand the basics of criminal investigations may consent to otherwise improper searches, waive privileges to confidential information, or fail to track evidence. In a worst case scenario, these individuals may falsify, conceal or destroy evidence in a misguided panic, turning what most in instances will be a civil enforcement case into a criminal case. These penalties and collateral consequences are potentially devastating to companies and individuals alike. For instance, in Fiscal Year 1999, environmental cases resulted in \$61.6 million in criminal fines. The figure for Fiscal Year 1998 was \$92.3 million. These figures do not include civil penalties, which also set records in Fiscal Year 1999. The statutory maximum prison term for most felony violations ranges from two to five years, and even misdemeanors, such as negligent discharges under the Clean Water Act, can result in up to a year in prison. Additionally, multiple violations can be stacked, meaning that even misdemeanor violations may result in jail terms of over one year. This has resulted in record levels for years of prison time, with criminal defendants sentenced to 208 years of prison for environmental crimes in Fiscal Year 1999."

Books" were filled in wrongly in order (it said) to hide the deliberate discharge of oil in breach of MARPOL or other regulations by by-passing or flushing the oily water separator. As presentation of a false document is a crime under US law, action can be taken against the wrongdoers even in circumstances where the actual discharge has taken place in waters outside US jurisdiction, because the United States has accepted MARPOL.<sup>44</sup>

The US Coast Guard has established a task force, called the Oily Water Separation Systems Task Force (OWSSTF), essentially to investigate matters concerning by-passing of the oily water separator. Physical investigation is carried out by the investigative arm of the Coast Guard. Such investigation may be triggered by the observation of possibly false entries in the Oil Record Book or by the mere discovery of suspicious-looking equipment in the engine room, such as flexible hoses and flanges, or due to observation of tell-tale signs, such as a break in paint at flanges or recently-painted flanges, which may indicate the use of such suspicious equipment. United States authorities have made no attempt to disguise the fact that they will jail shipmasters and chief engineers of ships which commit pollution offences, even when they occur outside its waters.<sup>45</sup> OPA 90 imposes criminal liability for negligent violations and provides for punishment of up to one-year imprisonment and/or fines of up to \$32,500 per day. The punishment for each knowing violation was increased by OPA 90 to up to three years' imprisonment or fines between \$5,000 and \$50,000 per day.<sup>46</sup> Furthermore, OPA 90 added or substantially increased criminal penalties

<sup>44</sup>. In *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 625 (citing 33 CFR § 151.25), the trial court held that UNCLOS arts. 216 and 230 limited the enforcement authority of a port state to prosecute violations of national laws by foreign-flagged vessels outside of the waters of the port state. The Court of Appeals stated that these UNCLOS provisions did not represent the full picture of the international enforcement scheme under UNCLOS in relation to the protection and preservation of the environment. It further said that the UNCLOS limitations did not apply to the "in-port, oil record book offences charged in this case". The UNCLOS 1982, Art. 218 provides port states the authority to institute proceedings based on pollution violations that occurred entirely outside the Territorial Sea or the Exclusive Economic Zone of the port state. Essentially, the court determined that nothing in UNCLOS 1982 limits the power of the United States, as the port state in this matter, to pursue "violations of marine pollution law that occur outside of its ports, and in some circumstances, outside of its coastal zones". The decision approves criminal prosecutions of owners, operators and shipmasters of other-flag vessels in the United States for alleged MARPOL violations on the high seas.

<sup>45</sup>. *The Criminalisation of Seafarers – From Shipmaster Mariner to "Shipmaster Criminal"*, GARD NEWS 177 at [www.gard.no/gard/publications/gardnews/recentissues/gn177/art\\_13.htm](http://www.gard.no/gard/publications/gardnews/recentissues/gn177/art_13.htm).

<sup>46</sup>. OPA-90 substantially stiffened criminal sanctions for the violation not only of maritime pollution laws, but also of the laws regulating the shipping industry in general. See Thomas Russo, *Criminal Liability in Maritime Accidents*, 7 USF MAR. LJ 151 (1994). See also Alfred J. Kuffler, *Prosecution of Maritime Environmental Crimes Versus OPA-90's Priority Response and Spill Prevention: A Collision Avoidance Proposal*, 75 TUL. L. REV. 1623 (2001). Captain Hazelwood, in the grounding of the *Exxon Valdez*, was charged under environmental statutes for the negligent discharge of oil, as well as under general criminal statutes for criminal mischief, reckless endangerment, and for operating a vessel while intoxicated. See *United States v. Kiriakos Daiglou* (N.D. Cal. 2001). See *Criminal Charges Stick: Neptune Dorado Gets Fines and Probation*, OIL SPILL INTELLIGENCE REP., 4 Jan 2001, at 1-3. See Alfred J. Kuffler, *Prosecution of Maritime Environmental Crimes Versus OPA-90's Priority Response and Spill Prevention: A Collision Avoidance Proposal*, 75 TUL. L. REV. 1623 (2001). See *Tanker Captain Arrested for Concealing Leak from US Coast Guard*, MARINE LOG, 10 May 2000, at [marinelog.com/DOCS/NEWS/MMMay10a.html](http://marinelog.com/DOCS/NEWS/MMMay10a.html). The owner, operator, shipmaster, chief engineer, and two shoreside executives, including the "designated person" under the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), were indicted in Baltimore for giving false statements to the Coast Guard and for failing to notify the Coast Guard of hazardous conditions under the Ports and Waterways Safety Act. The indictment also charged with falsification of documents because the oil record book had no entries concerning discharge

under the following pre-existing laws which comprehensively govern the maritime transportation of oil and other petroleum products:

- (a) Negligent Vessel Operations 46 USC 2302
- (b) Vessel Inspections 46 USC 3318
- (c) Carriage of Liquid Bulk Dangerous Cargoes 46 USC 3718
- (d) Vessel Load Lines 46 USC 5116
- (e) Foreign Commerce Pilotage 46 USC 8503(e)
- (f) Ports and Waterways Safety Act 33 USC 1232(b)
- (g) Intervention on the High Seas Act 33 USC 1481(a)
- (h) Deepwater Port Act of 1974 33 USC 1514(a)
- (i) Act to Prevent Pollution from Ships 33 USC 1908(a)<sup>47</sup>
- (j) See § D7-E7.

**§ 12.5 France.** After the pollution caused by the wreck of the *Erika* in December 1999, France has enacted its own legislation providing for criminal sanctions applicable to the shipmaster.<sup>48</sup> The harsh penalties for vessel source pollution are embodied in the “Perben 2 law”, a French law on organised crime and delinquency, named after the French justice minister, Dominique Perben. This law came into

of oily bilge water. *See Pacific Ocean Oil Spill Culprits Penalized \$9.4 Million*, ENV’T NEWS SERVICE, 29 Sept 1999, at [www.ens-news.com/ens/sep99/1999L-09-28-09.html](http://www.ens-news.com/ens/sep99/1999L-09-28-09.html); *United States v. Pearl Shipping Corp*, No. 99CV04359 (ND Cal. 31 Mar 2000) (Consent Decree). “On 24 September 1999, the owners, operators and shipmaster of the *M/V Command* pleaded guilty to charges of spilling oil in the Pacific Ocean off the California coast. The original charges accused both the shipmaster and chief engineer of knowingly spilling the oil. This case arose from the discharge of over 3,000 gallons of bunker fuel oil off the California coast that resulted in substantial environmental damage to wildlife and to beaches south of San Francisco. As a result of a guilty plea, the corporate defendants paid in excess of \$9.4 million in penalties, the company agreed to a compliance programme, and the shipmaster was prohibited from trading to United States ports for three years”. *See Chief Engineer Sentenced for Concealing Vessel Pollution*, DOJ ANNOUNCEMENT, 5 Jan 2006 at [www.usdoj.gov](http://www.usdoj.gov). “Noel Abrogard, Chief Engineer of the *M/V Magellan Phoenix*, was sentenced to imprisonment for one year and one day, and three years of probation for falsifying records that attempted to conceal repeated overboard discharges of oil waste from the ship. David M. Uhlmann, Chief of the Environmental Crimes Section for the Justice Department’s Environment and Natural Resources Division said, “Deliberate vessel pollution and obstruction of justice are serious crimes, and today’s sentence demonstrates that defendants who violate anti-pollution laws will be prosecuted and will serve time in prison”. Coast Guard inspectors learned that the *M/V Magellan Phoenix* had routinely discharged oil sludge and oil-contaminated bilge water directly overboard into the ocean without using the ship’s water separator, and without recording these discharges as required in the ship’s oil record book. *See Ibid.* MSC Ship Management (Hong Kong) Ltd agreed to plead guilty to charges that it engaged in conspiracy, obstruction of justice, destruction of evidence, false statements and violated the Act to Prevent Pollution from Ships. According to the plea agreement, including a joint factual statement, MSC Ship Management will plead guilty to criminal information which charges that a specially fitted steel pipe, referred to as the “magic pipe,” was used on the *MSC Elena*, a 30,971-ton container ship, to circumvent required ship pollution prevention equipment and discharge oil sludge and oil contaminated waste directly overboard. In two related prosecutions, the Chief Engineer of the *MSC Elena*, Mani Singh, was indicted in November and has agreed to plead guilty at a hearing scheduled for December 20, 2005. Aman Mahana, the ship’s Second Engineer, pleaded guilty on 1 December 2005.”

<sup>47</sup> *Statement of American Waterway Operators*, United States Senate Committee on Environment & Public Works Hearing Statements (2003), available at [epw.senate.gov](http://epw.senate.gov).

<sup>48</sup> A. K. Bansal, *Shipmaster as Captain, Manager and Scapegoat*, INTERNATIONAL FEDERATION OF SHIPMASTERS’ ASSOCIATIONS. NEWSLETTER NO 40, (Paul Owen ed., International Federation of Shipmasters’ Associations, London, UK), Sept. 2003.

force in March 2004 and increased the potential fine for pollution resulting from the discharge of oil or oily residues from ships. It does not matter whether the discharge is voluntary or accidental (but unrelated to a marine casualty) to €1 million, or the value of the vessel, or four times the value of cargo on board and freight. Foreign shipmasters are liable to a maximum of 10 years' imprisonment if caught within the 20 miles of the French territorial sea, as are French shipmasters if caught in any French territorial waters. Unintentional pollution is punishable by seven years' imprisonment and a €700,000 fine or up to four times the value of the cargo carried on board.

**§ 12.6 The United Kingdom.** The detail of the sanctions which the shipmaster faces for violation of MARPOL is discussed in Part III. However, judged from the defence the United Kingdom regulation provides to the shipmaster, that the person charged took all reasonable precautions and exercised all due diligence to avoid the commission of the offence, the United Kingdom has clearly shown a choice in favour of a traditional fault-based liability.<sup>49</sup>

**§ 12.7 The EU Directive of 30 September 2005.** In the wake of the *Erika* and *Prestige* catastrophes, the EU tightened the liability standard prescribed by the MARPOL Convention in respect of accidental spills. In the preamble of the directive, the European Commission highlighted that the rules contained in the MARPOL 73/78 Convention "are being ignored on a daily basis by a very large number of ships sailing in Community waters, without corrective action being taken". It also highlighted the discrepancies among Member States regarding the imposition of penalties for discharges of polluting substances from ships and stated the need for dissuasive measures regarding maritime safety, noting that "neither the international regime for the civil liability and compensation of oil pollution nor that relating to pollution by other hazardous or noxious substances provides sufficient dissuasive effects to discourage the parties involved in the transport of hazardous cargoes by sea from engaging in substandard practices". The directive mandates that "Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in internal waters, territorial waters of a member state, straits used for international navigation subject to the regime of transit passage and exclusive economic zones, are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences".<sup>50</sup> The directive further mandates that Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include

<sup>49</sup>. See e.g. reg. 36(2) MS (Prevention of Oil Pollution) Regulations 1996 (SI 1996/2154), as amended by regulation 8 of the MS (Prevention of Oil Pollution) (Amendment) Regulations 1997 (SI 1997/1910),

<sup>50</sup>. Directive 2005/35/EC Art. 4.

criminal or administrative penalties . . . <sup>51</sup> Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any person who is found responsible for an infringement within the meaning of Article 4.<sup>52</sup> The directive has been criticized as being overly vague regarding the criteria defining the conducts justifying the criminal charges and was placing the shipmaster in the position of a scapegoat.<sup>53</sup>

**§ 12.8 Coastal States Laws.** It is obvious that the shipmaster has a set of rights emanating from his position, but it is even more evident that his position causes him to owe far more duties and responsibilities to the ship's flag state and to coastal states than heretofore. More recently, it has been shown that coastal states are exercising their powers to enforce criminal laws with regard to shipmasters and broadening their responsibilities in regard to coastal states. It has become an increasingly common practice to hold the ship and the shipmaster criminally responsible for almost any incident under local laws – even if this action seems to go against commonly accepted international law. Coastal states also have a range of provisions which give them powers to prosecute shipmasters for infringements.<sup>54</sup> Among many such laws, rules against “major and minor pollutions including illegal dumping of garbage or excessive noxious emissions from their [sic] ship” are included.

<sup>51</sup>. *Ibid.*, Art. 8.1

<sup>52</sup>. *Ibid.*, Art. 8.2.

<sup>53</sup>. See COLIN DE LA RUE & CHARLES ANDERSON, SHIPPING AND THE ENVIRONMENT 1120–22 (2009).

<sup>54</sup>. A. K. Bansal, *Shipmaster as Captain, Manager and Scapegoat*, INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATIONS NEWSLETTER NO 40, (Paul Owen ed., International Federation of Shipmasters' Associations, London, UK), Sept. 2003.