The Governance of Maritime Law:
Quis custodiet ipsos custodes?

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The title of this talk poses the question "Who guards the guardians?" It has been chosen because what I am going to talk about today is the governance of maritime law and regulation by those in authority. I will be suggesting that the promotion of high standards of shipping and environmental protection involves challenges not only for the shipping and seafaring communities which have to comply with these laws, but also for those who make them, administer them, and enforce them. Whose task is it to watch over the work that they do?

If I look down at my notes rather more than should normally be necessary, before an audience which includes many friends and familiar faces, it is because I'm going to take my courage in both hands and address some delicate issues – ones on which people are often reluctant to comment.

After so many measures over the years to raise the standards with which the shipping industry is required to comply, I'll be suggesting that the time is ripe to take a look at the kite-marks of quality which we should be asking those in authority to strive to achieve.

Of course, if they are to do their work effectively, it is important that they are accorded all the respect which is properly due to law-makers and courts, and that any comment on the quality of their work is polite and well-intentioned. At the same time, those with a genuine commitment to the causes they seek to promote, and to the effectiveness of the part they play, will be the first to accept that a stifling of criticism is unhealthy, and that measured, constructive observations from the sidelines are a necessary cog in the machinery of governance in this field, as in any other.

What makes the time ripe is not just the steady growth in the burden of regulation, but the fact that, looking back over the last ten years, as we approach the end of the decade, we are bound to recall a fair crop of examples of new laws being produced which, quite frankly, were not of the highest quality; of established international laws not being observed as meticulously by administrations which signed up to them as might be desired; of other governments being slow to take them to task; and of courts of law being seemingly unable or unwilling to get involved in enforcing international laws.

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Reticent reaction to these things is at times redolent of the Emperor's New Clothes. "Surely what's happening can't be right," you may whisper to a neighbour – only to hear a sharp intake of breath: "You can't say that sort of thing here. You'll upset them, and only look silly. For as everyone can see, everyone else thinks it's okay." So an illusion of consensus persists, till a child speaks up. I'll be suggesting that despite appearances to the contrary, there is in fact no agreement that some of the things we've seen are okay.

To keep things in perspective I am not, of course, suggesting for a moment that these things happen on a daily basis. Far from it. Just as oil spills from ships have occurred in only the most microscopic percentage of voyages undertaken by the world's merchant fleet, so also the cases I am now talking about – where there have been slippages in standards of governance – have been few in number, and bear no comparison with the daily efforts of conscientious officials worldwide. But what both types of case have in common is that it's the rare ones, when things go wrong, which unfold in the public gaze, and it is therefore these by which the industry and its regulators tend to be judged.

As we all know, there is no shipping accident which attracts more attention from the media and public than an oil spill. It's a sad fact of life that bulk carriers have been lost with all hands in mid-ocean with no mention of the casualty beyond a few column inches in the trade press; and that oil spills where no one was hurt have been headline news in the national and sometimes international media. If pollution is a common thread in each of the cases I mention today, that reflects the public attention which these cases have commonly attracted, and the populist pressures which they have brought to bear on those in authority.

What I am therefore proposing to examine are the principles of law and practice which determine, or should determine, the extent to which these pressures play a legitimate role – the extent, in other words, to which public opinion or policy, actual or perceived, should influence the measures taken by governments and decisions reached by the courts.

Legislative standards

Logically it seems right to start with the process by which new laws are made in the first place.

In the maritime sector there are well known differences of approach. At the international, inter-governmental level exemplified by the IMO the emphasis is on uniformity, and consensus on measures which are carefully researched; which are based on expert assessment of the causes of accidents or pollution they seek to avoid; which are likely to be effective; and which do not involve costs out of proportion to the intended benefits.

At this international level a delicate balance is also maintained between the contributions of flag states or shipping nations and the input of coastal states with predominantly environmental interests.

Some complain that the process takes too long, but there have been many examples of important changes introduced quite quickly by the tacit acceptance procedure, and the delay argument has not always been the real reason why regional and national legislators took unilateral measures. In most, if not all, of the cases where they have done so in relation to pollution from ships, their goal was not to undertake a similar process in a speedier manner, but to adopt a different process allowing greater influence to domestic politicians and popular opinion.

The EU Directive on Criminal Sanctions for Ship-source Pollution is a case in point. I shall have more to say about it later, but for the moment let us just recall that it came into force only at the end of 2005 – over three years after the decision to introduce it following the *Prestige* incident – and that even then, it would take effect in member states only once implementing legislation had been drawn up and entered into force. In the UK that occurred in July 2009.

The same result could have been achieved much more quickly if a proposal had been put to the IMO to amend MARPOL Annex I under the tacit acceptance procedure – assuming, of course, that the requisite number of IMO states agreed to it. No such proposal has ever been made, and many will draw from that their own conclusions.

This raises the question of whether the EU – which at the time of the *Prestige* still had less than 20 member states, and which took up maritime regulation only after the *Erika* incident in 1999 – knew some secret about the subject as yet undiscovered by the IMO, with its 170 or so member states, as well as its secretariat, observer delegations and many consultative bodies which have contributed to its work over the last 50 years.

To put much the same question another way, is maritime regulation of higher quality, and more effective, if greater account is taken of public opinion?

That, of course, immediately begs a number of questions. Has the public been reliably consulted about the opinions attributed to it? Are those opinions well informed? How much does that matter?

To say that the public generally has a poor understanding of shipping does not mean in the slightest that people are fools. They just need some reliable facts on which to base their views. As we all know, few people outside the industry ever see large ships, let alone go on board, and most rely for their perception of shipping on what they've seen or heard in the media.

I've often found this obvious when I've been asked at a dinner party what I do for a living, and explained that pollution from ships is the main field in which I work. This soon prompts a discussion which shows how heavily opinions depend on the information behind them. People who are highly educated and well read are often quite unaware of things which industry insiders or legal specialists take for granted – like the differences between accidental spills and illicit discharges, or between civil remedies and criminal sanctions. The image of the industry they've gained from the

media is focused, of course, on oiled birds, flags of convenience, and reports they've heard of ships flushing out their tanks at sea.

As often as not they've also seen how the media reports things in which they've been personally involved, and how this compares with the facts as they know them. If they are given the chance of talking to someone directly involved in shipping, it can be striking how receptive they are to the real issues, and how readily they recognise the mischief of legislating for perceptions rather than reality.

Democracy allows us, of course, to elect governments for whatever reasons, good or bad, we may have. But once they are in power, all of us whom they are there to serve are entitled to call for good governance. That involves, among other things, that laws they bring forward are soundly based; and that if public views are taken into account, care is taken that these are well-informed.

This brings us to the subject of consultation, and what this should involve. At its most basic it should surely involve at least asking people what they actually think, rather than just assuming or asserting that they have views that echo the most vocal reactions, or that fit with a political agenda. But there should be more to it than this, given the complexity of shipping, and the limited acquaintance with maritime affairs of public and politicians alike. If their opinions are to be allowed to influence new laws, there is a need for them to be properly briefed so that their contribution to the process enhances rather than diminishes the calibre of the final product.

The need for this was highlighted some years ago when I attended a conference in this country at which a recently appointed shadow shipping minister spoke of the need to reform "Lloyd's Open Register". After she had referred to it a number of times, some in the audience felt it might be helpful to clarify exactly what she meant. There is, of course, no such thing as Lloyd's Open Register. There's a Lloyd's insurance market, there's a Lloyd's Open Form of Salvage Agreement, there's a Lloyd's Register of Ships, and there's also of course Lloyd's Register the classification society. However it proved, as suspected, that she had none of these things in mind. What she intended was to argue against the practice of states maintaining registries open to ships owned by non-nationals. Evidently she had gathered that there was political capital to be made in attacking flags of convenience, but as you can imagine, she was less than clear about what they are, what was supposed to be wrong with them, and how she was proposing to change them.

Given this widespread lack of familiarity with shipping, administrations introducing proposals for new maritime laws are in some ways, if you like, in a leadership role – bearing responsibility for ensuring firstly that they themselves have a proper appreciation of the issues, and secondly that an adequate and objective briefing is given to those whose views are canvassed, including politicians intending to vote on the proposals.

Some of the unilateral measures taken in this field, in various parts of the world, may fairly be seen as instances of this leadership being sadly lacking. If legislators don't care whether the laws they introduce are soundly based, and are concerned only to

reflect popular views, they are simply courting popularity – using the legislative process for their own electoral purposes, rather than to bring about genuine improvements in the public interest.

The importance of good consultation merits particular mention here, in Maritime London, as the procedure normally adopted by the UK when preparing domestic maritime legislation is one which, I suggest, we might reasonably encourage others to follow.

This procedure has typically involved inviting comments from a wide spectrum of interest groups, based on consultative material which has normally set out very well the relevant background, and canvassed the issues thoroughly on an objective basis. The quality of this material has reflected the long maritime traditions of this country as well as the unique concentration in our capital of maritime service industries and professions. It has also been reflected in the quality of the responses, and it has been quite common for draft proposals to be improved by modifications made in the light of well-informed reactions which this process normally elicits.

Unfortunately, not all laws affecting shipping have been universally made in this way. Those made in Brussels are a case in point. Of course, the European Community has sometimes published consultative documents when drawing up new policies, but overall its law-making process in the maritime sector has been influenced more by political factors than by the experience and expertise at its disposal. This is a reflection of the political structure of the Community and its growth in size. Although some of the world's largest fleets and most significant shipping interests are to be found in the Community, along with the world's leading expertise in various maritime service industries, their densest concentrations are in a limited number of member states.

As the Community has grown, these states have been increasingly outnumbered by others which have never had, or no longer have, significant fleets or comparable involvement and expertise in maritime affairs. As they all have a voice in the formulation of Community law and policy, an increasingly serious imbalance has developed between the respective contributions to the Community's maritime policy of its maritime nations and its other member states.

I describe this as an imbalance because it reflects national boundaries without reflecting the importance to the Community as a whole of its shipping interests, or the need for it to maintain a sound and balanced maritime policy. And I describe it as serious because it has led in the direction of polarized attitudes, in which the maritime nations have tended to find themselves in a dissenting minority, and in which there has at times been an almost perverse dismissal of the Community's own expertise as the pleading of special interests.

As a result, it has become possible for disproportionate influence to be seized in the law-making process by politicians whose real interest lies not in sound maritime policy but in the electoral value to them of populist views.

Possibly the most glaring example of this has been the EU Directive on Criminal Sanctions for Ship-source Pollution. I am not going to go back over the reasons why the industry coalition maintained that the Directive was in conflict with international law, but before this particular chapter is closed it is worth recalling that the controversy was in large measure a protest at the manner in which the Directive came into being.

As we all know, it was introduced very soon after the *Prestige* incident in November 2002. The decision to legislate for wider criminal sanctions was made less than three weeks after the vessel sank, at a time when expert investigations and official inquiries were still in their very early stages, and long before any meaningful conclusions could be suggested as to the cause of the incident.

In January 2003, when oil leaking from the *Prestige* came ashore in France, the French President was reported as stating that he was ''revolted'' by the activities of ''shady businessmen'' involved in shipping: ''France and Europe must not leave these shady men, these gangsters of the sea, to profit cynically from the lack of transparency in the current system.'' He was also reported as referring to ''hoodlums of the seas'', and as having asked the President of the European Commission to introduce measures that would ''make it easier to identify and prosecute all those responsible for polluting activities at sea''.

The draft Directive was published less than four months later, without any prior consultation with the public, industry or other interested parties. The accompanying Explanatory Memorandum began with a statement that the *Prestige* incident had highlighted the need for the proposed measures because it demonstrated that those responsible for pollution were not being adequately penalized. However it did not explain how the incident had demonstrated any such thing. No grounds were suggested for supposing that it had been caused by conduct which was criminal under existing law or which would be criminal under the proposed Directive.

The only criminal conduct to which the Memorandum referred was illicit breach of operational discharge controls, and these had nothing whatever to do with the *Prestige*. It focused on complaints of some coastal state governments that they had been gathering evidence of suspected illegal discharges, and been forwarding it to flag state administrations, but had not been receiving reports of any action being taken. It expressed concern that even if the discharge was detected in such cases, and traced to a particular ship, the offence was rarely brought to justice and, if it was, that there was frequently insufficient evidence for convicting ''the offender''. It did not explain why it was considered that if the evidence was insufficient to justify bringing proceedings, or held by a court to be inadequate to convict the defendant, it was nonetheless appropriate to refer to an ''offence'' committed by ''the offender''.

Whilst the Memorandum stated that the draft Directive was intended to ''tighten the net'' on such "offenders", only a careful study of its intricate provisions revealed that in fact it had no substantive bearing on illicit operational discharges, but dealt only with accidental spills; and that although the draft Directive professed to be designed

to implement MARPOL more effectively, it was in fact mainly concerned with altering the liability standard for accidental spills which the Convention prescribed. As it was later put in an official report of the European Parliament, the Memorandum suffered from many defects including "a lack of detailed problem analysis". Worse, it gave a completely misleading impression of the issues arising from the *Prestige* incident and of those raised by the proposed Directive.

These comments are not intended as any personal criticism of the authors of the Memorandum, but as a commentary on the unsatisfactory nature of the task required of them by their political masters. The nub of it all is contained in one single sentence: ''the urgency of arriving at a particular measure related to ship-source pollution has been forcefully stressed at the highest political level within the EU.''

In adopting that "particular measure" the EU legislative machine allowed ministers to put the cart before the horse. Rather than call on the Commission to prepare an objective consultative document to brief politicians and others on the issues involved, they made up their minds without any such briefing, leaving the Commission with the task of attempting to explain and justify a decision they had already made, which prejudged the cause of the *Prestige* incident, and which took no account of the relevant framework of international law. It was a decision which took its cue from emotive comments and commitments made by politicians for domestic electoral consumption. These commentators were muddling illicit operational discharges with accidental spills, and their remarks inappropriately mobilized hostility towards rogue operators responsible for the former against seafarers and others caught up in genuine accidents. As a consequence the Memorandum inevitably reflected the same confusion, and perpetuated misunderstandings which bedevilled debate throughout the subsequent legislative process.

I have gone into this background in some detail because, whatever different views there may be about the compatibility of the Directive with international law, there are lessons to be learnt from its legislative history.

There can be no overlooking that the Directive has fanned the flames of criminalization, nor the many reports that it has, as a result, had a very damaging impact on the morale of seafarers worldwide. This has occurred just at a time of difficulty in recruiting quality crews to man the latest generation of LNG carriers and other sophisticated modern ships. Seafarers rightly fear this undesirable trend, especially as incidents such as the *Hebei Spirit* have raised questions as to the ability of the international community to restrain it successfully through the IMO Guidelines on Fair Treatment of Seafarers.

For these reasons alone, quite apart from any others, the Directive is, in short, bad law. There is no escaping that the reason why this is the case is that it was shaped to a far greater extent by ministers engaging with popular sentiment than by detailed problem analysis of the kind which the European Parliament found wanting.

This is an imbalance which needs to be recognized, addressed and avoided if maritime regulation is to be effective in its professed aims of improving standards of ship safety and environmental protection.

Compliance and enforcement

So much for the law-making process. Once maritime laws are in place, compliance is of course normally the task of industry and seafarers, with public authorities taking on the role of enforcers. However that is not always the case, for states undertake their own obligations under international treaties, and in our context today a few words are needed on the subject of how these obligations are enforced.

Here the question "who guards the guardians?" is particularly pertinent. The general rule in international law is that proceedings against sovereign states to enforce their treaty obligations can be brought only by other parties to the treaty – in other words, by governments of other contracting states. Private entities who are not parties to it – even leading international industry bodies – normally have no standing to bring legal proceedings.

The problem with this is that it is normally private parties, such as ship operators or seafarers, who are the real victims of any breach of international maritime treaties. Other governments generally suffer no loss, and have no incentive for taking action. Indeed, diplomatic niceties tend to inhibit them from even mildly criticising each other, let alone suing.

Certainly it has always been industry bodies, rather than governments, who have been at the forefront of raising concerns when unilateral legislation has been made in apparent conflict with international maritime law. The State of Washington regulations, the Canadian Bill C-15, Australian legislation on the Torres Strait, and the EU Directive on Criminal Sanctions for Ship-source Pollution are all examples.

In the last of these cases the cause of international law enforcement took a set-back when the European Court of Justice ruled that the industry coalition, though allowed access to the Court, nevertheless had no standing to rely on the relevant provisions of the UN Convention on the Law of the Sea (UNCLOS). The Court did not comment on what the position would have been if the case had been brought by governments (rather than just supported by them – three flag states intervened with written observations to the Court relying on the same provisions). In the Opinion of the Advocate General the effect of those provisions was that it was outside the Community's law-making competence to legislate for areas beyond the territorial sea otherwise than in accordance with MARPOL. In other words, the Court declined to make any ruling to this effect on the ground simply that the issue had been brought before the Court by industry bodies rather than governments.

The generally muted reaction of governments to concerns of this kind is not limited to legislative measures, where conflict may not be apparent without going into legal issues, but has also been seen after other measures involving quite clear breaches of international law.

An example of this was seen not long after the *Prestige* incident when some European governments excluded single hull tankers from their waters when carrying heavy grades of oil. At that time the international regulations in MARPOL did not (as they now do) restrict the cargoes which could be carried in single hull tankers. There was nothing to stop states from imposing restrictions of this kind on entry into their ports and internal waters, but some governments went much further and deployed naval vessels to prevent tankers from passing within 200 miles of their coasts.

Now as most law students soon learn, the sovereign rights of coastal states in their territorial seas – the waters within 12 miles of their shorelines – are qualified by the obligation under the Law of the Sea Convention not to hamper ships exercising the right of innocent passage. There were no grounds for suggesting that these ships were not operating lawfully or that their passage was not entirely innocent.

In their exclusive economic zones – the waters between 12 and 200 miles from their coasts – coastal states have even less right to interfere. Here they have no sovereign rights but only the powers specifically conferred by UNCLOS and by certain other treaties (such as the Intervention Convention). These include jurisdiction to take measures to protect their coastline or related interests following a marine casualty, but in the absence of a casualty they do not provide any basis for measures to reduce the risk, or perceived risk, of pollution from a vessel navigating lawfully.

The case of the *Geroi Sevastopolya* was one example of such measures being taken. This was a Russian flagged tanker which in December 2003 was loading a cargo of 50,000 tonnes of fuel oil in Ventspils, Latvia, for carriage to Singapore, when Spanish maritime officials hearing of the intended voyage alleged that she was ''the next Prestige'', and that she was unfit to carry the goods off the Spanish coast.

An inspection team led by the European Maritime Safety Agency carried out a pre-departure survey of the vessel in Latvia and concluded that she was fit to sail. Her classification society also inspected her and gave its approval to her undertaking the voyage. Despite the fact that her voyage was lawful, the leader of the regional authority in Galicia was reported as threatening to fire on her if she entered Spanish waters, and on her passage south she was escorted by a Spanish naval vessel to ensure that she did not enter the Spanish EEZ. She abandoned her originally planned route through the Strait of Gibraltar and continued her voyage to Singapore via the Cape of Good Hope.

The victims of this incident were of course the private commercial interests whose voyage costs were increased. They had no right of access to international tribunals, and even if they could persuade the flag state to intervene, there was no prospect of any legal remedy during the voyage. Even after it was over, the political obstacles and uncertainties put them off attempting a claim.

Not only were there no legal proceedings – diplomatic protest of any kind was either muted or non-existent. This all begs the question what kind of precedent is set when governments turn a blind eye to measures by other states which do not conform with international law.

This very question arises from the recent oil pollution incident in Australia involving the container ship *Pacific Adventurer*. In March this year she was caught in the powerful cyclone Hamish whilst navigating off Queensland, where some of her containers were washed overboard and punctured the shell-plating, causing a bunker spill. An expensive clean-up operation was carried out by the state and federal authorities. The incident occurred before the entry into effect in Australia of the Bunkers Convention (which came into force internationally at the end of 2008), but the legal position was the same under legislation in force at the time of the incident: the owners were strictly liable for the spill, regardless of fault, subject to a right to limit liability in accordance with the 1976 Limitation Convention (as amended by the 1996 Protocol).

It turned out that the clean-up costs incurred by the authorities were nearly double the ship's liability limit of some A$17.5m. Though there was no real dispute about the legal position, it was said by the authorities to be publicly unacceptable for the owners not to reimburse the clean-up costs in full. The Queensland State Premier, Ms Anna Bligh, insisted that the "polluter pays" principle should apply, and undertook a public commitment to ensure that no part of the costs would fall on the Queensland taxpayer.

As Ms Bligh was not a signatory to the 1976 Limitation Convention, and had possibly never heard of it, some may be tempted to admire the doggedness with which she fought the corner of the Queensland taxpayer. Others may think it significant that the incident occurred on the eve of the state election, and that the incumbent Labour administration was on shaky ground. Judging from the Premier's media campaign to extract full payment from the shipowners, who of course were portrayed as the villains of the piece, the issue fell into her lap as a timely chance to connect with popular support.

Whatever view you take of the state authorities, different considerations apply to the federal government, which had long since ratified the Limitation Convention and bound the Commonwealth of Australia to abide by its terms. It was also, incidentally, among the sponsoring governments of the Bunkers Convention, with its regime for limitation of liability in accordance with the 1976 Convention.

One might therefore have expected Canberra to have a quiet word in the ear of Ms Bligh, and if necessary to make whatever private domestic arrangements were needed to address her concerns without putting the country in breach of international law and embarrassing its delegation at the IMO.

However the federal government was persuaded not merely to turn a blind eye to her actions, but indeed to help her deliver on her public commitment. This they were able to achieve because the shipowners belonged to a large corporate group with considerable business interests in the country, including activities not only in shipping but also in aviation, road transportation and distribution services, and cold storage. The owners baulked at paying more than they were legally obliged, since they feared – as did the whole industry – that an undesirable precedent would be set

for various maritime compensation regimes if they acquiesced in liability limits being ignored. However it was made clear to them that if they failed to pay up, the group's business interests in the country would suffer.

The Vienna Convention on the Law of Treaties 1969 provides that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Art. 26). We may surely take this as meaning that the parties to the 1976 Convention undertake to respect shipowners' rights of limitation, and not blackmail them into paying millions of dollars above their liability limit.

However the duress exerted on the owners was so serious in its financial implications for them that they decided – unfortunately, in some people's view, but understandably – that they had no choice but to give in. A joint media statement by the Australian Transport Minister and the Queensland Premier announced an agreement in which the owners paid a total of A$25m, which was recognized as substantially more than their legal obligation, including a donation to a trust specially established to help improve marine protection and maritime safety.

The happily re-elected Ms Bligh declared in the statement that "this deal delivers what I was determined to deliver – no cost to the Queensland taxpayer." The Federal Transport Minister explained that any shortfall in compensation for Queensland's clean-up costs would be reimbursed under the National Contingency Plan by the Australian Maritime Safety Authority (AMSA), which in turn would recoup any payments by a levy to be imposed on the shipping industry, "consistent with the internationally-recognized polluter pays principle."

And just in case anyone might suppose that the Australian delegation would keep a low profile next time it attended the IMO, let me add that it immediately submitted a paper to the IMO Legal Committee in which it drew attention to the incident and proposed a further increase in the liability limits under the 1976 Convention. The paper does not make it clear whether Australia will act any differently in any future case where the applicable limit is exceeded by clean-up costs, or whether it will go and do the same thing all over again. However it does invite discussion of whether the current limitation provisions remain relevant.

There are, I think, a number of important points which come out of this episode.

First, to pick up first on the invitation just mentioned, misunderstandings about limitation of shipowners' liability are not uncommon, and one of the reasons for this lies in reference out of context to the so-called "principle" that "the polluter pays". The origins and normal use of this phrase are to be found in land-based industrial activity, where the causes of pollution are more readily identified with the owner or operator of a polluting installation, and where a clearer account can be drawn up of the environmental cost of industry, particularly in terms of waste generation. It is indeed internationally recognized as a principle which lies behind various environmental laws unconnected with shipping, but it has played no part in the development of international compensation regimes in the maritime sector. Here the phrase is prone to mislead and can be very unhelpful.

One reason for this lies in the number of different parties normally involved in maritime transport – a fact reflected, for example, in the number and variety of defendants prosecuted in France after the *Erika* incident, albeit all but four of them were acquitted. In many shipping accidents there are serious difficulties in identifying who "the polluter" really is, and it is therefore dangerous to use terminology inviting emotive and simplistic imputations of blame.

This may be appreciated if it is recalled that the three most expensive oil spills worldwide in the last five years all resulted wholly or mainly from causes external to the ship. In the *Athos I* spill in New Jersey a tanker was punctured by large items of metal and concrete debris left on the bed of the Delaware River; the *Cosco Busan* spill in San Francisco harbour was caused primarily by a medical condition of a compulsory pilot which rendered him unfit for work, and which was known to the US Coast Guard when it renewed his certificate; and the *Hebei Spirit* spill in South Korea occurred when a supertanker was struck at its mooring by a runaway crane-barge. In each of these cases, as well as in many others, it is wholly inappropriate and prejudicial to describe the shipowner or operator as "the polluter".

A second misleading aspect of the phrase is that it implies that marine pollution compensation regimes impose, or should impose, liability on "the polluter" presumed to be at fault, when in fact they impose strict liability on the shipowner regardless of where fault actually lies. In each of the three cases just mentioned the shipowners and their insurers have paid, or are in the process of paying, over US$100m as compensation for pollution for which the ship interests were either wholly free from blame or at least not primarily to blame. It is a cornerstone of these regimes that compensation is available on this basis only if it is subject in virtually all cases to a finite limit.

For these reasons, whatever currency it may have as a principle in other fields, it plays no official part in international marine liability regimes. In this context it is better understood as a political catchphrase or slogan, to which resort is typically made when the benefit of these regimes is desired but the conditions or limits to which it are subject are found inconvenient.

A second feature of the *Pacific Adventurer* case is that it reminds us how big a pinch of salt is sometimes needed when politicians attribute their actions to irresistible pressures of public opinion. This is not by any means the only case where hostility towards the ship, far from constituting a pressure which prevented the political figures from acting as they would otherwise have wished, was something they themselves had whipped up for their own electoral purposes. Some of the on-line media reports invited public comment, and if you scrolled through the comments it could be seen that quite a few of those posted were critical of what were described as bullying tactics to deny the shipowners their legal rights. Public opinion was not necessarily what it was claimed to be, or what it would have been if the public had been reliably informed by political leaders of the position in international law, the reasons for it, and the importance of adhering to it.

But my main reason for referring to the case is not so much to focus on the actions of one government as to bring under the spotlight the reaction, or lack of it, of others. Evidently there is confidence in Australia that when its delegation is next at the IMO there will not be a collective coughing and spluttering; and that no one will put up their flag and say: *"Excuse me, but didn't you agree with the rest of us on the liability limit? How can you expect the international maritime community – in both the public and private sectors - to embrace both the letter and spirit of international rules and standards, and hope that the fruits of all our work will be effective, if governments at the forefront of sponsoring these laws respect them only when it suits them to do so?"* It was a fair bet that no one would.

Of course, given the importance of shipping being regulated by uniform global laws, rather than by a patchwork of unsatisfactory national or regional regimes, there is also great importance in the work done to cultivate good diplomatic relations which facilitate international agreements in this field. This is not something to jeopardize without good cause, and it is understandable that people sometimes prefer to let these situations pass without speaking up.

On the other hand, it is very easy for silence to be taken as assent. Indeed, that's the very process by which much of international law of the sea has developed in the past – by states taking measures in which others have acquiesced, normally because they were happy with a precedent which they themselves might want to follow one day. Here likewise, there may well be an element of governments wondering whether they would have acted any differently if they had been in the shoes of their Australian counterparts. Fair-minded as this is, it does still leave the question whether the precedent is for better or worse.

Those involved in negotiating the release of the "Karachi Eight", detained after the *Tasman Spirit* incident in 2003, found themselves up against the argument that Pakistan needed no lectures from Europeans on fair treatment of seafarers, as they considered their actions to be no different from those taken in Spain against the master of the *Prestige*.

The next time there's a bunker spill from a ship which is caught in a cyclone, and where the clean-up costs exceed the liability limit, it will no doubt be said by the authorities in the jurisdiction concerned that what's good for Australia is good for them too. But the crew may not be so fortunate as that of the *Pacific Adventurer*, for if the shipowner doesn't happen to have similar business interests in the country, and cannot be forced in the same way to pay over the odds, who is to say what other forms of pressure will be applied instead?

Judicial proceedings

Fair treatment of seafarers brings us to judicial proceedings, and particularly criminal prosecutions. Again, my focus is on the role of public opinion or policy. This can of course enter into civil proceedings as well, but it's the prosecution of seafarers after maritime accidents that has led to particular concerns.

These concerns have not been confined to those directly involved in the cases but have of course been shared widely in the international community, as is evident from the IMO/ILO Guidelines on Fair Treatment of Seafarers.

After the *Nissos Amorgos* incident in Venezuela in 1997, when the ship was detained for five months and the master for over a year, a number of industry organisations were keen to examine the whole subject of detention of seafarers, and we were asked to report on what appeared to be the main problems. An informal survey of people's experience suggested that there were three main types of case.

One was where passports were held while the facts of the casualty were investigated. Detentions of this kind for a few weeks were common but were not necessarily unreasonable and were not seen as a real problem. At the other end of the spectrum, criminal trials resulting in the defendant being convicted of an offence after a maritime accident, and sentenced to a term of imprisonment, had been few and far between.

What appeared to be much more common was pre-trial detention resulting from the decision of prosecuting authorities to bring criminal charges. Commonly the proceedings did not, for one reason or another, result at the end of the day in a jail sentence – sometimes because a fine was considered sufficient, or because the defendant was acquitted, or because the charges were dropped before trial. Sometimes bail terms were relaxed, and the defendant allowed to return home, at a point in the case where nothing relevant had changed but a sufficient amount of dust had settled.

What this highlights is the importance in these cases of the standards of fairness observed by prosecuting authorities when they decide to bring criminal charges. This is especially the case where foreign seafarers are concerned, given that their liberty is more seriously affected than that of domestic defendants if their passports are taken and they are unable to return home pending trial.

Needless to say, major cases of pollution from ships have had a unique tendency to unleash strong media-led feelings towards people caught up in them; and they have shown that coastal state authorities, prosecutors and courts can find it very difficult to do justice to public expectations as well as to the rights of the accused.

Striking the balance between these things takes us into the realm of human rights. One of their essential functions is to protect the individual from the outrage of crowds, especially those which are not well informed.

If any of these cases ever brought the expression "lynch mob" to mind, it's quite instructive to look it up and remind oneself of what passed as law and order until well into the 20th century in the southern states of the US. Nowadays, happily enough, people don't go around hanging seafarers from trees, but some of the social factors are still strikingly similar: public demand for heads to roll, with limited concern for whether the right heads were chosen; prejudiced assumptions of guilt; complicity of prosecutors, who found it easier to defend the practice than stand up

for due process of law; and the opposition faced by those committed to stamping it out.

If any of this rings a bell, it is small surprise that after an oil spill it can take a robust prosecutor to say that the evidence doesn't justify charges. But that doesn't justify taking the easy way out, by bringing charges which both the defendant and the international maritime community find hard to understand, and by leaving it to the court to decide on their merits only some years later.

After the *Erika* incident in 1999 criminal charges were brought against over a dozen defendants, consisting of various categories of corporate bodies and private individuals. The international maritime community had difficulty understanding how the allegations could be justified against a number of the defendants, but the charges were maintained until the end of a four-month trial in 2007. Then, in a development which increased uncertainty as to the basis on which they had originally been brought, the prosecution recommended in its closing speeches that most of the defendants be acquitted. The charges were not finally dismissed until January 2008, over eight years after the incident, when judgment was given absolving all but four of the defendants of any offence.

Eight years was a long time for unsustainable criminal charges to be left hanging over the heads and reputations of innocent public officers and industry professionals.

It gets worse, of course, when the defendant is a foreign seafarer, and when official concern about public opinion results not only in charges being brought of doubtful merit, but also in decisions to restrict the defendant's liberty pending trial.

It is because pressures of this kind notoriously exist that international law contains provisions to safeguard the rights of the individual. The Universal Declaration of Human Rights provides that everyone has the right to leave any country and return to his own. It is therefore normally difficult to justify withholding of a passport, let alone hotel arrest or detention in custody, on the mere ground that the individual has been charged with an offence, unless there is at least a reasonable possibility that he could, if convicted, be punished by a term of imprisonment.

This brings us to the safeguards set out in UNCLOS Article 230. This strikes an internationally agreed balance specifically between public concerns about pollution on the one hand and, on the other, the recognized rights of the accused including the liberty of foreign seafarers.

Article 230 provides: -

> ''*Monetary penalties and the observance of recognized rights of the accused*
>
> 1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the

marine environment, committed by foreign vessels beyond the territorial sea.

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.''

As can be seen, the Convention bars coastal states from imprisoning foreign seafarers for any pollution offence beyond their territorial waters, or for one within those waters unless involving a wilful and serious act of pollution. However, these restrictions have not always availed the defendant, and sometimes for reasons which have not been clear.

One particular concern is that prosecutors opposing the repatriation of defendants have sometimes attempted to avoid Art. 230 by framing their charges to allege that the acts of which the defendant is accused constituted not only pollution offences but other offences as well, and by contending that the latter are outside the safeguards of Art. 230.

An example of this occurred in Korea when the charges against the master and chief officer of the *Hebei Spirit* were amended on appeal to allege not only the offence of causing pollution but also that of causing damage to property, namely their own vessel. It was their conviction on the latter charge which resulted in the custodial penalties imposed on them. However it was plain that what the severity of the sentence was intended to reflect was not the damage to the ship but the pollution. The Supreme Court has since set aside that decision, and the "Hebei Two" have been allowed to return home. Its decision is an important precedent on the effect of Art. 230, and for not allowing it to be circumvented in this artificial way.

Another example of the same thing has been seen in proceedings following the *Prestige* incident. The main facts of the case are well known. No one has suggested that the master was responsible for the structural failure which weakened the vessel and led him to request the Spanish authorities to provide a place of refuge. His actions in remaining on board after most of the ship's personnel had been airlifted to safety, spending many hours in an attempt to save his ship and avoid the disaster which followed, are well documented and were described in the official flag state inquiry report as "exemplary". As the criminal proceedings brought against him in Spain still remain pending, it still remains to be seen how the prosecuting authorities propose to justify their action in charging him with pollution offences. It is presumably not going to be suggested that he was guilty of wilful pollution within the territorial sea, such as to allow scope under UNCLOS for a custodial sentence.

His detention in custody, and subsequently in Spain, is something they apparently sought to justify on the basis of a separate charge that he allegedly disobeyed the maritime authorities by failing promptly to proceed to the open sea when ordered to do so.

As the case is *sub judice* I am not going to comment here on the rights and wrongs of this allegation. The issue I am addressing is the question how, even assuming the allegation is upheld, the master's detention could be justified despite the Universal Declaration of Human Rights and UNCLOS Art. 230.

We may first reasonably ask whether, in all seriousness, it could ever be suggested that the facts called for a custodial sentence. As the whole world knows, events were to prove that the master and salvors were correct in their belief that sending the vessel into the open ocean would lead to the disaster that followed. The IMO Guidelines on Places of Refuge for Ships in Need of Assistance, adopted in December 2003, reflect the importance attached by the international community to the adoption by coastal states of contingency plans and decision-making processes designed to avoid disasters of this kind being repeated. Accordingly, even if an offence of disobedience were to be found, it will presumably be considered at the sentencing stage whether the master did at least know what he was talking about, and whether the actions of which he is accused, far from causing any pollution, were an attempt in good faith to avoid it.

Secondly, assuming that the court were nevertheless to contemplate imposing a custodial sentence, there is the question whether it would have done so if the case had never involved any pollution and had not generated so much public outrage. If a custodial sentence would not have been imposed but for the pollution, it follows that it is the pollution, not the technical form of the charges, which accounts for the proposed penalty; and as UNCLOS Art. 230 provides for monetary penalties only in respect of pollution from foreign ships, save in the case of wilful pollution in the territorial sea, this should preclude a custodial sentence.

Leaving aside that this should in turn have precluded his prolonged detention in Spain, Capt. Mangouras complained to the European Court of Human Rights that his detention in custody for 83 days had been a breach of his human rights because it resulted from a disproportionate bail demand of €3m. Earlier this year the Court rejected his complaint and this is now subject to appeal. That being the case, I am not going to comment on the judgment in detail save for a few remarks about the general approach the Court took, and in particular about the role in its decision of public opinion and policy.

The Court ruled that the bail amount had not been disproportionate, as the Spanish courts had been entitled, in its view, to take account of "social alarm" caused by "the seriousness of the crime in question and the catastrophic consequences" of the oil spill.

In reaching this conclusion it set out in its judgment what it described as "the relevant domestic and international law", quoting various provisions from UNCLOS

and EU Directives (notably the Environmental Liability Directive and the Directive on Criminal Sanctions for Ship-source Pollution). These provisions were not directly material to the specific issues concerning the detention of a foreign seafarer facing the charges brought, and the EU Directives mentioned did not come into being until after the incident. However these various sources were cited by the Court as indicating, in its view, "the growing and legitimate preoccupation that exists both at European and international level with regard to crimes against the environment."

The only provision of international law (or, for that matter, of European law) which bore directly on the issue before the court, namely the balance between environmental concerns and the liberty of a foreign seafarer, was UNCLOS Art. 230. However the only mention made of it by the Court was in a passage which it quoted from a report of the Commission for the Environment, Agriculture and Territorial Matters of the Parliamentary Assembly of the European Council. This passage outlined fields of thought concerning possible policy options to increase deterrence of environmental offences, and one of the ideas canvassed was to modify Art. 230 "to state more clearly the possibility of imprisonment in the case of the most serious pollution breaches".

Given that UNCLOS Art. 230 is legally in force, and that there was no suggestion of any interpretative issue to be resolved, it is not clear why it was thought it necessary or appropriate for the court to go outside the legal framework and delve into policy issues in order to deal with the application of Captain Mangouras.

Indeed a number of points are unclear. If policy considerations were considered relevant, it is not clear why the court paid more attention to a report suggesting the possibility of modifying Art. 230 than to the article itself, especially when no such modification has been formally proposed, let alone adopted. Nor is it clear why the report to which the court referred was considered an appropriate source to consult – the body which produced it is not, it must be said, one which many practitioners in the field of pollution from ships will have come across as a recognized authority on the subject.

Given that the court was, after all, established specifically for the protection of human rights, and given that it felt that a review was needed of international policy, it might have been expected to show interest in the IMO/ILO Guidelines on Fair Treatment of Seafarers. This is partly because these bear far more directly on the issues before it than any other material to which it referred, and partly because the terms of the Guidelines, as well as the Preamble to them, are as authoritative a guide to international policy in this area as the court could wish to find.

The Preamble begins by referring to the Organizations' awareness of "a number of recent incidents in which seafarers on ships that have been involved in maritime accidents have been detained for prolonged periods," and expresses concern, among other things, "that, in some cases, the grounds for such detentions have not been clear to the seafarers being detained or to the international maritime community."

The Guidelines go on to urge all states to take various measures to promote respect for the basic human rights of seafarers involved in such cases.

The incidents which prompted the Guidelines are not identified in the instrument but are well known to those familiar with the background history. The most significant were all maritime accidents resulting in serious pollution, media-led public outrage, criminal charges against defendants who appeared to bear little, if any, responsibility for what occurred, and prolonged detention of foreign seafarers pending trial.

The main concern which the Guidelines address is of course the tendency in such cases for basic human rights not to be respected if those involved in the administration of justice are heavily influenced by public sentiment, actual or perceived, without adequate regard for the risk that this may be prejudicial to an objective assessment of the merits of the case. However no mention of the Guidelines is made in the judgment of the court.

There is, of course, no objection to be taken to the court leaving out of account third party comment on the case itself, such as the report of a public hearing into the incident in the European Parliament, which expressed concern that the master was being inappropriately treated as a criminal; and the flag state inquiry report which concluded that it was difficult to see how he could be said to have caused the pollution; that there was no evidence he had disobeyed any instruction; and that Spain's treatment of him had been "widely condemned" and considered by many to be a violation of his human rights.

What is unclear is why the court based its decision on policy factors without mentioning the most relevant legal provisions actually in force, and why it based its view of these factors solely on material indicating what it described as a "preoccupation" with environmental crimes, to the exclusion of any material establishing international policy on the human rights issues on the other side of the case.

No details are given of the reasons for the court's view that this "preoccupation" with environmental concerns was "legitimate". As it referred to the EU Directive on Criminal Sanctions for Ship-source Pollution, should we assume that it was guided by the accompanying Explanatory Memorandum, with its opening statement that the *Prestige* incident had demonstrated that those responsible for pollution were not being adequately penalized? Or was it influenced by the statement in the Memorandum that the urgency of introducing the Directive had been "forcefully stressed at the highest political level within the EU.'' Or had members of the Court read about political figures denouncing "gangsters of the sea", and stressing the urgent need for measures that would ''make it easier to identify and prosecute all those responsible for polluting activities at sea''?

It is not clear whether the Court recognized that these statements reflected confusion between illicit operational discharges and accidental spills, or whether it appreciated the risk which this presented of prejudice to seafarers caught up in the latter type of

case. It did not distinguish between them in its references to "crimes against the environment".

In arriving at its conclusion the court essentially declined to criticise the Spanish courts for the weight they attached to the seriousness of the pollution and the scale of the resulting social alarm.

Whist it is fair-minded for higher courts to ask whether they would have acted differently in the shoes of the judges below, one of the functions of an international tribunal is to provide access to justice at greater remove from the domestic pressure of popular sentiment external to the legal process.

My point is not to criticise the desire of any court to be cognizant of public opinion and policy, but to draw attention to the extreme care required in this particular field when investigating these factors, and when deciding what weight, if any, should be given to them in legal proceedings. Hopefully the case will stimulate awareness of these important issues.

Conclusions

There are of course no quick or easy solutions to the issues I've raised, but a few long-term goals might perhaps be suggested.

So far as new laws are concerned, much has been said and written about the importance of maritime affairs being regulated by uniform international laws rather than a miscellany of unilateral national or regional measures.

Uniformity in this sector has many benefits, but it is not the only reason for preferring international solutions over domestic legislation. Another reason is that the process leading to them is generally more likely to result in a well informed, objective and balanced product. These qualities are less evident in unilateral measures, which have generally been driven by political interests in accommodating popular sentiment.

For these reasons it should certainly remain an important goal to maintain international regimes as the principal source of maritime regulation. We should continue to guard against over-politicization of international fora and, where domestic laws are in contemplation, to support well-informed consultative processes.

Another goal would be to support liability standards which draw as clear a line as possible between incidents which involve offences and those which do not. This is an important merit of the relevant MARPOL regulations. Domestic laws based on other liability criteria, such as negligence, gross negligence, or imprudence, are much less clear.

In relation to legal proceedings, anyone concerned to promote fair treatment of defendants might consider giving particular focus to the decision to prosecute. There is a natural reluctance to comment when proceedings are still in progress, even

though these often continue for some time. Nonetheless, if and when they are finally dropped or dismissed, there may sometimes be a case for polite review of whether it would be better, in any future similar case, for the investigating or prosecuting authorities to decide, and if necessary publicly explain, that charges are not justified.

Assisting prosecutors in making fair decisions is another reason for supporting clear liability standards: vague criteria leave too much room for argument in emotionally charged cases, and they give prosecutors too little protection from criticism if they decline to bring charges of dubious merit.

If we have anything useful to offer to our elders and betters in the judiciary, it might be to encourage particular care in determining the relevance in this field of public opinion or policy, and in identifying appropriately reliable sources. It is only natural that high-profile cases engender judicial concern to be sensitive to public opinion, but this is an international field in which the risk is particularly great of being led into error if account is taken of popular sentiment, or of public policy derived from sources other than international organizations acting with global support.

A further objective must be to support due respect at all times for international law. Surely nothing undermines it more seriously than measures by governments which appear hard to reconcile with their treaty obligations – not just because of the example set, but because there is seldom an effective remedy.

This presents us all with a challenge of diplomacy. Those seeking solutions to problems of this kind recognize the importance of the comity of nations, as well as respect for the sovereignty of states over waters within their jurisdiction, and for the integrity of their judicial proceedings.

At the same time, those who have contributed valuable work to the development of international maritime law might encourage respect for the fruits of their efforts if they are ready, when rare occasion demands, to offer a few tactful words recalling the relevant treaty commitments.

It does no one any favours if courtesies are taken to an extreme of silent acquiescence in measures of doubtful validity in international law. Silence of that kind is Emperor's New Clothes, and someone somewhere must break it.

Whilst the diplomatic concerns of governments are well understood, it may fall to some of us on the sidelines, in industry organisations and legal circles, to be the child who spoke the naked truth. Not to shock, offend, or stir up controversy, but because when issues of this kind arise, and there are genuine concerns to address, it may be easier for some than for others to raise them.

I therefore hope that nothing I've said in this spirit is taken amiss, and that anyone concerned to promote good governance in this field may detect a few grains of truth that merit further thought.