

# **THE DEVELOPMENT OF INTERNATIONAL MARITIME SECURITY POLICIES AND THEIR LEGAL IMPLICATIONS**

**By**

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The development and promulgation of explicit maritime security policies is a relatively new development in the history of international shipping. Certainly, ever since vessels have gone to sea, the security of the vessel, its cargo, passengers, and crew has been a primary concern of all those so engaged. However, this was more of an *a priori* tacit understanding than anything else. Ships and seafarers were expected to, and did, go to sea armed and prepared to defend themselves against all threats, known and unknown. Self-reliance was not only the order of the day, it was an occupational if not legal requirement.

In many respects, the maritime self-defense lessons learned over the last 5,000 years or so for sea-borne commerce are now being forgotten, or at least relegated to printed and bound memories stored in dusty, dimly-lit libraries and document repositories. In their place are emerging bureaucratic laws, rules, and regulations conceived, created, and implemented in smoke-filled backrooms and offices by political

action committees, politicians, national assemblies, and international organizations. “Civilized” societies have somehow managed to convince their members that they are all potential victims of criminal activities, that the ability to defend oneself and one’s interests is barbaric, and that our lives, fortunes, and sacred honor should be defended not by those to whom they belong, but by the society in which they live. As a result, we are told by police officers, security consultants, and sociologists not to resist an attack or mugging, that our possessions are not worth our lives, and that the duly organized law enforcement agencies will protect us. In short, we are instructed to become victims rather than victors.

### **Development of IMO Policies**

Nevertheless, the international concern for the security of ships, cargoes, passengers, and crews has been steadily growing over the past forty years. Within the International Maritime Organization (IMO), the first mention of “security” in any treaty, convention, or resolution appears in the Convention on Facilitation of International Maritime Traffic, 1965 (the FAL Convention). The FAL Convention was adopted by the International conference on Facilitation of Maritime Travel and Transport on 9 April 1965. It entered into force on 5 March 1967.

The purpose of this convention was to “facilitate maritime transport by simplifying and minimizing the formalities, documentary requirements, and procedures associated with the arrival, stay and departure of ships engaged on international voyages.” It was originally developed to meet a growing international concern regarding the excessive numbers of documents required for merchant shipping. The annex to the convention contains rules for simplifying formalities, documentary requirements, and

procedures upon arrival and departure of ships, and reduces to eight the number of declarations that can be required by public authorities. In light of the present concerns over maritime security in general and counter-terrorism specifically, modifications to the document requirements contained in the FAL Convention may become necessary. Nevertheless, Section 1, B1.3 of the Annex states:

Measures and procedures imposed by Contracting Governments for purposes of **security** or narcotics control should be efficient and, where possible, utilize advanced techniques, including automatic data processing (ADP). Such measures and procedures should be implemented in such a manner as to cause a minimum of interference with, and to prevent unnecessary delays to, ships and persons or property on board.

From 1965 until the *Achille Lauro* hijacking in 1985, a period of twenty years, the IMO was silent on the issue of security. Then, on 20 November 1985, the IMO Assembly adopted Resolution A.584(14), titled Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of their Passengers and Crews. This resolution authorized the Maritime Safety Committee (MSC) to request the Secretary-General to “issue a circular containing information on the measures developed by the Committee to Governments, organizations concerned, and interested parties for their consideration and adoption.” On 26 September 1986 the MSC approved MSC/Circ.443, titled Measures to Prevent Unlawful Acts Against Passengers and Crews On Board Ships. The measures discussed in MSC/Circ.443 became known as the IMO “security recommendations” because nothing in Circ.443 was deemed mandatory. In fact, the clear language of the circular indicated the security measures and procedures were merely *recommendations*. Paragraph 3.1 states:

3.1 Governments, port authorities, administrations, shipowners, operators, shipmasters and crews **should** take all appropriate measures against unlawful acts threatening passengers and crews on board ships. The measures implemented **should** take into account the current assessment of the likely threat together with local conditions and circumstances.

This is a very significant paragraph, and arguably the most important from a legal perspective. First of all, the use of the word “should” instead of “shall” clearly makes the security measures and procedures contained therein recommendatory and not mandatory. Second, although this circular was produced and disseminated in response to the *Achille Lauro* incident the year before, the language referring to “governments, port authorities, administrations, shipowners, operators, shipmasters and crews,” unquestionably makes the circular applicable to more than cruise ships and passenger terminals. Over the years, this distinction was lost on most readers, particularly the United States, which implemented the measures and procedures by mandatory legislation, but only so far as they were applied to cruise ships and passenger terminals. This is because, when read in conjunction with Paragraph 3.3, this is the apparent meaning that emerges. Paragraph 3.3 states:

3.3 The measures contained in this document are intended for application to passenger ships engaged on international voyages of 24 hours or more and the port facilities which serve them. Certain of these measures may, however, also be appropriate for application to other ships or port facilities if the circumstances so warrant.

Clearly, the intent was to have readers focus on the first sentence in this paragraph rather than the second. This is because the entire resolution was a reaction to a terrorist incident aboard a cruise ship. It is the second sentence, however, that makes the entire document applicable to *all* ships and port facilities, and hence much more important in today’s maritime security environment.

The next action taken by the IMO regarding maritime security came in the form of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome 1988). This became known as the SUA Convention of 1988.

The term “terrorism” is mentioned for the first time, although it is not defined. The Convention’s preamble states that the Party States to the Convention being “deeply concerned about the world-wide escalation of acts of terrorism in all its forms;” recalling that resolution 40/61 “unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed,” and also recalling that by resolution 40/61 IMO was invited to “study the problem of terrorism aboard or against ships,” agree to the conditions of the Convention. Article 3 of the Convention states:

1. Any person commits an offense [under the Convention] if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigation facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or injures or kills any person, in connection with the commission or the attempted commission of any of the offenses set forth in paragraphs (a) to (f).

2. Any person also commits an offense if that person:

(a) attempts to commit any of the offenses set forth in paragraph 1; or

(b) abets the commission of any of the offenses set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offense; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offenses set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Interestingly, the one word that is conspicuously absent in this belabored definition of “offense” is “terrorism,” even though the Convention’s preamble clearly uses it.

Another hiatus in IMO’s maritime security activities occurred from 1988 to 1996. On 5 July 1996, MSC/Circ.754, titled Passenger Ferry Security, was adopted.

The security measures recommended in Circ.754 related primarily to passenger ferries operating on international routes and the ports serving those routes. However, the circular also stated that the measures might “also be applied to international freight ferry operations depending upon the requirements of individual Member Governments.”

It is interesting to note that the first paragraph in the circular reaffirms the impression Circ.443 gives that it applies only to passenger vessels:

MSC Circular 443 supported security measures for passenger ships engaged on international voyages of 24 hours or more....

Even so, Circ.754 incorporates by reference Circ.443:

The measures outlined in this document should be read in conjunction with the security measures and procedures detailed in MSC/Circ.443.

This means, of course, that all the security recommendations contained in Circ.443 apply to passenger ferry operations as well, which also apply to all other ship and port operations. Is this the intent of Circ.443 and 754? It is difficult to tell. Certainly, if that was the intent, could not the drafters of Circ.754 simply have said Circ.443 also applies to passenger ferry operations, and left it at that?

Paragraph 5.6.6 is both interesting and strange. The paragraph states:

**Liaison to limit terrorists using ferries to move arms etc.** Ships as a means of transport, can be used as an innocent conduit for the movement of arms consignments etc. for terrorist groups. Although such consignments may pose little or no immediate threat to the ferry or its passengers, Member Governments should work with ferry operators to identify ways to minimize such traffic.

Surely, the drafters of this paragraph could not have truly believed that terrorist consignments of weapons and explosives “pose little or no immediate threat to the ferry or its passengers.” It had been over ten years since the *Achille Lauro* hijacking, the drafters must have known that the cruise ship was being used as an “innocent conduit” when the terrorists were discovered in their stateroom and subsequently forced to take over the vessel. The murdered American passenger would probably take issue with the notion that the hijackers posed “little or no immediate threat to the... passengers.”

Paragraph 5.2 of Circ.443, incorporated by reference, states:

The ship security plan should include measures and equipment as necessary to prevent weapons or any other dangerous devices, the carriage of which is not authorized, from being introduced by any means whatsoever on board ship.

This is clearly much stronger language than “Member Governments should work with ferry operators to identify ways to minimize such traffic,” and so the question arises as to how Circ.754 can be reconciled with Circ.443. The answer is simply that Circ.443 is the controlling document. Any apparent inconsistencies in Circ.754 must be resolved in favor of the recommendations contained in Circ.443.

Finally, on 20 November 2001 the IMO unanimously adopted Resolution A.924(22), Prevention and Suppression of Acts of Terrorism Against Shipping, that had been proposed by the Secretary-General in the aftermath of the terrorist attacks in New York and Washington. D.C. on 11 September 2001.

By this resolution, the Maritime Safety Committee was asked to undertake a review of all IMO instruments for the purpose of ascertaining whether there is a need to update those instruments in light of recent terrorist activities. The instruments specifically referred to in the resolution are:

- Resolution A.584(14)
- MSC/Circ.443
- MSC/Circ.754
- SUA 1988

Thus, from the FAL Convention of 1965 where the word “security” was mentioned only once in passing, to Assembly Resolution A.584(14) in 1985 that produced Circ.443 in response to the *Achille Lauro* hijacking, to the SUA Convention of 1988 where the term “terrorist” was carefully and meticulously avoided, to the enigmatic Circ.754 in 1996 that doesn’t quite mesh with Circ.443, to the 2001 Assembly Resolution A.924(22) where the IMO unequivocally came to grips for the first time with international terrorism and its effect on maritime commerce, the IMO has moved steadily toward a future in which it will play a significant role in making maritime commerce safe for the world.

Along the way, the IMO has taken a few side-trips into other areas relating to maritime security. These consist of resolutions concerning unsafe practices associated with alien smuggling and the trafficking or transport of migrants by sea (Resolutions A.773(18) and A.867(20); MSC Circ. 896/Rev.1), the Convention and resolution dealing with the prevention and suppression of the smuggling of drugs, psychotropic substances and precursor chemicals on ships engaged in international maritime traffic (FAL Convention 1988; Resolution A.872(20)), resolutions concerning the investigation, prevention and suppression of piracy and armed robbery against ships (Resolution



A.922(22); MSC Circs. 622/Rev.1 and 623/Rev.2), and a resolution establishing guidelines for the successful resolution of stowaway cases (Resolution A.871(20)). However, perhaps the most potentially significant international instrument to be devised that does not specifically address maritime security but which may affect the implementation of new maritime security measures around the world is the Law of the Sea Convention.

In 1949 the International Law Commission of the United Nations drafted a law of the sea convention in an attempt to create uniformity in international law relating to the use of the oceans and extensions of jurisdictions by individual nations. The result, nine years later, was a meeting in Geneva in which eighty-six nations participated that came to be known as the First United Nations' Conference on the Law of the Sea (1958), or UNCLOS I. As a consequence of UNCLOS I, four international agreements were developed: the Convention on the High Seas, the Convention of the Territorial Sea and the Contiguous Zone, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the Continental Shelf.

A second conference was held in the 1960s but no agreement was reached. Throughout the 1960s and 1970s many national territorial seas were expanded, with most coastal nations moving their claimed jurisdiction to twelve miles. A few rogue nations claimed territorial seas of 200 miles. Once manganese nodules were discovered on the ocean floor, however, a heightened concern over just who should have jurisdiction over seabed mineral rights and other peaceful uses of the ocean beyond coastal state jurisdiction resulted in the United Nations' call for a Third United Nations Law of the Sea Conference. Substantive deliberations began in 1974, with the twelve-mile territorial

limit issue becoming the focal point of the conference. In 1982 negotiations culminated in the adoption of the Law of the Sea Convention (UNCLOS III).

The Convention created a new body of international law whose primary intent is to establish and enforce jurisdiction among coastal, flag, and port nations. Quasi-specific maritime security issues were addressed by providing general obligations of the parties to the Convention, and delineating specific activities that were allowed within various jurisdictions. Most significantly, the Convention established the twelve-mile territorial limit and the 200-mile exclusive economic zone for all maritime nations that were a party to the Convention.

The basis for customary international law is the practice of states that reflects commonly accepted activity between nations and throughout the international community, and therefore, by tacit agreement, has the force of law. Historically, maritime law was one of the first forms of customary international law. Ancient seafarers needed to be able to predict their rights and obligations as they traded from one country to another.

The Code of Hammurabi was written around 1800 B.C., and the Greeks developed laws to deal with shipwrecks, piracy and blockades. Other ancient maritime codes include the Rhodian Sea Law, the Rules of Oleron, and the Consolato del Mare, all of which expressed the customary practice of the times of the maritime states involved, the principles of some of which have survived to this day.

One of the main problems in defining customary international law is deciding when a particular practice changes from mere custom or usage to a more-or-less uniformly accepted rule. What is customary international law and how it may allow

individual nations to maintain safe and secure navigation has been a problem for the maritime industry for hundreds of years.

The Law of the Sea Convention (UNCLOS III) incorporates most of the original 1958 agreements. A coast state may exercise prescriptive jurisdiction in its waters up to 200 miles from shore. In order to address territorial boundaries for purposes of jurisdiction, UNCLOS III establishes six ocean zones:

The **territorial sea** may extend up to twelve nautical miles from shore and is measured from a baseline on a country's coast. The **contiguous zone** extends an additional twelve nautical miles (22km) from the territorial sea limit. The **exclusive economic zone (EEZ)** allows a coastal state to declare territory extending from the outboundary of the territorial sea to 200 nautical miles (370km) from the coastal baseline (188 nautical miles where the territorial sea is twelve miles). The **continental shelf zone** extends a minimum of 200 nautical miles from the coastal baseline and may extend up to 350 miles in some instances. The **high seas** extend beyond areas of national jurisdiction and are generally freely available for use by all. The **archipelagic waters** bordering the coasts of island countries are reconfigured through specific baseline delimitations.

UNCLOS III ensures several important rights. The three most commonly referred to are:

- The right of innocent passage
- The right of transit passage
- The right of archipelagic sea lanes passage

The right of innocent passage guarantees that ships must be granted continuous and expeditious passage through a foreign coastal state's territorial seas so long as such passage is not prejudicial to the peace, good order, or security of the coastal state. This

right is granted by the Convention under certain conditions. Specific activities are forbidden while the ship is engaged in innocent passage:

- Any threat or use of force against the territorial integrity or political independence of the coastal state or in any other manner in violation of the Charter of the United Nations
- Any exercise or practice with weapons of any kind
- Any act aimed at collecting information to the prejudice of the defense or security of the coastal state
- Any act of propaganda aimed at affecting the defense or security of the coastal state
- The launching, landing, or taking on board of any aircraft
- The launching, landing, or taking on board of any military device
- The embarking or disembarking of any commodity, currency, or person contrary to the customs, fiscal, or sanitary regulations of the coastal state
- Any act of willful pollution, contrary to the provisions of the present convention
- The carrying on of research or survey activities of any kind
- Any act aimed at interfering with any systems of communication of the coastal or any other state
- Any act aimed at interfering with any other facilities or installations of the coastal state
- Any other activity not having a direct bearing on passage

Some commentators in the U.S. and U.K. have argued that cargo vessels and yachts carrying firearms for their own protection violate the right of innocent passage. There is, however, nothing in UNCLOS III that suggests this. The mere *carriage* of protective weapons does not constitute “exercise or practice with weapons of any kind.” Certainly, the *use* of such weapons in acts of self-defense could be argued to constitute the “exercise” of weapons. However, it could just as easily be argued that “exercise”

refers to “practice” and that such use is not practice or exercise but a necessary act of self-defense. Furthermore, what does “weapons of any kind” mean? Just about anything one cares to name can be used as a weapon, including box cutters, sticks, boxing gloves, and house keys. Also, *even if* the use of firearms in self-defense destroys the right of innocent passage, the question is, “So what?” What are the consequences of being denied innocent passage, particularly if one has already traversed the major part of the territorial sea in question? Is the coastal state going to make a vessel turn around and traverse it again in the opposite direction, or simply let it proceed onto the high seas? Is it going to seize the perceived offending vessel and drag it into port, causing considerably more trouble than if it were merely escorted out of the jurisdiction? In the final analysis, however, most would agree that it is better to be alive to argue the issue than dead; and, of course, one must get caught, otherwise the entire matter becomes immaterial. Furthermore, only signatories to the Convention are bound by its conditions, unless those conditions also constitute customary international law. Since the right of innocent passage was invented as a compromise in order to secure acceptance of the territorial seas provisions in the Convention, it clearly does not constitute customary international law.

What probably *does* constitute customary international law, however, is the right of transit. In 1949, the International Court of Justice confirmed that under customary international law, ships of all nations have the right to navigate “through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state....” Thus, the right of transit passage allows free transit through international straits, and was codified in the Convention as an acknowledgment of the rights of maritime states who required that along with the extension of territorial

seas to twelve nautical miles would be a guarantee of an unimpeded right of transit through international straits. Without this guarantee, only the right of innocent passage would exist within the territorial seas of the nations bordering the affected straits that were parties to the Convention. The difference is that the right of innocent passage applies to the entire territorial sea of a coastal state and is conditional and subject to international agreement, whereas the right of transit passage applies only to international straits and is unconditional and not subject to prior international agreement.

The right of archipelagic sea lanes passage permits transits for normal activity through archipelagos between one part of the high seas and another part of the high seas through traditional international navigation routes or through IMO-approved sea lanes. The right of transit by ships through archipelagos may have significant impact on military maneuvers.

On the high seas, no nation may assert sovereign rights, but all may exercise certain freedoms, including the freedom to navigate. These freedoms may be exercised by any state that pays “due regard for the interests of other States in their exercises of the freedom of the high seas.” Precisely what “due regard for the interests of other States” means is not completely clear. The exception to the rule, however, is that any state may exercise jurisdiction over foreign vessels on the high seas in order to punish persons suspected of engaging in piracy.

The United Nations’ International Court of Justice is the primary judicial organ of the United Nations, and is headquartered in The Hague. It was established in 1945, and its main functions are to decide cases submitted to it by states and to give advisory opinions on legal issues submitted to it by the General Assembly or Security Council, or

by such specialized agencies as may be authorized to do so by the General Assembly in accordance with the UN Charter. The Court is comprised of fifteen judges that are elected to nine-year terms by the General Assembly and Security Council from nominees of certain national groups. Questions before the Court are decided by a majority vote of the judges present, and maritime matters have historically focused on jurisdictional issues.

### **Development of National Maritime Security Policies**

Of the 160 Member States in IMO, only three have enacted national legislation incorporating the security recommendations contained in Circ.443 that were first promulgated in 1986. Those three nations are the United States, the United Kingdom, and Canada. While the United Kingdom's and Canadian legislation address all forms of maritime and seaport security, the United States' legislation only applies to cruise ships and cruise ship terminals. Whether this is intentional or simply a misreading of Circ.443 is not clear. The present national legislations are:

- United States: 33 Code of Federal Regulations §120 and §128.
- United Kingdom: The United Kingdom Aviation & Maritime Security Act of 1999 and Subsequent 'Directions'.
- Canada: Canadian Marine Transportation Security Regulations (Cruise Ships And Cruise Ship Facilities) of 20 May 1997; Cruise Ship and Cruise Ship Facility Security Measures of 1 August 1997; Memorandum of Understanding Cruise Ship Security of 30 March 1998.

Since only three nations out of a possible 160 have accepted the security recommendations contained in Circ.443 and enacted conforming maritime security legislation, the question is raised whether a standard for maritime security has been established within the industry. Without mandatory security measures, agreed to by

IMO's member states, enforced by treaty or convention, the answer most probably is that no standard now exists. This can significantly affect litigation in all areas of maritime security, from cargo loss, to stowaways, to drug smuggling, to piracy, to sabotage and hijacking, to terrorism. Without an established standard, courts will be forced to determine what security measures were reasonable under the circumstances. This may lead to different standards in different places, under different laws. If this occurs, then the predictability the law affords for any business endeavor will be lost, and the cost for such uncertainty will increase operating expenses. The industry, therefore, needs to consider the development and ramifications of future international maritime security policies.

### **Future Developments of International Maritime Security Policies**

Pursuant to IMO Assembly Resolution A.924(22), the IMO has recognized the need to review its present diplomatic instruments to ascertain whether there is a need to create mandatory international security standards. It is extremely likely that some mandatory security standards will in fact be developed. Once such standards are developed, the question will be how they will be made mandatory. Issues presently being reviewed include possible amendments to SOLAS, the ISM Code, and STCW. It is not clear what instrument or instruments will be used to implement any international standards that may be developed. However, a number of changes are almost certain to occur. Some of these may include:

- The requirement that each government identify a "Designated Authority" responsible for ensuring the development, implementation, and maintenance of ship security plans and port security management systems.
- New mandatory security measures applicable to all vessels, except pleasure vessels, over 500 GT sailing in international waters.



- Every port, port facility, off-shore facility and shipping company will ultimately be required to appoint a Company Security Officer (CSO) who will be specifically responsible for security at executive level.
- Every port, port facility, off-shore facility and shipping company will ultimately be required to appoint a facility/ship security officer who will be specifically responsible for the security of his port, port facility, off-shore facility, or ship.
- All CSOs and facility/ship security officers will be required to receive effective, comprehensive, security training.
- Every port, port facility, off-shore facility, ship and applicable ferry will be required to have a security plan. The contents of this plan will have to be “approved” by the “Designated Authority.”
- The definition of “port,” “port facility,” and “port/ship interface” must be established. This may involve difficult issues of national sovereignty and the extent to which an international diplomatic body may dictate to its member states. The underlying principle is that there should be “harmonization” between the ship and the port, and it may be that in the case of a large port, the port security plan will include a number of individual port facility security plans.
- All ships over 500 GT on international voyages may be required to be fitted with automatic identification systems (AIS).
- All ships may be required to notify the destination port of owner, crew and cargo details 96 hours prior to arrival.
- Information concerning seafarer identification and ship ownership may be required. Such “transparency” may infringe upon individual citizen privacy guaranteed by certain member states, corporate confidentiality, and union guarantees.
- Security requirements may be implemented that ensure the integrity of cargo and the tracking and identifying of shipping containers in intermodal transportation.
- Maritime security and communications equipment that prevents or hinders unauthorized boarding in port and at sea may be required to be developed and utilized.
- Research may be required to develop reliable, cost-effective vessel hijacking alarm systems.

- Government legislation and penalty regulations will be necessary to deal with unlawful acts and non-compliance with mandatory international security requirements.

Some of these proposed changes involve daunting issues of national sovereignty that may not be able to be resolved by the existing treaties and conventions. Modification of the SOLAS Convention, for instance, which by definition applies only to vessels engaged in international trade and over 500 gross tons, may not be feasible when trying to create mandatory security requirements for all seaports and other transportation systems in the world.

The ISM Code, on the other hand, has been developed under the auspices of the IMO as a guidance document regarding safety and pollution prevention management for marine companies and any ships they operate. The ISM Code's objectives are to enhance ship safety, instill a safety culture in the industry, and to protect the environment by promoting sound management and operating practices. This includes security measures to protect ships and crews. It lays down standards for management procedures and enables port state control officers to "inspect the ability" of crews on board ships. Compliance with the ISM Code is mandatory under the Safety of Life at Sea (SOLAS) amendments. Enforcing the requirements of SOLAS, like any other maritime treaty, is left to the member states through such mechanisms as refusing entries or departures. Further amendments to SOLAS may make, or attempt to make, certain security procedures mandatory for not only ships engaged in international trade over 500 gross tons (to which SOLAS applies by definition) but also all port facilities servicing such ships. Significant hurdles involving national sovereignty exist, however, to such modifications of the treaty.

## Negligent Security

While customary international law applies primarily to the world's nations and, by extension through national legislation, occasionally to private individuals, the more important inquiry for seaport managers, ship owners, and owners and operators of maritime businesses involves the legal liabilities, both criminal and civil, resulting from the implementation or non-implementation of security measures. National law generally dictates such liabilities. However, ship owners, seaport operators, and other persons or entities that conduct business internationally can be sued in any number of jurisdictions and held accountable for allowing improper or negligent security to exist. This is why it is so important to conduct a comprehensive security survey, prepare a detailed security plan, and then properly implement that security plan. The security measures and procedures chosen must meet international standards or, in the absence of such standards, must be reasonable under the circumstances.

Furthermore, if the vessel is found to have been unseaworthy, either at the time of the attack or when she first embarked upon her voyage, by the way she was manned, outfitted, or operated (including the way the crew was trained and what security procedures were in place), then the owners and operators may be held, according to the First Circuit at least, criminally responsible under 46 USC §10908.<sup>1</sup>

If a ship owner implements a certain number of security procedures, and a terrorist attack ensues, the question is not whether the procedures were successful (there is no such thing as absolute security), but rather, whether they were reasonable under the circumstances. A ship owner cannot guarantee the security of his ship. He can only take reasonable precautions to guard against particular security threats. Reasonableness under

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<sup>1</sup> See *United States of America v. Pedro Rivera*, *infra*, and discussion.

the circumstances can include the cost of implementing the security measures, how the measures compare to the security standards within the industry if any, the extent and nature of the security threat, and a host of other matters that may be relevant to the particular instance.

The bottom line is that every ship is responsible for her own security. Security planning is an important aspect of vessel management, and should not be taken lightly. Every vessel should have a security plan, and that plan should be clearly implemented.

The case of *United States of American v. Pedro Rivera*, 131 F.3d 222, 1998 AMC 609 (1st Cir. 1997), was decided by the First Circuit Court of Appeals sitting *en banc*, and involved the issue of seaworthiness and the radical criminal prosecution of a tugboat managing company's manager by the federal government under 46 USC §10908. Section 10908 provides as follows:

A person that knowingly sends or attempts to send, or that is a party to sending or attempting to send, a vessel of the United States to sea, in an unseaworthy state that is likely to endanger the life of an individual, shall be fined not more than \$1,000, imprisoned for not more than 5 years, or both. [Emphasis supplied]

The case arose out of an oil spill that occurred off the coast of San Juan, Puerto Rico in 1994, which was caused after the tow wire connecting the tugboat *Emily S.* to the barge *Morris J. Berman* parted. The barge subsequently ran aground and spilled her oily cargo. Rivera was the general manager of the company that managed the tugboat. It is interesting to note from the outset that the case did not involve injuries or loss of life. It was an oil spill case. The government, however, evidently not being able to make a case under any of the environmental protection statutes, chose to prosecute under the statute in question—a prime example of government prosecutors running amok. In any event,

Rivera was found guilty of failing to replace a deteriorated towing wire, and convicted. The Court of Appeals was then called upon to decide (1) whether such a conviction was legally allowed under 46 USC §10908, and (2) whether the evidence supported the conviction.

After examining the statute at length, including its legislative history as well as its statutory predecessor, the Court held that the statute did in fact allow a basis for criminal liability. It determined that, pursuant to the statute, a person may be found culpable if he: (1) knowingly sends a vessel to sea, (2) knowing the vessel is in an unseaworthy condition, and (3) knowing that the unseaworthiness is such that it will likely endanger life. Criminal prosecution, the Court argued, “requires knowledge not only that the vessel is unseaworthy but also that it is afflicted with a defect that is ‘likely to endanger’ life.” It stated, “run-of-the-mill unseaworthiness cases will not fall within this embrace.” But then, the Court said a very disturbing thing. It stated, “On the other hand, if growing numbers of individuals are prosecuted and convicted under the required standard, we see nothing inconsistent with the apparent safety objective of Congress.”

Having determined that the statute does in fact allow prosecution under the conditions set forth above, the Court next turned to the evidentiary standard needed for conviction. It focused on the statutory language, “likely to endanger life,” and held the government may not simply demonstrate the *possibility* that life may be endangered, it must prove the actions will “probably” or “in all probability” endanger life. “A slippery deck, a malfunctioning winch, or poor stowage all can lend themselves to fatal scenarios. There is very little that can go wrong at sea without some risk to human life.” The test, the Court said, “is not ‘possibility’ or ‘some risk.’ It is a significantly higher order.” The

Court reversed the conviction, holding that, “The government’s evidence, in sum, showed only that the parting of a tow wire *could* pose a serious risk to human life. This is inadequate to prove that Rivera violated §10908 by sending a vessel to sea knowing that its unseaworthy condition was *likely* to endanger life.”

This case has serious implications for the maritime industry. Although this was the first time someone has been prosecuted under 46 USC §10908, it may well not be the last. Failure to provide adequate security can render a vessel unseaworthy, and sending her to sea in that condition, when it is likely to endanger human life, may expose the operators to criminal prosecution. The government used 46 USC §10908 as an excuse to prosecute for an oil spill for which it could not otherwise obtain a conviction. It could attempt the same thing in relation to terrorist attacks, piracy, sabotage and hijacking.

Inadequate security can cause all sorts of losses, and hence liabilities, that one might never consider. An inadequate stowaway prevention plan, for instance, might allow stowaways to secret themselves in a vessel’s cargo. If they subsequently die and contaminate the cargo, requiring it to be rejected by the consignee, the ship owner could be held liable for the full loss of the cargo. Furthermore, if the crew is not properly trained in conducting stowaway searches or apprehending stowaways, and a crew-member is injured or killed, the master and ship owner could be found negligent or even criminally negligent. Improperly preparing a vessel for pirate attack, sabotage or acts of terrorism by failing to develop and implement a security plan, failing to adequately train and arm the crew, manning fire hoses when attackers are armed with automatic weapons, or failing to implement any of a host of prudent security measures, any or all of which results in injury or death, will give rise to legal liability on the part of the master and ship

owner. It may also allow a court to hold the vessel was unseaworthy at the inception of its voyage. If a weapon of mass destruction (WMD) is introduced into the United States by a vessel and is subsequently deployed or detonated, the loss of life could be catastrophic and the liabilities could be in the billions of dollars.

Port and port facility legal liabilities for negligently providing or failing to provide mandatory or adequate security are likewise a serious possibility. The opportunities for applying a negligent security cause of action in the maritime arena are boundless. A tanker boarded and scuttled, an offshore installation sabotaged and destroyed, a port facility's fuel depot ignited, a cruise ship passenger terminal bombed—if any of these were to be accomplished because of inadequate port or port facility security, those responsible for providing that security would be legally liable.

Mandatory security requirements for both ships and port facilities are presently being considered. What those requirements will be, how they will be mandated, where they will apply, and how they will be enforced is still unclear. What is clear, however, is that whenever mandatory requirements are established for any type of conduct or activity, a standard is set against which such conduct will be measured. If a container is stolen from a storage yard, or a nuclear device is loaded aboard a vessel hidden in the cargo, or a crucial pipeline is destroyed, or a cruise ship is hijacked, or a water supply is poisoned, all because one or more internationally mandated security requirements were not properly followed, the operators and owners of the affected vessel and applicable port facility will be liable. The list of security requirements that are mandated by either national or international law will provide virtually unbounded means for establishing liability. This will cause a fundamental change in the entire fabric of the maritime industry and the way

ship owners conduct business: from how their vessels are crewed and operated, to how cargo is received and transported around the globe, to how it is insured, and to how potential losses relating to security are underwritten.

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