

# **THE INVESTIGATION OF INCIDENTS AND CRIME AT SEA**

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On the 6<sup>th</sup> of November this year, Victim Support Europe launched it's Manifesto for 2014-2019 at the EU parliament in Brussels. This not only deals with crime but with the correct investigation of crime and incidents which could lead to criminal prosecution. Of course, this therefore encompasses all those on board ships within the EU inland waters and those on EU flag ships worldwide.

For too long, the rapid increase in crimes and incidents on the high seas have been ignored. These crimes and incidents have no pattern, they have affected all ships whether cruise or cargo ships and those on them, both passengers and crews. The problem is not the crimes and incidents themselves, which also exist on shore, but the lack of proper investigation and where required, the prosecution of those responsible and the investigation of the procedures in the companies concerned.

There are no police forces on the high seas, just the authority of the Master supported by the flag state the ship is registered in, all resting on the Resolutions of the United Nations Convention on the Law of the Sea. (UNCLOS)

## **UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

The Law of the Sea forms the basis for the general laws that the shipping industry and the marine administrations both national and international should comply with in their dealings with the ships and those on them.

Claims over the sea have been made for centuries and usually hinged on the sea power of those making such claims. In 1494, the representatives of Spain and Portugal, which were then the strongest sea powers of the day, met with Pope Alexander VI and he divided the Atlantic Ocean between them. He simply drew a line down the Atlantic and gave everything to the west to Spain including the

Pacific Ocean and everything to the east to Portugal including the Indian Ocean. Naturally this was not recognised by too many emerging sea powers.

The concept of Freedom of the Seas has been with us for centuries and was outlined by Hugo Grotius in his treatise *Mare Librium*, the Free Seas, published in 1609. It was only in the 17th Century that the establishment of territorial waters came into being. This was set at 3 nautical miles by the Dutch jurist Cornelius Bynkershoek based on his ‘cannon shot rule’, so called as this was the limit of a State’s ability to defend itself with shore based cannon. All waters beyond this limit were accepted as international waters, belonging to none and free for all to navigate.

This state of affairs existed until 1945 when the United States arbitrarily extended their control to cover natural resources on their continental shelf, obviously liberally translating the cannon shot rule to read missile range. This started the’ gold rush’ to extend and other nations quickly followed suit with various claims of sovereignty, some up to 200 miles.

The problems caused by the unilateral declarations of sovereignty over the seas were highlighted by Arvid Pardo of Malta in 1967, and in 1973 the third United Nations Conference on the Law of the Sea was convened to standardise the various claims. This lasted until 1982 and finally came into force in 1994.

## **SEA AREA JURISDICTION**

Although coastal states now can claim 12 miles territorial limits there are, as of 2006 still a few countries such as Jordan, Anguilla and Singapore using the old 3 mile limit.

### **Legal Zones**

UNCLOS sets the zones of coastal state jurisdiction and the High Seas.

**Base Line.** *The normal base line for measuring the breadth of Territorial waters is the low water line along the coast as marked on the charts and officially recognised by the coastal state. If there are offshore islands or reefs then these the base line can be extended to these.*

**The High Seas.** *Water beyond the jurisdiction of any State.*

**Territorial Sea.** *This may extend 12 miles from the baseline.*

**Internal Waters.** *Cover the waters between the shore and the base line from which the Territorial Seas are measured.*

**Contiguous Zone.** *Can extend 12 nautical miles beyond the Territorial Sea limit.*

**Exclusive Economic Zone. (EEZ)** *Can extend to a maximum of 200nm from the base line.*

**Continental Shelf.** *This is a ‘resource zone’ only without territorial rights and may extend up to 350 nm.*

**Archipelagic waters.** *Oceanic island states with territorial waters established from the base lines of its outermost islands.*

**Fisheries zones. (IFZ and EFZ).** *These are not set by UNCLOS but recognised as established by the state as inshore fishery zones of 12 miles and extended fishery zones of up to 200 miles in which the state may exercise rights over the fish stocks.*

## **The High Seas**

Article 87, Taken from UNCLOS of 10 December, 1982, states;

*1. The high seas are open to all States, whether coastal or land-locked.*

*Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:*

*(a) freedom of navigation;*

*(b) freedom of overflight;*

*(c) freedom to lay submarine cables and pipelines, subject to certain conditions*

*(d) freedom to construct artificial islands and other installations permitted under international law, subject to certain conditions*

*(e) freedom of fishing, subject to certain conditions*

*(f) freedom of scientific research, subject to certain conditions.*

*2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and*

*also with due regard for the rights under this Convention with respect to activities in the area.*

## **CRIMINAL JURISDICTION**

Having now established the areas of responsibility over navigable waters by states and ship in transit, as defined in the Law of the Sea, the next phase is to examine the right of criminal jurisdiction by states over ships, the persons on those ships and the areas such jurisdiction can extend to. While accident investigation is of equal importance, as such investigation could lead to criminal prosecution, criminal jurisdiction must, by necessity, have priority. Equally we must look at the rights of the ships in calling on those states for assistance in such areas.

The law of the Sea States;

1. *The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:*
  - (a) *if the consequences of the crime extend to the coastal State;*
  - (b) *if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;*
  - (c) *if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or*
  - (d) *if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.*

The above deals with territorial waters but it must be remembered that while these extend to 12 nautical miles from the base line, the Contiguous Zone extends to 24 nautical miles. From that, we can see that (a), (b) and (d) can extend through the contiguous zone on the basis that the crimes are against the States customs, fiscal, immigration or sanitary regulations

With reference to (c), we have for the first time a law that assists the master in dealing with a problem on his ship provided the ship is in States territorial waters. As this law is of criminal jurisdiction, then this would only apply to matters of a criminal nature. The master could call for assistance in dealing with criminal acts by crew or passengers for example. On the other hand if he suspected the carriage of narcotics, that also could be investigated by the coastal state.

### **Taken from UNCLOS**

*2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.*

*If the state suspects that the ship or a person on board has violated the laws of that state, then the act of sailing from that port is merely a navigational act and does not free the ship or the person from the jurisdiction of that State. Should the act have taken place even while sailing through the territorial waters or contiguous zone, the state has the right of 'hot pursuit'. This expression means that the state may authorize a warship or other ship belonging to a government agency and clearly marked as such or a similar aircraft to pursue a ship and board even on the high seas exactly as if the ship was still in its territorial waters. There is a distinction however as to the laws and rules that the ship can be pursued for. In internal waters of course, any act which is deemed by the State as breaking its laws and rules apply. However, if the ship is on passage in territorial waters, then 'hot pursuit can only be undertaken when the rules and regulations applicable to territorial waters are suspected as having been violated. Equally if the ship is only transiting the contiguous zone, then only when the ship is suspected of transgressing the contiguous laws and rules against the state can apply.*

This therefore defines the judicial rights of a state over a ship within its internal waters and that, for a crime committed while a ship was in those internal waters, those rights continue after a ship has sailed provided the rules for 'hot pursuit' are followed.

### **Taken from UNCLOS article 111**

*3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.*

*4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.*

*Except as provided in Part XII which deals with the protection and preservation of the marine environment or with respect to violations of laws and regulations adopted in accordance with Part V, which outlines the restrictions within the exclusive economic zone, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.*

### ***Civil jurisdiction in relation to foreign ships***

*Taken from UNCLOS article 27*

*1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.*

*2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.*

*3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.*

The above is most important as it protects the rights of those on board the ship which is exercising its rights of innocent passage. No arrests or detentions can take place unless the ship has committed an offence against the laws of that state applicable to the zones the ship passes through.

## THE FLAG STATE

Throughout these various laws and convention resolutions, references have been frequently made to the responsibilities of the Flag State. It is therefore necessary that we should have an understanding of the responsibilities of the Flag State and that State's obligations under these statutes.

Taken from UNCLOS article 91:

- 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*
- 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.*

### Duties of the Flag State.

Taken from UNCLOS Article 94 of the Law of the Sea

- 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
- 2. In particular every State shall:*
  - (b) Assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.*
- 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.*
- 7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.*

Paragraph 2 b stating the Flag States jurisdiction under its internal law over the vessel, gives rise to the requirement that vessels carry a copy of that state's Maritime and Civil law to ensure compliance. In the management of the ship it is prudent to have an understanding of the State's laws, especially where they might differ from the norm.

Paragraph 7 is also of special interest. Basically this means that in any incident on the High Seas, only the Flag State can hold an inquiry into the incident regardless of what other States are involved. Of course it states that the Flag State shall cooperate with another State's inquiries but the onus of the investigation remains with the Flag State.

IMO Resolution A912(22) Annex 1 States that a Flag State should;

- *Provide for the enforcement of its national laws, including the associated investigative and penalty processes.*
- *Take appropriate action against ships flying its flag that fail to comply with applicable requirements.*
- *Ensure the availability of sufficient personnel with maritime and technical expertise to carry out its flag state responsibilities including:*
  - *The development and enforcement of necessary national laws*
  - *The reporting of casualties and incidents as required by the respective instruments to which the flag state is a Party.*

## **Summary.**

Article 94 of UNCLOS is clear that unless the Master, while passing through coastal territorial waters, requests assistance from that country's authorities, only the flag state has jurisdiction to investigate and progress any criminal proceedings and by this article is duty bound to do so.

Any flag state has judicial jurisdiction over any flag ship while that ship is in the inland waters of that State.

It must be remembered that the USA has not ratified the UNCLOS agreement and therefore does not recognise the Law of the Sea. This allows this country to act outside the laws and it has done so on several occasions. By this same non recognition, it cannot claim any action be taken under UNCLOS resolutions.

From both Article 94 of UNCLOS and IMO resolution A912 there can be no doubt that on the high seas, it is the responsibility of the Flag state to enforce its laws, to report and to investigate any casualty or incident on its flag ships.

Equally while a ship is within the internal waters of a State, then that State has jurisdiction over that ship and its national laws apply. This then places the obligation on a state to investigate any crime or incident that is against its national laws, even after that ship has sailed while it is in the territorial waters of that State. It does not have such powers over that ship for any incident that occurs on the high seas prior to that ship's arrival unless the ship is of that country's flag.

### **The Position of the Master.**

The Shipmaster owes a duty of care to;

- To the passengers for their safety
- To the crew members for their health, safety and well being
- To every owner of goods carried in his ship
- The shipowner for the care of his ship.
- To all other persons who has business on the ship
- To the environment.

The Master is therefore legally responsible for the safety of all on board, whether passengers or crew. With regard to passengers, unless their passage agreement or ticket includes a 'Himalaya' clause, which protects the ship, the Master may be personally liable for any injuries they suffer. Irrespective of this, the Master has a duty to the safety of those on board above that of his duty to the owners of the ship.

## **CASE EXAMPLES**

### **Case 1. Failure of Captain and Shipping Company to properly deal with Alleged Rape and resultant Fatality.**

June 24 2010. On this date Akhona Geveza, a nineteen-year-old South African cadet on a British registered cargo ship, Safmarine Kariba, disappeared. Her body was later found drifting in the sea off the Croatian coast.

At 10 am that day Akhona's shipmate, Cadet Nokulunga Cele told the captain that a senior officer had repeatedly raped Akhona. On Akhona's behalf, and against her wishes, Nokulunga reported that Akhona had said that six weeks earlier the officer, a Ukrainian, had first tried to kiss her while giving her swimming lessons. Later he said sorry, and told her to come to his room. But there he allegedly raped her. Akhona didn't report it because she feared that nobody would believe her.

On hearing Nokulunga's story, shipmaster Klaudiusz Kolodziejczyk says he immediately confronted the still un-named officer. And he set-up a three-way meeting with the officer and Akhona for 1100, as if it was just a personal problem.

Akhona did not attend that meeting. So the captain organised a search, during which pills and a bottle of thinners were found on the ship's forecastle. Sea Rescue at Rijeka was alerted. Her body was found three days later.

Importantly, several other cadets in the same maritime studies programme anonymously told the South Africa Sunday Times about the way senior officers were threatening cadets' careers if they did not perform sexual acts. One cadet former female cadet said, “It was like we were dumped in the middle of a game park.”

The sexual abuse allegations include:

- A female cadet had to have two abortions after being raped at sea
- A married South African Maritime Safety Agency executive forced himself on a female cadet and threatened to cancel her contract if she reported it. His assault resulted in her having his child
- Senior officials raped two male cadets at sea
- At the end of their 12-month training three women trainees were pregnant
- A male cadet refused to have sex with a senior official and was punished by being sent home a month before finishing his training.

Months before her body was found floating off the Croatian coast in June, the 19-year-old Transnet cadet had told her father she was worried as a chief officer was acting inappropriately towards her and kept calling her his wife.

She had also given her father a list of those aboard the ship in case something happened to her. Her parents believe she was thrown overboard the ship, the Safmarine Kariba, to hide evidence of the rape.

The Croatian police later concluded that Akhona committed suicide. Their report said she was in a relationship with an officer that was “consensual but rough”. The seafarers’ union, Nautilus International, had doubts about this and called for a further investigation.

On March 3 2011, the House of Lords heard a new call for a full UK investigation into her death.

The Masters failure to deal properly with this case played a major part in this tragedy. Although being the flag state responsible, The UK authorities were not advised of this incident until the Croatian authorities had already commenced their investigation and the body of Akhona had been repatriated to South Africa. Once the UK authorities were advised they prepared to respond to any request for assistance which never came.

At no stage did a request come in to HM Government to undertake the investigation of this incident. The first that the police had heard of the issue was when the Department for transport advised them on the 4th august, by which time the Croatians had already commenced an investigation as had the SA police. The policy as regards to UK police investigation is for the Foreign and Commonwealth office to request the Metropolitan Police to investigate upon receiving an official request that never came. Once the investigation had started there were discussions between the South African Authorities and the UK representatives.

This non-compliance with UNCOS and the resultant confusion was not caused by the UK authorities, but by the Master of a British Flag ship being in complete ignorance of UNCOS and his duties to the Flag State to which the ship was registered. The Master also displayed poor judgement in his dealing with the incident and the alleged victim on board and, if suicide did result, this could have been an influential factor.

The company also failed to immediately notify the Flag State and the behaviour of both the Master and Company should still be a subject of investigation by the UK authorities.

### **Case 2. Failure of Flag State to Properly Investigate Crew Death.**

Crewmember Rebecca Coriam disappeared from the cruise ship Disney Wonder off the Pacific coast of Mexico on the morning of 22 March 2011. She was last seen in the crew lounge, where a security camera recorded her during a phone conversation that appeared to be causing her some emotional difficulty.

The case remains under investigation, and her whereabouts since that phone conversation have not been established. While some of the crew who sailed on that ship believe that she went overboard, there is other evidence that suggests she may be alive. Her parents have been critical of Disney's handling of the investigation, believing the company knows more than it claims to and has been more interested in avoiding unfavourable publicity than solving the case.

Since the Disney Wonder is registered in The Bahamas, a detective from the Royal Bahamas Police Force (RBPF) flew to the ship to begin a formal investigation once it had returned to Los Angeles, three days after the disappearance. He was reported to have undertaken "several days of onboard investigations" however Rebecca's parents, who were flown out from England to meet the ship when it returned, stated that they met the Bahamian detective and said he told them he had spent only one day on board investigating before flying back home. The detective also told him he had interviewed only a few crew members, and none of the passengers.

They claimed that the Disney Wonder's captain gave his condolences and expressed his theory that Rebecca had been washed overboard by a wave while at the crew pool, a theory they doubted due to the high walls around it

The Coriam's have been joined by British government officials, who instituted policies allowing for more comprehensive investigations of such incidents in the future, and advocates for the relatives of many other crew and passengers who have been reported missing from cruise ships over the last decade.

In November, Stephen Mosley, the MP for the City of Chester, the Coriams' constituency, brought the case up in the House of Commons. "The investigation into Rebecca's disappearance was appalling," he told Mike Penning, the Minister for Shipping. 'The Bahamian authorities made virtually no attempt at investigating Rebecca's disappearance," he continued, saying the RBPF was "internationally recognised as almost toothless. Very few people know that when they board a cruise ship that they are so poorly protected."

According to Jim Walker, Maritime lawyer and cruise ship accident expert, the BMA (Bahamian Maritime Authority) has been criticized for being beholden to large shipping companies like Disney and Royal Caribbean which register their cruise ships there to escape U.S. safety rules and regulations and U.S. taxes.

*'The BMA has a deplorable record responding to serious injuries, deaths or crimes involving passengers and crew members on cruise ships flying the Bahamian flag. Often no real investigation is performed. The "investigation" will consist of a representative or two from the BMA appearing at the next port of call, sometimes working with the cruise line's defence lawyers or risk management team. No BMA report concluding malfeasance of the cruise line in a passenger or crew death will ever see the light of day.'*

*If foul play is involved, the BMA will do nothing. As the BMA concedes on its website, "in fact, reports and documents may not be used as evidence in the event of any subsequent criminal proceedings. If a criminal investigation proves necessary, the entire incident should be investigated by a body independent of the original investigating authority."*

Again we see a complete failure of the Flag State to undertake swift and proper investigative procedures both for the victim and the actions of the Master and officers.

While the criminal investigation is still ongoing two years later, there has been no marine investigation as to why the pool was open if the seas were such that could come over the bow, and as to when and if the ship turned back and what search and rescue procedure the ship then followed.

### **Case 3. Failure of Flag state and the IMO to release Incident report.**

Danny F II was a cargo ship built in 1975 as a car carrier. It was renamed Danny F II when rebuilt as a livestock transporter in 1994.

In 2005, it was reported that Danny F II had been detained at Adelaide because of defects which included holed bulkheads, defective navigation lights and radio equipment and defective watertight doors.

The ship capsized and sank off Lebanon on 17 December 2009, carrying 83 people, 10,224 sheep, and 17,932 cattle. Over 40 seamen and passengers died.

In October 2010, the Panamanian authorities stated that publication of the report into the sinking was imminent. The report was finally lodged with the International Maritime Organisation (IMO) at the end of July 2013, but it cannot be opened or downloaded via the UN agency's Global Integrated Shipping Information System (GISIS) database. As a result, other flag state officials, family members and unions have been unable to read the findings.

As two of their members, the Captain and the Electro-Technical officer drowned in the sinking, Nautilus International is protesting to the IMO and the Panamanian Maritime Authority about the lack of access to the report. General Secretary Mark Dickinson commented: 'We are utterly appalled that after all this time the report is not publicly available. Ever since the ship was lost, the families of those who died have been treated with contempt and the move to withhold the results of the investigation adds further insult to injury.'

'This was a very major casualty with significant loss of life and there was worrying evidence suggesting the Danny FII had suffered from safety problems before the accident,' he pointed out.

'It is therefore imperative that there is transparency and disclosure to demonstrate that concerns have been properly addressed and that investigations had assessed technical issues including the potential effects of any alterations to hull or equipment, and the factors affecting the stability of the vessel.'

'Above all, it is essential that the relatives of those who died, and the shipping industry in general, can be given some comfort and reassurance that lessons have been learned to prevent similar disasters in the future,' Mr Dickinson added. 'The IMO secretary general has set the worthy objective of halving deaths at sea, but that will never be achieved if this sort of obstruction continues.'

#### **Case 4 Failure to Investigate Enclosed Space Deaths**

On the 5<sup>th</sup> of November 2012, five sailors were killed and one was injured due to inhaling of some poisonous gas on board a Varun Shipping-owned LPG carrier off the Gujarat coast.

A group of six seamen had gone into the compressor room while the Indian flagged vessel, MV Maharshi Krishnatreya, was on its way to Dubai for dry docking after discharging cargo in Mangalore. All the six were found

unconscious and help was sought from the authorities, the company official said.

In a statement, the Navy said it got a call from Varun Shipping at 1045 hrs, following which a Seaking MK 42C helicopter was sent from Mumbai for help. The vessel was 140 nautical miles southwest of Porbandar when the Navy was informed, it added.

A company official said the rescue team, which included doctors, declared the five sailors dead while the sixth one was immediately rushed to Porbandar where he is receiving medical help.

The Director General of Shipping stated that the Mercantile Marine Department, Kandla, has been ordered to conduct an inquiry into the incident.

Despite repeated requests to both Varun Shipping and the Marine Department in Kandla, they have refused to reply and as yet there is not even a preliminary report on the accident.

#### **Case 5. Disregard of UNCLOS By a Flag State.**

The Cypriot Flag vessel Virgo with a Russian crew was allegedly involved in a collision in international waters 130 miles off the US coast in August 2001 with a US fishing vessel involving loss of life on the fishing vessel. The vessel was arrested in Newfoundland and held in a Canadian port at the request of the US government, in complete contravention of UNCLOS. Armed police boarded the vessel and the crew were ordered off the vessel at gun point. The Captain was imprisoned by the Canadian authorities together with the OOW and the lookout. The Master was eventually released but detained in Canada for a further 18 months before being released on a \$US100,000 bond while extradition charges are pending. These were applied for by the USA in 2007.

'The Russian Transport Ministry demanded explanations why the inquiry is conducted by the Canadian authorities. In line with the United Nations' Maritime Law Convention, the investigation is to be carried out by the authorities of the state whose flag the ship wears. The Russian tanker flies the Cypriot flag,' said the departmental chief of the Russian Transport Ministry.

The Russian Merchant Shipping Department alleged that both the US and Canada had violated the UN Law of the Sea Convention by initiating criminal proceedings in the case of the Russian-owned tanker

The shipping department argued that the US-Canadian investigation was in breach of the UN maritime convention, which states: "In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national".

Russia formally complained to Ottawa that Canadian police had illegally removed the crew of the Virgo during a search of the vessel. The sources in the Merchant Shipping Department alleged that both the US and Canada had violated the UN Law of the Sea Convention by initiating criminal proceedings in the case of the Russian-owned tanker Virgo. Russia formally complained to Ottawa on Tuesday that Canadian police had illegally removed the crew of the Virgo during a search of the vessel.

Cypriot shipping authorities challenged the legality of a joint Canadian- US criminal investigation.

After their illegal 18 months detention, the crew were then permitted to return to Russia after a \$100,000 bond was posted to ensure their return for further legal action in Canada. If Canada agrees to extradition they could face manslaughter charges in the United States.

This is probably the most flagrant disregard of the resolutions of UNCLOS by any country.

### **Case 6. Hindrance of Investigation by Shipping Company**

The case entitled, Jane Doe v. Carnival Corporation, d/b/a Carnival Cruise Lines, 1998, centred on two crew members, the ship's nurse and another shipboard employee.

The facts in the case appeared simple: Two cruise ship employees became friendly during their employment, although they were not dating and were not involved in a sexual relationship. One evening, the nurse and the other employee had spent the day ashore sightseeing during a port of call visit, then spent the evening sipping wine in the nurse's onboard cabin. She asked her male companion to leave as she wanted to sleep. He refused and forced himself on her sexually and eventually, sodomized her. The nurse reported the crime to

ship security including the staff captain and captain. However, the male crew member was terminated for being late for his next assigned watch and for being intoxicated, not for sodomizing the cruise ship's nurse. The nurse who was a cruise ship employee for three years was in this instance, not to be believed over the word of the male employee who had only been with the cruise for two months, that she had been raped despite physical evidence to the contrary. Two days after the alleged rape, the male crew member was hurried to the Miami airport to summarily be put aboard a flight back to his native Italy. Although the crime had been reported to the FBI, Carnival ignored their requests to detain the suspects at the airport and he was able to escape interrogation by the FBI.

*(Ref; Bonita Navin, "Stalking Sexual Predators at Sea: The response of the cruise industry to sexual assaults onboard," International Travel Law Journal, 196, 1999)*

## **UNCLOS Tribunal**

The International Tribunal for the Law of the Sea is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.

The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21).

The Tribunal is open to States Parties to the Convention (i.e. States and international organisations which are parties to the Convention). It is also open to entities other than States Parties, i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" (Statute, article 20). Since the 1982 Convention came into force in 1994, nine cases have been arbitrated under Annex VII of UNCLOS even though it is open to entities other than state parties and private entities. One can only wonder why many of these

cases were not placed before the Tribunal. The reluctance to take cases to a tribunal specially established to deal with any disputes is inexplicable.

## **CONCLUSIONS**

These are but a few of the many recent cases of investigative failures, refusal to follow UNCLOS resolutions, and shipping company hindrance in correct judicial proceedings.

Too often, Masters of the ships do not know UNCLOS, do not have in their possession the common laws of the Flag state of their ship to which they could refer, and do not have any training in dealing with criminal investigations or the preservation of evidence and in particular training in dealing with sexual offences, which, with the increasing number of females now coming to sea, is becoming more prevalent.

Victim Support Europe have produced an excellent publication called the 'EU handbook for implementation of Legislation and Best Practice for Victims of Crime. This should be carried on every ship as it gives a superb guide for how to deal with incidents and crimes whether ashore or at sea.

Around the world, Officers and even crews are detained and even imprisoned illegally again by Flag States ignoring any international resolutions or regulations and then their arrest and detention ignored by the ship's flag state.

The situation on the cruise and hotel ships is even more appalling with over 170 persons claimed to have fallen over the side in the last 10 years, most of them female, many without any proper investigation, reports or correct procedures being followed by the Master and his staff on board.

According to Lipcon, Margulies, Alsina and Winkelman P.A, another marine legal company dealing with crime at sea;

*'the likelihood of a rape, sexual assault, sexual battery, or other sexual misconduct is actually higher on a cruise ship than on dry land. In fact, cruise ship rape or sexual assault is the most common crime that takes place on a cruise ship, according to one study of data compiled from crimes reported on cruise ships 2003-2006. A staggering 86% of crimes reported on cruise ships from 2003-2006 were cruise ship rapes or sexual assaults. People are 50% more likely to be sexually assaulted on board a cruise ship than if they are at home on dry land. It can, and has, happened to both passengers and crew.'*

Worse, is that these are the reported cases, with even more thought to be unreported or dealt with by negotiation between the cruise company and the victim.

Following the Coriam case, the British Shipping Minister responded by announcing that the Marine Accident Investigation Branch would investigate all deaths or disappearances of British citizens from vessels anywhere in the world, paralleling similar legislation signed by U.S. President Barack Obama that gives the Federal Bureau of Investigation that authority in the event of the death or disappearance of any American citizen. The Government would also work through the International Maritime Organization to increase international cooperation on such investigations.

He too, was critical of the Disney organisation, saying the company was "more interested in getting the ship back to sea than in investigating the case of the missing member of their crew".

What the British Shipping Minister and the US authorities seem to have missed is that, under UNCLOS, such investigation can only take place with the complete agreement of the flag state, which in many cases, will not be forthcoming and that their investigative officials have no powers to call on foreign nationals to give evidence, be detained or even to be questioned.

Again we see another country recognise that the UNCLOS resolutions regarding Flag State responsibilities cannot be followed because of the limited resources of many of these States who, while signing their agreement to UNCLOS have registered ships knowing of their inability to comply with their required commitment. Some 60 per cent of cruise ships are now registered in Panama, Liberia and the Bahamas.

Amnesty International has concluded that violent crime continues unabated in much of Panama. Reports of rape and other sexual violence are prevalent despite the under-reporting. Panama in addition has a large problem in trafficking in women and children who are sexually exploited. The police are widely accused of violating people's human rights. Conversely, the US Consular service notes that the Panama Police have taken steps to improve into responses to violence and other investigations. Violence against women and girls is as recent as late 2012 said to be "a massive problem in Liberia".

A 2010 human rights report on the Bahamas that states, “Human rights problems reported included complaints of abuse by police and prison and detention centre guards; poor detention conditions; a poorly functioning judicial system, leading to delays in trials and lengthy pre-trial detention; violence against women and children; and discrimination against persons of Haitian descent.”.

It is obviously impossible for these states to properly enforce their legal jurisdiction on their flag ships with such a poor record of justice in their own countries.

It would seem that we are now seeing recognition that UNCLOS is no longer a functioning basis for marine legal jurisdiction with the USA, which has not ratified the convention, declaring its own resolutions to the problem and signatories like the UK also declaring their intention of breaking the resolutions. While this is understandable it is not the correct way forward.

It is not UNCLOS that is at fault but the inability of those countries that have been allowed to register ships regardless of their incompetence or indeed intentions of providing the support required to comply with the resolutions. Breaking or ignoring UNCLOS will not correct a situation caused by the registration of ships in states that have no resources to carry out their liabilities. Even Mongolia, which is thousands of miles from the sea now has a ship register with over 300 ships on the books.

The Marine Industry is international and a situation that requires international agreement cannot be dealt with piecemeal. It is the registration of ships in states unable or unwilling to fulfil their obligations that is causing the problem, and it is a problem that, with the cruise ships carrying thousands of passengers increasing, is becoming out of control

The most obvious solution is to stop the registration of non-national ships by states with no proper resources to comply with UNCLOS, especially cruise ships, which effectively places thousands of innocent passengers in a situation of legal disenfranchisement and allows the cruise companies to operate their own private police forces that too often place corporate image before proper and effective judicial process. Most of these flag states apart from not having the criminal investigative staff in place, do not have even the properly qualified marine investigative personnel with the expertise for dealing with serious

incidents at sea, with the result that it becomes too easy for shipping managers to cover up such incidents which if properly investigated, could lead to criminal prosecution of the managers.

If Flag States are to be allowed to retain their right to register ships even though they cannot or will not honour their obligations, some form of international marine investigative body that is empowered to investigate both serious accident and criminal matters is required that all ships and nations can call on. Member States that do not have the resources to comply with their obligations can then call on or be required to engage such a force to act on their behalf.

Already, many nations have some marine investigative organisation and these could be linked and their remit expanded. The Marine Accident Investigators' International Forum could be the basis for advice and assistance in formulating a proper and effective international marine investigative force.

The security staffs employed on many of the cruise ships cannot be relied on to act independently as they are employees of the cruise company and, as has been seen in many cases, place their loyalty to their employers before that of the passengers. Passengers on most of these cruise ships are therefore without any independent legal support either from state or ship security personnel.

If the ship is to abide by the laws of the flag state, it is obvious that the ships must carry the legal regulations of the flag state of registry. In addition, there must be some form of training for Masters and senior officers in their responsibilities under these flag state laws as well as UNCLOS. The collection and preservation of evidence and the correct treatment of victims are all essential elements in attempting to deal with the increasing problem.

All ships carry the IAMSAR (International Aeronautical Maritime Search and Rescue) manuals. These procedures must be followed **regardless** of the vessels schedule. In many cases, human beings can survive in temperate waters for many hours after immersion and this must be a major factor in the time and search sequence. The search and rescue procedure followed by a Master after a man overboard incident must be an important part of any investigation.

The situation where accidents and crime are not being reported or investigated properly is untenable and becoming a disgrace to the Marine Industry. Passengers and even crews on ships registered in such states must be advised of

the current judicial situation and that their legal wellbeing while they are on the High Seas is completely in the hands of states that cannot meet their obligations.

Many at sea already do not have a high opinion of the ability of the IMO to progress resolution to many of the problems that continue to increase without any determined response. If the IMO is to refuse to disclose important reports into crime and incidents, then what trust remains will deteriorate further.

While the present inability of UNCLOS enforcement is affecting all seamen worldwide, it is especially affecting passengers. These are people who place their trust in us on the ships, the shipping companies, and the flag state marine administrations for their safety and wellbeing and we are failing them.

The High Seas must not be an obstruction to justice or a refuge for the guilty.