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United Nations Convention on the Law of the Sea (1982) (Select extracts)

PART II

TERRITORIAL SEA AND CONTIGUOUS ZONE

SECTION 1. GENERAL PROVISIONS

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

SECTION 2. LIMITS OF THE TERRITORIAL SEA

Article 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

SECTION 3. INNOCENT PASSAGE IN THE TERRITORIAL SEA

SUBSECTION B. RULES APPLICABLE TO MERCHANT SHIPS AND GOVERNMENT SHIPS OPERATED FOR COMMERCIAL PURPOSES

Article 27

Criminal jurisdiction on board a foreign ship

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.

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.

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.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, 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.

Article 28

Civil jurisdiction in relation to foreign ships

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.

PART VII

HIGH SEAS

SECTION 1. GENERAL PROVISIONS

Article 87

Freedom of the high seas

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 Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

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.

Article 90

Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Article 91

Nationality of ships

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.

Article 92

Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Article 94

Duties of the flag State

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:
 - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
 - (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.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - (a) the construction, equipment and seaworthiness of ships;
 - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
 - (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
 - (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
 - (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
 - (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at

sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

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.

Article 97

Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the 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.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Article 101

Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

PART XII

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

SECTION 1. GENERAL PROVISIONS

Article 192

General obligation

States have the obligation to protect and preserve the marine environment.

Article 194

Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

SECTION 2. GLOBAL AND REGIONAL COOPERATION

Article 197

Cooperation on a global or regional basis

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

SECTION 5. INTERNATIONAL RULES AND NATIONAL LEGISLATION TO PREVENT, REDUCE AND CONTROL POLLUTION OF THE MARINE ENVIRONMENT

Article 211

Pollution from vessels

1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

3. States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State

participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

6. (a) Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization.

(b) The coastal States shall publish the limits of any such particular, clearly defined area.

(c) If the coastal States intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organization thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; they shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organization agrees within 12 months after the submission of the communication.

7. The international rules and standards referred to in this article should include *inter alia* those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.

SECTION 6. ENFORCEMENT

Article 217

Enforcement by flag States

1. States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.
2. States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels.
3. States shall ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. States shall ensure that vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.
4. If a vessel commits a violation of rules and standards established through the competent international organization or general diplomatic conference, the flag State, without prejudice to articles 218, 220 and 228, shall provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.
5. Flag States conducting an investigation of the violation may request the assistance of any other State whose cooperation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag States.
6. States shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States shall without delay institute such proceedings in accordance with their laws.
7. Flag States shall promptly inform the requesting State and the competent international organization of the action taken and its outcome. Such information shall be available to all States.
8. Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.

Article 218

Enforcement by port States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.
2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.
3. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.
4. The records of the investigation carried out by a port State pursuant to this article shall be transmitted upon request to the flag State or to the coastal State. Any proceedings instituted by the port State on the basis of such an investigation may, subject to section 7, be suspended at the request of the coastal State when the violation has occurred within its internal waters, territorial sea or exclusive economic zone. The evidence and records of the case, together with any bond or other financial security posted with the authorities of the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.

Article 219

Measures relating to seaworthiness of vessels to avoid pollution

Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately.

Article 220

Enforcement by coastal States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and

standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.

2. Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7.

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

8. The provisions of paragraphs 3, 4, 5, 6 and 7 also apply in respect of national laws and regulations adopted pursuant to article 211, paragraph 6.

Article 221

Measures to avoid pollution arising from maritime casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests,

including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

SECTION 7. SAFEGUARDS

Article 223

Measures to facilitate proceedings

In proceedings instituted pursuant to this Part, States shall take measures to facilitate the hearing of witnesses and the admission of evidence submitted by authorities of another State, or by the competent international organization, and shall facilitate the attendance at such proceedings of official representatives of the competent international organization, the flag State and any State affected by pollution arising out of any violation. The official representatives attending such proceedings shall have such rights and duties as may be provided under national laws and regulations or international law.

Article 224

Exercise of powers of enforcement

The powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

Article 225

Duty to avoid adverse consequences

in the exercise of the powers of enforcement

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

Article 226

Investigation of foreign vessels

1. (a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:

(i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;

(ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or

(iii) the vessel is not carrying valid certificates and records.

(b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.

(c) Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.

2. States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

Article 227

Non-discrimination with respect to foreign vessels

In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State.

Article 228

Suspension and restrictions on institution of proceedings

1. Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels. The flag State shall in due course make available to the State previously instituting proceedings a full dossier of the case and the records of the proceedings, whenever the flag State has requested the suspension of proceedings in accordance with this article. When proceedings instituted by the flag State have been brought to a conclusion, the suspended proceedings shall be terminated. Upon payment of costs incurred in respect of such proceedings, any bond posted or other financial security provided in connection with the suspended proceedings shall be released by the coastal State.

2. Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of three years from the date on which the violation was committed, and shall not be taken by any

State in the event of proceedings having been instituted by another State subject to the provisions set out in paragraph 1.

3. The provisions of this article are without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State.

Article 229

Institution of civil proceedings

Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.

Article 230

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.

Article 231

Notification to the flag State and other States concerned

States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

Article 232

Liability of States arising from enforcement measures

States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.

SECTION 8. ICE-COVERED AREAS

Article 234

Ice-covered areas

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

SECTION 9. RESPONSIBILITY AND LIABILITY

Article 235

Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Merchant Shipping Act 1995 (Select extracts)

42 Obligation of shipowners as to seaworthiness.

(1) In every contract of employment between the owner of a United Kingdom ship and the master of or any seaman employed in the ship there shall be implied an obligation on the owner of the ship that (a) the owner of the ship, (b) the master of the ship, and (c) every agent charged with (i) the loading of the ship, (ii) the preparing of the ship for sea, or (iii) the sending of the ship to sea, shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition for the voyage during the voyage.

58 Conduct endangering ships, structures or individuals.

(1) This section applies (a) to the master of, or any seaman employed in, a United Kingdom ship; and

(b) to the master of, or any seaman employed in, a ship which (i) is registered under the law of any country outside the United Kingdom; and (ii) is in a port in the United Kingdom or within United Kingdom waters while proceeding to or from any such port.

(2) If a person to whom this section applies, while on board his ship or in its immediate vicinity (a) does any act which causes or is likely to cause (i) the loss or destruction of or serious damage to his ship or its machinery, navigational equipment or safety equipment, or (ii) the loss or destruction of or serious damage to any other ship or any structure, or (iii) the death of or serious injury to any person, or

(b) omits to do anything required (i) to preserve his ship or its machinery, navigational equipment or safety equipment from being lost, destroyed or seriously damaged, or (ii) to preserve any person on board his ship from death or serious injury, or (iii) to prevent his ship from causing the loss or destruction of or serious damage to any other ship or any structure, or the death of or serious injury to any person not on board his ship, and either of the conditions specified in subsection (3) below is satisfied with respect to that act or omission, he shall (subject to subsections (6) and (7) below) be guilty of an offence.

(3) Those conditions are (a) that the act or omission was deliberate or amounted to a breach or neglect of duty; (b) that the master or seaman in question was under the influence of drink or a drug at the time of the act or omission.

94 Meaning of “dangerously unsafe ship”

(1) For the purposes of sections 95, 96, 97 and 98 a ship is “dangerously unsafe” if, having regard to the nature of the service for which it is intended, the ship is, by reason of the matters mentioned in subsection (2) below, unfit to go to sea without serious danger to human life.

(1A) For the purposes of those sections a ship at sea is “dangerously unsafe” if, having regard to the nature of the service for which it is being used or is intended, the ship is, by reason of the matters mentioned in subsection (2) below, either (a) unfit to remain at sea without serious danger to human life, or (b) unfit to go on a voyage without serious danger to human life.

(2) Those matters are (a) the condition, or the unsuitability for its purpose, of (i) the ship or its machinery or equipment, or (ii) any part of the ship or its machinery or equipment; (b) undermanning; (c) overloading or unsafe or improper loading; (d) any other matter relevant to the safety of the ship; and are referred to in those sections, in relation to any ship, as “the matters relevant to its safety”.

98 Owner and master liable in respect of dangerously unsafe ship.

(1) If a ship which (a) is in a port in the United Kingdom, or (b) is a United Kingdom ship and is in any other port, is dangerously unsafe, then, subject to subsections (4) and (5) below, the master and the owner of the ship shall each be guilty of an offence.

International Convention for the Safety of Life at Sea (SOLAS), 1974

Chapter V Safety of Navigation (Summary of select extracts)

REGULATION 34 - Safe navigation and avoidance of dangerous situations

1 Prior to proceeding to sea, the master shall ensure that the intended voyage has been planned using the appropriate nautical charts and nautical publications for the area concerned, taking into account the guidelines and recommendations developed by the Organization. (Refer to the Guidelines for Voyage Planning, adopted by the Organization by resolution A.893(21).)

2 The voyage plan shall identify a route which:

- .1 takes into account any relevant ships' routing systems;
- .2 ensures sufficient sea room for the safe passage of the ship throughout the voyage;
- .3 anticipates all known navigational hazards and adverse weather conditions; and
- .4 takes into account the marine environmental protection measures that apply, and avoids as far as possible actions and activities which could cause damage to the environment.

3 The owner, the charterer, or the company, as defined in regulation IX/1, operating the ship or any other person, shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safe navigation and protection of the marine environment.

SOLAS Chapter XI-2 Special measures to enhance maritime security (Summary of select extract)

REGULATION 8 - confirms the role of the Master in exercising his professional judgment over decisions necessary to maintain the security of the ship. It says he shall not be constrained by the Company, the charterer or any other person in this respect.

The Merchant Shipping (Safety of Navigation) Regulations 2002 SI Number 1473 (Select extracts)

Safety of navigation requirements

5 (1)... a ship to which these Regulations apply shall comply with such of the requirements referred to in paragraph (2) as apply in relation to a ship of its description.

(2) The requirements are those referred to in the following regulations or paragraphs of regulations in Chapter V which are set out in the MCA's 2002 SOLAS V publication ...regulation 34.

Pilotage Act 1987(Selected extracts)

15 Compulsory pilotage.

(1) A ship which is being navigated in an area and in circumstances in which pilotage is compulsory for it by virtue of a pilotage direction shall be (a) under the pilotage of an authorised pilot accompanied by such an assistant, if any, as is required by virtue of the direction; or (b) under the pilotage of a master or first mate possessing a pilotage exemption certificate in respect of that area and ship.

(2) If any ship is not under pilotage as required by subsection (1) above after an authorised pilot has offered to take charge of the ship, the master of the ship shall be guilty of an offence....

(3) If the master of a ship navigates the ship in an area and in circumstances in which pilotage is compulsory for it by virtue of a pilotage direction without notifying the competent harbour authority which gave the direction that he proposes to do so, he shall be guilty of an offence....

16 Liability for ships under compulsory pilotage.

The fact that a ship is being navigated in an area and in circumstances in which pilotage is compulsory for it shall not affect any liability of the owner or master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated.

Department of Transport: mv HERALD OF FREE ENTERPRISE

Report of Court No. 8074. Formal Investigation (select extracts)

10. *The immediate cause of the disaster*

10.5 The *HERALD* capsized because she went to sea with her inner and outer bow doors open. From the outset Mr. Mark Victor Stanley, who was the assistant bosun, has accepted that it was his duty to close the bow doors at the time of departure from Zeebrugge and that he failed to carry out this duty. Mr. Stanley had opened the bow doors on arrival in Zeebrugge. Thereafter he was engaged in supervising members of the crew in maintenance and cleaning the ship until he was released from work by the bosun, Mr. Ayling. Mr. Stanley then went to his cabin, where he fell asleep and was not awakened by the call "Harbour Stations", which was given over the Tannoy address system. He remained asleep on his bunk until he was thrown out of it when the *HERALD* began to capsize. Mr. Stanley has frankly recognised his failure to turn up for duty and he will, no doubt, suffer remorse for a long time to come. If the Company regards it as appropriate or necessary to take disciplinary action against Mr. Stanley it has power to do so under the Code of Conduct for the Merchant Navy. In fairness to Mr. Stanley it is right to record that after the *HERALD* capsized he found his way out of the ship on to her hull where he set about rescuing passengers trapped inside. He broke a window for access and, when he was scooping the glass away his right forearm was deeply cut. Nevertheless he re-entered the hull and went into the water to assist passengers. He continued until he was overcome by cold and bleeding.

The bosun, Mr. Terence Ayling, told the court that he thought he was the last man to leave G deck, where he had been working in the vicinity of the bow doors and that, so far as he knew, there was no one there to close the doors. He had put the chain across after the last car was loaded. There is no reason why the bow doors should not have been closed as soon as the chain was in position. Mr. Ayling was asked whether there was any reason why he should not have shut the doors. He replied "It has never been part of my duties to close the doors or make sure anybody is there to close the doors." He also said "At that stage it was harbour stations so everybody was going to their stations." He took a narrow view of his duties and it is most unfortunate that that was his attitude. It is only fair to add that his behaviour after the *HERALD* capsized was exemplary. In the absence of any deck officer he took the responsibility for organizing the rescue efforts, first from the bridge and later in the passenger spaces.

The questions which arise are: why was the absence of Mr. Stanley from his harbour station not noticed? and, why was there not a foolproof system which would ensure that the vital task of closing the bow doors was performed irrespective of the potential failure of any one individual? This was not the first occasion on which such a failure had occurred. In October 1983 the assistant bosun of the *PRIDE* had fallen asleep and had not heard "Harbour Stations" being called, with the result that he neglected to close both the bow and stern doors on the sailing of the vessel from No. 5 berth, Dover.

A general instruction issued in July 1984 prescribed that it was the duty of the officer loading the main vehicle deck (G deck) to ensure that the bow doors were "secure when leaving port". That instruction had been regularly flouted. It was interpreted as meaning that it was the duty of the loading officer merely to see that someone was at the controls and ready to close the doors. That is not the meaning of the instruction. The instruction is not clearly worded, but, whatever its precise meaning, it was not enforced. If it had been enforced this disaster would not have occurred. We will revert to these points later.

Mr. Paul Ronald Morter was the Second Officer of the *HERALD* on 6th March. Mr. Morter

went to G deck during the course of loading to relieve the Chief Officer. Despite the arrival of Mr. Morter the Chief Officer remained on G deck for a time, without explaining why he did so. In due course the Chief Officer left Mr. Morter in charge of loading. About 10 or 15 minutes before the ship was due to sail the Chief Officer, who had overheard difficulties between Mr. Morter and the shore staff, returned and, according to a deposition made by him on the 1st April 1987, he suggested that the second officer should go aft and stand by for harbour stations while he completed the loading. That statement does not accord with the recollection of Mr. Morter. The evidence of Mr. Morter is that he did not expect the Chief Officer to return before departure. When there were still 20 to 25 cars to load Mr. Morter overheard on his radio the Chief Officer giving orders. The two officers did not meet face to face. Mr. Morter assumed that once the Chief Officer had arrived and started issuing orders he, Mr. Morter, was no longer to exercise the responsibilities of loading officer. The Court sensed that there was some tension between the Chief Officer and Mr. Morter and that the whole picture had not emerged in the course of their evidence. . . . Mr. Morter told the Court that if he had remained as the loading officer he would have communicated with the assistant bosun and he would have waited for a certain period and then chased after him.

10.6 Although the totality of the evidence left the Court with a sense of unease that the whole truth had not emerged, it was in the circumstances set out above that Mr. Leslie Sabel, the Chief Officer, relieved the Second Officer as loading officer of G deck shortly before he instructed the quartermaster to call the crew to harbour stations. Accordingly, it then became the duty of Mr. Sabel to ensure that the bow doors were closed. He does not dispute the fact that this was his duty. But he, too, interpreted the instruction laid down in July 1984 as a duty merely to ensure that the assistant bosun was at the controls. Mr. Sabel had been working with Mr. Stanley during the day of the disaster and he knew that it was Mr. Stanley's duty to close the doors. Mr. Sabel should have been able to recognize Mr. Stanley.

11. *Pressure to leave the berth*

11.1 The Court found some difficulty in finding a clear answer to the question: Why could not the loading officer remain on G deck until the doors were closed before going to his harbour station on the bridge? That operation could be completed in less than three minutes. But the officers always felt under pressure to leave the berth immediately after the completion of loading. The practice was for the officer on the car deck to call the bridge and tell the quartermaster to give the order "harbour stations" over the Tannoy. Frequently the order "harbour stations" was given before loading was complete. The order was given as soon as the loading officer decided that by the time the crew arrived at their stations everything would be ready for the ship to proceed to sea. The evidence of Captain Lewry was that on the Zeebrugge run it would have been necessary to delay the order "harbour stations" until the bow doors had been closed if the Chief Officer was required to remain on G deck until this had been done.

11.2 The "Bridge and Navigational Procedures" guide which was issued by the Company included the following:

Departure from Port

a) O.O.W./Master should be on the Bridge approximately 15 minutes before the ship's sailing time;

That order does not make it clear whether it was the duty of the O.O.W. or the Master to be on the bridge 15 minutes before sailing, or whether the officer was to remain on the bridge thereafter. If the O.O.W. was the loading officer, this order created a conflict in his duties. The conflict was brought to the attention of Mr. Develin by a memorandum dated 21st August 1982 from Captain Hackett, Senior Master of *FREE ENTERPRISE* VIII in which he said:-

Departure from Port

It is impractical for the O.O.W. (either the Chief or Second Officer) to be on the Bridge 15 minutes before sailing time. Both are fully committed to loading the ship. At sailing time, the Chief Officer stands by the bow or stern door to see the ramp out and assure papers are on board etc. The Second Officer proceeds to his after mooring station to assure that the propellers are clear and report to bridge.

The order illustrates the lack of thought given by management to the organisation of the officers' duties.

11.3 The sense of urgency to sail at the earliest possible moment was exemplified by an internal memorandum sent to assistant managers by Mr. D. Shipley, who was the operations manager at Zeebrugge. It is dated 18th August 1986 and the relevant parts of it reads as follows:

“There seems to be a general tendency of satisfaction if the ship has sailed two or three minutes early. Where, a full load is present, then every effort has to be made to sail the ship 15 minutes earlier I expect to read from now onwards, especially where FE8 is concerned, that the ship left 15 minutes early put pressure on the first officer if you don't think he is moving fast enough. Have your load ready when the vessel is in and marshal your staff and machines to work efficiently. Let's put the record straight, sailing late out of Zeebrugge isn't on. It's 15 minutes early for us.”

Mr. A. P. Young sought to explain away that memorandum on the basis that the language was used merely for purposes of what he called “motivation”. But it was entirely in keeping with his own thoughts at that time. On the 13th August 1986 Captain Thorne, the Senior Master of ***FREE ENTERPRISE VIII***, sent a memorandum to Deck Officers with a copy to Mr. Young, in which he said:-

“Finally, one of the reasons for such late arrivals is due to late departures from Dover the cause of which is rarely due to any inefficiency on the part of Dover staff - just lack of time available to handle both discharge and loading together with storing (often only 30-40 minutes). This situation can often be assisted by an early sailing from Zeebrugge the previous voyage: Zeebrugge staff MUST be made aware of such necessity immediately upon arrival”.

Mr. Young replied:-

“I would just like to state that I thoroughly endorse your action”.

The Court was left in no doubt that deck officers felt that there was no time to be wasted. The Company sought to say that this disaster could have been avoided if the Chief Officer had waited on G deck another three minutes. That is true. But the Company took no proper steps to ensure that the Chief Officer remained on G deck until the bow doors were closed. On the 6th March they were running late. The ***HERALD*** sailed 5 minutes late. This may have contributed to Mr. Sabel's decision to leave G deck before the arrival of Mr. Stanley, which he anticipated.

12. Captain David Lewry

12.1 Captain Lewry was Master of the ***HERALD*** on the 6th March 1987. In that capacity he was responsible for the safety of his ship and every person on board. Captain Lewry took the ***HERALD*** to sea with the bow doors fully open, with the consequences which have been related. It follows that Captain Lewry must accept personal responsibility for the loss of his ship.

In judging his conduct it is right to look at it in perspective. Captain Lewry has served at sea for over 30 years. He has held a Master's Certificate of Competency (Foreign Going) for over 20 years, and he has been in command of a ship for 10 years. Captain Lewry joined the ***HERALD*** on 13th March 1980 as one of five masters. The Company has issued a set of standing orders which included the following:-

“01.09 *Ready for Sea*

Heads of Departments are to report to the Master immediately they are aware of any deficiency which is likely to cause their departments to be unready for sea in any respect at the due sailing time. In the absence of any such report the Master will assume, at the due sailing time, that the vessel is ready for sea in all respects”.

That order was unsatisfactory in many respects. It followed immediately after 01.08 which was an order that defects had to be reported to the Head of Department. The sequence of orders raises at least a suspicion that the draftsman used the word ‘deficiency’ in 01.09 as synonymous with ‘defect’ in 01.08. On one construction of the orders, order 01.09 was merely completing the process of ensuring that the Master was apprised of all defects. That is how this Court would have interpreted it. But it appears that that is not the way in which order 01.09 was interpreted by deck officers. Masters came to rely upon the absence of any report at the time of sailing as satisfying them that their ship was ready for sea in all respects. That was, of course, a very dangerous assumption.

On the 6th March, Captain Lewry saw the Chief Officer come to the Bridge. Captain Lewry did not ask him if the ship was all secure and the Chief Officer did not make a report. Captain Lewry was entitled to assume that the assistant bosun and the Chief Officer were qualified to perform their respective duties, but he should not have assumed that they had done so. He should have insisted upon receiving a report to that effect.

In mitigation of Captain Lewry’s failure to ensure that his ship was in all respects ready for sea a number of points were made on his behalf, of which the three principal ones were as follows. First, Captain Lewry merely followed a system which was operated by all the masters of the *HERALD* and approved by the Senior Master, Captain Kirby. Second, the court was reminded that the orders entitled “Ship’s standing orders” issued by the Company make no reference, as they should have done, to opening and closing the bow and stern doors. ‘Third, before this disaster there had been no less than five occasions when one of the Company’s ships had proceeded to sea with bow or stern doors open. Some of those incidents were known to the management, who had not drawn them to the attention of the other Masters.

Captain Lewry told the Court that if he had been made aware of any of those incidents he would have instituted a new system under which he would have required a report that the doors were closed. It is possible that he would have done so. But those Masters who were aware of the occasions when ships proceeded to sea with bow or stern doors open did not change their orders. The Court has borne in mind all the points which were made on behalf of Captain Lewry.

The system which was in operation in all the Spirit class ships was defective. The fact that other Masters operated the same defective system does not relieve Captain Lewry of his personal responsibility for taking his ship to sea in an unsafe condition. In so doing he was seriously negligent in the discharge of his duties. That negligence was one of the causes contributing to the casualty. The Court is aware of the mental and emotional burden resulting from this disaster which has been and will be borne by Captain Lewry, but the Court would be failing in its duty if it did not suspend his Certificate of Competency.

14. *The Management*

14.1 At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for

the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the *HERALD* ought to have been organised for the Dover/Zeebrugge run.

All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness. This became particularly apparent from the evidence of Mr A. P. Young, who was the Operations Director and Mr. W. J. Ayers, who was Technical Director. As will become apparent from later passages in this Report, the Court was singularly unimpressed by both these gentlemen. The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster. This is a serious finding which must be explained in some detail.

14.2 In July 1986 the Department issued Merchant Shipping Notice No. M. 1188 entitled “Good Ship Management”. The advice given in that Notice included the following points: “The efficient and safe operation of ships requires the exercise of good management both at sea and ashore The overall responsibility of the shipping company requires the need for close involvement by management ashore. To this end it is recommended that every company operating ships should designate a person ashore with responsibility for monitoring the technical and safety aspects of the operation of its ships and for providing appropriate shore based back-up Stress is placed upon the importance of providing the Master with clear instructions to him and his officers. The instructions should include adequate Standing Orders. There should be close co-operation and regular and effective communication in both directions between ship and shore.”

That is very sound advice. It is advice which ought to have been unnecessary. A well-run ship-owning Company should have been organized in that manner before receiving the Notice. Mr. Develin was aware of that Notice. He thought that the Company Structure, its attitude to the Masters and its instructions complied with that advice. When he saw the Notice he took no action on it. It is only necessary to quote one example of how the standard of management fell short of the recommendations contained in that Notice. It reveals a staggering complacency.

On the 18th March 1986 there was a meeting of senior Masters with management, at which Mr. Develin was in the Chair. One of the topics raised for discussion concerned the recognition of the Chief Officer as Head of Department and the roles of the Maintenance Master and Chief Officer. Mr. Develin said, although he was still considering writing definitions of these different roles, he felt “it was more preferable not to define the roles but to allow them to evolve”. That attitude was described by Mr. Owen, with justification, as an abject abdication of responsibility. It demonstrates an inability or unwillingness to give clear orders. **Clear instructions are the foundation of a safe system of operation.** It was the failure to give clear orders about the duties of the Officers on the Zeebrugge run which contributed so greatly to the causes of this disaster. Mr. Clarke, on behalf of the Company, said that it was not the responsibility of Mr. Develin to see that the Company orders were properly drafted.

In answer to the question, “Who was responsible?” Mr. Clarke said “Well in truth, nobody, though there ought to have been”. The Board of Directors must accept a heavy responsibility for their lamentable lack of directions. Individually and collectively they lacked a sense of responsibility. This left, what Mr. Owen so aptly described as, “a vacuum at the centre”.

14.3 In the course of this Investigation other failures on the part of the management, which were not causative of the casualty, emerged in the evidence. Although they did not contribute to the disaster they are symptomatic of the malaise which infected the Company and they are

matters of public concern. Lessons can be learned from them which may be useful to all operators of passenger ferries of similar type.

14.4 As there are lengthy passages in this Report in which there is criticism of the management of the Company, it is only fair to the Company to state at this stage that a new Chairman took office only a short time before the disaster and much has been done since to improve the Company's approach to ship management. The Court was very favourably impressed by the evidence of Mr. J.F. Ford, the new Chairman, and that of Mr. A.D. Barratt, a director and general manager. We will make further mention of this evidence later in this Report, but we mention it at this stage for the benefit of those who do not read to the end of the Report.

Interview (Anonymous)

Name of Interviewee: THIS EVIDENCE WILL BE ANONYMOUS

Date of Interview: 3 July 2008

Details of background and qualifications

I first went to sea in October 1956. I first served as an apprentice with BP, then, in 1961 I joined Swires with a brand new 2nd Mate's Certificate, serving initially as Fourth Mate and Third Mate. After obtaining my First Mate's Certificate in Hong Kong in early 1963, I sailed as Second Mate, until promotion to First Mate in May 1965. During long leave in the UK in late 1965 / mid 1966 I obtained my Master's Certificate. I was promoted to Master in November 1970 and remained in that position until retirement in June 1994. The China Navigation Company Limited ('CNC Co') was a company registered in London, but operated from its base in Hong Kong; the ships were registered under the UK flag and, subsequently, transferred to the Hong Kong register; as Master, of course, this meant that the law of my Flag State was English law.

Narrative

When I was appointed Master, I would say that I was indeed 'Master Under God'. I was very aware of the power and the authority which I had in observing my duties, not only to ensure the safety of life at sea but also to maintain order and discipline for a successful voyage. As Master, I was responsible to the Company – answerable for claims against the Company, not only in terms of liability but also profitability. I also had personal liability, particularly in relation to Port State Control, ie the harbour authorities.

I was able to rely upon a common understanding of the needs of shipboard management as the Company provided them in the form of Fleet Instructions, which was the ship's Bible. In addition, though, I was responsible for my Standing Orders, which I wrote on joining the ship and, additionally, I was required to write Night Orders each evening at sea at about 2000 hours. I attach to this proof a set of Standing Orders which were drafted in 1990 (not by me, but by my predecessor in the ship I was joining – used by me because I felt that they were a particularly good example!). To make sure that all the officers had read and understood the orders, they had to sign them on joining the ship, as can be seen. This document stands as evidence of good shipboard management practice; that being said, during the period of which I speak, there would not have been any need to change the substance of Standing Orders in the preceding twenty years. Modern regulations and procedures have changed this a great deal.

I understood very clearly that I was Master within the meaning of the Merchant Shipping Act and nobody in the Company could compromise that. For example, on one occasion I was Master of a ship which was carrying a cargo of iron ore from India to Japan when the ship was caught in typhoon conditions and had to lie hove to about 200 miles off Hong Kong for a lengthy period, during which time damage was caused to the engine. When better conditions prevailed, I advised Hong Kong management of the situation and of my intention to divert to Hong Kong for engine repairs. I was instructed to do the repairs at sea or in Taiwan, but advised management that, notwithstanding their instructions, I was, in the interests of the safety of the ship, proceeding to Hong Kong for repairs, and did so.

Had those instructions not to enter Hong Kong come from the port authority, I feel that I would have had to comply otherwise I would have faced criminal penalties for disobedience of their law. (Also, one can't just blunder into a port in a 45,000 ton bulk carrier without

permission because one might cause any amount of mayhem!). To this extent, therefore, I believe that the Master's authority is not completely unfettered, as he is answerable to Port State instructions, which carry criminal sanctions for disobedience.

It is important to emphasise that, while I as Master appreciated my heavy responsibility in managing the safe and efficient operation of the ship, at the same time, I would have expected – and would have received – the protection of CNCo if I ever needed it.

There was a tremendous respectful relationship in CNCo between management and the Master. I always understood and keenly felt that I was under some pressure to keep going and manage the ship through any problems that were encountered, but would always have expected CNCo to support me and, if necessary, get me out of trouble as soon as I got into it. That is not to say that the Company would have permitted a miscarriage of justice.

My experience and impression of the shipping industry today is that the relationship between management and the Master has been eroded by a number of factors, and that the Master may well no longer have confidence that he can rely on his company to support him in a crisis. I believe that the root causes can be addressed as follows:

The economic pressures on shipping forced changes in management and in fleet operation. Whilst CNCo has always operated with foreign ratings, British and Commonwealth officers had in the main been the order of the day after the war and up until the '90's. However, as these officers became relatively more expensive, with their salaries and pension requirements, and therefore less economical, fewer were employed and were replaced by cheaper Eastern Europeans and others.

The process of containerisation, satellite navigation systems and electronic, almost instant, communications, in contrast to former loose cargoes, celestial navigation and radio communication, enabled, really, anybody, to run a ship and to be acceptable to good owners and insurers. In earlier times the expertise and experience required to do so made relatively expensive British / Commonwealth / Western European officers and the like, well taught in well organised navigation schools, a must on safety, efficiency and economic grounds.

I am aware that the economic recession of the 1970's and 1980's forced companies to reconsider how they could operate profitably, and I am aware that the organisation and management structure of CNCo changed. That being said, though, my personal experience, right up until the time I left, left me sure that I had access to management as and when I wanted it. Moreover, in CNCo, the Fleet Commodore had access not only to CNCo management but right of access to the board of directors if he felt the matter was serious enough.

I accept, however, that we were very fortunate in CNCO and things may well have been very different in other companies. While I am appalled at the recent case studies of the *Zim Mexico III* and the *Hebei Spirit*, I am not necessarily surprised in the light of how the industry has developed and would say that the Master is treated as the fall-guy for Management.

Document supplied by the interviewee:

Model Master's Standing Orders (1990)

- 1) Officers whilst on duty both at sea and in port are responsible for the safety of the ship and all people on her.
- 2) In carrying out his/her duties the officer on watch should be guided by the instructions contained in the C.N.Co. Fleet Operations Guide and follow the advice contained in M Notices 1102 and 1263. The International regulations for preventing collisions at sea must be obeyed at all times as annex V to MARPOL 73/78.
- 3) Watchkeeping at sea:
 - a) On taking over a watch the relieving officer must satisfy himself/herself that vessel is in the position marked on the chart and that the position is safe. The course being steered must be checked to ensure that it is the course laid down.
 - b) The officer being relieved must ensure that the officer relieving him is fit to keep a watch. Should the officer being relieved suspect that the relieving officer, for any reason whatsoever, is not fully capable of keeping an efficient watch then the Master must be called.
 - c) Officers are expected to be fully conversant with all the navigation aids with which the vessel is equipped. Full use is to be made of this equipment.
 - d) Whilst in sight of land, either visually or by radar the vessel's position is to be plotted on the working chart at least every thirty minutes, more frequently should conditions require it.
 - e) Out of sight of land AM and noon sights are to be taken daily by the O.O.W. to check the satnav. Other celestial sights should be taken when the opportunity presents itself, both to check the satnav and to help the officer retain proficiency in taking such sights. Should the satnav fail celestial sights are to be taken at ASM and PM twilight, during the forenoon watch and at noon.
 - f) In the event of poor visibility the Master must be called and a lookout posted.
 - g) VHF channels 16 and 67 are to be monitored at all times and the 2182 watchkeeper on whilst the vessel is at sea.
 - h) Any weather reports concerning storm or cyclone warnings are to be brought to the Master's attention as soon as they are received.
 - i) Officers are not to undertake any duties such as chart corrections, routine paper work etc. whilst on watch if such duties diminish in any way the efficiency of the watch being kept.
 - j) The compass error is to be determined at least once per watch if circumstances permit it and the compasses are to be compared frequently throughout the watch.
 - k) Unless specifically noted in the night orders set/leeway is to be allowed by the duty officer so as to keep the vessel on the track laid down.
 - l) The presence of the Master on the bridge does not indicate that he has taken control of the vessel's navigation. The Master will state when he is taking over the control of the vessel's navigation. The duty officer will continue to closely monitor the vessel's navigation when the Master has the con and alert the Master to any danger that may arise.
 - m) Fire/safety patrols are to be made by the officer coming off watch at 2400 and 044 hrs. Patrols are to be made at 2200, 0200 and 0600 by the deck watch rating. These patrols are to be entered in the deck log book.
 - n) If at any time the officer on watch is in doubt as to the best course of action to be taken in any particular circumstance then the Master must be called. The Master is available at all times and no officer will be reprimanded for calling the Master even though it may eventuate that such a call was unnecessary.
- 4) Watchkeeping at anchor:
 - a) Officers are to keep an anchor watch whilst the vessel is at anchor.
 - b) The vessel's position is to be checked frequently.
 - c) Should the vessel start to drag her anchor the Master must be called and the engines put on standby.
 - d) The Master is to be called when there is a significant deterioration in weather conditions, another vessel navigates dangerously close, or is dragging her anchor down on our

vessel. In the two latter cases the engines are to be put on standby immediately.

- e) The appropriate Port Control VHF channel is to be monitored as is ch.16.
- f) Fire patrols are to be carried out as if the vessel were at sea.

In port:

- a) With regard to cargo work officers will work under the direction of the chief officer.
- b) It is particularly important that the various regulations concerning quarantine and pollution are strictly observed.
- c) The duty officer must ensure that the gangway is safely rigged in accordance with regulations and that it is tended by the duty deck rating.
- d) Mooring lines must be checked regularly.
- e) The duty officer is to ensure the duty deck rating makes regular fire/security patrols of the accommodation.
- f) Visitors are only allowed on board "with the Masters permission". Should anyone try to board the vessel without business on board, or in a drunken or boisterous condition then the duty officer should request these people to leave the vessel, should they fail to do so either the Chief Officer or the Master should be called.

Miscellaneous:

- a) The deck log book and bridge movement books are important documents which in the unfortunate event of something untoward occurring on or to the ship could be used as evidence. The entries in these books must therefore be an accurate, concise and legible record of events on the vessel. Any corrections made to the entries in these books should be made by drawing a single line through the incorrect entry and initialling the corrected entry.
- b) One hour prior to departure from a berth or anchorage the bridge equipment must be tested as per the bridge deck check list. The results of this check are to be reported to the Master immediately it is completed.
- c) The advice and recommendations contained in the various company circulars and M notices held on board should be used by officers in the execution of their duties.

.....

Master

Officers should sign below to indicate that they have read and understand these orders.

Interview (Captain Graeme Drewery)

Name of Interviewee: Captain Graeme Drewery

Date of Interview: 3 July 2008

Details of background and qualifications

I was educated at the Trinity House School, which I attended for four years before I first went to sea, in 1959.

I joined Swires in 1964 and obtained my Master's Certificate in 1968. I served in China Navigation Company Limited ('CNCo') throughout my career from 1964 to 1997; their ships were registered under the UK and Hong Kong flags, so served under the jurisdiction of the law of England and Wales until I retired, in 1997.

In addition to my sea-going professional career, I have held a private pilot's licence since 1977, for fixed wing aircraft, as well as having a licence for helicopters and have held a glider pilot's licence for many years. This has given me a broader understanding, still, of navigation and command management, which can enhance my view of this subject.

Narrative

We talk about 'Master under God'. When I was first appointed Master, I emphatically say that I was regarded as, and regarded myself as, 'Master under God'. It was a position which held great responsibility, and which had to be discharged whatever conditions prevailed. My career involved trading mainly on the routine business of Swires in the Far East but early experience took me to Montreal and the Lakes, on a charter which involved different challenges. My experience of command management skills reinforces my belief that the Master's discretion must be unfettered in order to enable him to discharge his responsibilities for the safety of life at sea, irrespective of commercial management issues which may be uppermost in the minds of shore staff.

CNCo was a very fine company, whom I am very proud to have served throughout my career. They relied on me to maintain order and discipline on board as well as ensuring the safe arrival of the cargo at the port of discharge. This included the safe navigation of the vessel, sometimes in demanding circumstances. For example, there were occasions when I would have to take the ship through waters that were hazardous due to rocks and shoals [*and small craft?*]. The reasons were commercial, but my skills of professional competence and leadership were what the Owners relied on.

In return, I was confident that I could rely upon everybody in the Company I needed to. This especially included my Chief Engineer at sea, and the Marine Superintendent ashore. The Superintendent was a very influential person, not only in the Company but also in the local business community. During my career days, the marine superintendents were the key personnel in shore management who provided a vital link between the ship and the Company's management system. They were experienced Masters who had been promoted within the Company and many were personal friends of mine. Theirs was the task of supervising the fleet management.

I believe that changes in shoreside management have played a significant role in the changing relationship between the Master and the Company. For purely commercial reasons, shore offices dispensed with marine superintendents, and employed engineering superintendents instead. As a management response to changing times in the industry, this may have been

adequate in meeting the demands of legal obligations to ensure that the fleet was seaworthy, but a vital link in the family relationship between the Owners and the Masters was lost, because that link depended upon an understanding that comes from experience, and engineering personnel have different roles and responsibilities from deck personnel.

With the evolution of shoreside management within the industry, the Master is strongly aware that the loss of the parental relationship exposes himself to greater risks because he realises that his responsibility has not diminished at all. This becomes a significant problem when adding the factor of management control over the ship's affairs. This is starkly illustrated by the issue of communication. Language barriers can present major problems for shipboard management, which is the responsibility of the Master as part of his duties. But the Master does not get any choice over the nationality of his crew – he gets what he is given by the shore office (which might be a ship management agency which has no corporate relationship with the Owners). It was, of course, a communication problem which was held partly accountable for the loss of the *Estonia*. I recall a worrying period, as Master of the *Foochow*, when handing over on her transfer in 1980 to a South Korean subsidiary, the Korean deck crew could not understand a word of our instructions or advice. As a result, I feared for the efficient management of the subsequent voyage.

While CNCo was a fine company to work for, they took advantage of the management expertise that we could deliver. For example, the advent of Health and Safety laws prompted the Company to ask me to prepare a study of the Factories Act 1961, which I did and subsequently was relied upon as the expert. The potential consequence, of course, was that I would be accountable if I got the law wrong! This illustrates the important generalisation about the industry as a whole, though that, in my experience, the shore office viewed the Master as being conveniently accountable for anything which went wrong – in current jargon, the fall-guy. With the trend in legal claims rising astronomically, I can well imagine that that the distancing of the Master from the Employer will make him feel all the more that he is the fall-guy.

[No supporting documents were delivered during this interview.]

Interview (Mr Stuart Shields)

Name of Interviewee: Mr Stuart Shields

Date of Interview: 3 July 2008

Details of background and qualifications

I first went to sea in 1961, joining Port Line. In 1971 I joined Swires and in 1972 was appointed Chief Engineer. I served with Swires thereafter and, particularly, the Polynesia Line between 1981 and 1996. After I left I undertook engineering posts with Hoverspeed and Hebridean Cruises, before undertaking luxury yacht delivery operations.

Narrative

As Chief Engineer with Swires I held a position which, historically, has given rise to some acrimony on board ship, for the Master and the Chief Engineer have critical responsibility for the safety and efficient management of a ship, which demands close liaison and co-operation, while the ultimate responsibility falls upon the Master in terms of law.

I always attached great importance to maintaining this relationship of co-operation, even though the Chief Engineer has a heavy management burden of his own and sometimes must stand his ground when the management of technical repairs may be inconsistent with its cost-benefit analysis for the voyage. In latter years one of the most difficult management problems which he has had to encounter, involves communication between engine room staff. The Master does not get a choice of the nationality of crew, and the Chief Engineer has to make a success of all the tasks demanded in modern ship operations, despite language barriers, which may endanger safety as well as efficient management.

I am equally aware that some Chief Engineers did not engage in co-operation with the ship's Master, which led to some bitterness and historically this has given rise to the adage that oil and water do not mix. For example, the engineer might demand some deviation in order to carry out a repair that the Master had to consider in the light of the commercial pressures on the voyage. A lack of co-operation – indeed, a lack of dialogue – could lead to escalating bad feeling between the deck and engineering departments and a feeling that one did not appreciate the other. In ships which had accommodation amidships for the deck officers, to be close to the bridge, and aft for the engineers, to be close to the engine room, this could lead to physical polarisation, the effect of which was to damage further the efficient shipboard management of the vessel. It is as well, therefore, that trends in naval architecture in recent years have put all the accommodation right aft, in one superstructure.

I might finish by pointing out that the engineer has an ultimate advantage: when he leaves the Company's service, he has the training and experience to find more gainful employment, for good engineers are usually in demand. There is not much call for good navigation officers on dry land.

[No supporting documents were delivered during this interview.]

Corporate Manslaughter and Corporate Homicide Act 2007 - Explanatory Notes (Select extracts)

The offence

Section 1(1) The new offence builds on key aspects of the common law offence of gross negligence manslaughter in England and Wales and Northern Ireland.... However, rather than being contingent on the guilt of one or more individuals, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run. In summary, the offence is committed where, in particular circumstances, an organisation owes a duty to take reasonable care for a person's safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the person's death. How the activities were managed or organised by senior management must be a substantial element of the gross breach.

The elements of the new offence are:

- The organisation must owe a "relevant duty of care" to the victim. The relevant duties of care are set out in section 2.
- The organisation must be in breach of that duty of care as a result of the way in which the activities of the organisation were managed or organised. This test is not linked to a particular level of management but considers how an activity was managed within the organisation as a whole. Section 1(3) stipulates that an organisation cannot be convicted of the offence unless a substantial element of the breach lies in the way the senior management of the organisation managed or organised its activities.
- The way in which the organisation's activities were managed or organised (referred to in these notes as "the management failure") must have caused the victim's death. The usual principles of causation in the criminal law will apply to determine this question. This means that the management failure need not have been the sole cause of death; it need only be a cause (although intervening acts may break the chain of causation in certain circumstances).
- The management failure must amount to a gross breach of the duty of care. Section 1(4)(b) sets out the test for whether a particular breach is "gross". The test asks whether the conduct that constitutes the breach falls far below what could reasonably have been expected. This reflects the threshold for the common law offence of gross negligence manslaughter. Section 8 sets out a number of factors for the jury to take into account when considering this issue. There is no question of liability where the management of an activity includes reasonable safeguards and a death nonetheless occurs.

The term "senior management" is defined in section 1(4) to mean those persons who play a significant role in the management of the whole or a substantial part of the organisation's activities. This covers both those in the direct chain of management as well as those in, for example, strategic or regulatory compliance roles.

Meaning of "relevant duty of care"

The new offence only applies in circumstances where an organisation owed a duty of care to the victim under the law of negligence. This reflects the position under the common law offence of gross negligence manslaughter and, by defining the necessary relationship between

the defendant organisation and victim, sets out the broad scope of the offence. Duties of care commonly owed by corporations include the duty owed by an employer to his employees to provide a safe system of work and by an occupier of buildings and land to people in or on, or potentially affected by, the property. Duties of care also arise out of the activities that are conducted by corporations, such as the duty owed by transport companies to their passengers.

Section 2(1) requires the duty of care to be one that is owed under the law of negligence. This will commonly be a duty owed at common law, although in certain circumstances these duties have been superseded by statutory provision. The section also, in subsection (6), makes it clear that the application of the offence is not affected by common law rules precluding liability in the law of negligence where people are jointly engaged in a criminal enterprise (an aspect of the rule referred to by the Latin maxim “*ex turpi causa non oritur actio*”) or because a person has accepted a risk of harm (“*volenti non fit injuria*”).

Section 2(1) requires the duty of care to arise out of certain specific functions or activities performed by the organisation. The effect is that the offence will only apply where an organisation owes a duty of care:

- to its employees or to other persons working for the organisation. This will include an employer’s duty to provide a safe system of work for its employees. An organisation may also owe duties of care to those whose work it is able to control or direct, even though they are not formally employed by it. This might include contractors, secondees, or volunteers. The new offence does not impose new duties of care where these are not currently owed. But where such duties are owed, breach of them can trigger the offence.
- when the organisation is supplying goods or services. This will include duties owed by organisations to their customers and will cover, for example, duties owed by transport providers to their passengers and by retailers for the safety of their products. It will also cover the supply of services by the public sector, for example, NHS bodies providing medical treatment.
- when constructing or maintaining buildings, infrastructure or vehicles etc or when using plant or vehicles etc. In many circumstances, duties of care owed, for example, to ensure that adequate safety precautions are taken when repairing a road or in maintaining the safety of vehicles etc will be duties owed by an organisation in relation to the supply of a service or because it is operating commercially. But that may not be apt to cover public sector bodies in all such circumstances. These categories ensure that no lacuna is left in this respect.
- when carrying out other activities on a commercial basis. This ensures that activities that are not the supply of goods and services but which are still performed by companies and others commercially, such as farming or mining, are covered by the offence.

The effect is, broadly, to include within the offence the sort of activities typically pursued by companies and other corporate bodies, whether performed by commercial organisations or by Crown or other public bodies. Many functions that are peculiarly an aspect of government are not covered by the offence because they will not fall within any of the categories of duty of care in this section. In particular, the offence will not extend to circumstances where public bodies perform activities for the benefit of the community at large but without supplying services to particular individuals. This includes wider policy-making activities on the part of central government, such as setting regulatory standards and issuing guidance to public bodies on the exercise of their functions. In many circumstances, duties of care are unlikely to be

owed in respect of such activities in any event, and they will remain subject to other forms of public accountability. Sections 3 to 7 provide that the offence does not apply to the performance of specified public functions. However, whether the offence is capable of applying in any given circumstances will depend in the first place on whether a duty of care is owed to a person by an organisation, and whether the duty of care is a “relevant duty of care” by reason of section 2.

In criminal proceedings, questions of law are decided by the judge, whilst questions of fact, and the application of the law to the facts of the case, are generally for the jury, directed by the judge. Section 2(5) provides that the existence of a duty of care in a particular case is a matter of law for the judge to decide. This reflects the heavily legal nature of the tests relating to the existence of a duty of care in the law of negligence. Because the judge will be deciding whether the circumstances of the case give rise to a duty of care, he will need to make certain determinations of fact that are usually for the jury. For example, if considering whether a corporation owes a duty of care as employer, the judge will need to decide whether the victim was an employee of the corporation. The questions of fact that the judge will need to consider will generally be uncontroversial and in any event will only be decided by the judge for the purposes of the duty of care question. If they otherwise affect the case, they will be for the jury to decide.

Factors for jury

Section 1(4)(b) sets out the test for assessing whether the breach of duty involved in the management failure was gross. The test asks whether the conduct that constitutes this failure falls far below what could reasonably have been expected. Whether this threshold has been met will be an issue for the jury to determine. The previous common law offence of gross negligence manslaughter asked whether the conduct was so negligent as to be criminal.

To provide a clearer framework for assessing an organisation’s culpability, section 8 sets out a number of matters for the jury to consider. In particular, these put the management of an activity into the context of the organisation’s obligations under health and safety legislation, the extent to which the organisation was in breach of these and the risk to life that is involved. Section 8 also provides for the jury to consider the wider context in which these health and safety breaches occurred, including cultural issues within the organisation such as attitudes or accepted practices that tolerated breaches. When considering breaches of health and safety duties, juries may also consider guidance on how those obligations should be discharged. Guidance does not provide an authoritative statement of required standards and therefore the jury is not required to consider the extent to which this is not complied with. However, where breaches of relevant health and safety duties are established, guidance may assist a jury in considering how serious this was.

These factors are not exhaustive and section 8(4) provides that the jury is also to take account of any other relevant matters.

Sentencing Guidelines Council: Corporate Manslaughter & Health and Safety Offences Causing Death (Select extracts)

A. Elements of the offences

1. Corporate manslaughter is created by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA). The offence:

- (a) can be committed only by organisations and not by individuals. The organisations which can commit the offence are exhaustively defined by section 1(2) and Schedule 1;
- (b) has as its root element *a breach of a duty of care* under the law of negligence (s.2(1));
- (c) requires that the breach be a *gross* breach, that is to say one where the conduct falls *far below* what can reasonably be expected of the organisation (s.1(4));
- (d) further requires that a substantial element in the breach is the way in which the organisation's activities are managed or organised by its *senior management* (s.1(3));
- (e) is committed only where death is shown to have been caused by the gross breach of duty (s.1(1)(a)).

An obligation is imposed upon the prosecution to prove each of these elements to the criminal standard.

2. Health and safety offences, typically (but not exclusively) those contrary to sections 2 and 3 of the Health and Safety at Work Act 1974 (HSWA):

- (a) can be committed by both organisations and individuals; this guideline relates only to organisations;
- (b) do not depend on the law of negligence; the root element is a breach of a duty to *ensure* the health and safety of other persons, or absence of risk to them, whether employees or members of the public affected by the activity of the defendant;
- (c) once an absence of safety, or at least a risk to the health or safety of others, is proved by the prosecution, involve a statutory reverse burden of proof placed upon the defendant to show that it was *not* reasonably practicable to do more than was done to comply with the duty;
- (d) do not involve the proof of any particular injury or consequence; whilst prosecutions will very often ensue where there has been injury or death, the offence does not require proof that that injury or death was caused by the breach; this may well be in dispute even if a breach is proved or admitted;
- (e) thus embrace a very wide spread of culpability from the minimal to the very grave.

3. Where death occurs, there may therefore be a significant overlap between the offences, and it is to be expected that some cases will be prosecuted in the alternative despite the increased complexity that that will entail for a jury.

4. However, there are considerable differences between the two offences:

- (a) because corporate manslaughter involves both a *gross* breach of duty of care and senior management failings as a substantial element in that breach, those cases will generally involve systemic failures; by contrast health and safety offences are committed whenever the defendant cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety; that may mean that the failing is at an operational rather than systemic level and can mean in some cases that there has been only a very limited falling below the standard of reasonable practicability;

(b) in corporate manslaughter the burden of proof remains on the prosecution throughout; in particular this will ordinarily involve the prosecution identifying the acts or omissions which it relies upon as constituting the breach, and then proving them; by contrast, in a prosecution for a health and safety offence the prosecutor need only prove that there has been a failure to ensure safety or absence of risk, which it may often be able to do simply by pointing to the injury; once it has done so the burden of proof shifts to the defendant; the prosecution need not identify the precautions which it says ought to have been taken, nor need it prove how the accident happened; I usually however it will do so;

(c) in corporate manslaughter the prosecution must prove that the breach was a significant (but not necessarily *the only*) cause of death; by contrast health and safety offences can be proved without demonstrating that any injury was caused by the failure to ensure safety; this guideline is for cases where it is proved that the offence was a significant cause of death, not simply that death occurred.

B. Factors likely to affect seriousness

5. This guideline applies only to corporate manslaughter and to those health and safety offences where the offence is shown to have been a significant cause of the death. By definition, the harm involved is very serious.

6. Beyond that, the possible range of factors affecting the seriousness of the offence will be very wide indeed. Seriousness should ordinarily be assessed first by asking:

(a) How foreseeable was serious injury? The more foreseeable it was, the graver usually will be the offence.

(b) How far short of the applicable standard did the defendant fall?

(c) How common is this kind of breach in this organisation? How widespread was the non-compliance? Was it isolated in extent or indicative of a systematic departure from good practice across the defendant's operations?

(d) How far up the organisation does the breach go? Usually, the higher up the responsibility for the breach, the more serious the offence.

7. In addition, other factors are likely, if present, to aggravate the offence (the list is not exhaustive):

(a) more than one death, or very grave personal injury in addition to death;

(b) failure to heed warnings or advice, whether from officials such as the Inspectorate, or by employees (especially health and safety representatives) or other persons, or to respond appropriately to 'near misses' arising in similar circumstances;

(c) cost-cutting at the expense of safety;

(d) deliberate failure to obtain or comply with relevant licences, at least where the process of licensing involves some degree of control, assessment or observation by independent authorities with a health and safety responsibility;

(e) injury to vulnerable persons.

In this context, vulnerable persons would include those whose personal circumstances make them susceptible to exploitation.

8. Conversely, the following factors, which are similarly non-exhaustive, are likely, if present, to afford mitigation:

(a) a prompt acceptance of responsibility;

(b) a high level of co-operation with the investigation, beyond that which will always be expected;

(c) genuine efforts to remedy the defect;

(d) a good health and safety record;

(e) a responsible attitude to health and safety, such as the commissioning of expert advice or the consultation of employees or others affected by the organisation's activities.

9. Since corporate manslaughter requires proof of gross breach of duty and the substantial involvement of senior management, it is unlikely that the unauthorised act of an employee will significantly reduce the culpability of the defendant in that offence.