

PRESUMPTION OF SHIPMASTER'S CRIMINAL RESPONSIBILITY FOR NARCOTIC DRUGS IN SHIP'S CARGO – MARITIME REALITY CHECK*

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In the aftermath of the “Coral Sea” and “Therese” cases, the article deals with the problem of criminalization of the master of the ship for the crime of illicit traffic based on command responsibility. The first part of the article gives the general framework of the crimes of illicit traffic and smuggling by sea, and an overview of the ship security regulations as provided by the ISPS code. In the second part of the article, the position of the master of the ship with respect to responsibility for illicit traffic is emphasised. It starts by explaining details from both “Coral Sea” and “Therese” cases, where masters were indicted and/or prosecuted based solely on their command responsibility. The author tries to elaborate the problem from a maritime law perspective by explaining the evolution and meaning of different aspects of the three functions of the master of the ship today: nautical, administrative and representation of the shipowner. In order to put the potential responsibility of seafarers for the content of cargo into perspective, the reality of containerized cargo shipping is being explained and documented stage-by-stage. Finally, the basic concepts of criminal law are being explained, where principles of “nullum

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crimen, nulla poena sine lege” apply. According to that, there can be no analogy between criminal responsibility of the master of the ship for crimes of illicit traffic (where the principle of proven guilt applies) with command responsibility for war crimes.

Key words: *illicit traffic, smuggling, master of the ship, cargo handling procedure, drugs, functions of the master of the ship, command responsibility.*

INDEX

1. INTRODUCTION
2. ILLICIT TRAFFIC, SMUGGLING AND TRANSPORT BY SEA
 - 2.1. Illicit traffic
 - 2.2. Smuggling
 - 2.3. 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention) and transport by sea
 - 2.4. Crimes and transport by sea
 - 2.5. Ship security measures (ISPS Code)
3. ILLICIT TRAFFIC AND THE POSITION OF THE MASTER OF THE SHIP
 - 3.1. Command responsibility in practice: the “Coral Sea” and “Therese” cases
 - 3.2. Master of the ship: what is he (really) responsible for?
 - 3.2.1. *Nautical function and safety of the ship*
 - 3.2.2. *Administrative powers*
 - 3.2.3. *Legal representation of the owner*
 - 3.3. Illicit traffic and the modern cargo handling process
 - 3.4. Illicit traffic and the criminal responsibility of the master of the ship
4. CONCLUSION

1. INTRODUCTION

In 2008, 137 million TEU¹ (1,3 billion tons of cargo) were moved by sea, with cargo worth of \$4 trillion.² At the same time, the estimated overall value of the illicit traffic in drugs is over \$155 billion, including large carriages of drugs being moved intercontinentally by ships.³ Illegal migrations and illicit traffic in humans involving transport by sea need to be included into the grim statistics that link some of the most serious crimes of our times with shipping industry. It is clear that transport is an indispensable link in functioning of this extremely dangerous, ever-growing and resistant criminal industry, which poses a threat to society and world at large. Somebody has to be found guilty when shipments of drugs, illegal immigrants or trafficked people are discovered – public opinion on the effectiveness and zeal of the authorities shifts to unfavourable. The fact that real culprits come from the milieu of organized crime, and more often than not remain out of reach of the state authorities interested in prosecuting those crimes, results in placing a heavy weight of criminal responsibility upon the master of the ship. The commanding authority of the master of an ocean-going ship that is so strongly rooted in everybody's mind, combined with the echo of command responsibility coming from the criminal law circles engaged in prosecuting war crimes, have recently led to an explosive mixture. In the last couple of years, several cases where masters of the ship were prosecuted - and even found guilty - for illicit drug traffic based on command responsibility were reported, and rose the whole seafaring and shipping community to their feet. If that practice becomes a trend, and if linked with the numbers involved in this criminal industry as shown above, it might severally damage shipping industry as a whole on a long run, primarily by making recruiting highly trained and motivated seafarers difficult. As *Efthimios Mitropoulos*, Secretary-General of the IMO has put it, "... We should perhaps start by working, methodically and systematically, to make people stop nurturing the creeping perception that tends to hold shipping responsible every time something goes wrong in the transport system; and pass a "guilty" verdict even without trial, as so often happens, ignoring or occasionally deliberately forgetting what we all owe to it. Assisting those politicians who may know little about shipping to understand the industry's peculiarities and complexities would not, in this respect,

¹ TEU – Twenty-foot equivalent unit, standard measurement of one container in transport industry.

² Review of Maritime Transport 2009, Report by the UNCTAD Secretariat, UN New York and Geneva 2009, http://www.unctad.org/en/docs/rmt2009_en.pdf (4.7.2010), p. 24.

³ http://www.unodc.org/documents/wdr/WDR_2010/1.0_Transnational_drug_market_analysis_Introduction.pdf (4.7.2010), p. 5.

be a bad idea so that, should an accident happen, they do not rush to direct their wrath at shipping, requesting its head on a plate – instead of coming forward with constructive proposals to rectify any identified weaknesses and shortcomings.”⁴

The intention of this article is to give a maritime law perspective of some basic concepts tightly connected with the position of the master of the ship, in order to keep things in perspective, and really understand the meaning and scope of legal terms used in connection to the criminal responsibility of shipmasters. The first part of the article defines general terms of illicit traffic⁵ (in wider sense, with respect to any illicit cargo) and smuggling, and explains the link between those crimes and transport by sea. It ends with the more detailed explanation of modern regulations concerning ship security, and the way those security issues might influence the position of the master of the ship confronted with the criminal responsibility. The second part of the article focuses on the problem of criminalization of the master of the ship for illicit traffic, starting from the detailed report on two cases of detention/imprisonment of Croatian masters (Laptalo and Loris) in 2007/8. For better understanding of the legal position of the master, a deeper insight into the content and evolution of his functions - as traditionally defined in the maritime law - is given, with special emphasis being put on the nautical function, safety and security of the ship and the legal representation of the shipowner⁶. The cargo handling procedure in the modern maritime practice is being explained together with images of main documents involved in modern cargo shipping industry. Such an analysis is aimed at providing a deeper insight into the reality in which masters of the ship operate, explaining the physical and legal boundaries of their knowledge and control of the cargo that have to be taken into account while assessing their criminal responsibility. Finally, some basic issues

⁴ Criminalization in Shipping: Human Pawns in Political and Legal Games, Keynote speech by Efthimios Mitropoulos, Secretary-General of the IMO, London, October 6th 2004, http://www.imo.org/Newsroom/mainframe.asp?topic_id=847&doc_id=4358 (5.4.2010). On the position of the seafarers' unions regarding criminal responsibility see: Presumed guilty: Maritime unions have their work cut out in preventing seafarers from being treated as potential polluters and terrorists, says Sharon James in: Transport international Online, <http://www.itfglobal.org/transport-international/ti18guilty.cfm> (26.8.2009).

⁵ As defined in Art. 1 par. 1 (m) with respect to Art. 3 par. 1 and 2 of the 1988 United Nations Convention Against Trafficking in Narcotic Drugs and Psychotropic Substances, http://www.unodc.org/pdf/convention_1988_en.pdf (10.4.2010). Former Yugoslavia, and later Croatia became parties to it in 1990; Official Gazette SFRY (Sl. I. SFRJ) No. 147/1990, Official Gazette (Narodne novine) No. 4/1994. For details on the Convention and the trafficking of drugs by sea see *infra* 2.3.

⁶ For the purposes of this article, the term “owner” will refer also to operator and charterer, as the case may be, and within the meaning those terms have in the private maritime law. The term “carrier” is used only with respect to contractual relations arising from the contract on carriage of goods, whereas the term “company” is used in connection to the security issues as used and understood in the ISM and ISPS Code.

concerning criminal responsibility of commanding officers for illicit traffic, together with the problem of command responsibility are being discussed, and 10 guidelines for assessing the criminal responsibility of the master of the ship are given.

2. ILLICIT TRAFFIC, SMUGGLING AND TRANSPORT BY SEA

2.1 Illicit traffic

In the wider sense of the term, illicit traffic means every organized illicit trade in different commodities, provided by criminal activity. It can cover illicit trade of human beings, human organs, illegal migrations, drugs, arms, stolen cars, antiques and artefacts etc.⁷ In its narrower sense, the term is usually used in relation to illicit traffic of persons, as defined in the 2000 United Nations Convention Against Transnational Organized Crime (Palermo Convention 2000), and its two supplementing Protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), and Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol). The Convention has entered into force on September 29, 2003, and currently has 154 States Parties, Croatia being among them.⁸ As provided by the Convention, the crime of illicit traffic has been duly introduced and penalized in Art. 175 of the Croatian Penal Code; the wording of the criminal offence of illicit human traffic being almost the same as in the Palermo Convention 2000.⁹ According to the Palermo Convention 2000, “illicit traffic in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude

⁷ Milivojević Kruljac, L.: Organizirani kriminal – trgovina ljudima, *Hrvatska pravna revija*, 5/2005, str. 88.

⁸ Original text and status of ratifications: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (20.2.2010) Croatia ratified the Palermo Convention 2000, and published it in the Official Gazette – International Treaties in 2002, Official Gazette-International Treaties (Narodne novine-Međunarodni Ugovori) No. 14/2002.

⁹ Kazneni zakonik (Penal Code of the Republic of Croatia), Official Gazette (Narodne novine) No. 110/97, 51/01, 111/03, 105/04. 71/06, 110/07, 152/08.

or the removal of organs” (Art. 3, par. 1 a) Illicit Traffic Protocol). It is important to note that in the crime of illicit traffic, the victim *has not given consent* for the final purpose of illicit traffic (it has been lured, deceived, forced...), and the *abuse of the victim lasts long* after it has been taken from its domicile (often for years).¹⁰ The transnational industry of human illicit traffic is the fastest growing part of organized crime. According to the accessible data, 4 million women and children become victims of illicit traffic every year; men have to be added to that statistics. Annual net income from this industry on the world scale is estimated at \$3 billion.¹¹ According to the 2010 Illicit Traffic in Persons Report by the US Department of State, there are at least 12.3 million adults and children in forced labour, bonded labour, and commercial sexual servitude in the world.¹² Victims of illicit traffic get transported from their place of origin to a destination mainly by land, but also by sea and air.¹³ The extremely high profit in this industry with respect to the initial investment is due to the fact that human body can be sold (for prostitution) great many times, and not only once as drugs and arms, which only adds up to attractiveness and fast global growth of this type of criminal activity.

The illicit trade of drugs is an even bigger market, and a world-scale problem. According to the World Drug Report 2010 issued by the United Nations Office on Drugs and Crime (UNODC), “...the opiate market generates an annual turnover of up to US\$65 billion, of which some US\$55 billion for heroin alone. Moreover, the opiate market is interlinked with severe national and international security problems, particularly in Afghanistan and Pakistan. In terms of health impact, cocaine comes next, and represents as big a transnational organized crime threat as heroin. Esti-

¹⁰ Organizers of illicit traffic can be divided in three major groups:

- a) highly organized networks, such as Russian or Albanian mafia, primarily involved in arms and illicit traffic in drugs, but due to large profits have also taken their part in illicit traffic of people;
- b) medium organized networks, that operate in certain state, luring their victims and then transporting them into another state, where they operate brothels and similar places where victims are forced to work;
- c) informal “family” networks of individuals, who normally run a legitimate business, but involve in certain activity connected to illicit traffic, to earn some “extra cash” (transport, accommodation while in transit, etc.). Cit. from: Belušić, M.; Doležal, D.; Dvorski, I.; Draganja, M.: *Trgovanje ljudima, Kriminologija i socijalna integracija*, vol. 15 (2006), No. 2, p. 54. See also: Mađerić, L.: *Suzbijanje trgovanja ljudima*, Hrvatska pravna revija, 10/2008, p. 9-20.

¹¹ “Trafficking of Persons to Europe for Sexual Exploitation”, United Nations Office on Drugs and Crime (UNODC), 2010, p. 1 and 7. Some sources speak of an income of even \$7-12 billion. See: Turčin, K.: *Kupi me, prodaj me*, Banka, svibanj 2003, p. 66.

¹² The 2010 Trafficking in Persons (TIP) Report, p. 7, <http://www.state.gov/documents/organization/142980.pdf> (21.6.2010). See also <http://www.state.gov/g/tip/rls/tiprpt/2010/> (21.6.2010).

¹³ “Trafficking of Persons to Europe for Sexual Exploitation”, fn. 11, p. 1.

mates suggest that the global retail sales figure (some US\$88 billion) is even higher than for opiates, and the impact of the cocaine trade on stability can also be severe in some places.”¹⁴

Drugs, produced largely in Asia or South America, get transported mainly by sea to other continents, and in very large quantities. For example, the US Coast Guard in one raid seized 20 tons of cocaine (value over \$600 million) hidden in containers, on the Panamanian ship “Gatun” off the coast of Panama in 2007, making it the largest cocaine seizure in its history.¹⁵ Clearly, transport by sea plays an important role in the ever-growing industry of illicit traffic in the world today.¹⁶

2.2. Smuggling

Smuggling of migrants differs from illicit traffic in persons and “shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Art.3 par.1a) Smuggling Protocol). There is a sharp distinction between illicit traffic and smuggling of migrants in the legal sense, although in practice the difference can be quite blurred. In case of smuggling, the migrant has given his consent, and usually paid a large sum of money for the illegal entry into another state. After the illegal transfer to another country, the relationship between the migrant and the “organizer” of this crime ceases, and the migrant is on his own. Also, smuggling always has an international character, whereas illicit traffic can also take place within only one state, where victim is taken from his place of residence and held by force in another place.¹⁷

¹⁴ Fn. 3, p. 5. Some older sources put an estimate to a much higher figure of \$321 billion in 2003, which was around 1% of a global the GDP, and higher than the GDP of 88% of the states in the world at that time. “UN report puts world’s illicit drug trade at estimated \$321b” by Niklas Pollard, Reuters, in *The Boston Globe*, June 30, 2005.

¹⁵ Hint under the title “18. March”, http://www.uscg.mil/history/Chronology_Mar.asp (15.5.2010).

¹⁶ In order to understand the scale of illicit traffic on the international level, and the importance and/or threat it might pose for the industry of transport, in this article we reverted to the only official statistical data provided annually by the UNODC. However, one has to take into account the fact that the “grey zone” of unreported and/or undiscovered crimes is considerable, and therefore other available sources cited in the accessible literature vary considerably in numbers. Many factors influence the way the information gained from the field will be interpreted, and estimates are often under the influence of different socio-political factors. Therefore, it would be wise to take all of the reported figures with prudence, only as a landmark for understanding the overall problem.

¹⁷ Javor, I.: *Suzbijanje trgovanja ljudima*, Carinski vjesnik 10/2003, p. 30-32.; Belušić, M.; Doležal, D.; Dvorski, I.; Draganja, M.: *Trgovanje ljudima, Kriminologija i socijalna integracija*, vol. 15 (2006), No. 2, p. 52. Milivojević Kruljac, L., Fn. 7, p. 90-91.

Criminalization for transnational crimes according to the Palermo Convention 2000, as well as for illicit traffic and smuggling as envisaged by the respective protocols exists only if those acts have been committed intentionally, which means only if a subjective element of guilt, and even direct intent to commit the crime, has been established.¹⁸ regarding legal position of the master of the ship, if a person is found

¹⁸ The wording of the respective articles are:

Art. 5 Palermo Convention 2000:

CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity;
 - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
 - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
 - (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Art. 5 Trafficking Protocol:

- Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

on board of a ship illegally, without the valid transport documents, two distinctly different legal situations arise:

- a) if the crew found supernumerary people on board the ship during journey, they have to be treated as stowaways from that moment on, and reported to the authorities in the first subsequent port. However, that situation is far from being easy and straightforward for the ship and the carrier. It often involves a long and difficult procedure and negotiations between the state authorities, the ship, the carrier and his P&I club for this/those person(s) to be deployed from the ship to the state of the first port of call, and subsequently repatriated into his/her place of origin (which is sometimes difficult to establish). The further procedure will be one for stowaways, and there is no criminal responsibility of the shipmaster, because he revealed the existence of those illicit migrants to the authorities, and therefore took away the necessary element of the act of illicit traffic and smuggling: the illicit entry into the port state. This situation falls within the ambit of the maritime administrative law, and will not be dealt with further in this text, since it does not involve any possibility for criminal responsibility of the master of the ship.¹⁹
- b) if supernumeraries (or other illicit cargo) were found on board the ship by organs of the port state, that the master of the ship was (allegedly) unaware of, the question arises: can he be held criminally responsible for it, and on what grounds?

The proportions and far-reaching effect that the answer to this question has for the shipping and seafaring industry are linked to the proportions of the industry of illicit traffic today. As already shown, both illicit traffic and smuggling involve transport, very often by ship, due to the largely intercontinental nature of migrations and

Art. 6 par. 1 Smuggling Protocol

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants:
 - (i) Producing a fraudulent travel or identity document;
 - (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

¹⁹ See IMO “New Security Measures for Preventing Stowaways”, Facilitation Committee, 2002 on http://www.imo.org/newsroom/mainframe.asp?topic_id=583&doc_id=1852 (1.4.2010). See also: Pavišić, B.: *Slijepi putnici i kaznena odgovornost*, *Usporedno pomorsko pravo/Comparative Maritime Law*, 1-4/1995, p. 59-72.

the possibility to displace greater number of people and large amounts of drugs and other illicit goods at once. Notwithstanding the different legal definition and nature of those crimes, this distinction is fairly irrelevant at the first moment when people, drugs, arms or other illicitly traded goods are being discovered on board the ship by the authorities of the port state. Whether the organizer of that operation is planning to abuse those men, women and children further for a longer period of time, or their “relationship” is ending upon the illegal entry into that state, is irrelevant for the imminent question the authorities face: can they, or they can not, arrest the master of that ship on the ground of his command of that ship? Can he be held liable for the ship *and everything (and everybody) found on it*, even without his knowledge of its/their existence on board of the ship, by mere fact that he “should have known” of their existence? Can the omission of that knowledge be regarded as gross negligence in fulfilling his duties? If that is the case, under what circumstances can this happen? If not, why? The answer to those questions is undoubtedly – NO. Criminal responsibility for crimes of illicit traffic or smuggling exists only if the master of the ship can be proven guilty in due proceedings.

2.3. 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention) and transport by sea

The 1988 Vienna Convention is the last of the three major international instruments covering the issue of narcotic drugs and its suppression on the global level, and compared to its predecessors different while providing additional legal mechanisms for its implementation. It reinforces and supplements the measures provided in the Single Convention on Narcotic Drugs, 1961 (as amended by the 1972 Protocol), and the 1971 Convention on Psychotropic Substances.²⁰ The 1988 Vienna Convention consists of 34 articles and annexes. It entered into force in 1990, and gained a very large number of ratifications (184 in 2010). It represents the most decisive response of the international community in the war against drugs so far, targeting the usual circles of drug producers and traffickers, but (for the first time) also the drug consumers. By doing that it tries to reach a political balance between the (poor) producing countries and (economically developed) consumer countries, since it is the latter that have more interest, political power, economical sources and zeal to

²⁰ For full texts of those instruments go to <http://treaties.un.org/pages/Treaties.aspx?id=6&subid=A&lang=en> (10.4.2010.). More on the 1988 Vienna Convention see at: Pavišić, B.; Grozdanić, V.; Veić, P.: *Komentar Kaznenog zakona, III izmijenjeno i dopunjeno izdanje*, Narodne novine 2007., p. 459-468.

combat the drug business on a large scale. There is no definition of illicit traffic in drugs or psychotropic substances as a *delictum sui generis* in international law in the text of the Convention itself. On the contrary, the Convention starts from describing the illicit traffic as an international criminal activity, assessing the content of the behaviour by which that activity can be pursued, and obliges the States Parties to incriminate such behaviour through their national legislation, according to their legislative models. The description of the criminal act linked with the illicit traffic in drugs should therefore always be sought and found within the national legislation of the State Party, and not the Convention itself. The 1988 Vienna Convention incriminates also the “white collar” organized crime related to money-laundering of the drug related assets. The Convention empowers the courts and other bodies of the States Parties to order that bank, financial or commercial records be made available or seized, and that the principle of bank secrecy in those cases shall not be applicable.²¹ Moreover, it provides the legal basis for extradition in drug-related cases between countries with no other extradition treaties, resolving thereby one of the major legal obstacles so far.²²

The Article 17 of the 1988 Vienna Convention deals with illicit traffic by sea, and is therefore especially important with respect to the issue of criminal responsibility of seafarers. The basic requirement of the Convention vis-à-vis the States Parties in this context is mutual cooperation, in conformity with the international law of the sea. Every State Party should take all measures to suppress the illicit traffic by vessels flying its flag, and may request the assistance of other Parties in suppressing its use for that purpose. In case of vessels exercising freedom of navigation, every State Party that has reasonable grounds to suspect that a vessel is engaged in illicit traffic may notify the flag state and request its authorization to take appropriate measures with respect to it. Such cooperation and authorization from the flag state is to be given expeditiously; to that purpose each State Party has to designate an authority that will receive and respond to such requests. Upon the authorization of the flag State, each State Party to the Convention can board and search the vessel, and take appropriate action with respect to the vessel, persons and cargo on board, if evidence of involvement in illicit traffic is found. Such actions are to be carried out only by warships or military aircraft, or other ships or aircrafts in government service.

²¹ Art. 5 1988 Vienna Convention.

²² Art. 6 par. 3 and 4 1988 Vienna Convention.

2.4. Crimes and transport by sea

Ships are perfect mules. There is no doubt that a large percentage of the world's illicit trade in drugs, arms and people is being physically performed by ships. Transport by sea is traditionally the cheapest way of long distance transport. It is also the easiest, when it comes to transporting larger amounts of illicit cargo hidden within the cargo, given the reality of the modern shipping, as described *infra* under 3.3. Finally, it is the most logical and geographically possible way for the goods originating from one continent to reach the other, where their market is. The proof of that can be found in the practice of the police anti-drug squads operating in major commercial ports, where drugs, and other illicit cargo, are frequently being detected, after a complex preliminary work and joint action of (usually) police forces in several countries. There are different ways to stash the illicit cargo within the declared one. When it comes to the containerized cargo, there are two major ways of hiding trafficked goods: within the cargo inside the container or in the construction of the container itself.²³ Detecting the illicit cargo hidden within containers is a complex task, which involves specialized police forces of several countries, and sophisticated instruments and procedures (mobile x-rays, sniffing dogs, highly trained and experienced police officers etc.). It is impossible for masters of the ships involved in commercial shipping today to take over the police work, or to cooperate more with the police in the port of shipment, in making sure that cargo loaded onto the ships contains no illicit cargo. There are many reasons for this, but let us mention only two at this point. Firstly, the security measures in shipping today are very strict and in many ways legally and physically restrict the actions of the master of the ship with respect to the cargo loaded (more on this *infra* under 2.4.). Secondly, shipping companies' major investment in the security equipment, crew training and time for check-ups of the cargo upon loading onto the ship would necessarily increase the price of transport, which would in turn increase the price of the final product for the end consumer. Prolonging time a ship spends in a port means loss of money for the shipping company. Faced with the harsh economic situation and volatile shipping market, the scenario where shipping companies take over the role that the state police is unable to play,

²³ The research for this article has been partly carried out in the Adriatic Port of Rijeka, with the annual turn of 130.700 TEU in 2009. With the courtesy of the Croatian Ministry for Internal Affairs, Sector of Criminal Police in Rijeka, the data on major drug seizures in that port has been obtained. Their analysis shows that the quantity of the seized drugs in the period from 1997-2008 varies from 1,5 kg of hashish found in the personal belongings of a seafarer to more than 660 kg of cocaine. In all the cases but one (the one involving the seafarer) the drugs were being smuggled either in the cargo carried in the container, or within the construction of the container itself. In all cases of container/cargo smuggling, the port of origin was the Panamanian port of Guayaquil.

is simply not feasible. In the meantime, the master of the ship on which illicit cargo is found remains exposed to the authorities of the port state where the drugs are discovered. There are other sensitive issues, such as empty containers. The exported goods get shipped in full containers from one continent (mainly Asia) to another, where containers upon unloading of the goods lie empty and unsealed for some time within the premises of the ports. Then, they can either be returned empty by the order of their owner (large shippers and/or carriers), or they are loaded with new goods for another journey. After they are carried for loading to the shipper's premises, they can also lie there for some time, more or less unattended. Those are all periods when no control over either the container itself, or its contents, can be exercised by the side of the ship that will eventually carry that container over several continents, touching the ports of many countries, with different legal orders, routines and basic knowledge of the shipping and transport routine. Because of this unenviable position, and after the *Laptalo* case in Greece, an initiative to seal (also) the empty containers before they are loaded into the ship was started by large sea carriers and their commanding seafarers. Since containers should be checked in ports by port operations facilities prior to sealing, port operations insisted on two things: first, the representative of the carrier had to be present while the inside of the containers were being checked, and second, they had to be paid for this extra service. Again, more time and money to be spent - in the middle of a very harsh economic situation for shipping- resulted in failure of this initiative.

P&I Clubs²⁴ as mutual insurers of the shipowners' liability have a direct vested interest in keeping damages arising from that liability at the lowest possible levels. They issue different warnings, manuals and other materials for their members with detailed instructions for conduct in a large variety of situations arising at sea. Those instructions are precise, practical and of huge importance for maintaining the insurance cover by the shipowner should the damage arise. They are also incorporated in the internal instructions (manual) issued by the shipowner (company), kept on board the ship and strictly respected in the everyday life and handling of the widest range of situations in practice. P&I instructions (*Advice to Masters*) are issued and communicated directly to the masters on board the ships. Among many other issues they also contain a special instruction called "drug smuggling warning", in which they are reminded of the USA Anti Drug Abuse Act, by which every person who knowingly or intentionally brings or possesses controlled substance on board a vessel shall be punished.²⁵ It is clear that the respective US legislation, the P&I *Advice to Masters*

²⁴ Protection and Indemnity Clubs, see: www.ukpandi.com; www.londonpandi.com; www.igpandi.org (12.7.2010).

²⁵ Full text of the "Drug smuggling warning" reads as follows:

"Ships are often used as vehicles for drug smuggling. Drugs or illegal substances are hidden on the

and the insurance all take into account the subjective criteria of proved guilt for criminalization of every seafarer in particular, notwithstanding the special position of the master of the ship. There is no explicit or implied responsibility of the master only for commanding the ship on which controlled substance has been found.

ship itself or in its cargo. Customs authorities all over the world have intensified their search for drugs on board. The consequences for the shipowner and crew can be very serious when drugs are found.

In the USA the Anti Drug Abuse Act was introduced to prevent drugs from getting on board through greater on board security. The simple means of achieving this objective being by levying punishing fines on the shipowner and imposing jail sentences on those found guilty of having smuggled the drugs.

The Act establishes that any person who knowingly or intentionally brings or possesses on board a vessel a so called controlled substance shall be punished. For example a person committing a violation involving 1 kilogram or more of heroin, 50 grams or more of "cocaine base" or 10 grams or more of a mixture containing a detectable amount of LSD, shall be sentenced to a term of imprisonment of not less than 20 years and not more than life and a fine not more than USD 4,000,000 if the defendant is an individual or USD 10,000,000 if the defendant is other than an individual, or both. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein."

An option available to the authorities is confiscation of the entire ship – and seizure of the ship followed by a substantial delay while investigations are being carried out is not uncommon.

The amount of the applicable fine multiplied with the weight of the quantity of the drug discovered has no maximum – so fines are basically unlimited. Initial penalties are regularly assessed in tens of millions of dollars and although the amount can be reduced the owner has a very difficult burden of proof to sustain.

The owner must show that he exercised "the highest degree of care and diligence". While investigations are going on the ship will remain under arrest. Criminal proceedings will be instituted against anybody on board who might be involved in the smuggling.

The U.S Customs Service has issued a Sea Carrier Security Manual in which it describes routines and procedures which they expect an owner and the officers to implement. Only compliance to the letter with the contents of the manual will be accepted as a proof that the owner has exercised "the highest degree of care and diligence" which may then result in a reduction or withdrawal of the fine.

It is important that the Sea Carrier Security Manual is available on board, that it is closely studied and that its terms are appreciated, by means of instructions and the education of officers and crew and a tightening-up of all routines and procedures to comply with the manual and its principles.

An owner must be able to prove all precautionary steps and measures taken. It is thus important that they are properly recorded for future reference.

The U.S. Customs Service has declared its willingness to co-operate with owners in implementing such routines so that the aim of the legislation is achieved. To this effect owners have been invited to sign the Sea Carriers Initiative Agreement according to which the owner agrees to take the steps as reflected by the manual. We have recommended to our members that they sign the Agreement. A copy should be available onboard and included in the ship's documents to be presented to the customs authorities when entering a U.S. port.

It is thus important for a master to check:

§ that the Sea Carrier Security Manual is available on board

§ that its terms are implemented and closely followed

§ that all such steps are properly recorded for future reference

§ that the Sea Carriers Initiative Agreement is included among the ship's documents and that in general the highest vigilance is shown to combat smuggling of drugs or illegal substances in the ship or in its cargo."

See:http://www.swedishclub.com/tm_loss_prevention/advice_to_masters_2005/Advice_to_masters.htm (12.7.2010).

The third way to carry illicit cargo by sea is within an already existent part of the ship (for example bow ballast water tanks), a specially designed part of the ship, or attached to the ship's hull from the outside. It is notorious that frog-men are used to attach shipments of drugs to the underwater part of the ship's hull, securing its carriage to the desired port anywhere in the world on the ship's route, using the ship as a perfect mule: totally oblivious that it is used in criminal purposes. That practice is successfully suppressed by the underwater scan of the hull prior to its sail-off. If the illicit cargo was discovered in one of the subsequent ports that the ship touches, the ship and its crew would be beyond any suspicion should they be able to produce the "clean-hull" underwater scan from the previous port. The real factual issue here is whether performing such a scan for the ship is mandatory in the port of exit (leaving one state) and the port of entry (while entering another state for the first time), only in the latter port, or none of them. This important question (due to large costs in time and money involved), can only be answered on a case by case basis. The answer would largely depend on the regulations on the security measures as set by the ISPS Code, and enforced by the national legislation of every SOLAS State Party.

2.5. Ship security measures (ISPS Code)

After the 9/11 tragic events, ships were detected as potential weapons in terrorist attacks, and a whole set of extensive new legislative measures was put in place through the amendments of the 1974 Safety of Life at Sea Convention (SOLAS), as amended in 2002²⁶, by adding to it a brand new chapter XI-2 named "Special measures to enhance maritime security". Regulation XI-2/2 of the new chapter enshrines the International Code for the Security of Ships and of Port Facilities (ISPS Code).²⁷ Part A of this Code is mandatory, and part B contains guidance to the Contracting Governments as how to best comply with the mandatory requirements. All states parties to SOLAS 1974 (159 of them)²⁸ have to comply with its provisions, and ascertain that all of those measures pertaining to security of ships, crew and ports are being implemented. Every one of them has a duty to implement the whole ship

²⁶ SOLAS - Chapter XI-2 Special Measures to Enhance Maritime Security, Consolidated text of the International Convention for the Safety of Life at Sea, 1974, International Maritime Organization (IMO), London, 2004. The amendments were adopted at an international diplomatic conference, and entered into force internationally on July, 1st 2004. See the text and further info at: http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689 (10.3.2010).

²⁷ IMO – International Ship & Port Facility Security Code and SOLAS Amendments 2002 (ISPS Code) – 2003 Edition – International Maritime Organization, London 2003.

²⁸ http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (10.3.2010).

and port security system in accordance with the ISPS by its national law, and has a duty to report the state of compliance to the International Maritime Organization (IMO).²⁹ Apart from terrorist attacks, there are other security threats that are efficiently addressed by the ISPS Code measures as well: acts of piracy, robbery attacks, smuggling and illicit traffic in humans. Basically, the ISPS Code puts forward a comprehensive risk management concept. This concept consists of a standardized framework for evaluating risk, enabling governments to respond to changes in threat with changes in vulnerability for ships and port facilities.³⁰ This system refers to two major security subsystems: ships (together with their crew and management company) and port facilities. After 2004, all the SOLAS ships have to put forward the comprehensive ship security plans, and have to have a specially trained ship security officer on board (usually a second deck officer).³¹ Moreover, the shipping company has to have a company security officer, whose responsibilities include ensuring that a ship security assessment according to the ISPS is properly carried out, that ship security plans are prepared and submitted for approval by (or on behalf of) the administration of the flag state and thereafter is placed on board each ship. With respect to the position of the master of the ship, Art. 6 ISPS clearly states that “The Company shall ensure that the ship security plan contains a clear statement emphasizing the master’s authority. In the ship security plan, the Company shall establish that the master has the overriding authority and responsibility to make decisions with respect to the safety and security of the ship and to request the assistance of the Company or of any Contracting Government as may be necessary.”³² After 2004, all SOLAS ships have to carry an International Ship Security Certificate indicating that they comply with the requirements of SOLAS chapter XI-2 and part A of the ISPS Code. When a ship is at a port or is proceeding to a port of SOLAS contracting state, that state has the right, under the provisions of regulation XI-2/9, to exercise various control and compliance measures with respect to that ship. The ship is subject to port state control inspections but such inspections will not normally extend to examination of the Ship Security Plan itself except in specific circumstances. The ship may, also, be subject to additional control measures if the SOLAS state exercising the control and compliance measures has reason to believe that the security of the ship has been compromised, maybe in the last port it has touched before entering

²⁹ Croatia did it in 2004 by enforcing the Law on security of merchant ships and ports opened for international transport (Zakon o sigurnosnoj zaštiti trgovačkih brodova i luka otvorenih za međunarodni promet), Official Gazette (Narodne novine) No. 48/2004, 51/2004.

³⁰ Art. 4 ISPS.

³¹ Art. 7-9 ISPS.

³² Art. 6 ISPS. and Art. 11 ISPS.

that state (for example, performing underwater hull scans in its port(s), that may be mandatory for ships coming from certain ports and/or states, or optional, depending on the assessed security level for a certain ship).³³ Whereas the implementation of the security requirements on board a ship and its crew went smoothly and on time, with considerable effort being put to that respect by the shipping companies, the implementation in port facilities in different countries proved to be much more difficult, due to different economic power and different understanding of the problem by different states.³⁴ That fact makes the everyday life and routine of a master of the ship even more difficult. He has to be extremely well informed on all the security measures expected by each and every state whose ports his ship touches, while at the same time securing that all the ship and crew security measures are being complied with. Here, the logistics provided by his company are pivotal.

3. ILLICIT TRAFFIC AND THE POSITION OF THE MASTER OF THE SHIP

3.1. Command responsibility in practice: the “Coral Sea” and “Therese” cases

The smoldering problem of criminalization of seafarers in general, and more specifically with respect to the cargo carried on board of an ocean-going vessel, rose to a fire in the seafaring circles following the case of captain Laptalo and the ship “Coral Sea” in 2007. Croatian captain Kristo Laptalo, a veteran master of indisputable reputation with 40 years on the sea, was in command of the Bahamas-flagged reefer ship “Coral Sea”. It was carrying cargo consisting of 187.673 boxes of bananas from the Panama’s port Guayaquil to different Mediterranean ports. The cargo was organized in pallets, each containing 48 boxes, all tightly wrapped in plastic. Due to the very strict security drill in the Panama port, the crew was strictly forbidden to come even close to the part of the ship where loading or unloading was taking place, before the hatches were closed upon inspection by the anti-drug squad. Those inspections were done by

³³ Art. 14-18. ISPS.

³⁴ Zec, D.; Frančić, V.; Šimić Hlača, M.: Ports security organization and functionality – Implementation of the ISPS Code in medium and small countries, PDF document online, p. 1. However, the implementation of the ISPS in practice meant additional work for already overburdened crew, which rose negative feelings among the seafarers. See: OECD Workshop on Maritime Transport, Paris 4-5 November 2004, Seafarers’ Comments on Relevant Regulatory and Political Developments, Paper submitted by TUAC/ITF.

the special police forces carrying long arms, trained dogs etc. The cargo was loaded into four of the ship's storage decks (A,B,C,D) and several containers stowed on the ship's deck. The same ship had been carrying bananas on the same route between Guayaquil (Panama) and different Mediterranean ports for many years, and without exception the cargo from the storage deck 2A had always been unloaded in the Italian port Civitavecchia. The orders concerning the port of call and the amount of cargo to be delivered there in this case came to the ship and its master deeply into the voyage. This time, exceptionally, it was the storage deck 3A and containers from that deck that had to be unloaded in Civitavecchia (a very small amount of cargo compared to usual), and cargo from storage 2A and 4A eventually ended unloaded in the Greek port of Aegion. The reason for this unusual order was found in the fact that another ship carrying an enormous amount of bananas touched the port of Civitavecchia at the same time. Upon unloading the cargo in Aegion, 51,6 kg of cocaine was found by the ship's agent in two boxes among the 27.377 boxes of bananas unloaded at that port.³⁵ Captain Laptalo was arrested subsequently by the Greek authorities without any proof of his involvement or knowledge of this crime, apart from his position of the master of the ship carrying the illicit cargo. It is important to state some more facts pertaining to this case, because of their significance in understanding the issue of the (non) existence of the criminal responsibility of the master of the ship. The orders to call at Aegion port were sent to the master 13 days after the ship's departure from the port of Guayaquil, and the orders to unload the given amount of cargo came 17 days into the voyage. The fact speaking in favour of the seamen were seconded by the ship managing company, Trireme Vessel Management of Antwerp, and its managing director according to whom "no member of the crew could have known that the boxes containing the drugs would be unloaded in Aegion. Also, it would be impossible to introduce the drugs into the cargo while in the holds, given the limited access to the holds and lack of space."³⁶ The drugs were found during a quality check by the ship's agent who notified the coastguard and the police, after the ship had already been cleared to sail, 10 minutes before the scheduled arrival of a pilot on board the ship. Having heard of the incident, master Laptalo postponed sailing out on his own free will, came ashore and inspected the suspect boxes himself.³⁷ He was fully cooperative with the authorities then, and during the whole period af-

³⁵ "Bilješka- podnesak u obranu kapetana Krista Laptala za sudski zapisnik, Zapisnik o saslušanju i odlukama tročlanoga Apelacijskog suda sa ročišta održanih 16. i 17. srpnja, 2008. broj 436/2008", obtained by the courtesy of Seafarer's Union of Croatia/ITF Croatia.

³⁶ "Master in Jail After Drugs Found in Cargo", by Nigel Lowry, Lloyds List August 31, 2007. <http://www.mastermariners.org.nz/?p=73> (22.2.2010).

³⁷ Ibid.

terwards. At that point nobody from the port authorities spoke of even the possibility of his responsibility for this fact – it was merely a standard procedure for the master to come ashore and see for himself what was going wrong, in order to be able to report the facts to the company. That is indeed what master Laptalo did – he went back to the ship to notify immediately the company of the incident and the reasons for the postponing of the sailing out. It was the second time he came ashore from the ship that the port authorities changed drastically their attitude, and held him and two other members of the crew responsible for that incident. Master Laptalo, first officer Metelev and bosun Garcia were subsequently arrested. When the port captain was asked by the Laptalo's attorney: "What do you have against those people?" he replied: "Nothing, but I have 52 kg of drugs and have to arrest somebody".³⁸ Master Laptalo spent the next 16 months first in the police custody in Aegion, and then in the high-security prison Koredallos in Athens. The Court of 1st instance condemned him to 14 years in prison, for possession, transport and import of illicit drugs.³⁹ Although no evidence whatsoever was found against him, the sentence was based on Art. 45 of the Greek Private Maritime Code, according to which the captain of the vessel is liable for the vessel itself, and all men and cargo aboard it. The sentence was finally reversed by the Court of 2nd instance, and he was acquitted of all charges, because – indeed - no *guilt* was found on his part.⁴⁰ However, the fact that a sea captain was held in a high security prison for 16 months, was convicted as a felon by the Court of 1st instance to 14 years of prison, he was entered into the SIREN program⁴¹, is prohibited from entering the EU, his Certificate of competency might be annulled and his whole spotless career got ruined by this incident (he will not be able to sail and earn for the last few years of his career before retirement) - raises serious concerns and worry within the shipping and seafaring industry.⁴² The attorney hired through the P&I club to defend captain Laptalo said that "the fight to have the men freed on bail would be difficult. Jailing of crew in drug cases was almost a routine in Greece. This is the mentality of the judges". However, even against this background

³⁸ Letter of captain Laptalo to his attorney sent from the Koredallos prison in 2007, p. 3. Obtained by courtesy of Seafarer's Union in Croatia/ITF Croatia.

³⁹ Patras Court of Appeal, Case No. 436/2008 from July 17, 2008. Cited acc. to Pavišić, B.: "Kaznenopravna odgovornost zapovjednika broda – *ultra posse nemo tenetur*", Kapetanov glasnik: More je naš izbor, No. 18 (svibanj 2009), p. 48.

⁴⁰ Patras Court of Appeal of 2nd instance, Case No. 476-477/2008, the hearing upon appeal held on November 26-27, 2009). Cited acc. to Pavišić, *ibid*, p. 47.

⁴¹ Strategic Information Response Network,
http://www.childtrafficking.com/Docs/siren_07_introsiren_0108.pdf (23.2.2010).

⁴² Pavišić, Fn.36, p. 49.

of blanket charging of seafarers, the Coral Sea case stood out. According to the same source, he personally has never seen such a case where there was absolutely no evidence before the judge. The big issue in this case is that when the ship left Ecuador, the captain could not have known the destination and therefore could not have had a plan to deliver any drugs. Also, another fact established during the proceedings raises doubts: the entire cargo, together with the two boxes containing drugs were packed at the closed cargo-handling facilities of the port of Guayaquil. The entrance into that part of the port is strictly forbidden to the ship's crew, allowing entrance only to the port stevedores. The entrance is possible only after the biometric screening of the palm of the hand, saving all data of times and persons entering the premises. On the other hand, the police in Aegion destroyed the drugs found and seized together with paper and boxes, before removing prints (forensic evidence). If they had not done it, it would have been fairly easy to match those prints with the biometric evidence of the stevedores present at the Guayaquil port at the time that the cargo in question had been packed.⁴³ The second case involving a Croatian master of the ship and a first deck officer happened in Panama in 2008 (a year after the Laptalo case). *M/s Therese* carried sugar from the port of Buenaventura, Columbia (where it had spent nine days on anchor) to its final destination of Puerto Principe, Haiti. Prior to its leaving the port of Buenaventura (Columbia), the ship was inspected by the Columbian anti-drug police squad. However, that inspection included only the search of the cabins, the deck and the engine room, but not the underwater hull scan. The Columbian port security requirements, enforced according to the ISPS, do not require mandatory underwater hull scans within hours prior to the ship's departure from the port; usually, such a survey is necessary only if the ship touches the port for the first time after the trip from another State. It is generally known that in some countries, Columbia being one of the notorious, there is a high risk of drug-smuggling (in export) in the special cylinders (so called "parasites") placed by specially trained divers during the night to the ship's propeller or other part of the hull. Therefore, a master of the ship aware of that fact, and acting in accordance and on behalf of the managing company, could require and pay the divers to perform the underwater hull scan as a precaution measure. However, such scans are costly, and masters are generally under pressure from their companies to reduce costs, and increase efficiency. No respectable shipping company on the global market today shall explicitly order savings on the safety and security measures, but reducing costs remains a necessity for the company and its master.⁴⁴ Therefore, performing costly, but not mandatory scans out of a pure precaution is not the first choice in the maritime industry today. This is exactly why

⁴³ Letter of Capt. Laptalo to his attorney sent from the Koredallos prison in 2007, p. 3.

⁴⁴ Some reported cases speak of companies which refused to prolong the contract of employment to the master who insisted on the "clean hull" scan, contrary to the company's order to save and take the risk.

such a scan was not done in the case of m/s *Therese* prior to its leaving Buenaventura, Columbia. When the ship reached the anchorage in the zone of the Panama Canal, the Columbian authorities informed the authorities of Panama that a cylinder containing drugs was attached to the ship *Therese*. The drugs were indeed found there, and subsequently two members of the crew (both Croatian citizens) were held in custody for several months: Master Subat Loris and first officer Duško Tanurdžić, with no evidence, only because of their commanding position on the ship (master) and duties with respect to the cargo (1st officer).⁴⁵ They were charged with placing the drugs to the underwater part of the hull, carriage and importation to the Panamanian waters, and/or supervising the drugs in transit.⁴⁶ During the following proceedings, however, no proof for that was found, and they were eventually set free. However, it is important to notice that the amount of the drugs found in the cylinder placed on the “*Therese*” was eight packages, but the exact amount and content of those varied considerably during proceedings (from 3 to 8 kilograms; the content was sometimes defined as cocaine, and other times as heroine, cocaine and “unknown substance”).⁴⁷ Therefore, it is reasonable to conclude that in this case, as well as in the case of Master Laptalo, it was not a large quantity of trafficked drugs – it always varies between the amount of several kilograms, to several dozen kilograms, which cannot be perceived as a large quantity of drugs in the context of modern illicit traffic in drugs. Also, it is important to note that the drugs in the second case were found after a denunciation from the Columbian authorities, the very same who do not impose the underwater hull scan of the ships leaving their ports. In order to understand correctly the position of the master of the ship (and other deck officers) with respect to the possible criminal responsibility for illicit traffic, one has to have wider understanding of other maritime, administrative and practical issues that constitute the reality of shipping and seafaring business and are pivotal to correct assessment of the final issue of criminal responsibility. Therefore, this text will try to elaborate three major problems:

1. the functions of a master of the ship, especially with respect to the cargo carried,
2. cargo handling process, pertaining documentation, and the difference between the maritime and commercial liability for the cargo according to the contract of carriage,

⁴⁵ For liability for the cargo of the master of the ship see *infra* 3.2.1. Nautical function and safety of the ship).

⁴⁶ The indictment was grounded on the statement that it would be “contrary to the common sense” to presume that such a shipment of drugs would be left unattended during the transit.

⁴⁷ The information obtained from the legal defence correspondence in cases Loris and Tanurdžić, by courtesy of the Croatian Seafarer’s Union/ITF Croatia.

3. criminal responsibility (or not) of the master of the ship for the cargo containing illicitly trafficked goods, based on the principle of command responsibility.

3.2. Master of the ship: what is he (really) responsible for?

In the early days of shipping, when the very roots of the modern maritime law were set, by far the most valuable asset of the owner of the ship - was the ship itself. In most cases, that remains unchanged until the present days. When sailing into a trading venture across the sea, in those ancient uncertain times, the owner was physically present on the ship to ascertain, as much as possible, the successful outcome of the whole venture. The owner, or – if there were several of them – one of the owners chosen among them, was in charge of all the commercial aspects of the journey, willing even to risk his life in order to preserve his ship and see that it returned safely from the journey, accomplishing successfully its trading task. Since the owner was usually a merchant, he did not have sufficient maritime skills for navigation. Therefore, a master mariner was employed (in Roman law called *magister navis*), who was fully in charge of navigation and safety of the ship, and was completely independent from the owner in fulfilling those duties. After the first accumulation of capital, merchants started to own more than one vessel, and were therefore no more able to be physically present on their ships during the voyages. The owner of the ship started to run the shipping business from the mainland, and had no communication with his ships while on the sea. Therefore, he had to transfer some of his functions onto the master of the ship to secure his interests and enable the successful completion of the trading venture (in the first place), and ascertain order on the ship and ship's safety (in the second place, in order to fulfil the first goal). Those were the times and reasons when all modern-day functions of the master of the ship were formed. Although everything in shipping has changed since those days, those functions inherent to the position of the master of the ship have remained very much unaltered until today. Notwithstanding the fact that technical milieu of modern shipping has nothing in common with the old days, starting from the fact that the ship (and its master) today has a permanent communication with the owner, there is almost no legal system that has taken away the traditional functions of the master of the ship.

3.2.1. Nautical function and safety of the ship

A master is the chief officer on the ship. He is in command of all maritime and technical operations necessary for the completion of the maritime endeavour, and – in order to fulfil that – commands the crew. The Croatian Maritime Code, similar to many other national maritime law regulations, contains a norm according to which

“...the master of the ship commands the crew and all other persons on board the ship. (...) The master of the ship shall be appointed and relieved of the duty by the company.”⁴⁸ Closely linked to the nautical function is his duty to return the ship safely back to its owner(s) upon the successful completion of the maritime endeavour, therefore making him responsible for the ship's safety in the largest sense. That particular issue of ship's safety has dramatically gained in importance in the last decade, making an important impact to this traditional function of the master of the ship as well.

The master has to be on board his ship, has to be personally on the bridge while entering or exiting ports, remains liable for navigation even while using services of pilots, decides on what needs to be done in all of the situations that arise during navigation, putting up with all kinds of pressure, and has to keep the ship and the crew fit to respond to all extraordinary situations on the sea, therefore performing necessary drill exercises.⁴⁹

Last but not least, the master has to secure the necessary conditions for the owner to generate income from the carriage of goods by sea, the latter being the main commercial ground for the existence of the maritime venture in the first place. Commercial function, or duty for the carried cargo during the voyage, developed with time as a special part of the nautical function, and is nowadays deemed in the maritime law theory as the nautical function in the wider sense. The difference between those two functions of the master of the ship vis-à-vis the owner on the one side, and the shipper of the goods from the other, can be seen from the basic rules governing liability of the carrier for the goods carried by sea. The Hague-Visby Rules⁵⁰, as the source of law most widely accepted by both the shipping and trading industry worldwide, make a sharp difference between the liability of the carrier for the loss or damage to the cargo incurred as a result of an error in navigation, from the damage that was caused by an error of the crew in the commercial duty for the cargo during voyage. During the period of the voyage, while the master is the only one in command of the ship and the cargo, the owner is not liable for errors in navigation of the master, or other member of his crew. However, he remains liable for the errors that can

⁴⁸ Art. 146 par. 1 and 3, Maritime Code of the Republic of Croatia, Official Gazette (Narodne novine) No. 118/2004, 76/2007, 146/2008.

⁴⁹ Tassel, Y: Capitaine: attributions et responsabilités in: *Droits maritimes* (edt. Beurier, J-P.), Dalloz, 2008, p. 431. For liability of the master of the ship for seaworthiness of the ship see: Toremar, M: *The Legal Position of the Ship Master*, Master Thesis, Master of Law Program, Department of Law, School of Economics and Commercial Law, Göteborg University, 2000, p. 29-30.

⁵⁰ 1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law, Relating to Bills of Lading, signed at Brussels on 25th August 1924, <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> (12.4.2010).

be linked with the crew's duties to care for the ship's cargo, *as declared by the shipper*, and in accordance with his instructions.⁵¹ This important distinction of the carrier's liability arising from the contract of carriage of goods to the shipper (as the third party to the master – owner relationship) depicts best the very essence and roots of the master's functions on the ship. Duty of the master to care for navigation emanates from a very private, closed relationship with his employer. The latter invests the biggest asset (his ship) in the venture, and is not liable to anybody outside of this relationship for any collateral damage that might arise from the error in navigation, being the one that suffers the most from the mishap. The master, by making a fatal nautical mistake, risks his very life. The owner vested the master fully with those powers because he (the owner) is not capable to do that job himself. Both the owner and the shipper need the master and his knowledge. Because of that, the owner cannot give orders or instructions to the master in that respect, and the master is fully independent in fulfilling this function. Therefore, the owner cannot be held liable for those errors; everybody on the ship is exonerated for the errors or poor judgement that occurred during the highly risky and strenuous maritime venture. No additional pressure, in form of potential liability for damages with respect to private or public entities is to be put upon the master, while performing his difficult and responsible task of being alone in charge of the ship and everybody and everything on it. Should that not be the case, the pressure and risk of committing an error would only increase, therefore putting the ship and all the other interests linked with it (namely that of the cargo) to an even greater jeopardy. Nobody wins. This is the relationship whose ratio is turned “inwards” – only between the owner and the master.

On the other hand, the commercial duty of the master and the crew for the cargo carried is tightly connected to the contract of carriage of goods with the third party, the shipper. The owner of the ship, being the carrier under the contract of carriage, cannot personally fulfil the duty to care for the cargo during voyage, but vests again his crew, and his master as the commander of that crew, to take care of the cargo for

⁵¹ Art. IV par. 2. a) Hague-Visby Rules. This principle has been revoked by the 1978 UN Convention on the Carriage of Goods by Sea (Hamburg Rules), where the carrier remains liable for the loss or damage to the cargo caused by error in navigation during the whole voyage. This was the reason of marginalization of those Rules in shipping practice at the time. See text at: <http://www.jus.uio.no/lm/un.sea.carriage.hamburg.rules.1978/toc.html> (12.4.2010). The latest developments in this field include United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules 2009), where error in navigation is also not among excepted perils (Art. 17 par. 3). There was no obstruction to this idea during preparatory work, which speaks of a major development of technical milieu of shipping, what led to a different perception of legal interests of shipowners with respect to this issue. Text and preparatory works of Rotterdam Rules 2009 see at: <http://www.rotterdamrules2009.com/cms/index.php?page=about-2> (12.7.2010).

him, enabling him to earn the income for all of them from this commercial venture. Again, the former vested his master with some duties, but this time as his “agent” on the ship, to do something that is normally within his prerogatives, but cannot be done by him physically due to the non-presence on the ship. The ratio of this function of the master can be found “outwards”, in the contract of carriage with the shipper, but again links the master only with his employer, not with anybody outside, such as – the public authority. In other words, it is not (primarily) the public authority that vested the master with the duty to take care of the cargo carried on board the ship, in order to ascertain that no infringement of the public order (f.e. by way of illicit traffic, smuggling of the illegal cargo etc.) has been committed. The nautical function and care for the ship’s safety is therefore functionally a consequence of a closed relationship between the master and the owner of the ship, arising from the maritime law. Only consequentially is the public order being preserved by way of performing those functions, f.e. the preservation of the maritime environment from ship-sourced pollution, safety of life at sea etc. This is the point at which next function of the master of the ship arises.

3.2.2. Administrative powers

Due to the physical isolation of the ship from the mainland during the voyage, the master of the ship is vested with some administrative powers to ascertain minimal functioning of the legal order on board the ship while on the high seas. He commands the crew and enforces the order on the ship, being the only officer allowed to carry sidearms to that purpose. Due to the urgency of the situation, and lack of the physical communication with the mainland, the master has the power to secure the facts of birth, death or the last will of a deceased by entering them into a log book. This entry has the power of a public entry. The master can also restrict the freedom on the ship to any person who puts in danger the ship itself, or anybody on board of a ship, or in case a criminal offence has been committed, or the danger of a commitment of such an act exists, and within reasonable frameworks can preserve the evidences of such an act for further prosecution on the mainland.⁵² Again, all those functions are only the transfer of the original public state prerogatives on the

⁵² Full listing and more details on the administrative functions of the master of the ship see: Zapovjednik broda in: Pomorska enciklopedija, sv. 8 (Šo-Ž), Jugoslavenski leksikografski zavod “Miroslav Krleža”, Zagreb 1989, p. 576-577. On criminal acts committed on board the ship and functions of the master of the ship see: Pavišić, B.: Krivično djelo izvršeno na brodu i radnje zapovjednika broda radi pozivanja učinioca na odgovornost i utvrđivanja okolnosti pod kojima je djelo učinjeno, Zbornik Pravnog fakulteta u Zagrebu 1-2/1984, p. 129-154.; Pavišić, B.: Usporedni osvrt na krivična djela zaštite reda (poretka odnosa) u plovidbi, Usporedno pomorsko pravo/Comparative Maritime Law, 1-2/1987, p. 44-77.

mainland, transferred to the master of the ship due to the urgency of the situation, the lack of physical link with the ship on the seas, and the original function of the master to preserve the ship's safety. Again, we can say that the reasoning for this second specific set of administrative powers of the master on the ship came from "within" the maritime venture and the industry itself, but was given (or transferred) to him and enacted from the "outside", by the state, that is solely vested with those powers on the mainland.⁵³ Nowadays, the preservation of the public order has added a new dimension of the administrative power to the master of the ship, that of compliance with the ISPS code with respect to the security measures (see supra 2.4.).

3.2.3. Legal representation of the owner

Finally, the third function of the master of the ship is to legally represent the owner outside of his place of business. Representing the commercial interests of the owner of the ship during the maritime venture, the master of the ship has to conclude various contracts during the voyage in order to successfully bring the ship, passengers and its crew back.⁵⁴ Again, this function is only a part - or continuation - of the "inside" relationship between the master and the owner of the ship, as already shown above. Due to the need of legal certainty and preservation of the third party rights, the legal order had to intervene in this respect, specifying the content of this function, and its limits. By doing that, it did not, however, change the source of that function: those powers are inherent to the owner of the ship, and it is only by his will that some of them have been transferred to the master during the voyage, in order to preserve commercial interests of the owner. The legal order (or the public state) only intervened in order to give effect to that.

3.3. Illicit traffic and the modern cargo handling process

The vast majority of the cargo today is transported by multimodal transport, or by more than one means of transport. This is almost always the case with containerized cargo. The process of cargo handling can start at the shipper's or freight forwarder's premises, where it gets stowed and trimmed into the container, or palletized in some other form. Before the transport commences, the transport documents need to

⁵³ According to *Tassel*, the special character of the functions of the master on the ship is not to be attributed to the isolation, remoteness or urgency the ship is in. It is by the legal norm that he represents the law itself on board the ship, he is the sovereign on the ship. *Tassel*, Fn. 46, p. 431.

⁵⁴ See more in: *Pomorska enciklopedija*, Fn. 49, p. 577. See also: Barbić, J.: *Zapovjednik broda – punomoćnik broдача po zaposlenju*, *Zbornik Pravnog fakulteta u Zagrebu*, 1-2/2008, p. 15-33.

be issued, and the data on the cargo carried (type, weight, dimensions, value etc.) that will be entered therein will be those provided solely by the shipper. Before the closing and sealing of the container, the cargo has to be inspected by the customs, in order to get the export customs clearance. However, it is the disposition of the customs to decide whether there is an interest to physically inspect the cargo, or just to issue the customs declaration based on other accompanying documents, and data provided therein. Up to this point in the voyage, the container can be sealed by customs upon the fulfilment of the custom's procedure, but also (sometimes even before that) by the freight forwarder, in order to protect the content of the container during its voyage by land (Picture 1).⁵⁵



Picture 1: The customs seal placed on the door of the container

The agreed transport document is issued by the freight forwarder (usually a waybill, or multimodal transport document), and the container with the declared cargo will start its way to the port of shipment. The data and documents pertaining to the cargo shall be passed from the shipper (or his forwarder) to the ship's agent. Once the container has reached the port, the agent (or port stevedores on his behalf) puts a firm iron **ship's seal** with a serial number to the bottom of the container's doors, which is not to be removed until the cargo reaches its final destination and consignee (Picture 2).

⁵⁵ Customs is authorised to remove the seal placed on the container prior to its inspection, and inspect the content of the cargo, sealing the container afterwards.



Picture 2: Ship's seal placed on the bottom of the containers' doors, blocking both sides of the door

All of the previous seals are placed on the medium part of the door, and can remain intact after the ship's seal is being placed. In all the subsequent documents issued by the ship only the serial number from the ship's seal is entered. Upon the discharge and handing over the cargo to the consignee the intact ship's seal is the proof that the container has been shipped in the same way and condition it has been taken over for transport, and that it has not been tampered with the shipment underway. It is also a firm proof in favour of the carrier in case of loss of cargo. If cargo is damaged within the sealed container, the carrier will only be liable if he did not take the necessary measures as to the commercial care of the container during voyage, according to the specific instructions from the shipper (f.e. maintaining the constant temperature of the reefer containers, dangerous cargo etc.). In other words, once the containers have been loaded, trimmed and secured into the position in the container ship, the crew is to take specific care of the container only "from the outside", according to specific instructions provided by the shipper. The ship's crew obtain that information exclusively through the accompanying documentation, and can by no means inspect the real content of the containers, nor has any interest, or physical possibility, to do so. What documents are passed to the ship with respect to the cargo carried, according to which the master and the crew take all necessary measures and precautions?

The shipper issues a **disposition for shipment** (Picture 3), containing all the data on the cargo to be shipped in one shipment by one particular ship. Those are

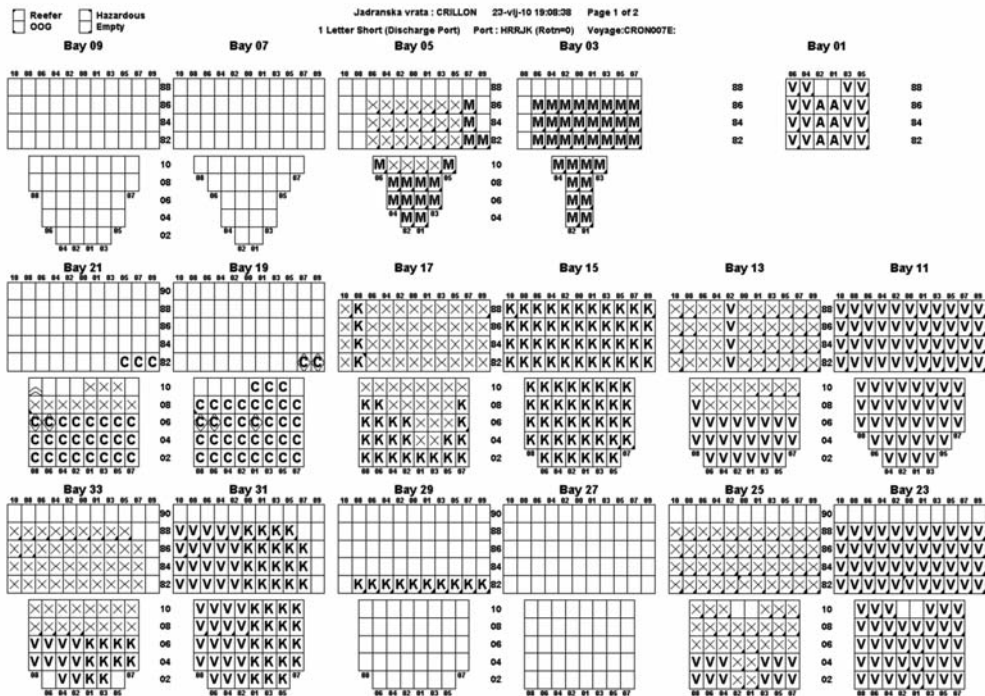
the data that will be used for all the subsequent cargo manipulations and entered into the transport documents. It is important to note at this point that the whole process is being done by way of documents: nobody has physically inspected the content of the container ever since it exited the premises of the shipper, or has been loaded into the container at some other place.

DISPOZICIJA												
nazivnik TRAST Verdijeva 3 RIJEKA			brojac HAPAG LLOYD HAPAG 00000 BREMEN			prilac HAPAG LLOYD HAMBURG			referent Jasna Tomac [213147]		pis. nat. ust. DRVENJACA	
broj CRILLON								PK L	placista 200	piv. ozn.		
broj pakiranja tovara 008W						broj tovara 008W						
rb	Disp. ulaza	Zaključak	Kontejner	Tip	Tez. kont.	Luka iskr.	Zemlja odrišmp.	Br. pak.	Tez. robe	Tranship.	Carinski dok.	Opasan teret
	Plomba	Opis robe										
1.	09007173 A2700558	37815353 DRVNA CELULOZA	CLHU8048337	45GP	3.800,00	TNRDS	TN	145	20,100,00		510/7280/28.12.09.	
2.	09007235 A2700559	37815353 DRVNA CELULOZA	CRXU9612258	45GP	3.800,00	TNRDS	TN	143	25,740,00		510/7280/28.12.09.	
3.	09007344 A2700560	37815353 DRVNA CELULOZA	CRXU9707461	45GP	3.800,00	TNRDS	TN	138	24,620,00		510/7280/28.12.09.	
4.	09006900 A2700555	37815353 DRVNA CELULOZA	HLXU6029111	45GP	3.800,00	TNRDS	TN	145	28,280,00		510/7280/28.12.09.	
5.	09007480 A2700561	37815353 DRVNA CELULOZA	HLXU6486946	45GP	3.800,00	TNRDS	TN	143	25,380,00		510/7280/28.12.09.	
6.	09006996 A2700557	37815353 DRVNA CELULOZA	HLXU6528620	45GP	3.800,00	TNRDS	TN	145	28,220,00		510/7280/28.12.09.	
Ukupna težina kontejnera: 22,800.00 kg Ukupna težina robe: 154,340.00 kg												
napomena												
ovjera agenta						ovjera HTZ-a						
agent JADROAGENT-HAPAG LLOYD - JADROAGE			referent agenta Nenad Vranic			referent HTZ-a			datum ovjera HTZ-a			
datum ovjera agenta 29. 12. 2009.			ovjera agenta			ovjera HTZ-a			datum ovjera HTZ-a			
OVAJ DOKUMENT IZRADEN JE ELEKTRONSKOM OBRADOM PODATAKA I VRLJEDI BEZ POTPISA I PEČATA.				datum prijema 29. 12. 2009. 14:20		vrsta T-B (F)		pila broj 0021		dispozicija br. 09068239		str. 1

Picture 3: Disposition for shipment

Based on the data from the disposition, the agent will make the **shipping plan** (Picture 4) for the whole shipment (all containers) to be loaded in that port onto one particular ship. The shipping plan is essential for the ship's safety and seaworthiness during the voyage: it is being done according to the technical and nautical characteristics of the ship on the one side, the declared characteristics of the cargo (from the transport documents provided to the agent: dimensions of the container, weight, special characteristics - refrigerated cargo, open top etc.) on the other, and the port of discharge on the third. The thing of interest to the ship and its master related to the containerized cargo is to preserve the stability of the ship during loading, but also after its completion, making the ship seaworthy for the voyage. The second thing of utmost importance in making the shipping plan is time. Commercial ships are on a very tight schedule, they have to leave the port on time, or lose money. There is a heavy pressure to the masters from the managing companies to speed up

the loading process and shorten the time spent in the port. Therefore, no container, either stowed alongside ship, or on the ship, should be moved twice, since that would mean loss of precious time. Therefore, the containers have to be placed in such a way as to preserve the ship's stability (heavy loads deeper under the deck, lighter and empty containers closer to the top etc.), but also grouped within the same bay according to the port of discharge. It is to be noted that ships touch ports 24/7, and procedures of loading and discharge take place at any time of the day or night, and in every weather condition.



Picture 4. Shipping plan – different letters signify different ports of discharge

Based on the information from the shipper's disposition, the ship's agent issues the **general disposition** (Picture 5), containing the information on the overall quantity of the cargo to be shipped (important also for freight payment).

GENERALNA DISPOZICIJA					
TRANSADRIA d. r. RIVA BODULI 1 51000 RIJEKA		HANJIN SHIPPING CO. 25-11 YOIDO-DONG 06000 SEOUL		CHILLON CRIL-09/0008	
Brodar					
Manifest br.	lip. kont.	hr. kont.	tona	neto	
HAPAG LLOYD 09066120 40' kontejneri (F) 14 kom. 53,200.00 kg 149,713.90 kg 20' kontejneri (F) 12 kom. 25,203.00 kg 166,377.03 kg					
CMA CGM S.A. FRANCE 03002100 20' kontejneri (F) 16 kom. 35,950.00 kg 258,231.15 kg					
HANJIN SHIPPING CO. 09066245 40' ko-hoj-ner (F) 10 kom. 38,870.00 kg 122,911.44 kg 20' kontejneri (F) 13 kom. 29,470.00 kg 170,512.30 kg					
UKUPNO:		65 kom.	182,690.00 kg	867,775.82 kg	
MANJANŠTVO IZDAVAJUĆI OBRADBA I ELEKTRONSKI OBLASTI		Datum izdavanja 30. 12. 2009. 12:00	Broj dokumenta 420-556-30. 12. 2009.	Broj dokumenta GD-010000	Str. broj 1

Picture 5: General disposition for shipment

Finally, the fundamental document for the ship is issued, based on the previously received information: the **cargo manifest** (Picture 6).

MANIFEST												
CMA CGM CROATIA POM Zr. faaizma 2/2 51000 RIJEKA		CMA CGM S.A. FRANCE 4 QUAI D ARENC 13002 MARSEILLE		CMA CGM CROATIA POM Zr. faaizma 2/2 51000 RIJEKA								
CMA-CGM crm CRILLON OOO'6R		CRIL-008 CRIL-09/0008										
ib. Tomatika	Posilica	Kontejner	Tip	Tez. kont.	Tez. robe	Tez. ukup.	Zemlja odred.	Temp.	bir. pak.	Transit.	Zb.	Opasni tovar
1.	PK2272680 075149	BMOU2079789	22G1	2,250.00	MTMLA	HR	148	1,569.00				
2.	NHSXRE07 0351139	BSIU2097047	22G1	2,250.00	MTMLA	HR	320	19,424.00				
3.	DJ1263002 5911958	CMAU1057535	22G1	2,250.00	MTMLA	HR	320	18,440.00				
4.	DJ1263042 5911965	CRXU1587267	22G1	2,250.00	MTMLA	HR	320	19,440.00				
5.	IN1533002 0351140	CRXU1866177	22G1	2,250.00	MTMLA	HR	320	19,121.00				
6.	NHSXRE02 0351132	DFSU2078906	22G1	2,250.00	MTMLA	HR	320	19,424.00				
7.	PK2272682 8117581	ECMU1183963	22G1	2,250.00	MTMLA	HR	320	2,524.00				
140 CARTON REF: 09-29' 124'-5-000.728.930-002 DLV 1 300 BAGS BROWN CROSS WEIGHT: 118.640 KGS NET WT 1 320 BAGS BROWN CROSS WEIGHT: 118.640 KGS NET WT												
Datum izdavanja 29. 12. 2009. 11:33						Broj dokumenta B-T (F)		Broj dokumenta 0006		Broj dokumenta 09068160		Str. broj 1

Picture 6: Cargo manifest

The cargo manifest contains all the information for the ship on the cargo loaded in one port, needed for the safe completion of the voyage. It can be seen from the picture that the information concerning the cargo is scarce: its general description, number of packages within the container, dimensions, gross and net weight. In order to stress the fact that the carrier did not physically check the content of the cargo, the wording “said to contain” is entered. It does not change the fact that the carrier remains liable for the full content, state and weight of the cargo as declared. It does, however, make a difference should the cargo prove to be of a different kind than declared. In that case, and by that wording from the transport documents, the carrier denied all liability for the false declaration of the cargo. However, the most important data for the ship during taking over of the cargo is the serial number of the container, printed in bold letters in the manifest. It is practically the only information that gets physically checked by the crew during loading, in order to ascertain that the right cargo is being loaded onto the ship. Although the serial number of the ship's seal is also stated in the manifest, it is physically impossible to check that number too, due to the numerous reasons: it is printed very small, it is dangerous for the crew to get too close to the manoeuvring space of the lifting crane, it would slow down the loading process, poor visibility (night, rain...) and the fact that the containers are placed too high on the deck for the crew member to see. The same applies for the discharge operation: the port stevedores should compare the seal number while taking over the cargo from the ship. In practice, it is usually not the case, due to the speed with which these operations are done. When several hundreds, even thousands of containers need to be manipulated in and out of a large container ship by several cranes in a very short time, pushed to the very limits of technical performance of the cranes, it is not possible – from the financial, organizational and purely physical point of view – to manipulate every and each container twice to the shore: once for the inspection of the seal's number by the shore officer(s) duly equipped for the task (scanner for the bar code, computer etc.), and second time to its place on the shore. Last, but not the least, it is linked with serious costs, that raise the overall cost of the port charges for the ship, that cannot be charged through freight, since it would undermine the competitiveness of the carrier. Shipping is a global industry, its market is literally the whole world. The smallest change in the cost-benefit ratio makes the whole venture uncompetitive. Major loss of time linked with more money to pay - it is simply not something that can reasonably be expected to happen by anybody nearly in touch with the shipping reality.

After the completion of the loading operations as envisaged by the shipping plan, the stevedores issue the list of the loaded containers, and pass it to the ship's agent, who issues the final transport document for the shipper: the on board bill of lading. The **bill of lading** is the evidence of the contract of carriage between the

shipper and the carrier. The contractual liability of the carrier to the shipper for the goods carried is based on the data entered in the bill of lading, and those data – as seen above – are being successively copied from the initial disposition of the shipper.

It is all based on confidence. There is no liability on the part of the carrier if the shipper willingly falsely declares the goods carried within the closed and sealed containers or pallets, if those goods remain within the limits of the given data (weight, dimensions etc.) important for the ship's safety. If there is no liability of the owner as the carrier under the contract of carriage, there is also no responsibility of the master as his legal representative in case trafficked goods are being found within the ship's cargo by the port state authorities. Position of the master of the ship with respect to the cargo carried is derived from his position towards the owner, which in turn is defined by the contract of carriage. There is no extra-contractual liability, no implied warranty towards the public authorities by the side of the ship, or its master as the chief commander of the maritime endeavour.

3.4. Illicit traffic and the criminal responsibility of the master of the ship

In criminal law, everybody is innocent until proven guilty in due proceedings. The principle of proven guilt is the fundamental principle of any civilised criminal law system, in line with the basic principles of human rights. Nobody can be charged with, or accused of, the crime that was not described as such by the law before the time the act was committed (“*nullum crimen, nulla poena sine lege*”). For a person to become a suspect, a reasonable doubt has to exist, based on some facts that link that person with the crime. For a suspect to be found guilty and accused of any crime, the substantial elements of a crime have to be found, as described by the applicable law of the court in charge of the case, and sufficient evidence must be provided in the proceedings to link the accused with the crime. Should that not be the case, there is no criminal responsibility for any crime, as well as for the crimes of illicit traffic of humans, drugs, arms or any other illicit cargo by the present status of international conventions and known national criminal laws.⁵⁶

Command responsibility⁵⁷ is the only case in criminal law where strict responsibility of a superior officer (commander) is envisaged for war crimes, as

⁵⁶ For criminal responsibility of the master of the ship with respect of his duties on board the ship see: Toremar, M., Fn. 46, p. 35 and further.

⁵⁷ See in general Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, 2010, p. 387-401; Meloni C., *Command Responsibility in International Criminal Law*, Asser Press, 2010; Mettraux G., *The Law of Command Responsibility*, Oxford University Press, 2009.

defined by the Art. 28 of the Rome Statute for the International Criminal Court⁵⁸, as well as Art.7 par. 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.⁵⁹ The principle of command or strict responsibility in criminal law is known also as the Yamashita or Medina standard, and is being acted upon in the present proceedings against military commanders for the war crimes committed in the former Yugoslavia before the International Criminal Tribunal for the Former Yugoslavia (ICTY). A commander of a ship is not a military commander. As seen above, his power to command arises from a different source and exists for different reasons than that of a military commander. The present sources of criminal law applicable to the crimes of illicit trafficking do not envisage strict command responsibility of the master of the ship for those acts. According to *Pavišić*, the analogy, by which certain acts would be proclaimed criminal or “enlargement” of criminalization from one field to another is strictly prohibited.⁶⁰ Therefore, and according to the abovementioned basic principle

⁵⁸ This article reads as follows: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph(a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. The integral text of the statute see at: <http://untreaty.un.org/cod/icc/statute/rome.htm> (2.4.2010).

⁵⁹ Art. 7 par. 3: Individual criminal responsibility “...The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” The integral text of the Statute see at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (2.4.2010).

⁶⁰ *Pavišić*, Fn. 36, p. 48.

of the criminal law, this type of responsibility does not exist, and cannot be enforced against a master of the ship for the crimes of illicit traffic committed during his command of the ship if no evidence of his personal involvement has been found. Everything important to know about the criminal offences committed in the course of a shipmaster's operating a vessel in international maritime navigation has been put succinctly by *Pavišić* in 10 Guidelines, which we reproduce here in their integral form:⁶¹

1. A shipmaster in international navigation (hereinafter: the shipmaster) shall be held criminally responsible only for culpable acts or an omission in the course of shipmaster's operating a vessel which constitutes a criminal offence under criminal law.
2. In predictability of criminal responsibility for acts or omissions in the shipmaster's operating a vessel, national law must be aligned with international law.
3. A shipmaster's fault for a criminal offence shall be individual and determined *in concreto*. The mere function of a shipmaster does not construe an *a priori* circumstance for determining fault. A shipmaster shall be held criminally liable for an act or omission of a crew member, which qualifies as a criminal offence under the circumstance stipulated by criminal law.⁶²
4. Sanctions for criminal acts committed in the course of the shipmaster's activities of operating a vessel shall be imposed according to the regulations of the relevant country in which the charges were brought, and under consideration of the weight of the criminal offence, whereas the circumstances of the offence shall determine the sanctions.
5. Fault for a criminal offence committed in the course of shipmaster's operating a vessel must be proven. The court shall determine the shipmaster's fault in a criminal proceeding.
6. A criminal proceeding for a criminal offence committed in the course of shipmaster's operating a vessel must be a due process (Article 14 of the

⁶¹ *Pavišić*, *ibid.*, 47.

⁶² This standing can be understood within the doctrine of *respondeat superior*. However, the author of this article disagrees at this point with *Pavišić*, since the master of the ship has only the duty to perform regular check-ups of the crew's premises, in order to ensure health and order on the ship (for example, prevent the spread of disease). Those check-ups have to be done with respect to the privacy of a crew member, and with as little disturbance for his intimacy as possible, given the special circumstances in which ship's crew live and work. Therefore, it is our belief that the master of the ship cannot be held liable for the acts of members of the crew, if the circumstances of the crime in question were impossible to detect within the regular duties of the master of the ship (*ultra posse nemo tenetur*). For example, small quantities of drugs hidden in parts of crewmembers' personal belongings cannot be detected during regular check-ups of the crew's premises, and therefore master of the ship should not be held liable for that.

International Covenant on Civil and Political Rights and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms inter alia).

7. Legal representation (defence) shall be provided to the person charged with a criminal offence in the criminal proceeding for an act committed in the course of shipmaster's operating a vessel.
8. The defence costs in the criminal proceedings for a criminal offence committed in the course of shipmaster's operating a vessel shall be covered by the company that appointed the shipmaster.
9. Special privileges foreseen under the national law are applied in cases concerning criminal offences committed in the course of shipmaster's operating a vessel.
10. Criminal proceeding for a criminal offence committed in the course of shipmaster's operating a vessel shall be conducted under due consideration of the interest of international navigation and with respect thereof.

4. CONCLUSION

The recent cases of Capt. Laptalo (in Greece 2007) and Capt. Loris (in Panama 2008), where these masters of sea-going ships were arrested and charged for illicit traffic in drugs without any proof of their individual guilt, rose a major concern among the seafaring world in the last few years. Capt. Laptalo was sentenced to 14 years in high-security prison by the court of 1st instance, but eventually relieved of all charges and set free by the Court of 2nd instance. He spent 16 months in prison, and suffered a number of devastating consequences to his, in every other respect flawless, career. It is not the end of those proceedings we should be looking at, it is their commencement in the port, upon the discovery of drugs, or any other illicit cargo on the ship, when the authorities of a port state arrest the master of the ship in question. In the reported cases, the two masters were charged for crimes of illegal importation of drugs based on their command responsibility for the ship, and everything on it. Such a (laic) legal construction is derived from the norm found in virtually every maritime law, according to which the master of the ship is in command of the crew and everybody else on the ship. It says: "If the master is in command of the ship, he therefore has command responsibility for ... (any crime, in those cases the illicit traffic)". This is legally completely wrong, and therefore unacceptable in practice. There is a sharp legal difference between commanding the ship with all the maritime functions implied, and command responsibility in terms of criminal law. Although

linguistically same, legally those terms are wide apart. From the functional analysis of the prerogatives of the master of the ship, it can only be concluded that those functions today are mostly derived from the “inside” relationship between the master of the ship and his employer, the owner of the ship. They serve first and foremost for the successful completion of the maritime endeavour, and preservation of the commercial interests of the owner of the ship. As a consequence, they are mostly developed and regulated within the private maritime law. The nautical function of the master of the ship means he has to preserve the ship and its cargo during voyage, and return it safely to the owner, preserving also his commercial interest in the cargo carried. This commercial duty with respect to the cargo is restricted to maintenance of the cargo according to the instructions given by the shipper, as pertained in the transport documents. With respect to the documents, we have clearly established that the documents and the date contained therein are virtually the same as those initially given by the shipper. The role the master and other deck officers play during (un) loading of the cargo is restricted to establishing the identity of the containers (with respect to containerized cargo) that are to be taken over for carriage in the respective port. The cargo within containers is already protected by the ship's seal while entering the ship, and no other physical inspection of the cargo is neither possible nor legally allowed. Since the commanding officer of the ship has no knowledge of the content of the cargo, he can bear no responsibility, criminal or other, should that content prove to be different than declared. The administrative function of the master of the ship is the only one with vested public interest of the state to preserve security and certain facts and information that arose during the period when ship was physically not in contact with the mainland, and only here we can detect a direct link to the administrative law. There is no direct link between the modern functions of the master of the ship and criminal law. Non-compliance with the administrative function can lead to a fine, or the responsibility of the master of the ship for misdemeanour. There is no implied obligation inherent to the position of the master in command of the vessel to ascertain that his ship is, or has to be, a crime-free zone, he only has to ascertain a safe completion of the voyage and obey all the (administrative) security measures with that respect.

On the other hand, criminal law has different principles that have to be obeyed in order to establish criminal responsibility. First and foremost, the principle of “*nullum crimen, nulla poena sine lege*” has to be applied with no exemption. This is not the case where *respondeat superior* doctrine applies.⁶³ With respect to possible

⁶³ *Respondeat superior* (Let the master answer), a common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment. See <http://law.jrank.org/pages/9834/Respondeat-Superior.html> (1.4.2010).

criminal charges, the master is only *primus inter pares*, the first among peers, equal to everybody else on board the ship, and is no more exposed to criminal responsibility than any other member of the crew. The non-compliance with some of the ISPS security measures (as maritime administrative rules) by the ship can only lead to his responsibility for misdemeanour, as envisaged by the national legislation enforcing the ISPS. The reason for this lies in the abovementioned fundamental principle of criminal law according to which a person can be responsible for a crime only if it has been described as such by the law before it has been committed. Therefore, non-compliance with the ISPS security measures by the ship (for which the master is responsible) is described and can be penalized as an administrative offence, and not as a crime. If, however, it turns out that due to non-compliance with a particular ISPS measure (for example “turning the blind eye” by the master by not performing certain check-ups) a crime has been committed or facilitated (for example, illicit traffic in drugs, or smuggling of illegal immigrants), the master cannot be held criminally responsible without proof of his guilt in the concrete case. Here, the other fundamental principle of criminal law, the principle of presumed innocence applies. He can only be proven guilty if he *knew* about the concrete criminal plan and/or committing of a crime and participated in it, or did nothing to prevent it. Without that pivotal subjective element (guilt), he cannot be individually held responsible for the crime, but can be – at the same time – held liable as the master of the ship for violation of the ISPS security measures, and penalized according to the way and measures envisaged for such a violation by the national legislation enforcing such ISPS security measures (usually fines). This fundamental difference between responsibility for misdemeanor, but at the same time non-existence, and therefore non-responsibility for the crime has to be stressed and understood very clearly.

Finally, it has to be repeated that command responsibility in terms of criminal law exists only where it is expressly envisaged by the law in force (*nullum crimen, nulla poena sine lege*). Today, it is envisaged only for war crimes. Criminal responsibility for illicit traffic, smuggling, ship-sourced pollution, or other crimes that are or can be linked with maritime industry is based on the proven guilt, and never command responsibility.

It is also important to keep in mind that arresting a master of the ship and other officers upon discovery of any illicit cargo on a ship raises commotion within the port, and all the eyes and manpower get closely focused on that ship. In such a situation, it would be easier for another ship carrying illicit cargo to go unnoticed. This practice, known as “mules”, is widely known and used by drug traffickers all over the world. A small quantity of drugs is being carried by the carriers (mules) who are frequently oblivious to the very fact that they are carrying drugs on them, or in their belongings (f.e. small quantity of drugs placed in the luggage of tourists in airports). The police

is subsequently informed of the “mules” by the very same criminals who organized it. During the commotion raised by the arrest of the “mules”, and while the attention is being diverted, a large quantity of drugs passes unnoticed, and the criminal plan is fulfilled.

The above reported two cases of Croatian masters, where relatively small quantities of drugs were found, do not allow us to come to definitive conclusions, since their incidence is too small. However, they raise some new questions:

1. The criminal prosecution of the masters of the ship for illicit traffic on the ground of command responsibility happened twice in two years involving only Croatian masters. How many other cases involving masters of other nationalities were there at the same time? Can we talk of a trend being formed under the pressure of public interest for prosecution when real culprits are out of reach?
2. If the answer to this question is positive, it is emerging at the beginning of 21st century, the time of a largely sophisticated and modern shipping industry. This industry has been known since the ancient times, and criminal command responsibility of a master of the ship has never been heard of. Can this be accidental?
3. The quantity of drugs seized in both reported cases are rather small (51 kg of cocaine in the Laptalo case, 3 or 8 kg of cocaine in the Loris case), given the scale of the global business of illegal traffic in drugs. There are other suspicious facts in both of the cases, speaking in favour of a possible “master plan” (unusual change of cargo to be unloaded in Aegion, destroying drugs before forensic evidence taken, acting upon denunciation from the government that has the largest rate of illicit traffic in drugs and has no enforcement of a basic measures against illegal traffic etc.). Can we talk of the practice of “mules”, where masters of the ships are being used as collateral victims?

The all-encompassing answer to those questions would need a thorough research on many levels, based on the data obtained by the seafarers unions (on all the masters of the ship arrested in similar cases) and the police (on the drug-trafficking cases involving sea transport). Although such cases of command criminal responsibility of masters and officers are perceived more as sad but isolated incidents within the seafaring industry, deep down it leaves a very bitter taste of fear in everyone who is, or plans to, embark on a sea-going ship as a deck officer. This fear is far from being ungrounded, because it looks like we still do not know the answer to the fundamental question: When and why did command of the ship become equivalent to command responsibility for war crimes?

Sažetak:

**PRETPOSTAVLJENA KAZNENA ODGOVORNOST ZAPOVJEDNIKA
BRODA ZA DROGU KOJA SE PREVOZI KAO BRODSKI TERET:
TEST BRODARSKE STVARNOSTI**

Prijevoz brodom jedan je od omiljenih vidova prijevoza ilegalnih imigranata i droge kojeg koristi organizirani kriminal širom svijeta. Ustaljeni je pomorsko-pravni princip odgovornosti zapovjednika broda kao punomoćnika brodara po zaposlenju za sve odnose koji nastanu tijekom plovidbe i u vezi s brodom, no brzina prijevoza, količina prevezene robe i nemogućnost kontrole sastava tereta od strane zapovjednika broda pri ukrcaju čine njegov položaj u slučaju ilegalnog krijumčarenja u suvremenoj pomorskoj praksi izuzetno teškim. U posljednje vrijeme zamjetan je trend vrlo slobodnog tumačenja dosega i uvjeta za kaznenu odgovornost pomoraca općenito, pa tako i zapovjedne odgovornosti zapovjednika broda. Sukobljeni interesi brodarske industrije, koja želi motivirati stvaranje i zadržavanje kvalitetnog kadra u struci, i interesa obalnih država suočenih s opasnim slučajevima ilegalnog krijumčarenja droge i ljudi počinjenih brodovima za suzbijanjem takvog ponašanja, čine ovo pitanje jednim od gorućih pitanja pomorsko-pravne prakse danas, i predmet su izučavanja ovog rada.

Ključne riječi: *nezakonito trgovanje (trafficking), krijumčarenje, zapovjednik broda, postupanje s teretom, droga, funkcije zapovjednika broda, zapovjedna odgovornost.*