

The narrow line between indifference and prudence: access to ports of foreign vessels in distress at sea. A right or a privilege?



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September 2016

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CHAPTER 1: INTRODUCTION

1.1 Introduction, research question and outline

The issue of the international legal regime governing a foreign vessel in distress or *force majeure* at sea and seeking refuge within the port of another state already arose almost two thousand years ago. An epigraph discovered in Greece, at the Port of Cauno and dated back to the first century stated that << no tributes will be asked to all those foreign vessels which retreat or seek refuge [into port] >>¹.

Since the 19th Century, many reported cases of access to ports of refuge were registered, including *The Eleanor*, *The Encomium* and *The Creole*. The dichotomy between the interest of vessels in distress to seek refuge and the sovereignty of coastal states over their ports was evident yet at the first stage.

Such a dichotomy increased after the *Torrey Canyon* and the *Amoco Cadiz* disasters, respectively in 1967 and 1978, which strongly shook the public opinion and considerably rose the international community's awareness of the environmental risk posed by vessels in distress at sea. Coastal states started to see vessels in distress as time-bombs ready to explode at any moments and between 1978 and 2002, refuge was denied to at least twenty-five different vessels, including the *Christos Bitas*, the *Andros Patria*, the *Toledo*, the *Long Ling*, the *Nagasaki Spirit* and the well-known *Castor* and *Prestige*².

And it was after the *Castor* and *Prestige* accidents, that states and international organization began to formulate procedures and standards to address the risk posed by those vessels to maritime safety and the protection of the marine environment.

The present dissertation aims to discuss the aforementioned issue for the purpose of determining whether or not coastal states have an obligation, under the international law of the sea, to grant refuge into their ports to ships in peril at sea.

In order to answer this main legal question, it will be necessary to answer four subsidiary questions:

(i) What is the general regime governing access to ports pursuant to the international law of the sea?

¹G. Purpura, *La Protezione dei giacimenti archeologici in acque internazionali e la Lex Rhodia del Mare*, AA.VV. (a cura di), *Mediterraneum. Tutela e valorizzazione dei beni culturali ed ambientali*, Collana monografica per la tutela e valorizzazione dei beni culturali" dell'Università "L'Orientale" di Napoli (pp. 13-27), 2004, pp. 18-19.

² E.T. Wiberg, *Tank Disasters. IMO's Places of Refuge and the Special Compensation Clause; Erika, Prestige, Castor and 65 Casualties*, Island Books, Norwalk, 2009, pp. 81-87.

(ii) Does exist any right of access to ports of refuge for foreign vessels in distress or *force majeure* (as a rule of customary law or as a treaty-based rule)? (iii) What is the role played by the decision-making process carried out by the competent authorities of coastal states in granting refuge to vessels in peril at sea? (iv) Might the duty to not cause transboundary harm and, in particular the duty not to transfer damage or hazards to another state, influences the coastal state's decision whether or not to grant refuge?

This Chapter 1 will follow with an elucidation on several terms and definitions.

Chapter 2 will examine the general regime, under the international law of the sea, governing the entry to ports by foreign vessels.

Chapter 3 will analyse content and legal status of a possible *right of access* to ports of refuge for vessels in distress or *force majeure*.

Chapter 4 will discuss the coastal state's *decision-making* at the basis of the modern international legal regime governing the access to places of refuge for ships in need of assistance.

Chapter 5 will examine the delicate connection between the decision-making process and the duty to not cause transboundary damage, with particular emphasis on the duty not to transfer damage or hazards.

Chapter 6 will be dedicated to the conclusions.

For reasons of space, the present dissertation will not address the implications of the International Convention on Salvage (Salvage Convention) and of the Special Compensation Protection and Indemnity Clause (SCOPIIC) with the regulation of the access to places of refuge, although the topic would deserve an autonomous examination.

1.2 - Use of terms and definitions

1.2.1 – Port State and Coastal State

The juridical distinction between Port State and Coastal State cannot be determined axiomatically under the international law of the sea, due to the absence of any general definition for those terms.

As will be observed in section 2.2, art. 2(1) LOSC states that the sovereignty of the Coastal State covers its internal waters, archipelagic water and territorial sea.

Arts. 56(1) and 77(1) LOSC recognize the sovereign rights of coastal states over their exclusive economic zone and continental shelf.

Hence, the Coastal State may be defined as that state characterized by the presence of a coastline, which exercises sovereignty, sovereign rights or jurisdiction in its own maritime zones. Therefore, *lato sensu*, the definition of coastal state is comprehensive of all the powers exercised in those maritime areas.

However, the LOSC and other international conventions³ also contain specific provisions on the port state. They refer to it as an entity separated from the Coastal State.

Prima facie, it seems reasonable to believe that the conceptual difference between “Port State” and “Coastal State” lays within the *locus* where a state exercises its jurisdiction. Thus, a Port State should exercise its jurisdiction within the limits of its ports and a Coastal State in the other maritime spaces under its jurisdiction.

Nevertheless, Art. 218(1) LOSC expands the Port State’s competency:

<< When a vessel is *voluntarily* within a port or at an off-shore terminal of a State, that State *may* undertake investigations and [...] institute proceedings in respect of any discharge from that vessel *outside* the internal waters, territorial sea or exclusive economic zone of that State in violation of *applicable international rules and standards* [...] (emphasis added)>>.

By virtue of art. 218(1) LOSC, the Port State is entitled to exercise jurisdiction within its ports even when the violation occurred on the high seas⁴, but only under certain conditions:

- (i) The vessel which committed the infringement shall enter to port *voluntarily*. Hence, whether the ship entered to port due to distress or *force majeure*, art. 218(1) does not apply.
- (ii) The state *may* exercise jurisdiction. It is not obliged to do so.
- (iii) The violation shall occur *outside* the internal waters, territorial sea and exclusive economic zone of that state. Therefore, whether the infringement started in any of those maritime areas continuing on the high seas or *vice versa* Coastal State enforcement jurisdiction applies.

³ E.g., *International Convention for the Safety of Life at Sea (SOLAS)*, 1974: Chapter I, regulations 6(b)(ii), 6(c), 11(c) 19(e). [1184 UNTS 3]; *International Convention for the Prevention of Pollution from Ships (MARPOL)*, 1973/78: Annex I, regulations 4(3)(b)(ii), 4(3)(c), 4(4)(c), [1340 UNTS 184].

⁴ It also might extend to the maritime areas of another state under its request. [Art. 218(2) LOSC].

- (iv) It is necessary a violation of *applicable international rules and standards*. The Port State jurisdiction is not a universal jurisdiction, but it reflects the interest of coastal states to enforce pre-existing treaty based rules and standards.

However, art. 218(1) only deals with vessel-source pollution sources. It is specific in its intent and it does not contribute to create any general broader definition of Port State.

Hence, it must be argued that, except when the distinction between Port State and Coastal State is formally operated by the law⁵, Coastal State and Port State are not two different subjects, rather they are the same subject - the Coastal State (*lato sensu*) - performing respectively the functions of Coastal State (*stricto sensu*) in internal waters, territorial waters, archipelagic waters, EEZ and continental shelf or Port State within its ports.

It seems also confirmed by art. 25(2) LOSC, which referring to << the necessary steps to prevent any breach of the conditions >> for entry to internal waters or a port facility, entitles the Coastal State (and not the Port State) of such a power.

Moreover, how it will be observed in Chapter 3, the modern international sources on places of refuge refer only to *coastal state* and *competent authority*, not even mentioning the port state. Therefore, the present dissertation will generally refer to Coastal State, except when the distinction between “Port State” and “Coastal State” is directly operated by the law.

1.2.2 - Distress and *force majeure*

The United Nations Convention on the Law of the Sea does not offer any definition of distress or *force majeure*, whilst the terms are mentioned in several provisions of the same convention⁶.

A multitude of treaties and agreements refer to conditions of distress or *force majeure* at sea, but only a small number of instruments include a general definition for those terms.

For instance, according to paragraph 1.3.11 of Chapter 1 of the Annex to the 1979 International Convention on Maritime Search and Rescue (SAR Convention), a *distress phase* is:

<< A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance⁷. >>

⁵ E.g., art. 218 LOSC (vessel-pollution); art. 23 UNFSA (fisheries conservation and management);

⁶ Arts. 18(2); art. 39(1)(c); art. 39(3)(b); art. 98(1)(b); 109(2) LOSC.

⁷ International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS.

Nevertheless, it would be arduous to determine objectively those situations which are likely to represent a concrete *danger*⁸.

Hence, the author takes the view that the conduct of a ship driven by stress or *force majeure* and not the material risk at the basis of the peril's condition should be taken into account to define an event of distress or *force majeure*, and this because beyond the evaluation of the concrete status of emergency affecting the ship, it is the subjective element of the conduct to be determinant for the recognition of any right of access to ports of refuge. The same subjective element that would distinguish a legitimate exception to the general regime stressed in 1.2 from an illicit behaviour.

The International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*⁹, at arts. 23 and 24, contribute to elucidate what is stressed above, although they are not a legally binding instrument, as well as they only focus on the responsibility of states.

Art. 23 refers to *force majeure* as:

<< [T]he occurrence of an irresistible force or of an unforeseen event, beyond the control [...], making it materially impossible in the circumstances to perform the obligation. >>

Art. 24 considers a situation of *distress* as:

<< [N]o other reasonable way [...] of saving the author's life or the lives of other persons entrusted to the author's care. >>

Prima facie, an event of distress differs from that of *force majeure* by virtue of the intentionality of the act, as well as because it deals with the safety of life. However, the ILC in its commentaries to the Draft Articles, points out that even if << a person acting under distress is not acting involuntarily, [...] the choice is effectively nullified by the situation of peril >>¹⁰.

It means that the final result of an event of *force majeure* or distress is in any case unavoidable and beyond the effective human control and this element distinguishes a distress or *force majeure* condition from any other circumstance of emergency at sea.

⁸ For instance, the United States Department of Defence (DoD) Dictionary of Military and Associated Terms refers to those circumstances which are likely to cause stress at sea as “[...] storms, waves and wind; collision; grounding; fire, smoke and noxious fumes; flooding, sinking and capsizing; loss of propulsion or steering; and any other hazards resulting from the unique environment of the sea”. In G.K. Walker, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, pp. 199-200, note 592.

⁹ *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two; supplement No. 10 (A/56/10).

¹⁰ *Ibid.* Art. 24, p. 78.

1.2.3 – Ports of Refuge and Places of Refuge

Although art. 11 of the LOSC titles “ports”, it does not offer any definition for this term.

Walker and Noyes, in commenting the aforementioned provision, define “port” as << [a] place provided with various installations, terminals, and facilities for loading and discharging cargo or passengers >>¹¹.

It means that, in principle, a port may be located in every maritime area within the national jurisdiction (AWNJ) of a coastal state, although, as will be pointed out in section 2.1, they are generally located within internal waters.

When a port is used to accommodate a ship seeking refuge it reasonably gains the status of *port of refuge*.

On 27 June 2002, Directive 2002/59/EC¹² was adopted and art. 3(m) of the same Directive included a new definition of *place of refuge*.

According to art. 3(m), a place of refuge is not only a port or part of it, but also << any other sheltered area identified by a Member State for accommodating ships in distress>>, at the condition that it lays in the << waters under the jurisdiction >> of a coastal state and that it is subjected to << authorization by the competent authority >>¹³.

Since the *Erika*, *Castor* and *Prestige* accidents, which strongly influenced the international regime of navigation which will be discussed more in detail in Chapter 3, the notion of *port of refuge* has been progressively assimilated by that one of *place of refuge* and this, probably, because of the broader scope of the latter definition. Both the definitions will be alternatively employed by the author for the present dissertation, whilst their meaning will be limited only to those installations, terminals or facilities laying within *internal waters* of coastal states.

¹¹ G.K. Walker and J.E. Noyes, *Definitions for the 1982 Law of the Sea Convention – Part II*, California Western International Law Journal, Vol. 33 [2002] No. 2, art. 4, CWSL Scholarly Commons, 2002, p. 283.

¹² Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC. *OJ L 208*, 5.8.2002, p. 10–27.

¹³ *Id.*, Art. 20.

CHAPTER 2 – THE GENERAL REGIME GOVERNING ACCESS TO PORTS UNDER THE INTERNATIONAL LAW OF THE SEA

2.1 – Introduction

There are many reasons why a vessel may decide to anchor within the port of another state or to use its port facilities. They encompass, *inter alia*, refuel, embark or disembark of passengers, load and upload of the cargo, discharge of sewage or garbage or other services necessary to carrying out trade, shipping operations, fisheries, tourism and other important activities at sea.

By virtue of art. 11 of the LOSC, ports and other port-facilities of coastal states << are regarded as forming part of the coast >>, therefore they generally¹⁴ lay within the internal waters of those same states.

The general international regime governing access to ports laying within internal waters of coastal states by foreign vessels will be discussed below.

2.2 – The general international regime

Art. 2(1) of the United Nations Convention on the Law of the Sea (LOSC) points out that:

<< The sovereignty of a coastal State extends beyond its land territory and *internal waters* [...] to an adjacent belt of sea, described as the territorial sea>> (emphasis added)

Art. 8(1) LOSC defines the internal waters *as those waters on the landward side of the baseline of the territorial sea* (except for archipelagic states).

Except for that portion of internal waters resulting from the application of the straight baselines method pursuant to art. 8(2) LOSC, which is regulated under the regime of the innocent passage ex Part II, Section 3 of the same convention, the internal waters of a coastal state are covered by its full and exclusive sovereignty, including the right to deny the passage to foreign vessels.

¹⁴ A specific exception has represented by art. 12 LOSC, which refers to those roadsteads partly or wholly situated beyond the outer limit of the territorial sea and that the same provision includes within the territorial sea.

Art. 211(3) LOSC recognizes the right of coastal states to set out << particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters [...] >>.

Both articles 2(1) and 211(3) prove how a coastal state is *de jure* allowed to regulate (and deny) the access of foreign vessels to its ports as part of its prescriptive jurisdiction pursuant to its sovereignty.

Furthermore, art. 25(2) LOSC recognizes to coastal State << the right to take the necessary steps to prevent any breach of the conditions to which the admission to internal waters or [port facilities] is subject >>.

Unlike the *sovereign rights* of the coastal state, the *sovereignty* is not affected by any limitation *ratione materiae*¹⁵, except for those constraints deliberately agreed by the same state (e.g., treaty-based obligations) or for those limitations resulting from other sources and principles of international law (e.g., the customary law).

Furthermore, unlike the territorial sea or archipelagic waters – also covered by art. 2(1) LOSC – foreign vessels do not enjoy any right of innocent passage within the internal waters of another state¹⁶.

According to Judge Huber, in the *Island of Palmas* case¹⁷:

<< Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. >>

In the *Nicaragua* case, the International Court of Justice (ICJ) pointed out that coastal states enjoy exclusive sovereignty over their ports and internal waters and such sovereignty includes the right of coastal states to regulate and deny access to those waters¹⁸. It also entitles coastal states to set out the conditions – fiscal or technical – for the entry to ports and regulate the access through their national/domestic law (prescriptive jurisdiction).

If a foreign vessel attempts to access a port of another state without its previous consent, the coastal state is entitled to exercise jurisdiction against that vessel, adopting measures proportionate and

¹⁵ Y. Tanaka, *The International Law of the Sea*, Cambridge Press, Cambridge, 2012, pp. 5-7.

¹⁶ Except for that portion of internal waters resulting from the application of the straight baselines method, pursuant to art. 8(2) LOSC.

¹⁷ *The Island of Palmas Case*, Permanent Court of Arbitration, 1928, p. 829, in G.F.K. Brugmann, *Access to Maritime Ports*, GmbH, Norderstedt, 2003, p 3.

¹⁸ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14; p. 111, para. 213.

necessary to deal with the relating infringement (enforcement jurisdiction), as provided for by art. 25(2) LOSC.

The right of a coastal state to grant the access of foreign vessels to its ports includes the right to withdraw its consent or to operate a *de facto* denial, which consists in authorizing the access to a port, although denying the use of all the services therein¹⁹.

Therefore, according to the general international regime governing access to ports by foreign vessels, such access is subject to the consent of coastal states which exercise jurisdiction over their ports. An alternate solution to freely access a foreign port involves the conclusion of *ad hoc* bilateral or multilateral treaties regulating the access²⁰.

2.3 - Convention and Statute on the International Régime of Maritime Ports

The Convention and Statute on the International Régime of Maritime Ports²¹ were adopted at Geneva on 9 December 1923, entering into force on 26 July 1926 and they offer an interesting international legal basis for discussing the regime of the access to ports.

As stated in the Preamble of the convention, it aims to grant the << international trade equality of treatment between the ships of all the Contracting States, their cargoes and passengers >>.

Art. 2 of the Statute points out that:

<< [...] every Contracting States undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessel, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards *freedom of access to the port*, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.>> (emphasis added)

Arts. 8 and 16 of the Statute set out the right to suspend such << benefit of equality of treatment >> or to deviate from art. 2 << for as short a period as possible >>. Furthermore, art. 12 allows the Contracting Parties to reserve, << at the time of signing or ratifying >> the Convention, the application of the aforementioned benefit in circumstances of transportation of emigrants.

¹⁹ G.K. Brugmann, *Access to Maritime Ports*, GmbH, Norderstedt, 2003, pp. 5-6.

²⁰ T. Scovazzi, *Elementi di Diritto Internazionale del Mare*, Giuffrè Editore, Milano, 2002, p. 102.

²¹ Convention and Statute on the International Régime of Maritime Ports, 26 July 1923. 58 LNTS 285.

In 1958, in the *ARAMCO* arbitration²², the tribunal referred to art. 2 of the 1923 Statute to affirm the existence of a << great principle of public international law >> involving the obligation for every coastal state to let its ports << open to foreign merchant vessels >>, except << when the vital interests of the state >> were threatened²³.

According to some commentators²⁴, the *ARAMCO* arbitration and the aforementioned art. 2 would contribute to recognize a right of free access to foreign ports.

However, such argumentation is not convincing for at least four different reasons:

- (i) The Convention and Statute on the International Régime of Maritime Ports are currently ratified by a low number of states²⁵. Therefore, it cannot contribute to prove a widespread assimilation and application of the rule by the international community in terms of customary international law.
- (ii) Art. 2 aims to grant the equality of treatment between the Contracting Parties of the Convention also regarding the access and utilization of their maritime ports. The element of *reciprocity* is a necessary condition for the recognition of that peculiar regime and such *reciprocity* applies only to the parties to the Convention²⁶.
- (iii) The United Nations Conference on Trade and Development (UNCTAD) Secretariat, in 1975, investigated about the legal contribution of the Convention and Statute on the International Régime of Maritime Ports in formulating an international right of free access to ports. The UNCTAD Secretariat denied the existence of any right of access, as well it excluded the status of *lex lata* for that rule and this, not only because of the low ratification of the convention, but foremost for the absence of any clear reference to the rule²⁷.
- (iv) The international case-law preceding and following the *ARAMCO* arbitration disagrees with the argumentation pointed out within the 1958 arbitral decision²⁸. La Fayette argued that the atypical solution reached in the *ARAMCO* arbitration was justified by the inadequacy of the

²² *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, (1963) 27 I.L.R. 117.

²³ A. Morrison, *Shelter from the Storm – The Problem of Places of Refuge for Ships in Distress and Proposals to Remedy the Problem*, Doctor of Philosophy Thesis, University of Wollongong, 2011, p. 66-67.

²⁴ *Ibid.* p. 66, note 44; B. Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework*, Springer, Hamburg, 2004, pp. 134-135.

²⁵ The number of states which ratified the Convention is just 19. The last one was Saint Vincent and the Grenadines in 2001. (<https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=560&chapter=30&lang=en>).

²⁶ Art. 34 of the Vienna Convention on the Law of Treaties (VCLT): “A treaty does not create either obligations or rights for a third State without its consent.”. *Vienna Convention on the Law of Treaties*, 23 May 1969, Vienna, 1155 UNTS 331.

²⁷ C. Liu, *Maritime Transport Services in the Law of the Sea and the World Trade Organization* in T. Cottier, *Studies in Global Economic Law*, Vol. 14, Peter Lang, Bern/Berlin/Bruxelles/Frankfurt/New York/Oxford/Wien, 2009, pp. 138-139.

²⁸ E.g., *Fisheries Case* (United Kingdom v. Norway), I.C.J. Reports 1951, p. 116; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14 - p. 111, para. 213; *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992, p. 593, 605.

activities of research carried out by the arbitrator in the resolution of the case²⁹. Furthermore, the *ARAMCO* arbitration does not refer to any *absolute* right, admitting the exclusion of the right of access when a << vital interest >> of the coastal state is threatened.

²⁹ *De La Fayette*, 11 Int'l J.Mar. & Coast. L. (1996), at 16 in B. Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework*, Springer, Hamburg, 2004, pp. 134-135.

2.4 – Conclusions

What is the general regime governing access to ports under the international law of the sea?

Under the international law of the sea, when a foreign vessel voluntarily decides to enter a port of a foreign state, it necessitates the previous approval of that same state, as a consequence of its territorial sovereignty over its internal waters and all the infrastructures therein. This point is also endorsed by the jurisprudence of international courts and tribunals.

The coastal state is entitled to regulate the entry, to deny it formally or *de facto*, as well as to withdraw its consent whether the vessel already entered port. Any unauthorized access to ports by foreign vessels or their non-compliance with the conditions set out for the access allow the same state to exercise enforcement jurisdiction against those vessels, for the purpose of preventing any illegal entry.

Prima facie, the Convention and Statute on the International Régime of Maritime Ports set out a formal obligation for coastal states to grant the freedom of access to their ports to foreign merchant vessels. However, the low ratification of the Convention and Statute, as well as its main object, affect the legal status of the rule and this chiefly for the element of *reciprocity* pursuant to art. 2 of the same 1923 Statute.

Nevertheless, how it will be discussed in Chapter 3, a different regime applies when a vessel is driven by distress or *force majeure*.

CHAPTER 3: ACCESS TO PORTS OF REFUGE FOR FOREIGN VESSELS IN DISTRESS OR *FORCE MAJEURE*

3.1 - Introduction

Conventional law and customary international law are those *hard-law* sources which can produce rights and obligations legally binding on states, therefore particular emphasis will be given hereinafter to the legal status of the *right of access* both as customary international law and as a treaty-based rule. This by virtue of art. 38(1) of the International Court of Justice (ICJ) Statute³⁰, which indicates that << international custom[s] >> and << international conventions >> are sources of public international law (which encompasses the international law of the sea)³¹.

What outlined in 1.2 is the general regime regulating the access of vessels to foreign ports.

Nevertheless, in case of distress or *force majeure*, a special regime applies.

Devine used to individuate two main *rights* connected with the entry to ports by vessels driven by stress or *force majeure*: (i) the *right of access* to a port of refuge; (ii) the *right of immunity* from certain infringements resulting from the condition of distress or *force majeure*³².

The *right of access* involves the entry into foreign ports by vessels in distress or *force majeure* and seeking refuge. It represents an exception to the general regime stressed in Chapter 2.

The *right of immunity* recognizes to a ship in distress a particular “immunity” from the coastal state’s jurisdiction over certain infringements which may be perpetrated by that vessel due to its poor condition. Hence, for instance, whether the ship driven by stress omits the fulfilment of several fiscal requirements for the entry it may be immune from the legal consequence resulting from the violation.

Such *immunity* seems to be nevertheless excluded when the condition of distress or *force majeure* is self-inflicted by the ship, such as in the case of the *M/V Frontier*, which in 1990 entered the port of St. Helena driven by distress, although the South African authorities had denied the entry. The *M/V Frontier* transported an illegal cargo of cannabis and it is the reason why the vessel was reluctant to refuel in any of the bordering states and found itself short of fuel at sea.

³⁰ Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1031.

³¹ D.R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford and Portland, 2010, pp. 22-23.

³² D.J. Devine, *Ships in distress a judicial contribution from the South Atlantic*, 1996, *Marine Policy*, Vol. 20, No. 3, pp. 229-230.

In that case, the Court of South Africa stated that, whilst the *M/V Frontier* was driven by distress at the time of its entry to St. Helena, the condition of distress had to be considered as self-inflicted by the ship, because it << was caused by a reluctance to refuel before St Helena solely attributable to the illegal nature of the enterprise >>³³. Accordingly, the Court pointed out that when a ship is in distress the right of *access* always applies, but when the distress is self-inflicted no *immunity* from jurisdiction should be recognized³⁴.

Both the aforementioned rights usually coexist, but they might also act independently. It means that a *right of immunity* might apply without a *right of access* and *vice versa*.

Therefore, only the legal status of the *right of access* will be discussed thereafter and not also that one of the *right of immunity*.

3.2 - Access to ports (to vessels in distress or force majeure) under relevant global treaties

3.2.1 - The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (LOSC) is a global, comprehensive and legally binding convention governing the “international law of the sea”. It was adopted on 10 December 1982 and entered into force on 16 November 1994. None of the provisions included therein formally refers to a right of access to ports of refuge for vessels in distress or *force majeure*, but some of them may indirectly provide a legal basis for such a right.

(a) Innocent passage and internal waters

Only few provisions of the LOSC regard – directly or indirectly – the legal regime of ports or internal waters and even less refer to vessels in distress or *force majeure*.

According to what observed in section 2.2, art. 18(2) LOSC, concerning the *innocent passage* of foreign vessels within the territorial sea of a coastal state, refers to *force majeure* and distress as those

³³ Supreme Court Case No 12, 1991. A description of the general legal back-ground in St Helena and of the trial in the court a quo can be found in P Mason, *Law in the South Atlantic*, New Law Journal, 1992, Vol 142, No 6553, pp 712-713. in D.J. Devine, *op.cit.*, pp. 231.

³⁴ *Id.*, pp. 231-234.

extraordinary conditions which do not affect the innocence of the passage, even when it is not continuous and expeditious.

The same provision, at paragraph 1(a), excludes innocent passage could extend also to internal waters of a coastal state, although according to art. 2(1) LOSC, territorial sea and internal waters are both covered by the sovereignty of a coastal state. This is the reason why scholars³⁵ often refer to the provisions contained into Part II, Section 3 of the LOSC to discuss the possible implications of the same convention with the right of access to ports in conditions of *force majeure* or distress, whilst those provisions only deal – at least formally - with the territorial sea and not also with the internal waters.

For instance, according to Morrison³⁶, Part II, Section 3 of the LOSC would offer the legal basis to prove the absence of compatibility between the *right of access* and the international law of the sea. He argued that access to internal waters by foreign vessels in distress or *force majeure* should be precluded by art. 19(2)(1) LOSC, which states that << any other activity not having a direct bearing on passage >> shall be considered affecting the *innocence* of the passage.

Therefore, Morrison pointed out that any unauthorized entry to internal waters or ports of a coastal state by a vessel in distress or *force majeure* would be affected *ab initio* by a condition of non-innocence caused by the *activity* resulting from the unauthorized access to a foreign port. Thus, a right of access would not be compatible with the LOSC, because of the condition of distress or *force majeure* started in the territorial sea, which would turn the passage from innocent to offensive, entitling coastal state to exercise enforcement jurisdiction against that vessel pursuant to art. 25(2) LOSC.

However, the author takes the position that an alternative interpretation should be followed.

More specifically, art. 19(2)(1) expressly refers to << any other activity >> and taking the cue from what is pointed out in section 1.2.2, an event of *force majeure* or distress cannot properly be considered as an *activity*, but rather as a *passivity* which operates beyond the effective human control, bypassing or nullifying the element of intentionality at the basis of the conduct of the ship (even when it results from a willful act, as in the event of distress at sea). Therefore, art. 19(2)(1) does not seem to exclude *a priori* any right of entry into ports for vessels in distress or *force majeure*.

³⁵ D.R. Rothwell and T. Stephens, *op. cit.*, p.224; Y. Tanaka, *op. cit.*, pp. 80-81; A. Morrison, *Places of Refuge for Ships in distress. Problems and methods of resolution*, Martinus Nijhoff Publisher, Leiden/Boston, 2012, pp. 101-102.

³⁶ A. Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, p. 102.

(b) The duty to render assistance

Art. 98(2) points out that the *duty to render assistance* extends also to the obligation of coastal states to << [...] promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea [...]>>.

Brugmann argued that art. 98(2) << implicitly describes the unwritten right of port access under stress of weather >>³⁷. However, the author takes the view that art. 98(2) should be interpreted narrowly.

In primis, because the same provision sets out only an obligation to “promote” the establishment of an adequate and effective search and rescue service regarding safety on and over the sea and not an obligation to establish it.

In secundis, because << an adequate and effective search and rescue service regarding safety on and over the sea >> is independent from any right of access to a port of refuge and in certain circumstances the same access results even less favourable than other modern instruments of search and rescue carried out outside the port (for instance, through the utilization of helicopters)³⁸.

Furthermore, art. 98 is included in Part VII, Section 1 of the LOSC, which lists those General Provisions governing the High Seas. Even presuming the application of such provisions for the Exclusive Economic Zone (EEZ), by virtue of art. 58(2) LOSC, the possibility to extend them also to the internal waters of a coastal state seems to be too speculative, as well as it lacks any legal basis.

3.2.2 - The FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

With the FAO Conference Resolution 12/2009, the Food and Agriculture Organization (FAO) of the United Nations adopted the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (PSM Agreement), which entered into force on 5 June 2016.

Unlike the LOSC, the PSM Agreement specifically refers to the entry to ports of foreign vessels driven by distress or *force majeure*.

³⁷ G. Brugmann, *op. cit.*, p. 116.

³⁸ J.H. Noyes, *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*, DENV. J. INT’L L. & POL’Y, 2008, Vol. 37: 1, p. 138.

Art. 10 points out:

<< Nothing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. >>

Art. 10 excludes that the legal framework set out by the PSM Agreement could affect the regime in force governing the access to ports of refuge of vessels in distress or *force majeure*.

Furthermore, art. 3(1) recognizes the right of a state party to enforce the provisions of the 2009 Agreement even to foreign vessels which << are seeking entry to its ports >>.

Therefore, a combination of both the aforementioned provisions shows how the PSM Agreement:

- (i) Subjects the entry to ports of vessels in distress or *force majeure* to international law, therefore avoiding to take a formal position on the recognition of any right of access of foreign vessels in distress or force majeure.
- (ii) Subordinates the same entry to the permission of the port State.
- (iii) Applies the regime observed above to all the foreign vessels, thus also to such vessels flying the flag of non-parties states.

Furthermore, art. 7 (*designation of ports*) at paragraph 1 points out that << Each Party shall designate and publicize the ports to which vessels may request entry pursuant to this Agreement [...] >>.

Hence, belonging both articles 7 and 10 to Part 2 (Entry Into Port) of the PSM Agreement, the author takes the view that the application of art. 10 should be in any case limited to those ports designed ex art. 7(1) and not to all the ports of a coastal state. It means that beyond any interpretation of art. 10, its scope is anyway limited by the same agreement.

3.3 – Access to ports (for vessels in force majeure or distress) in State practice

3.3.1 – State practice: early interpretation

Although Chircop argues how in the third century B.C., in the context of the Punic Wars, an expectation of hospitality into ports for ships driven by distress already existed³⁹, an independent practice emerged only at the beginning of the 19th century⁴⁰.

In 1805, Lord Stowell pointed out in *The Eleanor* case that:

<< [...] Real and irresistible distress must be at all times a sufficient passport for human beings under and such application of human laws >>⁴¹.

Furthermore, in the *Encomium* case, in 1833, the access to foreign ports of vessels driven << by stress of weather >>⁴² or << by the act of God >>⁴³ was recognized as a general principle of public international law. A right secured by the << code of humanity [...] and the best established usages amongst civilized nations >>⁴⁴.

In 1841, the existence of a << right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity >>⁴⁵ was recognized in the *Creole* case⁴⁶ and later its existence was confirmed in other relevant international arbitrations⁴⁷.

The application of the rule was also reflected in bilateral activities of states and within their national laws. Whilst a wide examination of the issue is not possible herein, it is sufficient to argue that many bilateral agreements regulating commerce between states included specific clauses for access to ports of refuge for vessels in distress or *force majeure*. Such clauses were based on a component of reciprocity between the signatory parties and they aimed to set out immunities from infringements caused by vessels driven by stress, rather than to recognize a proper *right of access* to ports of refuge⁴⁸.

³⁹ A. Chircop and O. Linden, *Places of Refuge for Ships. Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, pp. 169-170.

⁴⁰ A. Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, pp. 107-108.

⁴¹ A. Morrison, *Shelter from the Storm [...] op.cit.*, p. 17.

⁴² Lord Mc Nair, *International Law Opinions*, Vol. II, Cambridge at the University Press, 1956, p. 82.

⁴³ *Ibid.*, p. 85.

⁴⁴ *Register of Debates in Congress, Comprising the Leading Debates and Incidents of the First Session of the Twenty-Fifth Congress*, Part II Vol XIV, Gales and Seatos, Washington, 1837, p. 264.

⁴⁵ J.B. Moore, *International Arbitrations*, Government Printing Office, Washington 1898, Vol. IV, pp. 4375- 4377

⁴⁶ Case of the *Creole* v. Great Britain, decision of the Umpire, Mr. Bates, 1853, IA Moore, Moore's Digest, 1906, Vol. 2, p. 352.

⁴⁷ A. Morrison, *id.*, pp. 120-125.

⁴⁸ *Ibid.*, pp. 90-95.

Nevertheless, a number of earlier treaties referred to special circumstances, including war, bad weather or the threat of pirates, which justified a right to seek refuge and repair within the port of another contracting party - *inter alia*, art. 9 of the *Treaty of Peace, Friendship, Navigation and Commerce between the United States of America and Venezuela* (1836)⁴⁹ and art. 8 of the *Treaty of Peace, Amity, Commerce and Navigation between Guatemala and the United States* (1849)⁵⁰.

In 1957, the *Institut de Droit International* adopted the *Amsterdam Resolution*, which stated in Art. II that:

« Sous réserve des droits de passage consacrés, soit par l'usage, soit par convention, l'état riverain peut refuser aux navires étrangers l'accès aux eaux intérieures, à moins qu'ils ne se trouvent en état de danger »⁵¹ (emphasis added).

Although the resolution did not directly represent state practice, it showed how the general right of coastal states to deny the access to foreign vessels should not apply when those vessels were in distress.

And the same international practice was also reflected in the national legislation of a number of states.

For instance, art. 302 of the Italian *Codice della Navigazione*⁵² points out that, whether during the voyage an event which is likely to endanger the expedition occurs, the captain of the ship shall seek to ensure the safety of the expedition in every available manner, including the repairing in a port of refuge. The obligation is addressed to the captain of the ship and not to the state, but it reflects the intention of the code to give priority to the status of danger, rather than to the ordinary procedure for the access to ports.

Moreover, the *Australian Fisheries Management Act* provides special conditions concerning the illegal entry of foreign vessels into ports, when the unauthorized entry was justified by extraordinary circumstances which include, *inter alia*, the « unforeseen emergency [...] to secure the safety of human life or of the boat »⁵³.

⁴⁹ *Ibid.*, pp. 95-96

⁵⁰ A. Chircop and O. Linden, *op. cit.*, p. 183.

⁵¹ B. Parameswaran, *op. cit.*, p. 136.

⁵² Approved with R.D. 30 March 1942, n. 327.

⁵³ Part VI, Division 3, sec. 102(3)(c). In G.F.K. Brugmann, *op. cit.*, pp. 116-117.

3.3.2 - State practice: post 1970s interpretation

Scholars generally agree in recognizing the existence of a *right of access* to ports of refuge for vessels in distress or *force majeure* at least up to the second half of the 20th century and they often refer to it as a *customary international law*⁵⁴.

However, the historical establishment of the rule is not a sufficient condition to grant its adequacy in the modern legal context⁵⁵.

Since the late 20th century, the impact of pollution incidents at sea⁵⁶ and the growing environmental concern led to a progressive reinterpretation of the scope of application for the *right of access*.

It brought to a clear separation between the necessity to preserve the property of the ships and its cargo and the need to preserve the safety of life of people on board, therefore a *right of access* started to be recognized only when human life was threatened.

Between 1977 and the 2005, refuge to vessels in distress or *force majeure* was denied in at least twenty-six reported cases⁵⁷.

Beyond the *Erika*, *Castor* and *Prestige* accidents, which deeply influenced the modern mechanism of decision-making at the basis of the access to ports of refuge and that will be examined in the next chapter, the most relevant contribution to the development of the rule was provided for by the *M/V Toledo* judgment by the High Court of Admiralty of Ireland, which pointed out that⁵⁸:

<< Where [...] there was no risk to life as the crew had abandoned the casualty before a request for refuge had been made, it seems to me that there can be no doubt that the coastal state, in the interest of defending its own interests and those of its citizens, may lawfully refuse refuge [...] if there are reasonable grounds for believing that there is a significant risk of substantial harm to the state or its citizens [...] and that such harm is potentially greater than that which

⁵⁴ A. Chircop, *Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?*, Ocean Development & International Law (Taylor & Francis Ltd), 2002, p. 209; G.C. Kasoulides, *Vessels in distress 'Safe havens' for crippled tankers*, Marine Policy, Butterworth & Co (Publishers) Ltd, 1987, p. 184; D.J. Devine, *op.cit.*, p. 230; A. Morrison, *Places of refuge for ships in distress: the Australian position*, Australian Journal of Maritime and Ocean Affairs (2011) Vol 3(3), p. 82 note 3.

⁵⁵ N.M. Antunes, *Decision Making in the Imminence of Disaster: "Places of Refuge" and the Prevalence of National Interests*, in M. Chantal Ribiero and E.J. Molenaar (eds), *Maritime Safety and Environmental Protection in Europe. Multiple Layers in Regulation and Compliance*, Gráfica Ediliber, 2015, p. 91.

⁵⁶ *Inter alia*, the *Cristos Bitas* (1978), the *Andros Patria* (1978), the *Atlantic Empress* (1979), the *Aeolian Sky* (1979), the *Tarpenbeck* (1979), the *Prinsendam* (1980), the *Eastern Mariner I* (1981), the *Stanislaw Dubois* (1981), the *Kowloon Bridge* (1986) in G.C. Kasoulides, *Vessels in distress 'Safe havens' for crippled tankers*, Marine Policy, Butterworth & Co (Publishers) Ltd, 1987, p. 184; and in A. Morrison, *Shelter from the Storm [...] op.cit.*, pp. 17-20.

⁵⁷ E.T. Wiberg, *op.cit.*, pp. 81-87.

⁵⁸ *ACT Shipping (PTE) Ltd. v. Minister for the Marine, Ireland and the Attorney General (The MV Toledo)*, 1995, 2 I.L.R.M. 30, in A. Chircop and O. Linden, *op.cit.*, p. 218.

would result if the vessel in distress and/or her cargo were lost through refusal or shelter in the waters of the coastal state >>⁵⁹.

Moreover:

<< [...] the absence to any risk to human life excludes the most compelling reason in support of an application for refuge [...] >>⁶⁰.

The modern interpretation of the rule requires the << risk to human life >> as the necessary condition for the recognition of the right, although, even in that case, refuge might be nevertheless denied if human life may be safeguarded in a different manner and if the access would threat a specific coastal state's interest. It shows how the unauthorized entry to port should represent an *extrema ratio* and not just an alternative solution, thus reflecting the unavoidability of the final result, as pointed out in section 1.2.2.

Accordingly, there are nowadays many states which make access to their ports by vessels in distress conditional on the absence of any risk to their own environmental interest or maritime safety.

For instance, art. L5334-4 of the French *Code des Transports* subjects the access to port of vessels in *force majeure* to a prior authorization by the *police portuaire*⁶¹.

Moreover, the new art. R304-12 to the French *Code des Ports Maritimes*⁶², as modified by Decree No. 2012-166, provides a mechanism of consultation between competent land and maritime authorities of the government, before deciding whether or not grant refuge into port to a vessel in distress.

What stressed above proves how the modern reinterpretation of the rule brought to a more decisive role played by the decision making of coastal states or by their competent authorities. It in part affects the nature of *right* (as customary rule) for such a practice and this because:

- (i) Without any risk to human life, no exception to the general regime applies.

⁵⁹ *Id.*, para. 48-49.

⁶⁰ *Ibid.*

⁶¹ *Code des Transports*, adopted on 28 October 2010. Art. L5334-4: << [...] l'autorité investie du pouvoir de police portuaire peut autoriser l'accès [...] >>. (<http://codes.droit.org/cod/transports.pdf>)

⁶² *Code des Ports Maritimes*, adopted on 22 March 1978.

(<http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Francaise/Code%20des%20Ports/Code%20des%20ports%20maritimes%202012-1.pdf>).

- (ii) Even when the risk to human life exists, coastal states may decide to act so to ensure the safety of life of people on board, but without granting the access to their ports to vessels in distress or *force majeure*.

Nevertheless, it does not exclude the existence of a non-absolute *right of access* for the purpose of achieving a humanitarian purpose. That right is non-absolute, because its concrete applicability should be evaluated in practice. But when the access represents the only way to ensure the safety of life, it should prevail over the right of refusal by coastal state.

3.4 - Conclusions

Does exist any right of access to ports of refuge for foreign vessels in distress or force majeure (as a rule of customary law or as a treaty-based rule)?

Conventional law and customary international law are those *hard-law* sources which can produce rights and obligations that are legally binding to states. It follows that recognizing a conventional or a customary legal basis to the practice of the access to ports in distress would obligate states to grant access to their ports to foreign vessels in distress or *force majeure*.

The most important treaty governing the international law of the sea, the LOSC, does not directly refer to the regime of the access to foreign ports by vessels seeking refuge. Some commentators interpreted the LOSC to promote the conventional status of the *right of access*, although their argumentations are somewhat debatable. Similar considerations can be made for the PSM Agreement, which at art. 10 expressly refers to the entry to ports by foreign vessels in distress or *force majeure*, although the same agreement requires the entry be in accordance with the international law (thus presuming the existence of a higher regime), as well as it refers only to those ports designed under its art.7, and not to all the existing ports.

Hence, the nature of the right of access as a treaty-based rule shall be denied.

Ex adverso, a multitude of scholars agree in recognizing the existence of a *right of access* as customary international law, at least up to the second half of the 20th century. It seems to be supported also by a number of national and international sources which set out restrictions to coastal states' sovereignty for the purpose of assuring safety of life, although the practice significantly changed since the late 20th century, due to the high risk posed by vessels in distress to certain coastal state interests.

In conclusion, despite of the recent reinterpretation of the rule, the significant modification of its legal scope and the different role played by coastal states in deciding whether or not to grant refuge to vessels in distress, it seems reasonable to believe that a qualified *right of access* to ports of refuge for foreign vessels in distress or *force majeure* still exists as customary law.

CHAPTER 4: DECISION-MAKING PROCESS USED BY THE COASTAL STATE ON ACCESS TO PORTS OR OTHER PLACES OF REFUGE

4.1 - Introduction

The *Torrey Canyon* (1967) and the *Amoco Cadiz* (1978) disasters considerably increased public awareness on maritime safety, as well as the necessity to develop new international rules to face the peril to human life caused by accidents at sea.

Before the adoption, on 28 April 1989, of the International Convention on Salvage (Salvage Convention)⁶³, it was proposed to include a specific obligation within the text of the Convention for granting refuge to vessels seeking assistance at sea⁶⁴. The rationale of the proposal was to encourage salvage operations through the establishment of a net of safe-harbours where salvors might assist a ship in need of shelter (rather than towing that ship away from the coast), avoiding at the same time worst consequences to the environment which may arise from maritime casualties⁶⁵.

Some delegations opposed such a proposal, arguing that it would have seriously affected coastal states sovereignty. The result of this debate was the adoption of art. 11 of the Salvage Convention, which requires states parties, when they regulate or decide << [...] upon matters relating to salvage operations such as admittance to ports of vessels in distress [...]>>, to take into account *inter alia* << [...] the need for [...] preventing the damage to the environment in general >>.

Nevertheless, as mentioned in Chapter 2, the regime governing the access to ports by vessels in distress or *force majeure* changed significantly after the *Erika*, *Castor* and *Prestige* accidents.

- (a) The *M/T Erika* accident: A Maltese-flagged, single-hull tanker named *Erika*, travelling from Dunkirk to Sicily with a cargo of circa 26,000 tons of fuel oil, sank in the Bay of Biscay after being seriously damaged by a storm on 12 December 1999⁶⁶. Before the *Erika* broke up and sank, the ship found a temporary shelter in the Loire estuary. After that, refuge was denied by the French authorities.
- (b) The *M/T Castor* accident: The *M/T Castor* was a Cypriot-flagged tanker transporting a gasoline cargo from Romania to Nigeria. On 26 December 2000, the *Castor* experienced bad

⁶³ *International Convention on Salvage* (1989). 1953 UNTS 193.

⁶⁴ E.T. Wiberg, *op. cit.*, p. 62.

⁶⁵ A. Bishop, *The Development of Environmental Salvage and Review of the Salvage Convention 1989*, Tulane Maritime Law Journal, 2012, pp. 1-2.

⁶⁶ E.T. Wiberg, *op. cit.*, p. 90.

weather off the coasts of Morocco. Its hull cracked and the ship started to spill oil nearby the port of Nador. The Moroccan Coast Guard denied access to Nador or any other Moroccan ports to seek shelter. Five other countries denied refuge to the *Castor* due to the risk of explosion of its cargo: Algeria, Greece, Malta, Spain and Tunisia. The ship travelled in distress conditions for almost two months before being towed to Pireas (Greece) on 16 February 2001⁶⁷.

- (c) The *M/T Prestige* accident: The *Prestige* was a Bahamas-flagged single-hull tanker transporting 77,000 tons of fuel oil from Ventspils (Latvia) to Singapore. On 13 November 2002 the ship experienced bad weather in the Bay of Biscay which caused the breakage of its hull nearby the Spanish coast. Spain, France and Portugal denied refuge to the *Prestige* and ordered the ship to be towed to a safe distance from their coastline. On 19 November 2002 the *Prestige* sank off the Galician coasts leaking circa 40,000 tons of fuel oil into the sea, which drifted back to the coasts of France, Portugal and Spain creating incalculable damage⁶⁸.

The three accidents stressed above are what Wiberg defines as the *triumvirate of wrecks* which brought the shipping reform to a new legislative level⁶⁹.

A document submitted by the International Maritime Union Insurance (IMUI) to IMO's Maritime Safety Committee (MSC) in 2003, at paragraph 12(a) stated that:

<< The "port of refuge problem" is that vessels in distress need somewhere to go to be made safe. [...] Port Authorities are often reluctant to allow vessels in distress to enter their waters because they fear being presented with problems such as – Wreck removal – Pollution – Explosion [...]>>⁷⁰.

The legislative reform brought two main legal innovations: (i) the introduction of a definition for *places of refuge*; (ii) the introduction of the new status of *ship in need of assistance*, which differs from the condition of distress or *force majeure*, by virtue of the absence of any humanitarian implication connected with the event of emergency at sea.

It also revolutionized the role played by decision-making of coastal states, as pointed out by the IMO's Legal Committee before the adoption of the 2003 IMO's guidelines on places of refuge:

⁶⁷ *Id.*, pp. 85, 99-101.

⁶⁸ V. Frank, *Consequences of the Prestige Sinking for European and International Law*, The International Journal of Marine and Coastal Law, Vol. 20 N.1, 2005, pp. 2-3.

⁶⁹ E.T. Wiberg, *op. cit.*, pp. 13-14.

⁷⁰ MSC 77/8/2, 14 February 2003, p.7.

<< [T]he guidelines should include provision on the decision-making process to be followed in deciding whether or not to allow a ship in distress to enter a port or other place of refuge>>⁷¹.

“Places of refuge”, “ships in need of assistance” and a new role played by the “decision-making” of coastal states formulate a more articulate regime. And this because, how it will be examined more in detail hereinafter, the absence of a threat to human life (which characterizes the status of “ship in need of assistance”) makes the application of any *right of access* more difficult in practice, although the process at the basis of the decision by coastal states whether or not to grant the access might be strongly influenced by other factors (such as the duty to protect and preserve the marine environment)⁷².

Therefore, for the purpose of determining what is the effective role played by the modern decision-making process carried out by competent authorities of a coastal states in granting refuge to vessels in peril at sea, the IMO’s Guidelines on Places of Refuge for Ships in Need of Assistance, the EU legislation on places of refuge and the CMI’s draft-instrument on Places of Refuge will be examined below.

4.2 – IMO’s Guidelines on Places of Refuge for Ships in Need of Assistance

The IMO’s Guidelines on Places of Refuge for Ships in Need of Assistance were adopted by IMO Assembly Resolution A.949(23) on 5 December 2003⁷³.

The Guidelines are a global, voluntary instrument formulated in hortatory language⁷⁴. They were formulated to guide the master and/or the salvor of a ship in need of assistance and, as pointed out in their Preamble, << to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal State to protect its coastline >>.

Paragraph 1.1 excludes the application of the Guidelines when the << safety of life is involved >>. Therefore, they apply only when a ship is seeking assistance and the life of the master or crew is not

⁷¹ LEG 84/14 at point G, Agenda item 7, paragraph 95.

⁷² Y. Tanaka, *Key Elements in International Law Governing Places of Refuge for Ships: Protection of Human Life, State Interests, and Marine Environment*, JML & Commerce, Vol. 45. No. 2, 2014, pp. 175-177.

⁷³ IMO A 23/Res.949, December 2003. http://www.imo.org/blast/blastDataHelper.asp?data_id=9042&filename=949.pdf.

⁷⁴ Unlike the draft-guidelines which used terms as *shall* or *must* whilst they were not mandatory by nature, the 2003 Guidelines uses a hortatory language, only suggesting (e.g., *should having due regard to*) states to act in certain manner and not obligating them to do so. Nevertheless, following the *Stolt Valor* accident in 2012, the IMO’s Maritime Safety Committee (MSC) stated at its 91st session (MSC 91/22) that, although not legally-binding, the IMO’s guidelines *should be taken into account when responding to a casualty* (p.73, para. 21.5) in T. Yamaji, *op. cit.*, p. 12.

in danger, otherwise the SAR Convention or the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual⁷⁵ prevail over the Guidelines (paragraph 1.14).

Paragraph 1.18 defines a *ship in need of assistance* as

<< [A] ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard.>>

Paragraph 1.3 states that when a ship is in need of assistance, the best way to avoid worst consequences to the vessel and to the marine environment are to lighten its cargo and bunkers and to repair the damage, and that those operations are << best carried out in a place of refuge >>.

However, paragraph 1.4 points out that the access of a ship in need of assistance to a place of refuge may endanger the coastal state (economically and/or environmentally) and affect its population. Therefore, the request for access to a place of refuge should be subjected to << an objective analysis of the advantages and disadvantages of allowing a ship in need of assistance to proceed to a place of refuge >> carried out by the coastal state's authorities.

Paragraph 3.9 and Appendix 2 of the Guidelines refer to a multitude of factors which should be taken into account on a case-by-case basis for the aforementioned analysis, including *economic* and *social factors* (e.g., nature and condition of cargo, stores, bunkers, in particular hazardous goods; whether the ship concerned is insured or not insured; what is the nearest distance to industrial areas; amenity resources and tourism), *environmental factors* (e.g., pollution caused by ships; designated environmental areas; sensitive habitats and species) and *natural factors* (e.g., weather and sea conditions; seasonal effects including ice).

Furthermore, paragraph 3.11 states that << The analysis *should* include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment>> (emphasis added).

Such a comparison of the risk should rely upon six different factors:

- (i) << safeguarding of human life >>.
- (ii) << safety of persons at the place of refuge and its industrial and urban environment (risk of fire or explosion, toxic risk, etc.) >>
- (iii) << risk of pollution [in general] >>.

⁷⁵ IAMSAR manual: *International Aeronautical and Maritime Search and Rescue Manual*, London, 2007.

- (iv) << if the place of refuge is a port, risk of disruption to the ports operation (channels, docks, equipment, other installations) >>.
- (v) << evaluation of the consequences if a request for a place of refuge is refused, including the possible effect on neighbouring States >>.
- (vi) << due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance >>.

It is interesting to observe how the comparison of the risk was originally thought (ex para. 3.1.3.2 of the *draft-guidelines*) to be necessarily part of the decision-making process of coastal states, whilst the final version of paragraph 3.11 only suggests (and not obligates) states to include such a comparison in their decision-making without obligating them⁷⁶.

Paragraphs 3.12, 3.13 and 3.14 refer to the << Decision-making process for the use of a place of refuge >>. They set out certain general conditions concerning the access to places of refuge for ships in need of assistance which can be summarized as it follows:

- (i) A << permission >> to access a place of refuge by the coastal state is necessary (paragraph 3.12).
- (ii) << No obligation >> exists for the coastal state to provide a ship in need of assistance access to a place of refuge. The access should be granted only when it is << reasonably possible >> (paragraph 3.12).
- (iii) Even when access is granted, the coastal state might subject it to << practical requirements >> (paragraph 3.13).
- (iv) As a *general rule*⁷⁷, if the place of refuge is a port, the ship in need of assistance should bear << all the expenses which may be incurred in connection >> with the operations of assistance (paragraph 3.14).

What is stressed above shows how the IMO's Guidelines enhance, in principle, the discretionary powers of coastal states in determining whether or not to grant refuge. The precondition for the application of the Guidelines is the absence of any implication involving safety of life on board. It justifies the complex analysis for the assessment of the risk, which *de facto* seems to exclude any proper *right* of access to places of refuge for ships in need of assistance.

⁷⁶ Para. 3.11 of the IMO's guidelines reproduces almost integrally para. 3.1.3.2 of the former draft Guidelines of 2002, although para. 3.1.3.2 provided that the comparison of the risk "must" be included into the analysis, and not that – how it is pointed out at para. 3.11 – it "should" be included.

⁷⁷ The reference made by para. 3.14 to the *general rule* seems to recognize implicitly the possibility to exclude the payment of those expenses in *special* circumstances.

However, paragraph 1.17 states that the Guidelines << do not address the issue of liability and compensation for damage resulting from a decision to grant or *deny* a ship a place of refuge >> (emphasis added).

The author takes the view that the formulation of the aforementioned provision implicitly recognizes a sort of commitment for coastal states to grant the access to places of refuge when the outcome of the decision-making so recommends and this because, otherwise, it would not have made sense to refer to << liability and compensation for damage resulting from a decision to [...] deny >> the access to a place of refuge. No liability might exist without a proper obligation for a state to grant the access in certain circumstances, therefore, given the primary role played by the decision-making process on a case-by-case basis, it seems reasonable to believe that, even with regard to the access of ships in need of assistance seeking refuge, the refusal of coastal states shall be considered only as an *extrema ratio*.

4.3 – EU Enactments on Places of Refuge

4.3.1 - VTMIS Directive (as amended by Directive 2009/17/EC)

After the *Erika* disaster, the European Commission adopted the *Erika packages I and II*, including *inter alia* measures dealing with port State control, double-hull tankers and supplementary compensation for oil pollution damages.

In particular, the *Erika package II* contained two important instruments for the development of the European maritime safety legislation⁷⁸:

- (i) Regulation (EC) No 1406/2002, establishing the European Maritime Safety Agency (EMSA)⁷⁹.
- (ii) Directive 2002/59/EC, <<establishing a Community vessel traffic monitoring and information system [...] to enhancing the safety and efficiency of maritime traffic,

⁷⁸ S. Vatankhah, *The Contribution of the EC to Maritime Safety in view of the “Third Maritime Safety Package” of the European Commission*, in P. Ehlers and R. Lagoni, *Maritime Policy of the European Union and the Law of the Sea*, Transaction Publishers, New Brunswick/London, 2008, pp. 45-46.

⁷⁹ Art. 1, Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency.

improving the response of authorities to incidents, accidents or potentially dangerous situations at sea>>⁸⁰.

Pursuant to art. 288 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), << a directive shall be binding, as to the result to be achieved >> and it needs to be implemented by Member States which choose << form and methods >> for its implementation⁸¹.

Directive 2002/59/EC – also known as the *Vessel Traffic Monitoring and Information System* (VTMIS) directive – is a regional (it applies only between the EU Member States), legally-binding instrument enacted to enhance maritime safety and environmental protection.

The VTMIS directive sets out four important elements for the implementation of the European legal framework on places of refuge:

- (a) Member states are entitled to prohibit << without prejudice to the duty of assistance to ships in distress >> the entry into ports of ships in distress, when << exceptionally bad weather or sea conditions [create] a serious threat for the safety of human life or of pollution >>⁸². Such a prohibition might be addressed to << a particular ship or to ships in general >> and it applies << until it has been established that there is no longer a risk to human life and/or to the environment >>⁸³.
- (b) << Non-availability of a place of refuge may have serious consequences in the event of an accident at sea. Member States should therefore draw up plans whereby ships in distress may, if the situation so requires, be given refuge in their ports or any other sheltered area in the best conditions possible >>⁸⁴.
- (c) << Members states [...] shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress >>⁸⁵.

⁸⁰ Directive 2002/59/EC, see note 12, Art. 1.

⁸¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 13 December 2007, *Official Journal C 326*, 26/10/2012 P. 0001 – 0390.

⁸² Directive 2002/59/EC, Preamble, para. (15).

⁸³ *Id.*, Art. 18(1)(b).

⁸⁴ *Id.*, Preamble, para. (16).

⁸⁵ *Id.*, Art. 20. Unlike para. (16) of the Preamble, Art. 20 uses the form “shall” and not “should” with regard to the plans to be drawn up by member states. Nevertheless, the hortatory language of para. (16) seems justified by its collocation into the Preamble, therefore the terminology of Art. 20 should prevail.

(d) << “place of refuge” means a port, the part of a port or another protective berth or anchorage or any other sheltered area identified by a Member State for accommodating ships in distress >>⁸⁶.

On the one hand, Directive 2002/59/EC entitles Member States to prohibit access to ports of vessels in distress when it is likely to cause << a serious threat for the safety of human life or pollution >>.

On the other hand, it obligates those same states to designate *places of refuge*, taking into account the relevant IMO’s guidelines. As well as, by virtue of what is observed in (a), (b), (c), (d) above, even when Member States have the power to prohibit access to places of refuge, that power shall be subjected to three complementary conditions: (i) that no *prejudice to the duty of assistance to ships in distress* occurs; (ii) that the threshold of the *seriousness* of threat for the safety of human life or of pollution is achieved; (iii) that the *risk to human life and/or to the environment* persists.

Hence, the access to ports for vessels seeking refuge shall be *de facto* based on a case-by-case procedure and it will be the coastal state (or better, the competent authority designated by the coastal state) to ascertain, through a decision-making process, whether at least one of the three aforementioned conditions exists, denying then refuge⁸⁷.

However, the VTMIS directive was enacted before the *Prestige* disaster, as well as before the adoption of Resolution A.949(23) which implements the IMO’s Guidelines on Places of Refuge. Therefore, under the aegis of EMSA, Directive 2002/59/EC was amended by Directive 2009/17/EC for the purpose of integrating the former regime.

A new paragraph (14) of the Preamble states that << IMO Resolution A.949(23) is to form the basis of any plans prepared by Member States in order to respond effectively to threats posed by ships in need of assistance [...] >>.

Art. 3(c)(v) of Directive 2009/17/EC integrates the text of the former VTMIS directive with a definition of “ships in need of assistance” similar to that one at paragraph 1.18 of Resolution

⁸⁶ *Id.*, Art. 4(m).

⁸⁷ The main issue involving the practical determination of the conditions for denying the access to ports of vessels in need of assistance concerns the identification of the minimum threshold necessary to configure a *serious threat for the safety of human life or of pollution*. At paragraph (4), Art. 2 of the Commentaries of the International Law Commission (ILC) of 2001 to the *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, the ILC examining the meaning of the term “significant”, with regard to the minimum threshold of the risk regulated by the *draft articles*, pointed out that: << significant” is something more than “detectable” but need not be at the level of “serious” or “substantial”>>, therefore a *serious threat*, as that one required by para. (14), Directive 2002/59/EC, seems to configure a high level of threshold, something more than “detectable” and “significant”.

A.949(23), although the European definition does not exclude *a priori* that the condition of “ship in need of assistance” might involve also the safety of life on board⁸⁸.

Furthermore, Directive 2009/17/EC introduces articles 20(a) to (d) for the purpose of developing a complex mechanism of << plans for the accommodation of ships in need of assistance >>. They list those elements which shall be included in a plan for the accommodation drawn up by a member state, such as the identification of the << competent authority for assessing the situation >>⁸⁹; the procedure of assessment << for acceptance or refusal of ship in need of assistance >>⁹⁰; << the financial guarantee and liability procedures in places of refuge >>⁹¹.

In conclusion, as observed for the IMO’s Guidelines, the modern EU legislation enhances the role played by decision-making on the basis of an elaborated risk assessment analysis, which *de facto* restricts the application of any *right of access* for vessels seeking refuge⁹².

The consolidated text of the VTMS Directive sets out a regime which aims to balance the interest of vessels in distress or in need of assistance to obtain refuge with the interest of coastal states to protect their own environmental interests. The decision-making process of coastal states relies upon an analysis of the conditions at art. 18(1)(b) which exclude that a non-serious risk or a risk also involving human life may justify a denial for the entry. Moreover, even when a member state is entitled to deny the access to its ports, it shall draw up plans for accommodation of vessels seeking assistance through the designation of adequate places of refuge. No provision within the VTMS directive specifies how the decision-making process should be carried out by member states, but for such a purpose the EU operational guidelines have been developed.

4.3.2 - The EU Guidelines on Places of Refuge

For the purpose of implementing Directive 2009/17/EC, on 13 November 2015 the final version of the EU Operational Guidelines of Places of Refuge was adopted. The EU Guidelines were formulated

⁸⁸ Art. 3(c)(v) only states that the definition of ship in need of assistance is << without prejudice to the provisions of the SAR Convention concerning the rescue of persons >> and not, as pointed out by paragraph 1.18 of IMO’s guidelines, that it applies << apart from one requiring rescue of persons on board >>.

⁸⁹ Art.20(a)(2)(b); Art.20(b).

⁹⁰ Art.20(a)(2)(d).

⁹¹ Art.20(a)(2)(g); Art.20(c).

⁹² J.H. Noyes, *op.cit.*, pp. 140-141.

to provide guidance to the competent authorities of Member States in their decision whether or not to grant the access to places of refuge by vessels in need of assistance.

Chapter 4 states that << Where the safety of life is involved, the provisions of the SAR Convention should always take precedence [...] >>.

Furthermore, paragraph 4.2 points out that:

<< As a matter of principle, while each state involved in the operation *should* examine their ability to provide a place of refuge, the final decision on granting a place of refuge *is solely* the responsibility of the Member State concerned. >> (emphasis added).

Chapters 5 and 6 set out the procedures for assessing the risk << from a socio economic, public health and environmental perspective >> in order to decide whether or not to let a foreign vessel access a place of refuge.

The factors which Member States should take into account in assessing the risk are listed in paragraph 5.2 of the EU guidelines and they reproduce *verbatim* those stressed at paragraph 3.11 of the IMO's Guidelines⁹³.

Paragraph 6.1.2 clearly excludes that refuge might be denied for << commercial, financial or insurance [reasons] >>, furthermore paragraph 6.1.3 obligates (*shall*) Member States which denied refuge << for objective reasons >>:

<< [T]o forward all information relevant to the circumstances on which their decision is based to the State or States to whom the subsequent request [by the operator] is made [...] >>.

Particularly important is also Appendix D to the aforementioned EU guidelines, which at Step 3 (*Risk assessment for a vessel to remain at sea*) individuates eight points which are to be considered by the competent authority in deciding whether a ship should be moved to a place of refuge or remain at sea. They involve: (i) risk to human life; (ii) emergency response; (iii) environmental impact; (iv) risk to socio-economic interest; (v) navigational implications; (vi) weather forecast; (vii) benefit from transferring the ship to a neighbouring state; (viii) possible increasing risk of damage to the vessel.

⁹³ See 4.2.

Whilst the EU guidelines are not a legally-binding instrument, on 27 January 2016 Member States authorities and the maritime industry expressed their support for the aforementioned document through a *Joint Declaration on the EU Operational Guidelines on Places of Refuge ('PoR')*⁹⁴.

The Joint Declaration gives efficacy to the relating EU legislation, providing an assimilation of the EU guidelines into the VTMIS procedures. The success of the modern EU system was tested on February 2016, following the adoption of the aforementioned Joint Declaration. In that circumstance, the *M/V Modern Express*, a vehicle carrier in distress nearby the French coast in the Bay of Biscay, found refuge into Bilbao port, pursuant to the application of the 2015 EU operational guidelines⁹⁵.

4.4 – Comité Maritime International Draft-Instrument on Places of Refuge

Since the adoption of the IMO's guidelines on Places of Refuge with Resolution A.949(23), the Comité Maritime International (CMI), as observer of the IMO, submitted two important reports to the Legal Committee (LEG)⁹⁶.

- (i) LEG 91/6 = on 24 March 2006, the International Working Group of CMI, although recognizing that << there is no immediate support for a new instrument >> on places of refuge (as stressed in LEG 90/15)⁹⁷, prepared a draft-instrument << to recognize the concurrent rights of States and vessels which are in distress, and produce a regime which is consistent with the international obligations States are currently under where they have ratified UNCLOS and other Conventions which touch on this topic >>⁹⁸.
- (ii) LEG 95/9 = on 23 January 2009, the CMI submitted at Annex I to LEG 95/9 the draft-instrument on places of refuge approved in 2008 at the CMI Conference in Athens⁹⁹. The CMI << fears that a repeat of the events which took place in 2001 and 2002, in relation to the vessels *Castor* and *Prestige*, may take place again in the future >>¹⁰⁰ due to the absence of any legally binding instrument on places of refuge.

⁹⁴ Joint Declaration on the EU Operational Guidelines on Places of Refuge ('PoR'), 27 January 2016. http://www.iumi.com/images/gillian/News2016/Joint_Declaration_on_the_EU_Operational_Guidelines_on_Places_of_Refuge.pdf.

⁹⁵ [http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/places-of-refuge-for-ships-in-distress](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/places-of-refuge-for-ships-in-distress).

⁹⁶ T. Yamaji, *Evaluation of IMO Guidelines on "Places of Refuge"*, Journal of Maritime Researches Vol. 4: 13-29, 2014, p. 18.

⁹⁷ LEG 91/6, para. 1.

⁹⁸ *Id.*, para. 3.

⁹⁹ LEG 95/9, para. 4.

¹⁰⁰ *Id.*, para. 7.

The draft-instrument proposed by CMI consists of a Preamble and nine different paragraphs.

The most relevant innovations included within the aforementioned document are:

- (i) The definition of << ship in need of assistance >> at paragraph 1(b) of the draft-instrument differs from the other definitions in sections 4.2 and 4.3: firstly, it expressly refers also to losses to the *cargo*; secondly, its formulation does not formally exclude risks to human life and this is in accordance with the definition of *place of refuge* at paragraph 1(c) which include the protection of human life among those interests which the access to places of refuge for ships in need of assistance aims to safeguard¹⁰¹.
- (ii) Paragraph 3(a) provides a formal obligation for any competent authority¹⁰² to << permit access to a place of refuge by a ship in need of assistance when requested >>, except when there are << reasonable grounds >> for believing that the vessel or its cargo are << likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused >>¹⁰³.
- (iii) When a competent authority << reasonably >> decides to grants access to a place of refuge and damages occur to << the ship, its cargo or other third parties or their property >>, the same authority benefits from an immunity from any liability arising from its decision¹⁰⁴. On the other hand, whether the same authority refuses to grant refuge, it << shall be liable to compensate the other State, shipowner, salvor, cargo owner, or any other party >>, unless it proves the reasonability of the refusal¹⁰⁵.

What observed above shows how the draft-instrument proposed by CMI, not only formally sets out a general obligation to grant refuge to vessels in need of assistance (encompassing into the definition

¹⁰¹ LEG 95/9, Annex I, para. 1(c): “place of refuge” means a place where action can be taken in order to stabilize the condition of a ship in need of assistance, to minimize the hazards to navigation, or to protect human life, ships, cargoes or the environment.

¹⁰² *Id.*, para. 1(b): “competent authority” means a State and any organisations or persons which have the power to permit or refuse entry of a ship in need of assistance to a place of refuge.

¹⁰³ Within the CMI draft-instrument this exception is formulated in three different *Options*, which therefore set out three different and alternative paragraph 3(b) to be eventually implemented. Nevertheless, the three *Options* proposed by the CMI agree about the possibility (<< [...] a competent authority *may* [...] >> [emphasis added]) for the competent authority to deny the entry when the vessel or its cargo are <<likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused>>.

¹⁰⁴ LEG 95/9, Annex I, para. 4.

¹⁰⁵ *Id.*, para. 5.

also risks to human life, generally reserved to the distress or *force majeure* situations), but it also recognizes liability for states or other competent authorities when they *unreasonably* decide to deny the access to places of refuge.

It is clear that the *reasonability* of the decision would rely upon an objective assessment by the competent authority of the concrete circumstances which would determine the risk – and by virtue of paragraph 1(e) of the document, such assessment shall be undertaken in accordance with the IMO’s guidelines or other analogous instruments – nevertheless the assessment is necessary only when *reasonable grounds* for the peril exist¹⁰⁶, otherwise the obligation to grant refuge shall prevail¹⁰⁷.

Therefore, unlike the IMO’s guidelines and the European legislation, the CMI draft-instrument focuses more on the obligation at the basis of the access to places of refuge and on the consequences connected with the possible refusal, rather than on the decision-making process funding the choice by competent authorities to deny the access.

However, it must be argued that:

- (i) Given the obligation to grant access to ships in need of assistance provided for by paragraph 3(a), it is nevertheless necessary to have an assessment of the objective conditions which would justify the refusal. Hence, the *reasonability* of the decision would rely upon a comparison of the risk similar to that one discussed at sections 4.2. and 4.3 or it would be assessed *post factum* by a competent court¹⁰⁸. It means that the difficulty in assessing the risk in practice would be unchanged, but the CMI draft-instrument would formalize the nature of *extrema ratio* for the refusal, favouring the access unless the decision-making process leads to an uncertain or unreasonable result.
- (ii) At LEG 95/10¹⁰⁹, the IMO Legal Committee restated the predominant opinion of its delegations in << no need for a new convention at this point in time >>¹¹⁰. Moreover, it points out how several delegations considered the CMI draft-instrument as not complying with States’ sovereignty under the LOSC, as well as << it might unduly interfere with the right of coastal States to deal with incidents on a case-by-case basis >>¹¹¹. Therefore, <<

¹⁰⁶ *Id.*, Option 1, para. 3(b); Option 2, para. 3(b); Option 3, para. 3(b)(i).

¹⁰⁷ *Id.*, para. 3(a).

¹⁰⁸ *Id.*, para. 6.

¹⁰⁹ LEG 95/10, para. 9(a), pp. 24-25.

¹¹⁰ *Id.*, para. 9(a)(4).

¹¹¹ *Id.*, para. 9(a)(6).

[t]he Committee decided not to develop a binding instrument on places of refuge at this stage >>¹¹².

In the IAPH opinion, the reason for the CMI draft-instrument failure is that << it does not provide the coastal States with sufficient incentives to balance the increased benefits accorded shipping interests >>¹¹³.

Therefore, it may be argued that a reformulation of the draft-instrument proposed by CMI, through the inclusion of incentives (in terms of liability, insurance and compensation) for coastal states aimed to balance their sovereignty's restriction caused by the obligation ex paragraph 3(a) above, might overcome the reluctance of states in adopting an *ad hoc* global and legally binding instrument on places of refuge.

¹¹² *Id.*, para. 9(a)(7).

¹¹³ F. van Zoelen, "An Instrument on Places of Refuge from a Ports' perspective" CMI Yearbook 2009 Part II, CMI, Antwerp, 2009 (CMI, 2009) 181, 182 in IAPH report, *Places of Refuge from a Port's Perspective*, p. 7 (<http://www.iaphworldports.org/iaph/wp-content/uploads/2015/06/PLACES-OF-REFUGE-for-IAPH-website.pdf>).

4.5 - Conclusions

What is the role played by the decision-making process carried out by the competent authorities of coastal states in granting refuge to vessels in peril at sea?

Decision-making of coastal states in granting refuge to vessels in need of assistance shall be done on a case-by-case basis. The absence of a global, comprehensive and legally binding instrument regulating the coastal state's decision-making excludes the possibility to achieve any univocal solution. Few doubts exist that when the safety of life is threatened a qualified *right of access* applies, but the same cannot be argued for the residual circumstances, such as when the vessel is not technically in distress or *force majeure*, but it is “only” in *need of assistance*.

In this case, the coastal state (or a competent authority), through its decision-making process, plays a primary role in determining whether or not to grant the access of a foreign vessel to its port. Such decision-making is funded on a specific assessment of a number of factors – social, environmental, economical, natural – which are necessary to evaluate the risk connected with the decision to grant or deny the access. In the end, the comparison of the risk helps to reach a final and balanced solution. Thus, the right of refusal by the port state operates as *extrema ratio* when it is necessary to safeguard the self-help of coastal states, otherwise when no risk exists access should be presumably granted¹¹⁴.

The IMO's guidelines and the EU operational guidelines examined above are thought to lead coastal states in their decision-making, but they do not offer any practical support. *In primis*, because beyond the contribution of the EU operational guidelines (by virtue of the 2016 Joint Statement) they are not legally binding instruments. And, in any case, the EU guidelines do not work on a global level. *In secundis*, they only set out specific procedures which coastal states are encouraged to follow in order to ensure a *good* decision-making, but they do not obligate coastal states to grant the access or to refuse refuge when certain conditions occur. They only suggest (or obligate) states to take into account several elements for their decision-making, but *de facto* those same states keep a strong discretionary power.

The CMI's draft-instrument, if it had been adopted, would have represented a cornerstone for the development of the matter and this because *inter alia* it provides a specific *obligation* to grant refuge to ships in need of assistance, which would apply also beyond any risk to human life. Nevertheless, the majority of delegations at IMO Legal Committee excluded the need, at least at the present moment, to adopt any new legal instrument.

¹¹⁴ R. Barnes, *Refugee Law at Sea*, International and Comparative Law Quarterly, vol. 53, n.1, 2004, p. 60.

CHAPTER 5: THE RISK OF TRANSBOUNDARY HARM IN THE CONTEXT OF REQUESTS FOR ACCESS TO PORTS OR PLACES OF REFUGE

5.1 - Introduction

It was stressed in the earlier chapters that when the safety of life on board is endangered and the vessel is in distress or *force majeure*, a qualified right of access to ports of refuge applies. The same cannot be necessarily argued when human life is not threatened and this because the definition of *ship in need of assistance* excludes any humanitarian implications arising from an event of emergency at sea¹¹⁵.

The role played by decision-making is significantly changed. As observed in sections 4.2, 4.3 and 4.4, the *environment* is one of the elements funding the analysis of the risk at the basis of the decision-making process. According to what examined in the IMO's guidelines, the EU legislation and the CMI's draft-instrument, the risk posed by a vessel seeking refuge to the coastal state's environment might justify the refusal by coastal state to grant shelter. It is legitimized by the interest of coastal states to protect their environment, but also by their *duty* to do so.

Indeed, the duty to protect and preserve the marine environment is formally stated in art. 192 LOSC, as well as it shall be considered as customary international law¹¹⁶.

One of the conditions to protect and preserve the marine environment is not to cause damage to other states' environment or any other areas beyond the national jurisdiction of states through activities under their jurisdiction or control. This specific limitation is known as the duty not to cause transboundary damage.

Since the 1941 *Trail Smelter* arbitration, the duty for a state to make use of its own territory without causing any transboundary damage was proclaimed as customary law by means of the *sic utere tuo ut alienum non laedas* principle¹¹⁷.

The same duty was thereafter restated by other important international judicial decisions¹¹⁸, as well as it was formally included within Part XII of the LOSC at art. 194(2) LOSC, thus to encompass any

¹¹⁵ Except for the broad definition at para.1(b) of the CMI's draft-instrument.

¹¹⁶ D.R. Rothwell and T. Stephens, *op.cit.*, 475; R. Warner, P. Verlaan and G. Lugten, *An Ecosystem Approach to Management of Seamounts in the Southern Indian Ocean*, Vol. 3, IUCN, Gland, 2012, pp. 8-9.

¹¹⁷ The Trail Smelter Arbitration Case (United States Vs Canada) 1941, U.N. Rep. Int'l Arb. Awards 1905 (1949).

¹¹⁸ *Inter alia*, the *Advisory Opinion concerning Legality of the Threat or Use of Nuclear Weapons* (1996), ICJ Reports 1996, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (1997), ICJ Reports 1997, p. 41, para. 53; in Y. Tanaka, *The International Law of the Sea*, *op.cit.*, p. 260, notes 27 and 28.

source of pollution arising from activities under the jurisdiction or control of states which might spread << beyond the areas where they exercise sovereign rights [...] >>.

Article 194(2) shall be read in accordance with art. 195 LOSC, which sets out an important obligation to not transfer damage or hazards:

<< In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another >>.

Art. 195 LOSC is mandatory only for the parties of the LOSC, but there is no doubt that its legal content is part of the broader duty to do not cause transboundary damage, which, as stressed before, is currently accepted as customary international law.

Therefore, given that the duty to protect and preserve the marine environment may justify the coastal state's decision to deny refuge to a ship in need of assistance, might the duty to do not cause transboundary damage and, more specifically, the duty to do not transfer damage or hazards, influences the decision-making process in the opposite direction, so to grant the access to ports of refuge to those same vessels¹¹⁹?

Three different elements shall be discussed hereinafter for the purpose of answering the legal question set out above: (i) the terminology used by art. 195 LOSC; (ii) whether and how the same duty is implemented by the instruments examined in sections 4.2, 4.3 and 4.4; (iii) how art. 195 LOSC should be interpreted by virtue of the other provisions of the 1982 Convention.

5.2 – Meaning of art. 195 LOSC

It is clear that art. 195 LOSC was thought to avoid that states in protecting and preserving their marine environment acted so to transfer damage or hazards to other states or to maritime areas beyond their national jurisdiction.

Nevertheless, the terminology used by art. 195 LOSC leaves some room for discussion.

In primis, art. 195 LOSC verbatim denies only the transfer of damage and hazards and not also the transfer of the *risk* relating to such a damage or hazards. It means that *de jure* the same provision would not apply when, for instance, a ship seeking refuge is towed away from a coastal state by virtue

¹¹⁹ The question has been inspired by a brief consideration made by Tanaka (Y. Tanaka, *ibid.*, pp. 82-83) concerning the possible connection between art. 195 LOSC and the right of entry into foreign ports by vessels in distress.

of the sole risk to the environment posed by its cargo or by its distress condition. Although, the definition of pollution of the marine environment at art. 1(1)(4) LOSC expressly refers also to the introduction into the marine environment of substances or energy which are << likely to result >> in certain deleterious effects.

In secundis, the provision refers to that transfer of damage or hazards << from one area to another >>. The formulation used by this provision is ambiguous. On the one hand, the utilization of the term << area >> in lieu of << state >> suggests to extend the application of art. 195 LOSC to any areas, thus also those different areas lying under the national jurisdiction of the same state. Therefore, the transfer of damage or hazards from the internal waters to the territorial sea of a coastal state would not exclude the application of art. 195 LOSC. On the other hand, it seems reasonable to believe that the rationale of art. 195 LOSC is inspired by the duty to do not cause transboundary damage which implies the transnationality of the transfer.

Furthermore, the LOSC does not give any definition of << transfer >> which may help to determine its specific meaning.

According to Nordquist, Rosenne and Grandy << [...] no interpretative appears on the record for key words such as “transfer” [...] The word “transfer” implies physical movement from place to place [...] >>¹²⁰.

The LOSC uses the same term also at art. 244(2), with regard to the << transfer of knowledge >>, involving marine scientific research, and in several provisions¹²¹ of Part XIV of the LOSC, concerning the << transfer of marine technology >>.

In both the aforementioned cases the word << transfer >> means the movement of something (knowledge or technology) from one state to another and not also from different maritime areas under the jurisdiction of the same state. Therefore, for reasons of coherency, it seems reasonable to opt for a narrow interpretation of art. 195 LOSC, relying also upon the transnationality of the transfer.

5.3 – Art. 195 LOSC and international regime on places of refuge

The IMO’s guidelines, the EU legislation and the CMI’s draft-instrument refer to the risk posed to the environment by a vessel in need of assistance. Those instruments consider such a risk as one of

¹²⁰ M.H. Nordquist, S. Rosenne and N. Grandy, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, Vol. IV, Part XII, 2002, p. 72.

¹²¹ Arts. 266(1) and (3), 268(c), 269(a) and (c), 270, 271, 272, 273, 276(1), 277(d).

the factors composing the decision-making process of coastal states. When the coastal state's environment is in peril, the refuge might be denied.

Different attention is reserved by the three aforementioned instruments to the effects that the refusal would produce to the environment of another state or the marine environment and its biodiversity in areas beyond national jurisdiction (ABNJ).

The IMO's guidelines at para. 3.11 sets out that the comparison of the risk should also include an << evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring States >>.

The EU guidelines at para. 5.2 literally reproduces para. 3.11 of the IMO's guidelines, with regard to the comparison of the risk. Furthermore, at para. 6.1.4 they refer to << passage plan[s] >> which shall be drawn by member states to avoid any damage to neighbouring states resulting from the transfer of the ship in need of assistance to a designated place of refuge.

The CMI's draft-instrument refers at para. 5 to the possible effects of the refusal, but only in terms of liability and compensation which may arise on neighbouring states when the << refusal of access is unreasonable >>.

The provisions observed above suggest that coastal states should not disregard the effects on neighbouring states caused by their decision to deny refuge. Whilst they do not obligate coastal states to grant shelter when the damage is likely to affect another state, as well as they only refer to << neighbouring States >> and not also to maritime areas beyond the national jurisdiction. Nevertheless, it must be once again reminded that, at the present moment, only the EU legislation has a binding (but not global) legal status.

5.4 – Duty not to transfer damage or hazards and art. 225 LOSC

Art. 225 LOSC states that:

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

According to art. 235(1) and (2) LOSC, states shall fulfil their international obligations involving the protection and preservation of the marine environment or they will be liable for any damage caused

by their violation, as well as they shall ensure a << prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment>>. Furthermore, art. 304 LOSC includes the “Responsibility and liability for damage” within the *General Provisions* of the same Convention.

Art. 225 LOSC belongs to Part XII, Section 7, which encompasses a number of “safeguards” states parties shall adopt when they decide to exercise enforcement jurisdiction against a foreign vessel. Nevertheless, the scope of art. 225 LOSC seems to be not limited only to those powers of enforcement relating to the “protection and preservation of the marine environment” - pursuant to Part XII, Section 6 - but also to the other enforcement powers exercised << under this Convention >>, such as those enforcement measures pursuant to art. 25(2) LOSC.

Furthermore, it is clear how the decision by coastal states to deny the access to their ports to a ship seeking refuge, for the purpose of protecting their marine environment, may *de facto* conflict with art. 225 LOSC where the denial endangers the safety of navigation, creates any hazards to a vessel (not necessarily only to the vessel in emergency at sea) or exposes the marine environment to an unreasonable risk, given that the denial was accompanied by any enforcement measure.

Therefore, a juxtaposition between art. 225 and art. 195 LOSC shows how, although the duty to do not transfer damage or hazards does not cover also the *risk* as such, art. 225 obligates states to refrain from exercise enforcement jurisdiction¹²² against a foreign vessel when it is likely to expose the marine environment in general to an unreasonable risk¹²³.

It follows that the decision of a coastal state to refuse refuge to a ship in need of assistance for the purpose of protecting its marine environment might paradoxically violate several of those provisions set out by the LOSC to safeguard the same marine environment, entailing the application of arts. 235 and 304 LOSC. It seems also endorsed by the formulation of para. 1.17 of the IMO’s guidelines, which, as pointed out in section 4.2, excludes the same guidelines << [...] address the issue of liability and compensation for damage resulting from a decision to grant or deny a ship a place of refuge >>, thus implying that a liability for coastal states might arise from decisions to deny refuge.

¹²² Including *inter alia* the towing of the ship away from the coast or the physical interruption of its navigation towards a port or any other place of refuge.

¹²³ Although no definition of *unreasonable risk* is included within the LOSC or other sources of international law of the sea, the definition of “unreasonable” offered by Applegate is particularly complete: << "Unreasonable" describes an undefined, nonzero level of risk determined on an ad hoc basis by balancing both health considerations and nonhealth concerns such as technology, feasibility, and cost >>. In J.S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, Articles by Maurer Faculty, paper 719, Vol. 91:261, 1991, p. 268.

5.5 – Conclusions

Might the duty to do not cause transboundary harm and, in particular the duty not to transfer damage or hazards, influences the coastal state's decision whether or not to grant refuge?

Under the international law of the sea, states are bound by the duty to protect and preserve the marine environment. It includes the duty to not cause transboundary damage and the duty not to transfer damage or hazards from one area to another. All these general obligations are implemented by the LOSC which reserve the whole Part XII to the “protection and preservation of the marine environment”.

There is no doubt, according to the IMO's guidelines, the EU legislation and the CMI's draft-instrument that the risk posed by a ship in need of assistance to the coastal state's environment can strongly influence the decision by the same state whether to grant or not refuge to such a vessel. The so called *triumvirate of wrecks*¹²⁴ proves it in practice, considering the decision by the coastal states involved to deny refuge to the *Erika*, *Castor* and *Prestige* in order to avoid worst consequences to their marine environment.

Nevertheless, the duty to protect and preserve the marine environment in general, and not just that of the coastal state, may also influence the decision making in an opposite direction.

The three international instruments mentioned above include the effects on neighbouring states produced by the refusal as one of those factors which coastal states (or competent authorities) should assess in carrying out the comparison of the risk at the basis of the decision-making process. Although, except the EU legislation, which has a limited legal scope, those instruments are not mandatory to states.

On the other hand, the LOSC also obligates coastal states to do not use enforcement measures against foreign vessels seeking refuge into ports, when the refusal is likely to cause an unreasonable risk to the marine environment (in areas under and beyond the national jurisdiction of states) or when the refusal would directly or indirectly transfer the damage to another state. Otherwise, the coastal state would be liable for the loss caused by the non-fulfilment of those obligations concerning the protection and preservation of the marine environment.

¹²⁴ See 4.1.

Therefore, by virtue of what stressed above, it is possible to conclude that the duty to do not cause a transboundary damage and, in particular, the duty not to transfer damage or hazards from one area to another (interpreted in terms of transboundary nature of the harm) are able to influence the decision-making of coastal states, thus to obligate those same states to grant the access (or at least to do not exercise enforcement measures to avoid it) when the consequences at arts. 195 and 225 LOSC would otherwise occur.

CHAPTER 6: CONCLUSIONS

Have coastal states any obligation, under the international law of the sea, to grant refuge to ships in peril at sea?

No doubts exist that under the international law of the sea and according to the prominent jurisprudence of international courts and tribunals, coastal states have territorial sovereignty over their ports and internal waters, which includes the right of states to deny the access to their ports or to subject it to specific technical or financial conditions. There is not any international provision which formally obligates states to grant access to their ports to foreign vessels. Only art. 2 of the 1923 Statute of the Convention on the International Régime of Maritime Ports formally refers to a *freedom of access* to ports, but it is not *lex lata*, it has been ratified only by a low number of states, as well as it only sets out an equal treatment's regime between its signatory parties.

However, when a vessel in distress or *force majeure* attempts to access a foreign port to seek shelter some exceptions apply. Usually, they involve the immunity from violations committed by the same vessel, but they may also extend to a qualified-right of entry into foreign ports when the entry is necessary to protect human life of people on board. Such a qualified right has not any conventional basis, but its status as international customary law is historically endorsed by a multitude of legal sources.

Nevertheless, since the late 20th century the scope of the rule significantly changed with a consequent modification of the role played by coastal states in deciding whether or not to grant refuge to foreign vessels. It brought to a clearer juridical separation between cases where the safety of life is involved (and the qualified right applies) and cases where no risk to human life exists (and the discretionary power of coastal states prevails). However, the absence of any global, legally binding instrument providing rules and responsibilities to coastal states in carrying out their decision-making process, *de facto* establish a broad discretionary power to coastal states. It is clear also by virtue of the need to assess the risks in practice, on a case-by-case basis, although, as pointed out in the *M/V Toledo judgment*, when the risk for the state is << potentially grater >> than that one for the vessel and the human life is not in danger, the refuge should be denied.

An attempt was made by the CMI to introduce a comprehensive legal instrument to regulate the access to ports/places of refuge, as well as to introduce specific rules on liability and compensation for states resulting from the decision to grant or not refuge, but the majority of states showed itself still too

reluctant to adopt a global instrument which would significantly affect the sovereignty of coastal states.

Nevertheless, whilst the LOSC does not offer any concrete legal basis for the access into ports of vessel seeking refuge or for the regulation of the decision-making process carried out by coastal states, it offers the basis for distinguishing *good* decision-making from *bad* decision-making, at least when refuge is denied without taking into account its transboundary effects on neighbouring states and ABNJ. The combination of arts. 195, 225, 235 and 304 LOSC shows how the 1982 Convention indirectly (but concretely) influences the decision-making process of coastal states, even when the safety of life is not involved.

In conclusion, in general, an obligation to states to grant refuge into their ports to vessels in peril at sea exists, under the international law of the sea. It is a qualified/non-absolute obligation, for the reasons stressed above, but it prevails as *extrema ratio* when no other way exists to safeguard human life or when the denial would produce several transboundary consequences. As well as, it seems reasonable to believe, given the poor condition of a vessel seeking refuge, that in any case an obligation arises also when no reasons to deny refuge exist, thus when the access to port in distress, *force majeure* or in need of assistance does not conflict with a higher interest of self-help of coastal states.

Nevertheless, it does not mean that a global and comprehensive instrument, similar to that one proposed by the CMI, would not be eventually necessary. As observed by IAPH, the opposition by states to introduce such an instrument, which would formally affect their territorial sovereignty, might be won through the stipulation of incentives for coastal states – chiefly in terms of compensation and liability – for the purpose of balancing their sovereignty's restriction following from the introduction of a formal obligation to grant refuge to vessels in distress.

Annex I

List of Acronyms and Abbreviations

ABNJ = Areas Beyond National Jurisdiction

AWNJ = Areas Under National Jurisdiction

CDEM Standards = Construction, Design, Equipment and Manning Standards

CMI = Comité Maritime International

EC = European Community

EEZ = Exclusive Economic Zone

EMSA = European Maritime Safety Agency

EU = European Union

FAO = Food and Agriculture Organization

UNFSA = Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

IAMSAR Manual = International Aeronautical and Maritime Search and Rescue Manual

IAPH = International Association of Ports and Harbors

ICJ = International Court of Justice

ILC = International Law Commission

ILO = International Labour Organization

IMO = International Maritime Organization

IMUI = International Maritime Union Insurance

IUU Fishing = Illegal, Unreported and Unregulated Fishing

LEG = Legal Committee (IMO)

LOSC = United Nations Convention on the Law of the Sea

MARPOL = International Convention for the Prevention of Pollution from Ships

MSC = Maritime Safety Committee (IMO)

PSM Agreement = Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

Salvage Convention = International Convention on Salvage

SAR Convention = International Convention on Maritime Search and Rescue

SCOPIC = Special Compensation Protection and Indemnity Clause

SOLAS = International Convention for the Safety of Life at Sea

TFEU = Consolidated Version of the Treaty on the Functioning of the European Union

UNCTAD = United Nations Conference on Trade and Development

VCLT = Vienna Convention on the Law of Treaties

VTMIS = Vessel Traffic Monitoring and Information System

Annex II

List of international instruments¹²⁵

1923 – Maritime Ports Convention: Convention on the International Regime of Maritime Ports, Geneva, 9 December 1923. In force 26 July 1926; 58 *League of Nations Treaty Series* 285 (1926-1927).

1945 – Statute of the International Court of Justice: Annex to the 1945 Charter of the United Nations, San Francisco, 26 June 1945. In force 24 October 1945, 3 Bevens 1179.

1969 – Vienna Convention: Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. In force 27 January 1980, 1155 United Nations Treaty Series 331; <www.un.org/law/ilc>.

1973 – MARPOL 73/78: International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, as modified by the 1978 Protocol (London, 1 June 1978) and the 1997 Protocol (London, 26 September 1997) and as regularly amended. Entry into force varies for each Annex. At the time of writing Annexes I-VI were all in force.

1974 – SOLAS 74: International Convention for the Safety of Life at Sea, London, 1 November 1974. In force 25 May 1980; 1184 United Nations Treaty Series 277 (1980), with protocols and regularly amended.

1979 – SAR Convention: International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979. In force 22 June 1985; 1405 United Nations Treaty Series 118, as amended.

1982 – LOSC: United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *UNTS* 396; <www.un.org/Depts/los>.

1989 – Salvage Convention: International Convention on Salvage, London, 28 April 1989. In force 14 July 1996; 1953 *UNTS* 194.

1995 – Fish Stocks Agreement: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and

¹²⁵ A special thanks to my supervisor, Professor Erik J. Moleenar, for giving me the opportunity to take advantage of his magnificent table of instruments.

Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; <www.un.org/Depts/los>.

2007 – IAMSAR Manual: International Aeronautical and Maritime Search and Rescue Manual (Volumes I, II and III). First edition, London, 1998, amended in 2015 and entered into force on 1 July 2016. <<http://dcaa.trafikstyrelsen.dk:8000/icaodocs/Doc%209731%20-%20AN%20958/DOC%209731%20IAMSAR%20Manual%20Volume%201,%20Organisation%20and%20Management%20-%202008%20Edition.pdf>>.

2008 – TFEU: Consolidated Version of the Treaty on the Functioning of the European Union, Lisbon, 13 December 2007. In force 9 May 2008. O.J. C 115/47.

2009 – PSM Agreement: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; <www.un.org/Depts/los>.

Case-law

1853 – *Creole case* (Case of the Creole v. Great Britain, decision of the Umpire, Mr. Bates), IA Moore, Moore's Digest, 1906, Vol. 2, p. 352.

1928 - *The Island of Palmas Case* (United States v. Netherlands), Permanent Court of Arbitration (PCA), II RIAA 829.

1949 - *The Trail Smelter Arbitration* (United States Vs Canada), U.N. Rep. Int'l Arb. Awards 1905.

1951 - *Fisheries Case* (United Kingdom v. Norway), 1951 I.C.J. 117.

1963 - *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, 27 I.L.R. 117.

1986 - *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 1986 I.C.J. 14.

1991 – *The M/V Frontier*, Supreme Court, St. Helena, Case No 12, 1991.

1992 - *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J. Reports 351.

1995 - *ACT Shipping (PTE) Ltd. v. Minister for the Marine, Ireland and the Attorney General (The MV Toledo)*, 2 I.L.R.M. 30.

1996 - *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226.

1997 - *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. 7.

National law

1942 – Codice della Navigazione (Italy).

1985 - Malaysian Fisheries Act (Malaysia).

1985 - South African Marine Traffic Regulations (South Africa).

1991 - Australian Fisheries Management Act (Australia).

2010 - Code des Transports (France).

2012 - Code of Maritime Ports (France).

Other instruments

1836 - Treaty of Peace, Friendship, Navigation and Commerce between the United States of America and Venezuela.

1849 - Treaty of Peace, Amity, Commerce and Navigation between Guatemala and the United States.

2001 - Draft Articles on Responsibility of States for International Wrongful Acts, with commentaries of the International Law Commission (ILC).

2001 - Draft Articles on Responsibility of States for International Wrongful Acts.

2002 - Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community Vessel Traffic Monitoring and Information System and Repealing Council Directive 93/75/EEC.

2003 – IMO Guidelines on Places of Refuge for Ships in Need of Assistance. IMO Res. A.949(23), 5 December 2003.

2008 – CMI Draft Instrument on Places of Refuge. 17 October 2008.

2009 - Directive 2009/17/EC amending Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community Vessel Traffic Monitoring and Information System and Repealing Council Directive 93/75/EEC.

2015 – EU Operational Guidelines on Places of Refuge. 13 November 2015.

2016 - Joint Declaration on the EU Operational Guidelines on Places of Refuge, 27 January 2016.

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