

UNIVERSITY OF CAPE TOWN

LLM DISSERTATION

Not in my backyard: The obligation to grant places of refuge to ships in need of assistance.

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Abstract

Oceans cover 70% of the world's surface and are a source of 90% of the world's biomass. Oceans provide the world's populations with food and facilitate international trade in goods. The shipping industry is a notable source (although not leading source) of marine pollution both from operational discharges and maritime incidents. With a vast number of ships navigating the world's oceans the impact of maritime incidents, especially of bulk carriers of oil, on the marine environment can be devastating.

Ships which become distressed often attempt to find a 'place of refuge', being a nearby port or a sheltered area within the territorial waters of a nearby coastal state. Traditionally these ships in distress had the customary law right of entry into port in order to ensure that persons on board could be saved. This position seems to have changed in the modern age. With the advancement of modern technology persons on board can be saved without bringing the distressed ship into port. In addition, these ships in distress present a serious risk to the marine environment within the waters of the coastal state. Coastal state practice seems to indicate that coastal states prioritise the preservation of their own sovereign waters over the needs of the particular ship in distress, especially where there is no risk to human life. It would seem that the traditional customary law rights of ships in distress do not apply to circumstances where there is no risk to the persons on board and where there is only a risk to the marine environment. These ships are now commonly called ships in need of assistance and are differentiated from ships in distress due to the fact that the risk is one to the marine environment and not to human life.

The result of the refusing places of refuge creates the problem of ships in need of assistance as such ships proceed to beg for entry from other nearby coastal states usually being refused along the way. Through the discussion of notable maritime incidents of this nature it will be shown that such refusal of entry by coastal states into a place of refuge is a leading factor that increases the

probability of a maritime incident occurring and thereby increasing the likelihood of damage to the marine environment.

The concept of state sovereignty has been utilised as a justification for coastal states refusing entry into a place of refuge. This dissertation will discuss the concept of coastal state sovereignty paying particular attention to the legislative and enforcement rights of coastal states in the regulation of pollution and the protection of the marine environment. The international community has long since recognised that the protection of the marine environment is a general state duty and a principle of international customary law. The duty to protect and preserve the marine environment guides, informs and restricts coastal state action. This dissertation analyses the relationship between sovereignty and the duty to protect the marine environment in the context of ships in need of assistance in modern international law.

This dissertation seeks to conclude with an overall analysis of the current customary and modern international law rights of ships in need of assistance in order to determine whether coastal states are obliged to grant places of refuge. The IMO Guidelines will be discussed to analyse whether same add any value to the problem of ships in need of assistance and to what end such guidelines indicate further development on this issue.

List of Acronyms

UNCLOS	The United Nations Convention on the Law of the Sea 1982
IMO	International Maritime Organisation
ICJ	International Court of Justice
CDEM	Construction Design Engineering and Manning
OPRC	International Convention on Oil Pollution Preparedness, Response and Co-operation opened for signature on 30 November 1990

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Chapter 1: Introduction

Where a ship is in a situation of distress and poses a risk to the marine environment, say, through the discharge of oil, it is stated that the best way of preventing such environmental pollution is for that ship to navigate, if possible, into a sheltered area.¹ These sheltered areas are usually within the territorial waters of a particular coastal state or that coastal state's port. These sheltered areas have come to be known as places of refuge. The purpose of a place of refuge is to allow the ship an opportunity to take necessary actions to stabilise its condition and conduct repairs. It has been recognised that "the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel's condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard".² Affording a ship a place of refuge reduces the hazards to navigation and the likelihood of environmental pollution.³

Carriage of goods by sea, particularly bulk carriage of oil and related petroleum substances, is a risky business. Notwithstanding the advances in navigation and satellite technology many casualties still occur at sea. Shipping accidents cannot be eliminated.⁴ Shipping accidents may result in the loss of human life and participation in the shipping industry is regarded as a dangerous profession. This is evident in the fatality rate of seafarers which is twelve times higher than in the general workforce.⁵

Even though shipping losses have decreased significantly from 1 ship per 100 per year in 1912 to 1 ship per 670 per year in 2009, catastrophic accidents such

¹ Timagenis G "Place of refuge as a legislative problem" 2003 *CMI Yearbook* 376.

² IMO Assembly, 23rd session, Resolution A949 (23) *Guidelines on Places of Refuge for ships in Need of Assistance* adopted on 5 December 2003, Annex, Article 1.19 (IMO Guidelines).

³ IMO Guidelines Article 1.19.

⁴ Ceyhun G "The Impact of Shipping Accidents on Marine Environment: A Study of Turkish Seas" 2014 (10) *European Scientific Journal* 1; Akten N "Shipping accidents: a serious threat for marine environment" 2006 (12) *Journal of the Black Sea Mediterranean Environment* 269.

⁵ Allianz Global Corporate & Specialty AG & Cardiff University "Safety and Shipping 1912-2012 From the Titanic to the Costa Concordia" (2012) unpublished paper by Allianz Global Corporate & Specialty AG 2.

as the sinking of the *Prestige* tanker near the coast of Galicia (Spain) illustrate the dire consequences such accidents can have on the marine environment.⁶

The effects of oil spills may result in the loss of key organisms from an environmental community, increases in chemical toxicity giving rise to lethal effects and the loss of habitat or shelter and the consequent elimination of ecologically important species.⁷ Such pollution likewise impacts the lives of people living nearby and more particularly those persons whose livelihoods depend on harvesting resources from the sea.

Ships have historically been afforded right of entry into ports or any other waters which they are closest to in order to be able to “ride out a storm or undertake repairs before continuing a voyage”.⁸ However recent state practice illustrates that coastal states are now generally reluctant to allow ships in distress into their territorial waters or ports for fear of the potential pollution that might result.⁹ This recent state practice seems to be a change to the long accepted international customary law rule which saw requests for refuge very rarely being refused.¹⁰ The reluctance to grant a place of refuge is primarily driven by the prioritisation of that coastal state’s interests in protecting its own marine environment, over the interests of the ship seeking refuge. Whilst granting a place of refuge to a ship in distress may reduce the likelihood and extent of pollution, such risk cannot fully be mitigated. There is therefore a chance that notwithstanding the place of refuge being granted, a pollution incident may occur. This explains the perceived reluctance to grant a place of refuge.

⁶ Fields *Safety and Shipping 1912-2012 From the Titanic to the Costa Concordia* 2.

⁷ Ceyhun 2014 *European Scientific Journal* 1.

⁸ Chircop A “Ships in distress, Environmental threats to Coastal States, and Places of refuge: new directions for an ancient regime?” 2002 (33) *Ocean Development & International Law* 208.

⁹ Examples of refusals taken from Morrison A *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* (2012) Martinus Nijhoff Publishers The Netherlands 15 and include the following: *Urquiola* (1978), *Christos Bitas* (1978), *Andros Patria* (1978), *Atlantic Express* (1979). Also See Nordquist M *International Law Governing Places of Refuge for Tankers Threatening pollution of Coastal Environments in Law of the Sea, Environmental Law and Settlement of Disputes* Martinus Nijhoff 2007 505-519.

¹⁰ Chircop 2002 *Ocean Development & International law* 208.

Recent state practice seems to evidence a “not in my backyard” approach to providing places of refuge to ships in distress where there is an environmental risk.¹¹ Where coastal states refuse entry into places of refuge, these ships in distress are obliged to move to the next closest state and ‘beg for entry’, all the while increasing the likelihood and severity of a pollution incident.¹² In this context, these ships have been called “leper ships”.¹³

The debate around the perceived change in state practice in granting places of refuge is an important one and there are a number of examples of requests for refuge by ships in distress being refused by coastal states.¹⁴ There have been three notable maritime incidents since 1999 concerning this issue.¹⁵ These were the incidents of the *Erika*, the *Castor* and the *Prestige*. All three were involved in maritime incidents, all had requested a place of refuge and had that request refused.¹⁶

As will be clear from an analysis of the facts and consequences of the above three examples, there is a distinct conflict and competition between the rights of the ship (ship owners) and the rights of the coastal state. As it stands, modern state practice seems to indicate that coastal states prioritise their own interests above that of the ships.

As mentioned above, historic international customary law shows that ships in distress had a right to seek refuge within the sovereign waters of state. Likewise, there was a correlating duty on the coastal state to receive these ships and provide certain immunities from the governing law.¹⁷ The reluctance to grant places of refuge for ships in distress signifies a possible change in *opinio juris*.

¹¹ Chircop 2002 *Ocean Development & International law* 207.

¹² Ibid 208.

¹³ Ibid.

¹⁴ See footnote 9 for further examples.

¹⁵ Other examples include the *Napoli* in 2007, the *Stolt Valor* in 2012 and the *Flaminia* in 2012.

¹⁶ Chircop 2002 *Ocean Development & International law* 207; Frank V “Consequences of the *Prestige* Sinking for European and International Law” 2005 (20) *International Journal of Marine and Coastal Law* 1.

¹⁷ Chircop A “Living with Ships in Distress – a new IMO Decision – Making Framework for the Requesting and Granting of Refuge” 2004 (3) *World Maritime University Journal of Maritime Affairs* 31-33.

The predominant source of rules pertaining to the Law of the Sea is the United Nations Convention of the Law of the Sea (UNCLOS).¹⁸ UNCLOS represents, to a large degree, a codification of the law of the sea and is seen to be accepted by the international community as representing international customary law.¹⁹ UNCLOS would therefore be fundamental starting point in determining whether there is an established right for a ship in distress to be granted a place of refuge. That being said, it is notable that there is no express general international law obligation on a coastal state, outside of specific treaty law, compelling the assistance of ships in distress outside of the rescue of crew.²⁰

The current state practice seems to indicate that states enjoy the benefit of not being legally obliged to grant ships in distress a place of refuge within their sovereign waters where there is no risk to human life. Aside from some moral consciousness these states seemingly bear no responsibility for the consequences of their refusal. This state practice seems to flow from the concept of sovereignty and the fact, as is argued by coastal states, states enjoy the authority to make and enforce their own laws and political agenda within their sovereign waters.²¹ This is the context within which this dissertation seeks to explore the question of whether coastal states are obliged in terms of current international law to grant places of refuge to ships in distress.

Chapter 2 of this dissertation will begin with a discussion of the concepts of ships in distress and places of refuge taking cognisance of the development of these concepts. Particular emphasis will be on the competing interests between coastal states and the interests of the ship to seek refuge in order to introduce and discuss the problem of ships in distress.

Chapter 3 will discuss the nature and extent of coastal state sovereignty within the internal and territorial waters in so far as the prevention of pollution is

¹⁸ The United Nations Convention on the Law of the Sea 1982 opened for signature 10 December 1982, 1833 UNTS (entered into force 16 November 1994).

¹⁹ Tanaka Y *The International Law of the Sea* (2012) Cambridge University Press United Kingdom 264.

²⁰ *MV Toledo (ACT Shipping (OTE) Ltd v Minister for the Marine, Ireland and the Attorney-General* 1995 2 ILRM.

²¹ Tanaka *The International Law of the Sea* 17.

concerned. The purpose of this chapter is to analyse the legislative and enforcement rights and duties of coastal states in the prevention, reduction and control of pollution of the marine environment. This analysis will be in terms of UNCLOS and other applicable International Conventions with the inclusion of other provisions of international law. The duty on states to protect the marine environment will thereafter be discussed and placed in the context of the problem ships in distress and the previous discussions of sovereignty.

Chapter 4 will discuss whether coastal states are obliged to grant places of refuge to ships in distress where there is a risk to the environment. This discussion will be placed in the context of the coastal states' rights and obligations relative to the prevention, reduction and control of marine pollution. The IMO Guidelines will be discussed to analyse whether same add any value to the topic being discussed and to what end such guidelines indicate further development on this issue.

Chapter 5 will conclude with a summary of the current status of international law and whether there in fact is an obligation on coastal states to provide a place of refuge to ships in distress. Recommendations on the way forward will be finally proposed.

Chapter 2: Ships in distress and places of refuge

2.1 Introduction

This chapter begins a discussion of the concepts of 'ships in distress' and 'places of refuge'. This chapter seeks to highlight the development of the concept of 'ships in distress' to that of 'ships in need of assistance' and set out the change in the traditional rights of refuge afforded to such ships. This chapter thereafter sets out the current issues relating to ships in need of assistance and the identification of the various and often competing interests involved and how these interests have influenced the development of the above concepts.

2.2 Ships in Distress / in Need of Assistance

No matter how prepared, skilled and diligent seafarers conduct themselves in the navigation of the world's oceans, accidents will always happen.²² It is a matter of fact that ships do find themselves in situations of distress or difficulty where external assistance is needed in order to rescue the persons on board, to secure the vessel or to safeguard the cargo. Broadly speaking, these ships are called 'ships in distress'.

In light of the imminent danger caused by situations of distress, International law applies particular rules as to what constitutes distress and to what end, as is discussed further on in this dissertation, the particular ship may be granted immunity from liability in respect of breaching local coastal state laws.²³

The *Eleanor Case* is regarded a classic example of where the court analysed the concept of distress.²⁴ Lord Stowell set out four criteria for proving distress in the 1809 *Eleanor Case*.²⁵ Firstly the distress must be urgent and something of

²² Timagenis *CMI Yearbook 2003* 376.

²³ Tanaka *The International Law of the Sea* 264.

²⁴ The *Eleanor Case* 1809 165 English Reports 1068.

²⁵ *Ibid.*

grave necessity. Secondly there must at least be a moral necessity. Thirdly it must not be a distress which is self-created. Fourth, the distress must be proved by the claimant in a clear and satisfactory manner.²⁶ Lord Stowell held that “irresistible distress must at times be a sufficient passport for human beings” into a place of refuge.²⁷ The focus of the notion of distress and the formulation of the requirements was to save the lives of the persons on board.²⁸

There has however been some development of the concept of distress. It is recognised that distress could include risk to the marine environment. This is supported by the 1995 *Toledo Case* which accepted that it was modern practice in international law to distinguish between circumstances where there is a humanitarian risk (being the safety of the crew) and where the risk is primarily economic (that of the vessel and cargo).²⁹ This differentiation is important in whether there is an obligation on coastal states to grant a place of refuge to that distressed ship. It was held in the 1995 *Toledo Case* that where there is a risk to human life, there is an obligation to grant a place of refuge. However, the Court held that a coastal state may lawfully refuse access if there is no risk to human life and there are reasonable grounds for believing that there is a significant risk of substantial harm to the marine environment.³⁰

Further to the differentiation noted in the *Toledo Case*, the International Maritime Organisation (IMO) has broadened the definition of distress further by introducing the term ‘ships in need of assistance’.³¹ ‘Ships in need of assistance’ are differentiated from ‘ships in distress’ by the fact that there is no risk to the persons on board. The risk is a potential loss of the vessel or cargo giving rise to an environmental or navigational hazard.³² This precise formulation of ‘ships in

²⁶ Tanaka *The International Law of the Sea* 81 quoting *The Eleanor Case* 1809 165 English Reports 1068.

²⁷ *The Eleanor Case* 1809 165 English Reports 1068.

²⁸ D Devine “Ships in Distress – A judicial contribution from the South Atlantic” 1996 (37) *Marine Policy* 229.

²⁹ *MV Toledo (ACT Shipping (OTE) Ltd v Minister for the Marine, Ireland and the Attorney-General* 1995 2 ILRM.

³⁰ *Ibid.*

³¹ IMO Guidelines Article 1.19.

³² IMO Guidelines Article 1.18.

need of assistance' by the IMO is a relatively recent development and is understood in this dissertation to be a subcategory of the broader concept of distress.

The differentiation between ships in distress and ships in need of assistance is important as the concept of ships in need of assistance is a modern development on the traditionally established concept of ships in distress. As will be discussed below, ships in distress were traditionally afforded certain rights and immunities under international customary law. The differentiation is therefore relevant in the analysis of whether the traditional customary law rights afforded to ships in distress are equally afforded to ships in need of assistance.

This dissertation is not intended to deal with the rules applicable to the rescue of persons on board which is largely reflected in the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue.³³ The particular focus of this dissertation is whether there is an obligation on coastal states to offer places of refuge to ships in need of assistance where there is a risk of environmental harm.

2.3 Places of refuge

The term 'place of refuge' is a modern take on a "firmly entrenched and time hallowed" custom where ships in distress were afforded safe havens, sanctuaries and shelter from the elements with the intention to protect the ship and the persons on board.³⁴ Traditionally ships in distress were afforded an exceptional right of shelter in the territorial waters of a coastal as a result of some type of distress or force majeure such as bad weather, crew safety or mutiny.³⁵ These places of refuge were traditionally found within the ports of coastal states and the term 'port of refuge' was generally used in this regard.³⁶

³³ International Convention on Maritime Search and Rescue 1979.

³⁴ D Devine 1996 *Marine Policy* 229; Chircop A & Linden O *Places of refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* (2006) Martinus Nijoff Publishers The Netherlands 1.

³⁵ Chircop 2002 *Ocean Development & International law* 212.

³⁶ Chircop et al *Places of refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* 7.

This was due to the fact that, traditionally, in order to save the persons on board the ship had to be taken into port. As will be discussed below, this is no longer a strict necessity. Accordingly a ship could be granted entry into a bay or some other sheltered area and the persons on board could be airlifted to safety. Places of refuge could therefore be within a port or any other sheltered area within the coastal state's waters. These places of refuge would, due to their locality, generally be found within either the internal (waters landward of the baseline) or territorial waters (within 12 nautical miles from the baseline) of a coastal state.

From an environmental point of view, places of refuge allow for the mitigation of potential marine pollution caused by a maritime incident and are akin to designated reception facilities for pollution control.³⁷ It is stated that ships which are leaking oil (or other pollutants) cause less pollution when such ships are in easily accessible areas as anti-pollution measures can be taken more easily and are therefore more effective.³⁸ The best way to prevent damage from a maritime incident is therefore to ensure that those pollutants remain contained within the ship and the ship remains afloat.³⁹ A place of refuge allows ships in need of assistance to make the necessary repairs or be salvaged under less extreme conditions therefore increasing the likelihood of success and reducing the likelihood of a potential pollution incident. This is what places of refuge are intended to achieve.

2.4 The Traditional Right to Refuge under International Customary Law

Before the development of modern methods of rescuing persons from a ship in distress, the main way of saving persons on board the ship was to ensure that the particular ship itself was saved. In this way the safety of persons on board

³⁷ Timagenis *CMI Yearbook 2003* 376.

³⁸ Ibid.

³⁹ Shaw R "Places of Refuge, International Law in the Making ?" *2003 CMI Yearbook 2003* 329.

was inextricably connected to the safety of the ship itself.⁴⁰ This is the background upon which the above concept developed. The right of entry for ships in distress was primarily focussed on the protection of persons on board and was in that way a predominantly humanitarian focussed concept.⁴¹

It was generally recognised that a ship in distress would have the exceptional right of entry in times of distress as Lord Stowell held in the 1809 *Eleanor Case* that “irresistible distress must at times be a sufficient passport for human beings” into a place of refuge.⁴² The 1995 *Toledo Case* recognised that there was a generally recognised right of refuge for the purposes of saving the lives of the crew and which developed from international customary law over centuries.⁴³

The traditional right of entry would entitle a ship in distress to be allowed entry into a port or sheltered waters in order to attend to repairs, bring on fresh water, resupply and leave the port at its own will.⁴⁴ Importantly, the ship was exempted from the jurisdiction of the coastal state for any offences committed outside the territorial jurisdiction of the coastal state.⁴⁵ These exceptional rights of entry applied to all ships even where the flag state and the coastal state were at war.⁴⁶

Chircop states that there was general acceptance of the above mentioned exceptional rights of entry in time of distress until about 60 years ago when coastal states began to question the exceptional right of entry where the lives of the persons on board were not at risk.⁴⁷ The development of modern rescue methods now meant that the persons on board could be rescued without having to save the ship and bring it into port. This change in attitude is reflected in the

⁴⁰ Chircop 2004 *World Maritime University Journal of Maritime Affairs* 31-33.

⁴¹ D Devine 1996 *Marine Policy* 229.

⁴² The *Eleanor Case* 1809 165 English Reports at 1068.

⁴³ *MV Toledo (ACT Shipping (OTE) Ltd v Minister for the Marine, Ireland and the Attorney-General* 1995 2 ILRM.

⁴⁴ Chircop 2004 *World Maritime University Journal of Maritime Affairs* 31-33.

⁴⁵ Yang H *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006) Springer Berlin 65-67.

⁴⁶ Chircop & Linden *Places of refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* 190-191.

⁴⁷ Chircop 2004 *World Maritime University Journal of Maritime Affairs* 34.

1995 *Toledo Case* which accepted that there is a modern practice of coastal states to distinguish between circumstances where there is a humanitarian risk and where the risk is only in respect of the vessel or cargo.⁴⁸ The *Toledo Case* held that a coastal state may lawfully refuse a request for refuge if there are reasonable grounds for believing that there is a significant risk of substantial harm.⁴⁹

From the analysis of the above it is clear that traditional customary international law was mainly focussed on the protection of human life on board. It is also important to note that the customary law right of entry in times of distress did not contemplate situations where the risk is one of harm to the marine environment and not to human life. As was discussed above the change in terminology from ships in distress to ships in need of assistance reflects this change in the traditional right of refuge. As international customary law did not contemplate ships in need of assistance for the protection of marine environment, further legal bases need to be explored in order to establish whether there is an obligation on coastal states to grant a place of refuge to ships in need of assistance.

2.5 The problem of ships in need of assistance

It has been recognised that “the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel’s condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard”.⁵⁰ The potential hazard could manifest in the loss of the vessel, the cargo, persons on board and could thereafter result in a pollution incident. As stated earlier, the focus of this dissertation is the potential for harm to the marine environment.

⁴⁸ *MV Toledo (ACT Shipping (OTE) Ltd v Minister for the Marine, Ireland and the Attorney-General* 1995 2 ILRM.

⁴⁹ *Ibid.*

⁵⁰ IMO Guidelines Article 1.19 .

Granting a place of refuge to ships in need of assistance can be an essential mitigating factor of the likelihood and extent of pollution from a ship. That being said, the mere granting of this place of refuge cannot guarantee that marine pollution will be totally avoided. It is therefore still possible that there will be a pollution incident within the place of refuge. This therefore places the coastal state in the position where there is a chance that it may suffer harm as a result of allowing a ship in need of assistance to seek refuge within its territorial waters or port. The coastal state therefore assumes a portion of risk when granting a place of refuge to ships in need of assistance. That being said, should a pollution incident occur within a place of refuge the extent of the pollution resultant therefrom may be reduced.⁵¹ The risk of a pollution incident impacts the interests of the coastal state. That being said there are a number of other interested parties involved in the decision whether or not to grant a place of refuge.

There are three broad groups of interests involved: the ship's interests (particularly the owners, salvors, charterers and insurers of the ships) in saving the vessel and cargo, the interests of the coastal state to preserve its own coastlines and the common interest of all other states in the health of the marine environment.⁵²

Persons interested in saving the ship and its cargo are made up of the ship owners, the owners of the cargo, the insurers of the ship (or cargo), the charterers and the crew. This group is primarily driven by economic interests and focussed on ensuring that the vessel and cargo reaches the designated destination in a safe manner. As was discussed above, the chances of saving the ship and the cargo is greatly increased and the risk of pollution (and the consequent possible liability) is minimised if a place of refuge is granted by the

⁵¹ Frank 2005 *The International Journal of Marine and Coastal Law* 3.

⁵² Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 42.

coastal state. This group is therefore very much in favour of the granting of a place of refuge to ships in need of assistance.⁵³

The coastal states, coastal communities, port authorities and national governments are particularly concerned with the preservation of the local marine environment and minimising the effects of pollution.⁵⁴ The consequences of serious pollution could impact the coastal state's fisheries, mariculture, tourism and the general health and wellbeing of those persons living along the coastline. Coastal states are understandably reluctant to grant a place of refuge to ships in need of assistance for fear of compromising their own interests.⁵⁵

Other states, especially neighbouring states, would have an interest in a coastal state granting a place of refuge. Firstly, where the place of refuge is refused the ship in need of assistance will in all likelihood seek refuge from the next nearest coastal state. The refusal by state A would therefore make the ship a problem for state B to deal with. Secondly, where pollution is discharged into the ocean, such pollution can easily spread beyond the territorial waters of state A and into the territorial waters of state B. The transboundary nature of pollution is especially notable in areas such as the Mediterranean where there are many states sharing a particular body of water.⁵⁶ Other coastal states, whether through owning ships or as a flag state, have an interest in the preservation of the global marine environment as a means to generate income through harvesting its resources and as an economical means of transporting goods.

The problem arises where a coastal state's decision is to refuse a place of refuge and prioritise its own interests. This may cause, or significantly contribute to, a pollution incident. Had the coastal state afforded a place of refuge the overall harm suffered may have been reduced. As discussed above recent state practice seems to suggest that coastal states are generally reluctant to grant

⁵³ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 47.

⁵⁴ Ibid.

⁵⁵ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 51.

⁵⁶ See Haas P *Mediterranean: The Politics of International Environmental Cooperation* (1990) Columbia University Press New York for a detailed account of the issues involved.

places of refuge. The *Erika*, the *Castor* and the *Prestige* are all good examples of such reluctance and the resultant negative consequences.

In December 1999, the *Erika* experienced a structural failure and sank in bad weather in the Bay of Biscay resulting in environmental and socioeconomic harm for local French coastal communities.⁵⁷ The 30 884 tons of oil spilled into the sea. Due to the type of substance and the poor weather conditions, the pollution was particularly difficult to contain resulting in the soiling of several hundred kilometres of coastline.⁵⁸ One of the issues raised by the *Erika* accident was whether it should have been given refuge in France despite the local port authority refusing entry and the ship requesting a place of refuge.

In December 2000 the *Castor* was transporting 30 000 tonnes of unleaded gasoline and from Romania to Nigeria when it required salvage in bad weather off the coast of Morocco.⁵⁹ The salvors were refused refuge to safer waters in order to unload the cargo and undertake repairs by seven Mediterranean coastal states.⁶⁰ The stricken ship navigated approximately 1000 miles for over 30 days as a "leper ship" before the cargo could be discharged off the coast of Tunisia and Malta.⁶¹ The *Castor* was then towed to Greece which granted the ship a place of refuge on the condition that the gasoline was offloaded.⁶²

The November 2002 *Prestige* accident was very similar to the *Erika* incident both being older ships and both carrying 'black product' in this case 77 000 tons of Russian heavy fuel oil.⁶³ After initially experiencing difficulties on 13 November 2002 and after airlifting the crew to safety, the ship's Master and salvors attempted to save the ship for six days.⁶⁴ During this time the numerous

⁵⁷ Chircop 2002 *Ocean Development & International Law* 214.

⁵⁸ Permanent Commission of enquiry into accidents at Sea (CPEM) *Report of the Enquiry into the Sinking of the Erika off the Coasts of Brittany on 12 December 1999* 43-52.

⁵⁹ Chircop 2002 *Ocean Development & International Law* 208.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 32.

⁶³ Frank 2005 *The International Journal of Marine and Coastal Law* 3.

⁶⁴ Ibid.

requests for a place of refuge were refused by Spain and Portugal.⁶⁵ On 19 November 2002 the *Prestige* broke in two due to six days of severe weather and sank 133 nautical miles off the northwest coast of Spain.⁶⁶ The sinking of the *Prestige* was the catalyst for change in the area of places of refuge internationally and notably within the European Union.⁶⁷

The *Prestige* accident highlighted the fact that there was a lack of a clear legal regime for dealing with ships in distress.⁶⁸ It further highlighted the absence of a legal duty on coastal states to assist ships in distress by granting a place of refuge.⁶⁹ The general opinion is that if Spain granted a place of refuge to the *Prestige* during the early stages of the accident, the eventual consequences could have been avoided.⁷⁰

2.6 Concluding remarks on ships in need of assistance

From the above Chapter it is submitted that there is still a duty to provide a place of refuge to ships in distress in international customary law where there is a risk to human life. However with the advances of modern technology it is no longer necessary to grant distressed ships a place of refuge in order to save the persons on board. There is therefore an increasing category of ships that are 'in need of assistance' rather than 'in distress' as there is no risk to human life. The focus of this dissertation deals with these ships in need of assistance which also pose a risk to the marine environment and which are increasingly being refused a place of refuge. The question is whether this state practice is in line with the coastal states' obligation to provide places of refuge in international law.

⁶⁵ Frank 2005 *The International Journal of Marine and Coastal Law* 3.

⁶⁶ *Ibid* 3.

⁶⁷ *Ibid* 1.

⁶⁸ *Ibid* 54.

⁶⁹ *Ibid* 11.

⁷⁰ *Ibid* 53.

Chapter 3: The Coastal State's Rights and Duties in Modern International Law

3.1 Introduction

The previous Chapter introduced and discussed the problem of ships in need of assistance and highlighted the competing interests involved. This Chapter will discuss the nature and extent of coastal state sovereignty within both internal and territorial waters in so far as the prevention of pollution is concerned in order to highlight the rights and duties within the two maritime zones. The duty on states to protect the marine environment will thereafter be discussed as a factor that limits sovereignty and placed in the context of the problem ships in need of assistance. This Chapter will conclude with a discussion as to whether the exercise of sovereignty in refusing to grant a place of refuge is commensurate with a coastal state's duty to protect the environment. In other words this Chapter explores whether the emerging trend to refuse ships in need of assistance places of refuge is in line with international law.

3.2 Coastal State Sovereignty

One of the fundamental principles of international law generally is that of sovereignty.⁷¹ In the context of the law of the sea, the principle of sovereignty is the counterpoint to the principle of freedom of navigation and seeks to safeguard the interests of the coastal state.⁷² The principle of sovereignty gives rise to the extension of national jurisdiction into offshore spaces and supports the territorialisation of the oceans.⁷³

⁷¹ Tanaka *The International Law of the Sea* 16 quoting *The Eleanor Case* 1809 165 English Reports.

⁷² Tanaka *The International Law of the Sea* 17.

⁷³ Tanaka *The International Law of the Sea* 17; Molenaar *E Coastal State Jurisdiction Over Vessel Source Pollution* (1998) Kluwer Law International The Netherlands 78.

The exercise of sovereignty within a coastal state's waters is however not absolute and can be limited by bilateral treaties and also judicial decisions such as the *Corfu Channel Case* where it was held that a state is not allowed to knowingly allow its territory to be used for acts contrary to the rights of other states.⁷⁴ There are therefore certain limits and compromises within international law, specifically UNCLOS, that govern the exercise of sovereign rights by the coastal state. Furthermore, such sovereign rights and obligations are different depending on the specific maritime zones. The focus of this dissertation is on places of refuge. These places are commonly found within the internal or territorial waters of a coastal state. Accordingly the focus of this Chapter is on rights and obligations of coastal states in exercising sovereignty within these two maritime zones.

3.2.1 Internal Waters under UNCLOS

Internal waters refer to the waters landward of the baseline of the territorial sea and form part of the territory of the coastal state.⁷⁵ In terms of international customary law and UNCLOS a coastal state has sovereignty of its land territory and its internal waters.⁷⁶ Such internal waters (and therefore ports) are seen as an "appendage" of the coastal state where the coastal state is able to regulate such areas.⁷⁷ Internal waters fall to be regulated in the same manner as the land territory (with certain limitations as set out below).⁷⁸

A foreign ship voluntarily entering the internal waters of a coastal state impliedly submits to the jurisdiction of that coastal state.⁷⁹ The foreign ship is therefore subject to the current domestic laws in addition to the applicable flag state

⁷⁴ *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v Albania) 1949 ICJ reports 4,18.

⁷⁵ Article 8(1) of UNCLOS.

⁷⁶ Article 2(1) of UNCLOS.

⁷⁷ Churchill R & Lowe A *The Law of the Sea* (1999) Manchester University Press 61.; Brugman G *Access to Maritime Ports* (2003) Angus & Robertson Australia 15.

⁷⁸ *Fisheries Jurisdiction* (United Kingdom v Norway) 1951 ICJ reports 133.

⁷⁹ Bardin A "Coastal State's Jurisdiction over Foreign Vessels" 2002 (27) *Pace International Law Review* 30.

laws.⁸⁰ Foreign merchant vessels (the rules regarding warships are not the subject of this discussion) are subject to the coastal state's regulations on navigation, sanitary, fiscal, technical and customs controls.⁸¹ The only real limitation on the coastal state's ability to adopt laws is the obligation to communicate such laws to the IMO where such laws result in a condition of entry into a port.⁸²

Article 220 of UNCLOS provides that a coastal state may prosecute a ship within its port that is believed to have infringed its own pollution laws whilst in the territorial waters. Article 218(1) extends this jurisdiction where there is evidence that the ship has contravened international pollution laws whilst outside of the internal waters, territorial waters or exclusive economic zone of the coastal state. The coastal state is required to detain all unseaworthy ships that pose a threat to the marine environment in terms of Article 219(1) of UNCLOS.

By virtue of their usual location within the internal waters of a coastal state, ports fall within the area of sovereignty of coastal states and are therefore subject to full coastal state jurisdiction and control.⁸³ As there is no general right to innocent passage through the internal waters of a coastal state (aside from the exceptions in Articles 8(2) and 34(1)) it is suggested that there is therefore no right of entry into a coastal state's port.⁸⁴ The above sovereignty rights therefore extend to the granting or refusal of access to a port in a similar manner in which access into the internal waters can be regulated.

The non-existence of a general right of entry into the internal waters or a port of a coastal state has raised some debate in international law. The 1958 *Aramco* arbitration stated in obiter that as a matter of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed

⁸⁰ Bardin 2002 *Pace International Law Review* 30.

⁸¹ Ibid.

⁸² Article 211(3) of UNCLOS.

⁸³ La Fayette L "Access to Ports in International Law" 1996 (11) *International Journal of Marine and Coastal Law* 1.

⁸⁴ Ibid 22.

when the vital interests of the coastal state require.⁸⁵ The views stated in the *Armaco* arbitration do not however accord with considerable jurisprudence to the contrary and as was also held in the 1986 case between *Nicaragua v USA* where the International Court of Justice (ICJ) held that the sovereignty of the coastal state entitles the coastal state to regulate access to its ports.⁸⁶ The views stated in the *Armaco arbitration* can really only point towards a presumption that ports would be open to foreign merchant ships as a matter of convenience of commerce and not as a legal right. La Fayette supports this view and states that there is no evidence that a coastal state is obliged to keep its port open to foreign ships unless the exception of genuine distress occurs.⁸⁷

As was discussed in Chapter 2, the traditional customary international law position supports the view that a foreign ship would be allowed access into a port in times of distress only as a necessary means to save the persons on board. As was discussed, this traditional customary international law position seems to have changed. The current state of traditional customary international law does not therefore grant a right of access to a port to safeguard cargo or to protect the environment in the absence of saving human life. In this regard UNCLOS likewise does not confer any further rights of entry into internal waters for ships in need of assistance.

Coastal states are able to regulate entry by ships in need of assistance into their internal waters and have the ability to take the necessary steps to prevent and breach of its laws for which entry into the internal waters is conditional.⁸⁸ Coastal states may adopt laws and regulations for the prevention, reduction and control of marine pollution.⁸⁹ In the context of ships in need of assistance, it is submitted that coastal states are empowered to adopt laws and regulate access to internal waters as an exercise of sovereignty and as a means of pollution control.

⁸⁵ Saudi Arabia v Arabian American Oil Company (*Armaco*) 1958 27 OLR 117 212.

⁸⁶ *Nicaragua v USA* 1986 ILR 349 445. Also see *Attorney General v Bates* (1610) 2 State Trials 371 and *Patterson v Bark Eudora* (1903) United States Supreme Court Reports (47 L Ed) 1002.

⁸⁷ La Fayette 1996 *International Journal of Marine and Coastal Law* 3

⁸⁸ Article 25 (2) of UNCLOS.

⁸⁹ Article 194 (1) of UNCLOS.

3.2.2 Territorial Sea under UNCLOS

Historically coastal states generally exercised jurisdiction over the waters adjacent to the coastline up to 3 nautical miles.⁹⁰ This jurisdiction was utilised for the purposes of security, customs control, sanitary regulation and fisheries control.⁹¹ Conversely, a coastal state would not be entitled to exercise any jurisdiction past the 3 nautical mile limit and which area would be seen as the high seas.⁹² UNCLOS now clearly confirms that the breadth of the territorial sea cannot exceed 12 nautical miles from the baseline and that the sovereignty of coastal states extends beyond its land territory up to the limit of the territorial sea.⁹³ The below discussion explores the powers of the coastal state in the context of ships in need of assistance.

The coastal state can enact its own laws in its territorial sea in terms of Article 21 of UNCLOS. These laws should not impair the right of innocent passage of foreign vessels nor should they apply to the Construction Design Engineering and Manning (CDEM) requirements of foreign ships unless such requirements are constant with the generally accepted international rules or standards.⁹⁴ In principle, coastal states may be entitled to adopt laws which restrict entry into the territorial sea by ships in need of assistance.

The coastal state's power to regulate access by ships in need of assistance is evidenced in the wide legislative powers set out in UNCLOS. In terms of Article 21 can enact the following relevant laws: (a) adopt laws regarding the safety of navigation: it can organize maritime traffic and passage of ships by drawing sea-lanes and traffic separation schemes in its territorial sea; (d) adopt legislation regarding the conservation of living resources of its territorial sea; (f) ensure the preservation of the environment by adopting regulations on the prevention,

⁹⁰ Fur Seal Arbitration (United States of America v the United Kingdom) 1895.

⁹¹ Tanaka *The International Law of the Sea* 18.

⁹² Fur Seal Arbitration (United States of America v the United Kingdom) 1895.

⁹³ Article 2(1) and 3 of UNCLOS.

⁹⁴ Bardin 2002 *Pace International Law Review* 36.

reduction and control of pollution.⁹⁵ Ships in need of assistance present both navigational and environmental hazards and coastal states are entitled through Article 21 of UNCLOS to adopt laws which may be a legal basis for refusing access to ships in need of assistance.

The powers in Article 21 of UNCLOS are further bolstered by Article 211 (4) of UNCLOS which grants the coastal state the power to exercise its sovereignty within the territorial sea and adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels. This power extends to all foreign vessels including those exercising innocent passage. The caveat to this power is that this legislative jurisdiction may not hamper innocent passage.

Article 220 of UNCLOS confirms the enforcement jurisdiction of the coastal state and confirms that where a vessel has violated the laws of the coastal state or the applicable international rules for the prevention, reduction and control of pollution, the coastal state may inspect, detain and institute proceedings against the ship in question.

In the exercise of the above enforcement powers, the coastal state has a duty to avoid adverse consequences resultant therefrom. The coastal state is to ensure that it shall not endanger the “safety of navigation or otherwise create any hazard to a vessel, bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk”.⁹⁶

Coastal states therefore have nearly unlimited legislative and enforcement jurisdiction within their territorial waters in respect of pollution control. These wide legislative and enforcement powers may be utilised as a legal basis to regulate and refuse access to a place of refuge by a ship in need of assistance. Coastal states are really only limited from hampering innocent passage or the

⁹⁵ Bardin 2002 *Pace International Law Review* 36; Article 21 of UNCLOS.

⁹⁶ Article 225 of UNCLOS.

enforcement of more stringent CDEM requirements when compared with the international standards.⁹⁷

The concept of innocent passage is a compromise between the concept of freedom of navigation and that of sovereignty.⁹⁸ The concept of innocent passage therefore allows foreign ships to enter the territorial waters of a coastal state under certain conditions. In this way the freedom of navigation of that ship is balanced with the sovereign rights of the coastal state. The right of innocent passage exists as a “limitation and an exception to absolute coastal state sovereignty in the territorial sea”.⁹⁹

In terms of Article 17 of UNCLOS all ships enjoy the right of innocent passage through the territorial waters of a particular coastal state subject to the provisions of UNCLOS and specific rules applicable to innocent passage. A ship’s journey through the territorial waters of a coastal state would need to meet the requirements of ‘passage’ and would need to be innocent in nature.

‘Passage’ is defined in Article 18 of UNCLOS as traversing the territorial sea without entering into the internal waters of the coastal state or proceeding to or from internal waters to call at a port facility or roadstead. In this way ‘passage’ is a temporary state of being where the territorial waters of that particular coastal state is not the final destination.¹⁰⁰ In support of this understanding Article 18(2) of UNCLOS states that this passage must be “continuous and expeditious”. Ships are therefore generally not allowed to ‘hover’ or cruise around in the territorial sea, because, irrespective of whether or not the ship’s conduct would be considered ‘innocent’, the ship would not be properly engaged in passage as is defined in UNCLOS.¹⁰¹

⁹⁷ Articles 21, 211 and 220 of UNCLOS.

⁹⁸ Agyebeng W “Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea” 2006 Vol 39 *Cornell International Law Journal* 372.

⁹⁹ Agyebeng 2006 *Cornell International Law Journal* 380.

¹⁰⁰ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 101.

¹⁰¹ Churchill & Lowe *The Law of the Sea* 82 in Agyebeng 2006 *Cornell International Law Journal* 372.

There is however one exception to the continuous and expeditious requirement. Passage can include stopping and anchoring where same are incidental to ordinary navigation, rendered necessary by force majeure or distress or for the purposes of rendering assistance to others in distress or danger.¹⁰² This is very relevant to the focus of this dissertation and will be discussed in greater depth in Chapter 4.

As is clear from the above paragraphs there is a compromise between the coastal state's sovereign rights of regulation and enforcement within the territorial sea and the rights of freedom of navigation bestowed on foreign ships traversing those territorial waters. One of the key compromises is that of innocent passage which guarantees the right of innocent passage by a foreign ship through the territorial sea. However coastal states may interfere with a foreign ship claiming innocent passage where the passage is prejudicial to the peace and good order of the coastal state. That being said, it is clear from the above paragraphs that the coastal state may choose from a wide array of measures which directly and indirectly protect their territorial waters and coastline from vessel source pollution.

3.3 Other applicable conventions

Further to the rights encapsulated within UNCLOS there are a number of other relevant international conventions which provide further insight into the coastal state rights and obligations in the regulation of and protection from vessel source pollution.

¹⁰² See Article 18(2) of UNCLOS.

3.3.1 The Salvage Convention of 1989

The Salvage Convention of 1989 came into force on 14 July 1996 and is aimed at determining uniform international rules regarding salvage operations.¹⁰³ Salvage operations are those activities aimed at assisting ships in danger and which therefore have an effect on the safety of vessels, property in danger and to the protection of the environment.¹⁰⁴ Essentially salvage operations are executed under a contract between the party giving the assistance (the salvor) and the master of the ship. The salvor is required to attend to certain activities for which he will receive payment where there is a useful result.¹⁰⁵

The Salvage Convention does confer rights on a coastal state to take measures in accordance with generally recognised principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty which may reasonably be expected to result in major harmful consequences.¹⁰⁶ The coastal state may give directions in the execution of salvage operations which may include permission or refusal of a place of refuge to the particular ship in distress. It is important to note that Article 9 of the Salvage Convention specifically reserves the coastal state's rights to protect their marine environment from pollution.

The Salvage Convention does, however, impose certain responsibilities on the coastal state. Whenever a coastal state is involved in matters relating to salvage operations it must take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.¹⁰⁷ This duty to co-operate is essential in the decision by a coastal state

¹⁰³ <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx> (Accessed on 8.12.2015).

¹⁰⁴ International Convention on Salvage, 1989 (the Salvage Convention).

¹⁰⁵ Article 12 of the Salvage Convention.

¹⁰⁶ Article 9 of the Salvage Convention.

¹⁰⁷ Article 11 of the Salvage Convention.

as to whether a ship in distress is to be granted a place of refuge or admission into port.

The Salvage Convention is not regarded as a basis for which a legal right of entry for foreign ships in need of assistance can be based. On the contrary, Morrison suggests that the wording of Article 9 (totally preserving the coastal states' protection rights) read with the wording of Article 11 (merely providing for a duty to co-operate) may suggest that the Salvage Convention could be a basis in refusing access to ships in need of assistance.¹⁰⁸

As a counterpoint to Morrison's suggestion, cognisance must be had of the general duties and considerations in the protection of the marine environment. It is clear that the Salvage Convention recognises the importance of protecting the marine environment.¹⁰⁹ This recognition is evident from the departure of the traditional 'no cure no pay contracts to the allowance of 'special compensation' in Article 14 of the Salvage Convention. Where the salvor attended to salvage operations which prevented or minimized damage to the environment the salvor may be entitled to special compensation of the expenses incurred together with an additional 30% and where a tribunal deems fair, up to an additional 100% of the costs incurred.¹¹⁰ The establishment of 'special compensation' meant that salvors could at least recover their expenses and this creates an incentive for ship owners to participate in salvage operations where there is a threat to the environment.¹¹¹

The above being said, the contents of the Salvage Convention in the context of the duty to grant places of refuge and protection of the marine environment is "an uncertain mix of private and public law provisions within the Salvage Convention, and the public law provisions are, unfortunately, vague and

¹⁰⁸ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 27.

¹⁰⁹ Shaw *CMI Yearbook 2003* 331.

¹¹⁰ Article 14 Salvage Convention.

¹¹¹ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 26.

equivocal”.¹¹² Whilst the comments by Mukherjee are valid, one could resolve these problems with reading the provisions of the Salvage Convention with the broader duty to protect the environment discussed below. This may well provide the necessary context from which more distinct duties can be distilled.

3.3.2 OPRC Convention 1990

The International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) requires states to make precautionary plans for dealing with potential oil pollution incidents individually and also in collaboration with other states.¹¹³ The OPRC came into force in May 1995 and was amended by a protocol on Hazardous and Noxious Substances on 14 June 2007.¹¹⁴

Parties have a duty to take all appropriate measures in accordance with the provisions of the OPRC to prepare for and respond to an oil pollution incident which poses or may pose a threat to the marine environment, or to the coastline or related interests of one or more states, and which requires emergency action or other immediate response.¹¹⁵

The OPRC requires states to prepare oil pollution emergency plans, stockpile equipment needed to combat oil spills and to hold training exercises. All flag states are required to ensure that its ships have on board a shipboard oil pollution emergency plans which are subject to inspection whilst the ship is in port or at an offshore terminal.¹¹⁶

¹¹² Mukherjee P.K. “Refuge and Salvage” in Chapter 10 of Chircop A & Linden O *Places of refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* (2006) Martinus Nijhoff Publishers The Netherlands 278.

¹¹³ International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1995.

¹¹⁴ About the IMO OPRC Convention

<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness%2c-Response-and-Co-operation-%28OPRC%29.aspx> (accessed on 8.12.2015).

¹¹⁵ Article 1 and 2 of OPRC.

¹¹⁶ Article 3 of OPRC.

The OPRC does not specifically deal with places of refuge for ships in distress but “it does envisage the development by States of oil pollution response contingency plans, and some States have such plans which expressly provide for the possibility of admission to their ports or havens of ships in distress which may prove to threaten pollution”.¹¹⁷ Shaw notes that the OPRC links up with the duties of co-operation in Article 11 of the Salvage Convention.¹¹⁸ Further to this it is suggested that where states are party to both the Salvage Convention and the OPRC one could read these two conventions together. In doing this one could argue that the emergency plans required to be established under the OPRC need to be in line with the tenants of the duty to co-operate in order to prevent damage to the marine environment.

3.3.3 The Intervention Convention 1969

A classic example of coastal state intervention was the incident concerning the *Torrey Canyon*.¹¹⁹ The *Torrey Canyon* was a Liberian tanker which suffered an incident off the coast of the United Kingdom on the high seas in March 1967 and spilled approximately 80 000 tons of crude oil into the ocean from pollution.¹²⁰ The tanker was abandoned by the owners and the United Kingdom destroyed the abandoned ship using bombs and napalm in an attempt to safeguard its coastline.¹²¹ This incident and the actions by the United Kingdom introduced a novel legal issue concerning the unilateral actions on the high seas of a state in an attempt to protect its own interests. It was not until this incident that that the whole world began to realise the seriousness and urgency of the problems of marine pollution and the complex legal issues needing to be addressed and clarified.¹²² There was clearly a need to establish a legal basis for a coastal state to be able to intervene and protect its own interests on the high seas in

¹¹⁷ Shaw *CMI Yearbook 2003* 331.

¹¹⁸ *Ibid.*

¹¹⁹ Nada V The *Torrey Canyon* Disaster: Some Legal Aspects 1967 *Denver Law Journal* 401.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Han L & Shan H *Maritime Pollution Liability and Policy: China, Europe, and the US* (2010) Kluwer Law International The Netherlands 15.

international law. In response to the *Torrey Canyon* incident the The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (The Intervention Convention) was concluded in order to deal with some of the deficiencies highlighted by the incident.

The Intervention Convention entered into force on 6 May 1975 and allows states to take measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastlines from pollution.¹²³

The Intervention Convention places certain obligations onto the coastal state. The coastal state is obliged to first proceed and consult with other states affected by the incident in question and notify any person having an interest which can reasonably be affected by the proposed intervention measures to be taken by the coastal state.¹²⁴ The coastal state is obliged to use its best endeavours to avoid any risk to human life and to afford assistance to any person in distress.¹²⁵ It is however important to bear in mind that the measures taken by the coastal state under the Intervention Convention must be proportionate to the actual or threatened damage and not go beyond what is reasonably necessary to achieve the to prevention, mitigation or elimination of grave and imminent danger to from pollution.¹²⁶

The actions taken by a coastal state pursuant to the Intervention Convention could include ordering a damaged ship to proceed or to be towed clear of a coastline threatened with pollution provided that the incident is firstly one that poses a grave an imminent danger and secondly that such action in in line with the requirements of Article 5 of the Intervention Convention.¹²⁷

There is a link to Article 221 of UNCLOS that is relevant to intervention measures by coastal states. UNCLOS permits the coastal state to take and

¹²³ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention).

¹²⁴ Article 3 of the Intervention Convention 1969.

¹²⁵ Article 3 of the Intervention Convention 1969.

¹²⁶ Article 5 of the Intervention Convention 1969.

¹²⁷ Shaw *CMI Yearbook 2003* 331.

enforce measures beyond the territorial sea which are proportionate to the actual or threatened damage to protect their coastline or related interests which may reasonably be expected to result in major harmful consequences.¹²⁸

3.4 The duty to protect the Marine Environment under UNCLOS

In addition to the rights and obligations relevant to the prevention and protection from pollution there exists an overarching duty on states to protect the marine environment. This duty informs, directs and limits the exercise of coastal state action and sovereignty in the context of pollution control.

The obligation to protect the marine environment is explicitly set out in Articles 192 to 195 of UNCLOS. The degree of acceptance and consensus expressed by states in negotiating the environmental provisions of UNCLOS suggest that the duties expressed therein represent definitive *opinio juris* and represent an agreed codification of existing principles.¹²⁹ Due to the wide ratification of UNCLOS it is therefore stated that these duties and principles form part of international customary law.¹³⁰ It is said that that the emergence of UNCLOS reflects a paradigm shift in international law from the freedom to pollute to an obligation to prevent pollution.¹³¹ The focus of UNCLOS is not on the obligations of responsibility for damage but rather on a general and comprehensive regulation on the prevention of pollution.¹³² In this way it rectifies the deficiencies of the *sic utere tuo ut alienum non laedas* rule discussed below.

Article 192 of UNCLOS is titled “General obligation” and stipulates that “states have the obligation to protect and preserve the marine environment”. Coastal states have a general duty to protect the marine environment and harmonise

¹²⁸ Article 221 of UNCLOS.

¹²⁹ Birnie P & Boyle *A international Law and the Environment* (2009) Oxford University Press United Kingdom 352.

¹³⁰ *Ibid* 396.

¹³¹ Tanaka *The International Law of the Sea* 264.

¹³² *Ibid*.

policies in this regard.¹³³ This succinct obligation confirms the general obligation in an uncompromising manner. The duty expressed therein is not conditional; it is not limited to particular area and is focussed on preventative action by states. This duty is therefore of much wider application than that expressed in the *Trail Smelter Case* (discussed below) as it is not limited to areas under national jurisdiction. Furthermore, the duty is expressed in a general manner. It is not limited to being in favour of a particular state. It is also noted that the duty does not only extend to states but to the marine environment as a whole.¹³⁴ It is therefore submitted that coastal states are not only obliged to protect the marine environment within their own territorial waters but also have a broader duty to protect the marine environment as a whole.

The limitation of state sovereignty is clear and unequivocal. Article 193 confirms “that states have the sovereign right to exploit their natural resources in accordance” with their duty to “protect and preserve the marine environment”. There are two important considerations relative to this Article. Firstly, the fact that sovereignty is limited by an environmental duty clarifies a state’s jurisdiction and links same to the principles set out in the Stockholm and Rio Declarations.¹³⁵ Secondly, the environmental duty is not only in respect of the marine environment within its jurisdiction, but to the marine environment as a whole. This solidifies the state’s duty to the international community of states to protect the marine environment.

With reference to Articles 192 and 193 of UNCLOS it is difficult to reconcile adherence of the above general duty to protect the marine environment owed to all states and the act of a particular coastal state in refusing to grant a place of refuge. Evidence of maritime incidents proves that the refusal of a place of

¹³³ Chircop 2002 *Ocean Development & International law* 217.

¹³⁴ Birnie & Boyle *International Law and the Environment* 352.

¹³⁵ See Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration which confirms that states have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

refuge significantly increases the chances and extent of environmental harm.¹³⁶ It is submitted that a conscious decision by a coastal state to refuse a place of refuge in the full knowledge of the possible risks to the marine environment may be in violation of the general duty owed to all states to protect the marine environment.

Article 194 (1) of UNCLOS places a positive duty on all states to take all appropriate measures that are necessary to prevent, reduce and control pollution of the marine environment from any source. Article 194 (2) places an obligation on states to take measures to prevent pollution from activities under that states control or jurisdiction which expands the *Trail Smelter Arbitration* principles in a similar fashion as Article 192. Article 194 (2) further obliges states to ensure that where a pollution does occur from incidents or activities under their control or jurisdiction does not spread beyond their sovereign areas. Article 194 (2) must be read with Article 195 which confirms that states shall not directly or indirectly transfer pollution from one area to another. Article 195 refers not only to damage but also to hazards which can therefore be read so as to include possible damage. In this regard a ship in distress could be a hazard as there is a chance that there will be harm to the marine environment.

Articles 194 and 195 are therefore of specific relevance to the debate on places of refuge. The act of refusing to grant a place of refuge may be in direct conflict with Articles 194 and 195 of UNLCOS as the usual result of the refusal is that the ship in in need of assistance moves on to the next coastal state to beg for entry. The decision by the coastal state to refuse entry therefore may result in a transfer of a hazard or the eventual pollution of the marine environment.

The definition of pollution as set out in Article 1 of UNCLOS means “the introduction...directly or indirectly of substances...into the marine environment...which results or is likely to result in...harm to living resources and marine life and hazards to human health, hindrance to marine activities...and reduction of amenities”. It is submitted that the decision of refusing to grant a

¹³⁶ Shaw *CMI Yearbook 2003* 331.

place of refuge could constitute an act of indirect pollution. Such an act would be in direct conflict with the duties set out in Articles 192 to 195 of UNCLOS.

It is submitted further that the refusal to grant a place of refuge is in direct conflict with the general duty to protect the marine environment and not to transfer such pollution to another area. It is submitted such conduct could constitute an act of deliberate pollution. It is for these reasons that it is submitted that such conduct by a coastal state may constitute an abuse of right under Article 300 of UNCLOS.

3.5 Other Environmental Duties under International Law

In addition to the above mentioned limitations on the sovereignty rights of coastal states under UNCLOS there are international law principles which further inform and limit the exercise of coastal state sovereignty and measures against marine pollution.

3.5.1 The duty not to cause harm

One of the most important principles to be considered is that no state has the right to use or permit the use of its own territory in such a manner which causes harm to another state or its people. This principle was upheld in the 1938 *Trail Smelter Arbitration* as a confirmation of the customary law rule of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another).¹³⁷ It was held that if a state allows an activity to occur within an area under its jurisdiction and such activity causes harm to another state, the polluting state will be liable.

The exercise of sovereignty by a coastal state within the territorial sea would easily fall into a 'use' of its territory. Accordingly, where a coastal state refuses to grant a place of refuge as an exercise of sovereignty it can be said that the

¹³⁷ Trail smelter Arbitration United States v Canada) 3 1941 Reports of International Arbitral Awards 1907.

coastal state is 'using' or 'exercising power over an area within which it has jurisdiction'.

As was discussed in Chapter 2 the refusal to grant a place of refuge to a ship in need of assistance will likely increase the chances of a pollution incident occurring and harm being suffered within the territorial waters of another coastal state. In such an example, it therefore can be said that the coastal state's use of its territory in refusing to grant a place of refuge could cause harm to an area under the jurisdiction of another coastal state.

In such circumstances and using the principles stated in the *Trail Smelter Arbitration*, one could argue that the refusal by a coastal state to grant a place of refuge conflicts with the duty not to cause harm to another state. Flowing therefrom it can be argued that coastal states are not entitled to refuse ships in need of assistance access to a place of refuge within their territorial sea.

The 1949 *Corfu Channel Case* clearly states that every state has an obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states.¹³⁸ In this regard the 1996 International Court of Justice advisory opinion concerning the legality of the threat or use of nuclear weapons supported this and expanded same by stating there is a general obligation on states to ensure that activities within their jurisdiction and control respect the environment of other states.¹³⁹

The focus of the *sic utere tuo ut alienum non laedas* rule and the *Trail Smelter Arbitration* ruling was on pollution occurring and harm being suffered within respective territories of states. The polluting activity must have occurred within an area under the jurisdiction of a state and the harm must be to an area under the jurisdiction of another state. There is therefore a limited application of this principle in the context of pollution. The refusal of access must be in relation to the coastal state's internal waters or territorial sea and the harm must occur within the internal waters or territorial sea of the other coastal state. If the

¹³⁸ *Corfu Channel case* (United Kingdom v. Albania) 1949 ICJ Reports 4.

¹³⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Reports 226.

pollution harm occurs only within, say, the exclusive economic zone of other state or the high seas, the *Trail Smelter Arbitration* principles will not apply. As was discussed above Articles 192 and 194 UNCLOS have remedied this limitation.

3.5.2 The 1972 Stockholm Declaration

Principle 21 of the 1972 Stockholm Declaration confirms that states have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.¹⁴⁰

It is said that the care for the world's oceans has been a matter needing international co-operation and agreement since the dawn of civilisation.¹⁴¹ Such co-operation and agreement is brought about by the fact that all states have an interest in the world's oceans. Principle 21 of the 1972 Stockholm Declaration draws on the principle laid down in the *Trail Smelter Arbitration* and supports the idea that a coastal state's decision to refuse a place of refuge as an exercise of its sovereignty may, depending on the circumstances, not be acceptable.

Principle 21 of the 1972 Stockholm Declaration was repeated verbatim in Principle 2 of the 1992 Rio Declaration which highlighted the concept of 'common concern' as a means to designate those issues which involve global responsibilities. Principle 7 thereof confirms that states shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem and that states have common but differentiated responsibilities.¹⁴² These common concerns are universal in

¹⁴⁰ The Declaration of the United Nations Conference on the Human Environment (the Stockholm declaration) 1972

¹⁴¹ Glazewski J *Environmental Law in South Africa* 2nd ed (2005) Lexisnexis Durban 639.

¹⁴² Birnie & Boyle *International Law and the Environment* 97.

nature and require the common action of all states in order for protective measures to work.¹⁴³

Whilst the Stockholm and Rio Declarations are considered to be 'soft law' and non-binding, the principles set out therein should inform the discussion on coastal state duties in respect of ships in need of assistance and whether a refusal of a place of refuge is in line with these recognised principles.

3.6 Concluding Remarks on Coastal State Rights & Obligations

The concept of sovereignty is fundamental in providing a legal basis through which coastal states can regulate shipping activities so as to deal with pollution incidents and take such measures as may be necessary to deal with the effects of pollution. Coastal states have extensive competency to regulate access to their internal and territorial waters and to intervene with ships in need of assistance which have contravened the applicable laws. This coastal state's intervention may include refusal of access to a particular maritime zone, detention and prosecution of an offending party and expulsion of the particular foreign ship from the coastal state's sovereign waters. These rights are clearly set out in international customary and conventional law and may provide a legal basis for a coastal state to refuse access to ships in need of assistance.

The wide coastal state legislative and enforcement competency set out above is however not unlimited. Coastal state rights are curtailed and balanced against the rights of other states through specific obligations placed on the coastal state in the exercise of its own rights. A key limitation on the coastal state's sovereignty is that of the right of innocent passage.¹⁴⁴ The right of innocent passage balances the foreign ship's right of freedom of navigation against the sovereign rights of the coastal state. Conventional international law also provides a basis from which coastal state sovereignty is limited and introduces

¹⁴³ Birnie & Boyle *International Law and the Environment* 97.

¹⁴⁴ Van der velde W "The position of Coastal State's and Causality of Ships in International Law" 2003 *CMI Year Book* 480.

concepts of protection of the marine environment, notice, reporting, preparedness and co-operation. These concepts inform and contextualise the rights of the coastal state in the regulation and control of marine pollution.

What the following Chapter seeks to achieve is to analyse a coastal state's rights and obligations in the context of places of refuge for ships in need of assistance so as to establish whether coastal states are obliged to grant such ships a place of refuge where there is a threat of environmental harm.

Chapter 4 – Ships in Environmental Distress – A right to refuge?

4.1 Introduction

This Chapter seeks to evaluate the rights and duties of coastal states in modern international law of the sea with a view of ascertaining whether a coastal state is obliged to grant a place of refuge to ships in need of assistance where there is only a risk of environmental damage. Conversely the question is whether ships in need of assistance have the right to enter a port, the internal or territorial waters of a coastal state for the purposes of seeking refuge. It has been stated that there is no simple ‘yes’ or ‘no’ answer to this question and there are a wide range of views on this matter.¹⁴⁵ The complexity involved in answering this question is partly due to the fact that the rules applicable to ships in distress (and more recently in respect of ships in need of assistance) have historically been derived from different fields of international law. These different fields include trade law, humanitarian law, the law of armed conflict, admiralty law, the law of the sea and more recently international environmental law.¹⁴⁶ What follows is an analysis of the above posed question in the context of the internal and territorial waters of a coastal state and to whether the obligation to grant a place of refuge exists.

4.2 Refuge in Internal Waters

The fundamental characteristic of internal waters is that of sovereignty. This maritime zone is regarded as an extension of the state’s territorial sovereignty.¹⁴⁷ As set out in Chapter 3 there exists extensive legislative and enforcement competency in favour of the coastal state. Coastal states are able

¹⁴⁵ Hooyhonk E “The Obligation to Offer a Place of refuge to a Ship in Distress” 2003 *CMI Year Book* 406.

¹⁴⁶ Noyes J “Places of Refuge for Ships” 2008 *Denver Journal of International Law and Policy* 137.

¹⁴⁷ Churchill & Lowe *The Law of the Sea* 61.

to regulate entry by foreign ships into their internal waters and are empowered to take the necessary steps to prevent and breach of its laws for which entry into the internal waters is conditional. The key question relevant to internal waters is whether there is a right of access by a ship in need of assistance into the internal waters of a coastal state for seeking refuge or otherwise. Granting a right of access to a ship in need of assistance would result in an exception to the principle of sovereignty.¹⁴⁸ A ship in need of assistance requesting access as a right would need to show that there is a valid legal basis from which that right exists so as to limit the coastal state's sovereignty.¹⁴⁹

A means of establishing this legal basis could be that there 1) exists a general right to access a coastal state's internal waters or ports, 2) that in times of distress there exists an exceptional right of access or 3) that the coastal state owes a duty to protect the marine environment and thereby is required to grant access in order to mitigate any possible marine pollution. Items 1 and 2 are now discussed in turn with item 3 being discussed in general thereafter.

4.2.1 General Right of Access to Internal Waters or a Port

In stark contrast to the legal regime regulating territorial waters, there is no established right of innocent passage through the internal waters of a coastal state aside from the exceptions in Articles 8(2) and 34(1) of UNCLOS which are not of relevance here. Accordingly there needs to be a clear legal right of entry into these waters in favour of the ship in need of assistance. If it can be shown that there exists a legal right of access then by implication there would automatically be a right of refuge for a ships in need of assistance. To establish a general right of entry such right would have to exist either in international customary law or by virtue of conventional law.

¹⁴⁸ Van der velde *CMI Year Book 2003* 480.

¹⁴⁹ *Ibid.*

From a practical viewpoint ports are open to merchant ships so as to allow for international trade.¹⁵⁰ La Fayette states that there is a presumption that ports would be open to merchant ships as a matter of convenience and commercial interest however not as a legal right.¹⁵¹ In support thereof Chircop states that in terms of international customary law there is no longer a general right of access as an absolute right.¹⁵²

Using UNCLOS as a proxy of generally regarded international custom it is important to note that there is no guaranteed right of entry into a port or internal waters. In the context of ships in need of assistance Article 211(3) of UNCLOS confirms that coastal states may establish particular rules for the prevention, reduction and control of pollution and make same a condition for entry into a port. It is also noted that UNCLOS does not carve out special treatment for ships in need of assistance in respect of access to internal waters as it does under territorial waters (as is discussed below).

Since ports form part of the internal waters of coastal states, such coastal states are allowed to exercise their sovereignty when considering granting access to ships in need of assistance.¹⁵³ In terms of international customary law it is therefore submitted that there does not exist a general right of access into a port for the purposes of seeking refuge or otherwise.

In terms of international conventional law there do exist certain bilateral and multilateral treaties which are relevant to granting a general right of access. Parties to a bilateral treaty are well within their rights to agree to limit their sovereignty and grant an absolute right of access to each other. Generally such treaties are put in place to stimulate international trade and good inter-governmental relations.¹⁵⁴ It is notable that from the majority of bilateral agreements put in place there was no agreed and established right of access to

¹⁵⁰ La Fayette 1996 *International Journal of Marine and Coastal Law* 1.

¹⁵¹ *Ibid.*

¹⁵² Noyes 2008 *Denver Journal of International Law and Policy* 139.

¹⁵³ Molenaar *Coastal State Jurisdiction Over Vessel Source Pollution* 101.

¹⁵⁴ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 56.

a port.¹⁵⁵ The majority of these bilateral treaties focussed on clauses granting favourable treatment to the contracting parties' ships but falling short of establishing an absolute right of access.¹⁵⁶

From a multi-lateral treaty perspective the Ports Convention of 1923 dealt with access to ports.¹⁵⁷ In terms of Article 2 of the Statute to the Ports Convention and subject to the principle of reciprocity, every Contracting States undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessel 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.¹⁵⁸ Whilst Article 2 of the Statute does confer a right of access it is not an absolute one as access may be suspended or denied in terms of Article 8 and Article 16, respectively. It is therefore the general view that the Ports Convention was not intended to grant an absolute right of access but to grant access in a reciprocal manner which could be limited.¹⁵⁹ Morrison states that the fact that there has been limited acceptance of the Ports Convention there is insufficient evidence that the Ports Convention represents customary international law.¹⁶⁰ Brugmann states that whilst the Ports Convention is not widely ratified, the States which have ratified the Ports Convention represent 53% of the world's tonnage in terms of ownership.¹⁶¹ It is therefore submitted that whilst the Ports Convention does not confer absolute rights of entry, there seems to be some agreement amongst the signatory states that a right of entry should be granted subject to the principle of reciprocity.

¹⁵⁵ Brugman *Access to Maritime Ports* 39 - 48 in Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 56.

¹⁵⁶ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 56.

¹⁵⁷ Convention and Statute on the International Regime of Maritime Ports 1923. See Brugmann *Access to Maritime Ports* 9 - This convention has not been widely ratified

¹⁵⁸ Article 2 of the Ports Convention 1923.

¹⁵⁹ Yang *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* 56.

¹⁶⁰ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 61.

¹⁶¹ Brugman *Access to Maritime Ports* 9.

From the discussion above it is submitted that there is no evidence in international customary or conventional law of a general right of access by a foreign ship into the internal waters or port of a coastal state. It is therefore submitted that ships in need of assistance would likewise find no favour in accessing internal waters as a general right for the purposes of refuge outside of a specific treaty to this effect.

4.2.2 Exceptional Right of Access in times of Distress

From a humanitarian view it is generally recognised that ships have right of entry into the sovereign waters of a coastal state in times of distress.¹⁶² It could be argued that by the beginning of the 20th Century the basic elements of access to places of refuge for ships in distress were established to the extent that there was a customary international law right to access a place of refuge in time of distress.¹⁶³

As was discussed in Chapter 2 there has been a fundamental shift in the traditional rights afforded to ships in distress. The traditional right of refuge was not linked or concerned with the dangers to the marine environment but only that of saving the lives of persons on board. The question is therefore whether in the absence of any risk to human life, a foreign ship would be able to claim distress as a means of being granted a place of refuge within the internal waters of a coastal state.

It is therefore submitted that whilst there still exists a general right of refuge in time of distress under international customary law, such right is only applicable in circumstances where the granting of access is necessary for saving the lives in board. There is therefore no obligation under international customary law on the coastal state to grant a place of refuge where the risk is only environmental.

In a similar fashion as the discussion on general rights of access, a coastal state is at liberty to enter into bilateral or multilateral conventions wherein it

¹⁶² Tanaka Y “Key Elements in International Law Governing Places of Refuge For Ships: Protection of Human Life, State Interests and Marine Environment” 2014 *Journal of Maritime Law and Commerce* 160.

¹⁶³ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 88.

would agree to grant access in times of 'environmental distress'. That being said there is no evidence of any guaranteed right of access contained in any multilateral treaty.¹⁶⁴ The Ports Convention does provide ways for a contracting party to refuse access in its entirety and did not specifically contain provisions relating to ships in distress.¹⁶⁵ The Ports Convention did however make mention of applying to 'ports of refuge specifically constructed for that purpose'.¹⁶⁶ It is therefore possible that a ships flagged to a signatory to the Ports Convention would be entitled to access a port in times of distress where that specific port had been constructed for that purpose.

Outside of a specific agreement to the contrary it is submitted that a coastal state is not obliged to offer a place of refuge within its internal waters to a ship in distress under international law unless the granting of that place of refuge is necessary for the saving of human life.

4.2.2 Concluding Remarks on Rights within Internal Waters

From the above discussion it is submitted that ships in need of assistance do not enjoy a general or exceptional right to access the internal waters of a coastal state to seek refuge in the absence of same being necessary to save human life. It is submitted that coastal states are therefore not obliged to grant a place of refuge to a ship in need of assistance within its internal waters or port a general right. It is, however, submitted that pursuant to the duty to protect the marine environment discussed below, a coastal state may well be obliged to grant a place of refuge to a ship in distress in order to protect and preserve the marine environment.

¹⁶⁴ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of Resolution* 92.

¹⁶⁵ Article 8 and 16 of the Ports Convention; Chircop & Linden *Places of refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* 193.

¹⁶⁶ Protocol of Signature (Ports Convention) paragraph 1.

4.3 Refuge in Territorial Waters

As was discussed in Chapter 3, the laws regarding the territorial waters and the rights and obligations of the coastal state therein are fundamentally different to the regime regarding internal waters. Essentially the modern international law compromises between sovereignty and freedom of navigation have, through negotiation and agreement, have been established by UNCLOS. The coastal states continue to enjoy wide legislative and enforcement powers within their territorial waters, however, subject to the established rights of other states.

4.3.1 Innocent Passage

A fundamental difference between the regime regarding territorial waters as opposed to internal waters is the concept of innocent passage. Whilst there is not right of innocent passage through the internal waters of a coastal state there is such a right within the territorial waters.¹⁶⁷ Accordingly, rights of access to the territorial waters have already been established and agreed subject to certain conditions. The concept of innocent passage is a key compromise between the concept of freedom of navigation and that of sovereignty and informs the rights and duties of coastal states.¹⁶⁸ The question is whether the current international law regarding innocent passage could be used as a basis for establishing a right of refuge for ships in need of assistance. In pursuit of the answer it must be established whether a ship in need of assistance complies with the requirements of innocent passage as set out in Articles 18 and 19 of UNCLOS in that the ship 1) falls into the what is defined as 'passage' and 2) that the passage is 'innocent'.

¹⁶⁷ Article 17 of UNCLOS.

¹⁶⁸ Agyebeng 2006 *Cornell International Law Journal* 372.

4.3.1.1 Passage

As was discussed in Chapter 3, the main requirement regarding the definition of 'passage' within Article 18 of UNCLOS is that the journey of the ship should be 'continuous and expeditious'. At this point it would seem that a ship in need of assistance would not initially satisfy this requirement as in all probability the ship would anchor within the territorial waters so as to allow anti-pollution measures to be implemented. However, Article 18 does allow for one exception to the 'continuous and expeditious' rule. Such an exception is where stopping and anchoring are incidental to navigation or rendered necessary by force majeure or distress. It is clear that stopping to deal with pollution is not incidental to navigation but it could be argued that it might fall into a circumstance covered by force majeure or distress. As UNCLOS does not specifically define 'distress' it is submitted that ships in need of assistance could fall into 'distress' as mentioned in Article 18(2) of UNCLOS.¹⁶⁹

A ship's right to entry as a result of force majeure is settled in international law and is an ancient principle.¹⁷⁰ The term of force majeure is generally utilised to indicate a particular peril which is irresistible and involuntary or an 'Act of God'.¹⁷¹ If there is an instance of genuine force majeure the ship affected thereby would be able to rely on Article 18 of UNCLOS and anchor within the territorial waters of a coastal state. In such a case all of the rules discussed regarding innocent passage would apply to that ship.¹⁷² In such a case the coastal state would not be permitted to expel the ship in need of assistance from its territorial waters provided that the ship remains to be innocent and not prejudicial to the peace, good order or security of the coastal state.

Where the force majeure is caused by some deficiency, neglect or conduct of the ship in question it may introduce an argument that the coastal state would

¹⁶⁹ Article 18(2) of UNCLOS.

¹⁷⁰ Murray C "Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor" 2002 *Ohio State Law Journal* 1478.

¹⁷¹ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of 12*.

¹⁷² Murray 2002 *Ohio State Law Journal* 1478.

have a right to self-defence as that ship is at least partly responsible for the condition in which it finds itself.¹⁷³ An example of such an instance would be where the flag state or owner failed to ensure that the CDEM requirements of the ship were maintained and as a result thereof the ship found its self in peril. It could be argued that the peril was created, in this example, due to negligence and not as a result of an 'irresistible act'. As a result thereof, the ship in need of assistance may not be entitled to the benefits afforded to it under force majeure and accordingly may not be entitled to access the territorial sea to seek refuge.

It is submitted that whilst ship in need of assistance may not meet the requirements of force majeure it may nevertheless be in a state of distress and therefore granted certain rights. The notions of distress and force majeure may overlap to a degree but force majeure essentially refers to external forces affecting the ship. Article 18 of UNCLOS does not differentiate between any types of distress and is therefore open for interpretation. It is said that 'distress' means an event of grave necessity such as severe weather or mechanical failure or a human caused event such as a collision with another ship.¹⁷⁴ The necessity must be urgent and produce a well-grounded apprehension that there will be a loss of the vessel, its cargo or the lives of its crew or passengers.¹⁷⁵ Whilst there is no express indication in UNCLOS that 'environmental distress' would be sufficient, loss of the vessel or cargo resulting in pollution, could constitute distress.

From the above it would seem therefore that the concepts of force majeure and distress may not apply to ships in need of assistance where the ship has failed to maintain international CDEM requirements. Accordingly, ships in need of assistance in this case will not satisfy the requirements set out in UNCLOS in respect of 'passage'. That being said, where there is no evidence of negligence

¹⁷³ Murray 2002 *Ohio State Law Journal*.1481.

¹⁷⁴ Walker G *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (2012) Martinus Nijhoff Publishers The Netherlands 169.

¹⁷⁵ Ibid.

or poor ship maintenance, it is submitted that ship in need of assistance may fall into the category of force majeure or distress set out in Article 18 of UNCLOS.

4.3.1.2 Innocence

Assuming that the ship in distress meets the requirements of Article 18 of UNCLOS the enquiry would therefore follow as to whether such passage is innocent as set out in Article 19. The requirement of innocence is split into two parts. Firstly in Article 19(1) it is negatively defined as passage that "is not prejudicial to the peace, good order or security of the coastal State" being the overarching requirement. Secondly and in attempt to give some context to the first part, UNCLOS also provides a list of activities in Article 19(2) which are considered to be non-innocent in nature.¹⁷⁶ Non-innocent activities relevant to this dissertation are "any act of wilful and serious pollution" and "any other activity not having a direct bearing on passage" included in subparagraphs (h) and (i) of Article 19(2) respectively.

There is some debate as to the relationship between Article 19(1) and Article 19(2) of UNCLOS. Some commentators are of the view that the examples listed in Article 19(2) are intended to provide coastal states with an objective means for interpreting Article 19(1) and therefore limiting the opportunity for abusing their rights in this regard.¹⁷⁷ In this way the examples listed in Article 19(2) limit the enquiry into whether a foreign ship's activities are seen as non-innocent. Should the activity of the foreign ship not fall into one of the examples listed, the activity is innocent. On the other hand there are some commentators which are of the view notwithstanding the fact that the facts of a particular circumstance may not neatly fit into the categories listed in Article 19(2), the ship's conduct can still be classified as 'prejudicial to the peace, good order or security of a coastal state' in terms of Article 19(1).¹⁷⁸ Article 19(2) specifically guides the

¹⁷⁶ See UNCLOS Article 19.

¹⁷⁷ Churchill & Lowe *The Law of the Sea* 61; Brugman *Access to Maritime* 85.

¹⁷⁸ Sage-Fuller *The Precautionary Principle in Marine Environmental Law: With Special Reference to High Risk Vessels* (2013) Routledge New York 50 and Tanaka *The International Law of the Sea* 87. The debate

enquiry and analysis of whether the activity is non-innocent. Article 19(2) specifically states that “[p]assage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of a coastal state if...it engages in any of the following activities”. Article 19(2) specifically stipulates the mechanism for determining whether the activity of the foreign ship falls foul of Article 19(1). In this way the enquiry is simply whether the activity of the foreign ship falls into one of the examples listed. It is therefore submitted that should the activity not be covered by the examples listed in Article 19(2) the activity of the foreign ship will be innocent.

There are also varying opinions as to whether the list in Article 19(2) is exhaustive.¹⁷⁹ There is no indication contained in the first part of Article 19(2) that the list which follows in sub-paragraphs (a) to (l) is an open list. In support thereof there is no use of wording such as ‘including but not limited to’ or any wording to include a ‘catch-all’ such as, for example, ‘any other activity which is prejudicial to the peace, good order or security of a coastal state’. It is noted that there is a reference in sub-paragraph (l) to a catch-all but same refers to ‘any other activity not having a direct bearing on passage’ which is discussed below. It is submitted that sub-paragraph (l) does not clearly change the character of the list contained in Article 19(2). It is therefore submitted in this dissertation that the list of non-innocent activities is seen to be an exhaustive list which limits the interpretation of the first paragraph of Article 19.¹⁸⁰ Should a particular ship’s activities meet the above requirements, the passage of that ship will be innocent and the ship would therefore have a legal right to continue its passage through the particular territorial waters.

around the independence of Article 19(1) and 19(2) presents an interesting question when dealing with ships carrying nuclear substances. Some states have utilised the precautionary principle to justify a legal basis for limiting innocent passage. The argument is that whilst the transportation of nuclear material is not listed in the examples in Article 19(2) such an activity is most definitely prejudicial to the peace, good order or security of a coastal state’ in terms of Article 19(1). See Sage-Fuller *The Precautionary Principle in Marine Environmental Law: With Special Reference to High Risk Vessels* (2013) 51 for a further discussion on this.

¹⁷⁹ See Hakapaa K & Molenaar E “Innocent passage – past and present” 1999 *Marine Policy* 132; Kraska J *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* Oxford (2011) University Press New York 2011.

¹⁸⁰ For a contrary view see Hakapaa & Molenaar 1999 *Marine Policy* 132.

In analysis of subparagraphs (h) and (l) of Article 19(2) of UNCLOS it is submitted that in general, ships in need of assistance do not fall foul of any activities considered to be non-innocent. In respect of subparagraph (h) there needs to be wilful pollution which implies a notion of intent. Under normal circumstances ships find themselves in distress accidentally or possibly through negligence, but not intentionally. In respect of subparagraph (l) the activity must not have any direct bearing on passage. As was discussed above and in respect of Article 18 of UNCLOS it is very possible that a ship in distress which seeks refuge in the territorial waters of a coastal state may well satisfy the requirements of passage. The reference to passage in subparagraph (l) of Article 19(2) is therefore somewhat circular. It is therefore submitted that a ship in distress which seeks refuge would not easily fall foul of Article 19(2). Accordingly it is submitted that unless the conduct of the ship in distress falls foul of Article 19(1) of UNCLOS there may well be an obligation on the coastal state to regard the passage of a ship in need of assistance as innocent.

As regards Article 19(1) Sage is of the view that the mere threat that a ship in need of assistance may cause marine pollution cannot in itself be considered as an element of rendering the passage of that ship non-innocent.¹⁸¹ Sage states further that an actual environmental damage must have occurred for a coastal state to declare that the passage is non-innocent.¹⁸² This therefore introduces the possibility that ships in need of assistance and vulnerable to causing a pollution incident may well be considered innocent in terms of Article 19 of UNCLOS. Sage states that a strict interpretation of Article 19 “would exclude the possibility of denying the so-called “leper ships” a right of innocent passage on grounds of their poor condition, if they were not engaged in a non-innocent ‘activity’”.¹⁸³ Sage does note, however, that The International Law Association Committee on Coastal state Jurisdiction has accepted that where a ship's condition is “so deplorable that it is extremely likely to cause a serious incident

¹⁸¹ Sage B “Precautionary Coastal State Jurisdiction” 2006 *Ocean development of International Law* 362.

¹⁸² Ibid.

¹⁸³ Sage 2006 *Ocean development of International Law* 363.

with major harmful consequences, including to the marine environment" that ship's passage cannot be regarded as innocent.¹⁸⁴

Should the passage of the particular ship meet the requirements of innocence, the coastal state is allowed to further regulate the manner in which such innocent passage is exercised. The coastal state may adopt laws in respect of safety of navigation, regulation of maritime traffic, conservation of the living resources of the sea, the preservation of the environment of the coastal state and the prevention, reduction and control of pollution.¹⁸⁵ It is submitted that Article 21 of UNCLOS may provide a basis to regulate the innocent passage of ships in need of assistance insofar as the location of the place of refuge is concerned. It is submitted that Article 21 does not provide a basis for the coastal state to refuse a place of refuge all together as same might fall foul of the rights of innocent passage as the laws and regulations adopted in terms of Article 21 of UNCLOS cannot however have the practical effect of denying or impairing innocent passage.¹⁸⁶

4.3.1.3 Concluding Remarks on Innocent Passage

From the above discussion it is submitted that the rules regarding innocent passage can cater for ships in need of assistance where there is a risk of environmental harm from pollution. It is recognised that not all ships in need of assistance could rely on 'distress' or force majeure, especially in instances where there has been negligence and non-adherence to international operational standards. In this regard it is submitted that if one takes a pragmatic

¹⁸⁴ Sage 2006 *Ocean development of International Law* 363, Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution' (Franckx, E rapporteur, Molenaar EJ assistant rapporteur) in International Law Association, 'Report of the 69th Conference', London Conference (2000) 493. The Committee noted that the concept of innocent passage seeks to balance a variety of coastal state interests which stem from its sovereignty over the territorial sea with the legitimate interests of other members of the international community. The Committee noted that there is state practice which shows that coastal states exercise rights of expulsion of foreign ships notwithstanding the right of innocent passage and that there is a relaxation of the distinction of innocent and non-innocent passage and rather a focus on expelling ships which are dangerous to the marine environment.

¹⁸⁵ See UNCLOS Article 21.

¹⁸⁶ See UNCLOS Article 24.

approach, recognising that the rights afforded to ships in need of assistance should be focussed on solving the immediate problem for the benefit of the ship and also in pursuit of protecting the marine environment, questions of culpability should be restricted to an ex post facto analysis of which party is to bear the costs incurred. It is accordingly submitted that the rules of innocent passage could constitute a basis to establish a legal obligation on coastal states to grant places of refuge to ships in need of assistance within the territorial sea where there is no clear evidence of negligence on behalf of the ship.

The concept of innocent passage may well provide a legal basis for arguing that there is a duty on coastal states to grant places of refuge to ships in need of assistance. This would act as a limitation of the traditional sovereignty rights of the coastal state. That being said, coastal states may be able to protect themselves against the environmental risk of ships in need of assistance through other international conventions. These rights of self-protection may allow the coastal state to expel ships in need of assistance notwithstanding the right of innocent passage.

4.3.2 The Duty to Co-operate & The Right of Self Protection

As was discussed in Chapter 3, coastal states by virtue of certain multilateral treaties owe duties to cooperate with the international community in the protection and preservation of the marine environment. Examples of this co-operation are found in the Salvage Convention and the OPRC. As Shaw notes, the OPRC links up with the duties of co-operation in Article 11 of the Salvage Convention which confirms the duties on the coastal states to take into account the need for co-operation between salvors, other interested parties and public authorities.¹⁸⁷ Whilst such duties of co-operation do not stipulate a specific legal obligation on coastal states to grant places of refuge, such duties to require the coastal state to consider the fact that granting a place of refuge might well be the most appropriate measure to take in the circumstances.

¹⁸⁷ Shaw *CMI Yearbook 2003* 331.

The counterpoint to the above would be the expressions of self-defence found in UNCLOS and the Intervention Convention.¹⁸⁸ It is however important to bear in mind that the measures taken by the coastal state under the Intervention Convention must first be subject of consultation with other states and thereafter be proportionate to the actual or threatened damage and not go beyond what is reasonably necessary to achieve the prevention, mitigation or elimination of grave and imminent danger to from pollution.¹⁸⁹

It is submitted that the fundamental principle evident in the above multilateral conventions is that of consultation and a balancing of interests based on sound information. It is accordingly submitted that the above multilateral conventions do not specifically call for the admission of a ships in need of assistance into a place of refuge. Similarly it is submitted that same do not indicate a basis from which a refusal can be solely based. It is submitted that the decision to grant or refuse a place of refuge under the above conventions would of necessity be a value judgement which would need to be informed by the rights of innocent passage and the duty to protect the environment.

4.3.3 Concluding Remarks on Refuge in Territorial Waters

It has been submitted that the rules of innocent passage could well provide a standalone legal basis to argue that a coastal state is obliged to grant a place of refuge within its territorial waters to ships in need of assistance. This is differentiable from the position within the internal waters of a coastal state in so far as the obligation to grant a place of refuge within the internal waters may be a product of the duty to protect the marine environment and not as a standalone obligation.

A coastal state's obligations to consult and co-operate in respect of taking measures to protect and preserve the marine environment may similarly require a coastal state to grant a place of refuge within the territorial sea.

¹⁸⁸ See Article 220 of UNCLOS and Article 1 of the Intervention Convention.

¹⁸⁹ Article 5 the Intervention Convention.

4.4 Duty to Protect the Marine Environment

As was set out in detail in Chapter 3 there is a clear general obligation on coastal states to protect and preserve the marine environment.¹⁹⁰ This duty to protect the marine environment could be a legal basis to limit coastal state sovereignty in favour of an obligation to grant places of refuge to ships in need of assistance.¹⁹¹ Welgemoed is of the view that the discussion on places of refuge will turn on the relationship between sovereignty and the duty to protect the marine environment.¹⁹²

The fundamental characteristic of the duty to protect the marine environment is as an overarching, general obligation not limited to a particular maritime zone and a duty owed to the international community as whole. It would be difficult to argue that Article 194 (1) of UNCLOS is unclear in this regard. It places a clear positive duty on all states to take all appropriate measures that are necessary to prevent, reduce and control pollution of the marine environment from any source.

As was discussed above modern coastal state practice seems to indicate that coastal states are entitled to exercise sovereign powers and refuse entry to a place of refuge to a ship in need of assistance. The difficulty is trying to reconcile these sovereign powers with the general obligation to protect the marine environment. By refusing access to a place of refuge, the coastal state itself could be the contributing factor in a resulting pollution incident.

Tanaka states that coastal states have a dual role with regards to pollution. Coastal states are to protect their own interests but as a member of the international community, coastal states are to protect the marine environment in favour of the interests of the whole international community.¹⁹³ Tanaka is further of the view that coastal states are required to show due diligence and not

¹⁹⁰ Article 192 of UNCLOS.

¹⁹¹ Van der velde *CMI Year Book 2003* 484.

¹⁹² Van der velde *CMI Year Book 2003* 485.

¹⁹³ Tanaka 2014 *Journal of Maritime Law and Commerce* 180.

cause transfrontier pollution.¹⁹⁴ This is supported by Article 194 (2) of UNCLOS which obliges coastal states to ensure that pollution does not spread beyond their sovereign areas. There may be cause to argue that if it can be shown that a coastal state did not act with due diligence to all the relevant factors and decides to refuse entry to a ship in need of assistance and a pollution incident occurred, the coastal state may be liable to affected persons for the damages suffered.¹⁹⁵

The duty to protect the marine environment does not necessarily speak to the rights of access to a particular maritime zone of a particular coastal state. The crux of the duty is to preserve and protect the marine environment. It is therefore submitted that where a place of refuge is requested by a ship in need of assistance so as to protect the marine environment from pollution, the coastal state is obliged to take the appropriate measures in order to ensure that the marine environment is protected from harm. It is irrelevant as to whether a place of refuge is granted and where such would be located. What is relevant is that the chosen location allows for the appropriate antipollution measures to be put in place so as to ensure that the marine environment is preserved and protected.

4.5 The IMO Guidelines

It has been stated that that there is no clear legal regime governing and guiding the decisions by coastal states to grant places of refuge to ships in need of assistance.¹⁹⁶ In response to the difficulties encountered and lack of uniform decision making criteria the IMO adopted its Guidelines on Places of Refuge for Ships in need of Assistance in December 2003 (the IMO Guidelines).¹⁹⁷ The IMO Guidelines are aimed at balancing the rights of the ship with that of the coastal state so as to provide a common framework which can be used to determine places of refuge and respond effectively to requests by ships in need

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Frank 2005 *The International Journal of Marine and Coastal Law* 3.

¹⁹⁷ IMO Guidelines.

of assistance.¹⁹⁸ The IMO Guidelines essentially provide for risk assessment and decision making criteria so as to promote objective decision making as to requests for places of refuge.¹⁹⁹ The IMO Guidelines align directly with the issue dealt with in this dissertation. The question is whether these IMO Guidelines provide a legal basis from which one could argue that a coastal state is obliged to provide a place of refuge to a ship in need of assistance.

Paragraph 1.7 of the IMO Guidelines acknowledges that “granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast”.²⁰⁰ The IMO Guidelines therefore clearly acknowledge that there is no obligation on the coastal state to grant a place of refuge.²⁰¹ The IMO Guidelines provide, at the very most, a basis to assess the situation in line with the provisions contained therein.²⁰² The IMO Guidelines although being non-binding might well encourage a coastal state to properly consider a request for a place of refuge with proper consultation of interested parties and the reliance on sound information.²⁰³ This might link up to the duties of consultation and co-operation discussed earlier on in this Chapter. Morrison states that there has been some acceptance of the IMO Guidelines in the United Kingdom, European Union, Canada and Australia and there is therefore a chance that the IMO Guidelines or something similar might end up as a new norm of customary international law in the future.²⁰⁴

¹⁹⁸ Preamble to the IMO Guidelines.

¹⁹⁹ Noyes 2008 *Denver Journal of International Law and Policy* 140.

²⁰⁰ Article 1.7 of the IMO Guidelines.

²⁰¹ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of 92*

²⁰² *Ibid.*

²⁰³ Van Hooyhonk *CMI Year Book 2003* 435.

²⁰⁴ Morrison *Place of Refuge for Ships in Distress- Problems and Methods of 92.*

Chapter 5 – Conclusion

This dissertation sought to discuss and analyse the current state of international law concerning ships in need of assistance in order to determine whether coastal states are obliged to grant places of refuge in times of distress as a means to protect the marine environment. The proposition put forward in this dissertation was that the granting of places of refuge to ships in need of assistance would in all likelihood reduce the probability of a pollution incident occurring. It further proposed that should a pollution incident nevertheless occur, had the ship been granted a place of refuge, the extent of the pollution may well be minimised. Essentially places of refuge offer a sheltered area to ships in need of assistance to enable the effective implantation of antipollution measures. The focus of the discussion within this dissertation was the recognition that places of refuge play an important role in the protection and preservation of the marine environment.

The concept of ships in need of assistance is a relatively modern development of the traditional custom concerning ships in distress. Traditionally a distressed ship had a right of entry into a 'port of refuge' (as they were referred to then). There has been a notable paradigm shift in the development of the concept of distress. The custom concerning distress was traditionally primarily concerned with the protection of human life. With the advances of modern technology the requirement for granting a distressed ship refuge in port in order to save the persons on board was reduced. Persons on board can now, in many instances, be saved whilst the distressed ship is out at sea. The advance of technology also brought larger vessels which are able to transport significant quantities of potentially polluting materials. The potential pollution risk concerning these ships is therefore much higher in the modern era when compared with the ships of the past. These two broad developments sparked the change in coastal state position on the obligations to provide places of refuge to ships in distress. This difference is reflected in the terminology used when describing the specific

instance of distress. Where there is a risk to human life such a ship is termed a 'ship in distress'. Where there is only a risk to the vessel, cargo and marine environment such ships are termed 'ships in need of assistance'.

It is common place for coastal states, when faced with a request for a place of refuge, to differentiate between ships in distress and ships in need of assistance. Coastal states have demonstrated a reluctance to grant a place of refuge to a ship in need of assistance as there is no risk to human life. This reluctance and development of the traditional rights of ships in distress has introduced the problem of ships in need of assistance. To what end, if any, has the traditional right of refuge been preserved in the modern era? Chapter 2 concluded that whilst the traditional right of refuge remains valid such rights only apply to circumstances where there is human life at risk. Accordingly the traditional rights of refuge do not apply to the modern ships in need of assistance.

In order to establish an obligation on coastal states to grant places of refuge to ships in need of assistance alternative bases of international law must be explored. The analysis of UNCLOS together with other multilateral conventions in Chapter 3 provided a good basis to explore the rights and duties of coastal states with respect to access and measures aimed at regulating pollution.

The establishment of an obligation on coastal states to grant places of refuge to ships in distress would legitimise a limitation on coastal state sovereignty. It was concluded that coastal states have a wide legislative and enforcement competency to regulate access into their sovereign waters and to adopt laws regarding pollution control. The differentiation was made between the regime regulating internal waters and that of territorial waters. This differentiation illustrated the fact that whilst coastal states are required to grant limited access to foreign ships in territorial waters, such access does not apply in internal waters. With regards to internal waters it was concluded that subject only to the duty to protect the marine environment there would be no obligation to grant a place of refuge to ships in need of assistance.

The discussion on territorial waters introduced the concept on innocent passage which represents an agreed limitation of coastal state sovereignty provided that certain conditions are met. In Chapter 4 this concept was discussed in detail and whilst there may be some argument to the contrary, innocent passage could provide a standalone legal basis to argue that a coastal state is obliged to grant a place of refuge within its territorial waters in the absence of negligence on the part of the ship in need of assistance. Whilst it may be possible to determine the cause of the situation with the benefit and clarity of time and hindsight, it is submitted that in the moment of a maritime incident a strict reliance and investigation of causation would defeat the purpose of Article 18 of UNCLOS. It is submitted that where force majeure or distress is claimed, the coastal states should act on the presumption that the ship meets the requirements thereof without undue reliance on arguments of causation and proceed with haste to mitigate the potential negative effects of the maritime incident. It is submitted that undue reliance on self-protection in this regard would not be consistent with the coastal state's duties to act with due diligence and protect and preserve the marine environment.

It is submitted that the duty to protect the marine environment is an overarching duty owed to the international community as a whole. Coastal states have a duty to protect the marine environment and take measures to ensure that no transfrontier pollution occurs. It is submitted that the duty to protect the marine environment does not necessarily speak to the rights of access to a particular maritime zone of a particular coastal state. It is submitted therefore that the duty to protect the marine environment does not provide a legal basis to argue that coastal states are obliged to grant access into internal or territorial waters. However, the duty to protect the marine environment is not being served by a complete refusal to grant places of refuge to ships in need of assistance.²⁰⁵ It is submitted that whilst the coastal state has a duty to protect the marine environment and take measures to ensure that no transfrontier pollution occurs, this duty does not specifically require the coastal state to grant access within its

²⁰⁵ Chircop 2002 *Ocean Development & International law* 221.

sovereign waters. For instance the coastal state could establish dedicated reception facilities outside of its sovereign waters to deal with ships in need of assistance. In a similar fashion as the concept of 'port of refuge' developed into that of a 'place of refuge' not necessarily being within a port, it is possible for 'places of refuge' to develop and be established outside of the internal or territorial waters of a coastal state.

It is however recognised that main reason places of refuge have been requested within the internal or territorial waters of a coastal state is that such locations provide suitable conditions for the execution of antipollution measures. It may simply not be possible to engage in antipollution measures in the high seas. This is however only the current position. In a similar fashion as the advances in shipping technology have developed so too could the antipollution measures and reception facilities be developed. If requisite technology is developed, coastal states may well be able to comply with their environmental duty without granting access into their internal or territorial waters.

The thrust of the duty is to preserve and protect the marine environment. Where granting a place of refuge to a ship in need of assistance is the only appropriate measure available there may be an obligation on the coastal state to grant such place of refuge purely as a means of protecting the marine environment. If, through advancement of technology or the establishment of off shore pollution reception facilities, coastal states can adequately deal with ships in need of assistance there would be no reason or need to grant a place of refuge within the sovereign waters of the coastal state.

This dissertation sought to analyse whether there was a legal obligation on coastal states to grant places of refuge to ships in need of assistance. Essentially this dissertation analysed whether there was a limitation on coastal state sovereignty when dealing with ships in need of assistance. Discussions in this regard are usually focussed around access to sovereign waters and the obligation, if any, to grant such access in times of need. It is submitted that there is no clear legal basis which legitimately limits the sovereign powers rights of

coastal states outside of the arguments of innocent passage and specifically agreed conventional law. If one constrains the discussion to issues of sovereignty and limitations thereof, it is submitted that problem of ships in need of assistance is difficult to solve. However, if one focusses on the key issue regarding ships in need of assistance, being the potential negative impact to the marine environment, issues of access and sovereignty become less relevant. The duty to protect the marine environment is already accepted as a legitimate limitation on sovereignty as was discussed in this dissertation. It is therefore submitted that there is no need to establish a separate legal basis to limit the sovereignty of coastal states in respect of protection of the marine environment as same already exists. Furthermore, the duty to protect the marine environment does not specifically speak to issues of sovereignty and access. The duty is focussed on the protection of the marine environment. The enquiry is therefore whether the act of refusing to grant a place of refuge to a ship in need of assistance falls within the established duty to protect the marine environment.

To answer this question there would be a need to consider the specific circumstances in each and every case in order to determine the appropriate course of action so as to ensure that the interests of the marine environment are prioritised. It is therefore submitted that where the circumstances require a ship in need of assistance to be granted a place of refuge in order to protect the marine environment, coastal states are obliged to grant such refuge in their internal or territorial waters as the case may be. It is submitted that this obligation is clear and unequivocal in modern international law of the sea. Any act of refusal by a coastal state cannot be reconciled the overarching duty to protect the marine environment.

The difficulty lies in making the decision of what is the most appropriate course of action so as to ensure that the marine environment is protected and therefore give effect to the duty. It is submitted that this is where further development is required. The decision making criteria to be utilised in the context of ships in need of assistance needs to be universally agreed and flexible in nature in order

to be adaptable to different circumstances whilst always placing the protection of the marine environment at the forefront. It is submitted that the goal is to draft and agree a multilateral convention dealing with ships in need of assistance, specifically setting out the decision making criteria to be utilised. It is submitted that there is no need for further discussion and debate as to whether coastal states are obliged to grant places of refuge to ships in need of assistance. It is submitted that this obligation has already been established as and when the specific circumstances require.

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