Existing concepts in the law of the sea: possible bases for places of refuge?

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Introduction

On 11 November 2002 the Bahamian registered tanker, the *Prestige,* laden with 77,000 tons of heavy oil en-route from Latvia to Singapore developed a 10 meter crack in the hull in heavy weather off Cape Finisterre. On the 13th it sent out a distress signal that the hull had ruptured and oil was leaking. It was then 35 nm offshore and drifting shorewards. On the 14th it was taken in tow by a salvage team, which succeeded in stabilising it. It requested permission to be towed into the calmer waters of a sheltered harbour to transfer its cargo to another tanker. France, the UK and nearby Spain and Portugal refused permission, fearing pollution and explosion in a confined harbour area. Under Spanish orders and shadowed by a naval frigate the *Prestige* was towed out to sea and then south towards Portuguese waters. Rough seas damaged it further and on the 15th the master abandoned ship. Meanwhile, about 6,000 tons of oil escaped and were polluting the Spanish coast, fouling beaches and seabirds and closing fisheries and shellfish beds. It caused a political storm onshore and within the European Union. Portugal then dispatched a frigate to push the tugs westwards, further out to sea. On the 19th the *Prestige,* buffeted by huge waves for a week, split apart and sank 145 nm off the Spanish coast near the Portuguese EEZ, causing the worst oil spill since the grounding of the *Exxon Valdez* in 1989. The oil spread was driven onshore polluting 290 km of Spanish coastline. If the tanker had been given shelter in a small bay the pollution could easily have been contained. It also threatened to pollute the coasts of France and Portugal. In the wake of the *Prestige* disaster, Spain and Portugal were blamed for exacerbating what should have been a minor oil spill by refusing to give the tanker permission to dock in a sheltered area. [1]

As *The Economist* put it:

> Governments must develop clearer guidelines on when and how to offer ailing ships a port of refuge; dithering and bickering between Spain and Portugal left the *Prestige* in rough seas far longer than necessary.[2]

Earlier the *Castor* incident prompted the International Maritime Organisation to consider urgently guidelines on 'places of refuge'. In January 2001, the 31,068 ton tanker, the *Castor* developed a 24 meter crack across the deck halfway along its length. It was in the Mediterranean en-route from Romania to Nigeria. Algeria, Gibraltar, Greece, Malta, Morocco, Spain and Tunisia all refused permission to enter territorial seas and ports, fearing oil pollution and explosion. Spain evacuated the crew and ordered it 30 nm offshore. It was towed around the Mediterranean Sea for more than a month, before a relatively sheltered place could be found off Tunisia where successful lightering operations could be carried out. In commenting on the *Castor*, Mr. W. O'Niel the former Director-General of IMO said:

> Ships in a situation such as that facing the Castor do not need or want to proceed to a port. What they do need is access to relatively sheltered waters so that whatever operations must be performed to make

[1] For information resources on the sinking of the "Prestige", see the IMO Library Services @ www.imo.org

[2] *The loss of the Prestige*, The Economist, November 23rd 2002.

them and their cargoes safe can be done with the minimum of risk to either the ship, the coastal State, the environment or indeed the salvors themselves. One can understand the reluctance of coastal States to put their citizens or their coastlines at risk. At the same time, for the international community not to have some form of structured arrangements in place to cope with a ship in distress like the Castor is clearly not satisfactory and is a matter which we must address. [3]

In one of the first such examples in 1978, the 218,000 ton Greek tanker *Andros Patria* developed a 15 meter crack in the hull in passage though a storm off Cape Finisterre. Following an explosion a fire broke out in the fractured No. 3 tank from which 55,000 tons of oil poured into the sea. France, Portugal, Spain and the UK refused permission for the stricken tanker to enter their territorial waters for fear of pollution. It was eventually towed to a position 250 nm south of the Azores where it could undertake a ship-to-ship cargo transfer, using two other tankers. The lightering operations were interrupted form time to time by the weather and took 19 days to complete at which time the continuously moving convoy reached a position 200 nm north west of the Cape Verde Islands. A similar situation arose in 1979 after the collision of two supertankers the *Atlantis Empress* and the *Aegean Captain* in the Tobago-Granada passage. The holed and burning *Atlantis Empress* presented a serious threat of major pollution to the Islands of Trinidad and Tobago, and to the South American mainland. Under orders from Trinidad and Tobago, salvors towed it 300 nm offshore, where it sank with most of its cargo onboard after being ripped apart by explosions.[4] The 270,000 tons of crude oil which sank with the tanker still constitutes the world's largest ever loss of oil at sea, though none came ashore. There were other incidents during that period which drew the attention of the commentators, the *Cristos Bitas* (1978), *Prisendam* (1980), *Eastern Mariner I* (1981) and *Stanislaw Dubois* (1981), all noted in Kasoulides.[5] These particular incidents were more recently cited by the International Law Association in support of 'a state practice which shows that ships whose condition is so utterly deplorable that they are extremely likely to cause serious incidents with major harmful environmental consequences are denied entry into the territorial sea for fear of harm to the interests of the coastal state'. [6]

The problems of maritime lepers were again vividly demonstrated in 1989 during the voyage of the *Khark 5*. This 285,000 ton Iranian tanker suffered a 20m by 30m hole in its port side following explosions and fire in heavy seas off the northwest coast of Morocco. After Spain and Morocco banned it from their territorial seas it was towed into the Atlantic Ocean in order to comply with the bans and in search of better weather. The salvors protested that the oil spill had been worsened by the refusal to allow the tanker into sheltered waters for repairs and by

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[3] Keynote address to the 20th annual National Sea Day organised by the Institut Francais de la Mer at the French Senate in Paris, quoted in an IMO document "Places of refuge" available @ www.imo.org

[4] See, C. De La Rue and C. B. Anderson, *Shipping and the environment*, (1998) at p. 568 and pp. 823-824.

[5] G. Kasoulides, '*Safe havens' for crippled tankers*, 11, Marine Policy, 184 (1987) at pp. 185-187.

[6] E. Franckx (ed), *Vessel-source pollution and coastal state jurisdiction, the work of the ILA Committee on coastal state jurisdiction relating to marine pollution (1991-2000)* at pp. 127-128 note 279.

requiring it to be towed into stormy seas where some 40-000 – 60,000 tons of oil had escaped. After the leakage stopped, Iran requested Spain to allow the tanker into a Canary Island port to offload its remaining cargo. This request was refused as Spain feared that it could break up. Portugal also refused it permission to enter the territorial waters of Madeira. It was towed further south to Senegal but it also closed its territorial seas to the stricken tanker. The salvors were then forced to tow it towards the Cape Verde Islands but it was branded as "undesirable" and the salvors were left with no option other than to carry out on the high seas a ship-to-ship transfer of the 200,000 tons of the crude oil still remaining on the *Khark 5*. The vessel continued its odyssey south-east of the Cape Verde Islands in search of better weather. Whilst waiting for the weather to improve damaged pipework ruptured and it lost more oil. Operations were finally completed 250 nm west of Sierra Leone after it had been being towed around for 6 weeks. It was then able to sail under its own power to Europe for repairs. [7] In another incident in 1991, the 97,083 ton Greek tanker, the *Kirki* ran into heavy seas approaching Kwinana (Western Australia) and lost its bow spilling 7,700 tons of light crude. Permission to be towed into Freemantle to discharge its cargo was denied and it was towed about 900 nm north to Dampier. On the tow to the north a further 11,000 tons of oil escaped in the sea, though virtually no oil came ashore. The *Kirki* was stabilised at sea off Dampier by salvors and a ship-to-ship transfer took place about 30nm from the port limits of Dampier. [8]

In recent times oil spill contingency planning and response capacity have improved greatly especially in Australia, Denmark, Germany, Norway and the UK. Occasionally stricken tankers are given access to sheltered waters after strict precautions were taken. For example in 1995 the ultra large crude carrier, *Mimosa* carrying 337,000 tons of Brent crude oil damaged its forepeak in contact with an underwater object 80 nm west of the Hebrides. It was permitted to divert to Lyme Bay in the south of England under escort of the naval corvette *Eithne* and the Coastguard tug/supply boat *Brodospas Sun*. On the passage southwards it was monitored from the air and a safety watch maintained in close co-operation between the tanker and public officials. On arrival in Lyme Bay the cargo was transferred without incident onto another tanker.[9] The incidents mentioned above are only a few examples. A survey by the International Working Group of the Comite Maritime International (CMI), which sent out a questionnaire to its Member National Associations, notes many examples in state practice.[10] The CMI study shows that coastal states frequently refuse entry to their ports and territorial sea to maritime casualties and 'leper ships' posing any risk of pollution, no matter how small,

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[7] See, De La Rue and Anderson op. cit. at p. 825.

[8] The *Kirki* incident is discussed in D. Baird and R. Lipscombe, *Safe havens policy and practice in Australia*, a paper delivered at the Australian Maritime Safety Authority Conference, February 2002 at pp.6-7 available on the AMSA website @ www.amsa .gov.au

[9] For a discussion of the *Mimosa* lightering operations see, De La Rue and Anderson op. cit. at p.825.

[10] Places of refuge: International Sub-Committee paper posted on the CMI website @ www.comitemaritime.org

or of fire or explosion, or if there is a high risk of the ship sinking at its moorings or in the approaches to port and thereby causing a wreck removal problem or a hazard to navigation.

After the *Erika* accident in 1999 a working group of IMO's Maritime Safety Committee (MSC) listed "ports of refuge" amongst the selected safety issues for further consideration. In reaction to the *Castor,* the MSC at its 74th session 30th May 2001 instructed the Safety of Navigation Sub-Committee to consider ways in which the international community can deal with the problem of vessels seeking places of refuge. A similar request was made through the IMO Legal Committee to CMI. It was not until the *Prestige* disaster highlighted the catastrophic consequences for the environment that IMO adopted guidelines on places of refuge. In November 2003, the IMO Assembly adopted two resolutions addressing the issue of refuge for ships in distress. Resolution A.949 (23) "*Guidelines on places of refuge for ships in need of assistance*" recognises that when a ship has suffered an incident, the best way of preventing pollution before the ship's condition deteriorates would be to lighten its cargo and bunkers and repair the ship in a place of refuge. The IMO guidelines provide a framework within which all risk factors can be assessed case-by-case by balancing the interests of the ship against those of the environment and the coastal state. A second resolution, A.950 (23) "*Maritime Assistance Service*", recommends that all coastal states should establish a Maritime Assistance Service in order to improve their maritime casualty response capacity.

The purpose of this paper is firstly, to consider whether maritime casualties and 'leper ships' with structural damage (such as the *Castor*) can in innocent passage enter the territorial sea of another state to transfer cargoes and carry out repairs. Secondly, the paper deals with the right of the ship in distress to seek refuge in a port or sheltered waters near the coast. In particular it considers the question whether this involves a right to save the ship and cargo where the crew have abandoned ship and life is not at risk. In the available space it is not however possible to deal with all the aspects of a refusal of refuge in salvage law. Thirdly, as the *Prestige* demonstrated with the tanker's condition progressively deteriorating, pollution from the ship can spread to other areas and damage neighbouring states and their environments. Some consideration is given to whether coastal states are by virtue of Part XII of LOSC under a duty to deal with such emergencies and grant a place of refuge to oil tankers for lightering operations. Finally, the paper briefly assess the IMO guidelines on places of refuge and their legal implications in the context of existing concepts in the law of the sea.

Innocent passage

Art. 1(1) of the 1982 Law of the Sea Convention (LOSC) recognises that 'the sovereignty of a coastal state extends beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea'. The International Court of Justice in the *Nicaragua* case noted that this prescription "merely responds to firmly established tenets of customary international law".[11] Sovereignty is the most comprehensive form of state authority, whose exercise is nevertheless subject to LOSC and other rules of international law.[12] Coastal states have by virtue of their sovereign rights over the territorial sea powers of intervention to act against ships that pose a threat of oil pollution in order to protect their coastal environment. Ultimately, the coastal state has the sovereign right to decide whether or not to allow a stricken tanker into its territorial sea or ports. Active intervention occurred in the *Kirki* incident when Australia gave instructions on how to deal with the casualty and ordered the tanker to stay 100 nm from the coast during the tow to the north as it posed a serious pollution risk. Passive intervention can best be illustrated by the 'maritime leper' syndrome where the coastal state refuses a damaged ship entry to its territorial waters and access to port facilities.

In international law the jurisdiction of the coastal State over its territorial sea is subject to the right of innocent passage. In the territorial sea of a coastal state foreign vessels have a right of unimpeded 'passage' provided their voyage is 'innocent'. Art. 17 of LOSC provides that "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea". Coastal states are under a general duty not to hamper the innocent passage of foreign ships through the territorial seas. [13]In particular, they may not impose legal requirements on foreign ships which will have the practical effect of denying or impairing the right of innocent passage, or of discriminating against the ships or cargoes of any particular state.[14] A foreign ship may be present in the territorial sea either in innocent passage or otherwise. If it is not in passage or is in non-innocent passage, the ship is subject to the full enforcement jurisdiction of the coastal State. To quote Churchill and Lowe:

> The territorial sea is subject to the sovereignty of the coastal State, and the only right which foreign ships enjoy there, apart from any right given by a specific treaty, is the right of innocent passage. In consequence, if a foreign ship ceases to be innocent or steps outside the scope of passage it may be excluded from the territorial sea. Accordingly, it is provided that 'the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent' (TSC, art, 16(1); LOSC, art, 25(1)). There is no express provision setting out the right to exclude vessels not engaged in passage, but this right undoubtedly exists in customary international law, and hovering vessels would almost certainly be deemed non-innocent so providing a further justification for their exclusion.[15]

This raises issues as to what is passage and what is considered to be innocent passage.

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[11] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgement of 27 June 1986, paragraph 212. p.111.
[12] LOSC art 1(3).
[13] Art 24.
[14] Art. 24 (1).
[15]R.R. Churchill and A.V. Lowe, *The Law of the sea*, 3rd ed. (1999) at p. 87.

Passage

Passage covers navigation through the territorial sea for the purposes of traversing that sea without entering internal waters or calling at a port. It is also extended to navigation through the territorial sea for the purpose of proceeding to or from internal waters or calling at a port facility outside internal waters (e.g. an offshore roadstead or deep water port).[16] Passage must be continuous and expeditious whether it consists of navigation through the territorial sea or entering or leaving a port. It also includes acts of stopping and anchoring, though only where this is incidental to ordinary navigation, rendered necessary by *force majeure* or distress, or to render assistance to another ship, persons or aircraft in distress. [17]

Ships claiming innocent passage must first be in passage as defined in art 18 of LOSC. Innocent passage consists of two different elements, 'passage' and 'innocence' which are set out in arts 18 and 19 of LOSC respectively. O'Connell suggests that: "The aim of defining 'passage' independently of its innocence is to give the coastal State unquestionable powers to expel ships which are not in passage – for example, are hovering or anchored, otherwise than incidentally to navigation".[18] This point was well illustrated in the *Attican Unity* case (see below). The influential International Law Association Committee on Coastal State Jurisdiction Relating to Marine Pollution at its London Conference 2000 confirms that:

> The right of innocent passage laid down in Art. 17 of the 1982 Convention is made subject to various conditions, in particular Arts., 18 and 19 of the 1982 Convention, which contain two different elements of the concept. Ships must first of all be in "passage" within the meaning of Art 18, which covers navigation by ships in transit through the territorial sea, and navigation by ships that come from or head for a port or internal waters. Ships "cruising", "hovering" or merely "lying in" the territorial sea, cannot claim their passage to be "continuous and expeditious", and consequently cannot claim a right of innocent passage, except under the circumstances of paragraph (2), for example *force majeure*.[19]

Stopping and anchoring

LOSC deals with a ship's normal right to exercise innocent passage. It does not refer to the status of maritime casualties in the territorial seas, though art 18(2) provides that passage includes stopping and anchoring if they are rendered necessary by *force majeure* or by distress. For example, foreign ships would be able to stop and anchor in the territorial sea in order to ride out a storm or to carry out emergency repairs before continuing their voyage. LOSC does not mention whether a distressed ship can engage in acts ancillary to stopping and anchoring.[20] May a ship for instance engage in fire-fighting? Art 18 contains the only exceptions in LOSC to the rule on continuous and expeditious passage. Besides stopping and

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[16] Art. 18(1).
[17] Art. 18(2).
[18] D.P. O' Connell, *the International Law of the Sea*, Vol. I, (1982) at pp.269-270.
[19] Franckx ed. op. cit. at pp. 125-126.
[20] See, A. Chircop, *Ships in distress, environmental threats to coastal states, and places of refuge: new directions for an ancien regime?* 33, ODIL, 207 (2002) at p. 215.

anchoring, ships are not allowed to deviate from their route and manoeuvre, cruise around, merely drift or lie in the territorial sea. Weinstein for instance submits that 'ships wandering the sea to look for a 'dumpsite' are not considered to have a 'purposeful passage' in the sense of Art 18.'[21] But it is fair to assume that if a ship has stopped in its track it should be able to carry out some ancillary acts, such as extinguishing a controlled fire using its own fire-fighting gear and hands without salvage assistance from the shore. This is recognised by most IMO Conventions which provide for *force majeure* exceptions to their normal application. [22]Given the *lacuna* in LOSC it would be difficult to describe precisely what actions the master may take on the bridge which are incidental to stopping and anchoring. If however salvage operations are required involving the deployment of salvage tugs and a salvage team, it is submitted that, the nature of such activities would no longer constitute 'passage' under art 18(2) or be something 'not having a direct bearing on passage' under art 19(2) (l) of LOSC.

Assistance at sea

LOSC extended the distress exception to cases where one ship seeks to render assistance to another ship, person or aircraft in danger or in distress. Art 18 does not spell out what actions a ship can take in order to render assistance to another ship in distress. Various proposals at UNCLOS III to include in the term 'passage' actions which a passing ship may take were not accepted by the Conference.[23] Furthermore, literally interpreted under art 18(2) a salvage tug cannot enter the territorial sea in innocent passage and assist a vessel in distress in those seas. To quote Rosenne and Yankov:

> A second substantive change from article 14, paragraph 3, of the 1958 Convention is the addition of "rendering assistance to persons, ships or aircraft in danger or distress" as a basis for stopping and anchoring while in passage. Article 18 reflects the general tradition and practice of maritime law, as set out in article 98 (in Part VII on the high seas), and elementary considerations of humanity. It may be on a strict reading of article 18, entering the territorial sea for the purpose of rendering assistance is not "innocent passage," but this interpretation would hardly be compatible with the general obligation of good faith in the interpretation and application of this Convention imposed by general international law and made specific by article 300. [24]

Accordingly, art 18 should be interpreted consistent with the obligation of ships to render assistance to others at sea. This is a well-recognised principle of international maritime law. On the high sea a similar duty is imposed by art 98 of LOSC. The International Law Commission considered the duty to render assistance at sea to be part of customary international law[25]and it is embodied in the International Convention for the Safety of Life at Sea (SOLAS 74/78) in regulation V/7 and in the 1979 International Convention on Maritime

[21] Weinstein, *The impact of regulation of transport of hazardous waste on the freedom of navigation*, 9, IJMCL ,135 (1994) at p. 141.
[22] For a discussion of '*force majeure*' incorporated in maritime conventions, see Kasoulides, op.cit. at pp.188-189.
[23] See, S. Rosenne and A. Yankov (eds) , *United Nations Convention on the Law of the Sea 1982: A Commentary* , Vol. II, para 18.2 at p. 160.
[24] Ibid. para 18.6(d) at p.162.
[25] See, O,Connell, Vol. II op. cit. at p.814.

Search and Rescue (SAR Convention). Although not explicitly referred to in art 18, an exception should therefore be made for passing vessels and salvage tugs to enter the territorial seas for purposes of rendering assistance to another vessel or persons in danger or distress.

A ships' right to enter the territorial sea for purposes other than passage

Article 18 of LOSC reads:

1. Passage means navigation through the territorial sea for the purpose of:
(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
(b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purposes of rendering assistance to persons, ships or aircraft in danger or distress.

Because a ship must be on a 'purposeful' passage as defined in art 18(1) entry *per se* does not constitute passage.[26] Art 18 envisages passage in two circumstances: (i) traversing through the territorial sea in lateral transit; and (ii) proceeding to and from internal waters or to and from a call at a roadstead or port facility outside internal waters. Art 18(2) provides a basis for stopping and anchoring while a ship is in innocent passage through the territorial sea. Prima facie this means that a ship in distress cannot enter the territorial sea in innocent passage for the purpose of stopping. Sir Gerald Fitzmaurice explained that: 'it is for instance not passage if a ship enters the territorial sea out of her normal course because of weather conditions or other emergency, for the purpose of anchoring and of eventually leaving the territorial sea by the same route, and not passing through it and leaving at another point'[27] It would therefore appear that ships like the *Prestige* and the *Castor* cannot claim a right of innocent passage to enter the territorial sea for the purposes of transhipment of their cargoes and to effect repairs.

A question which arises is whether art 18 allow ships an entry right into internal waters. It may be useful to refer to its drafting history. In customary international law innocent passage existed primarily for ships in lateral transit.[28] This was confirmed by the 1926 Harvard Draft Convention on the Territorial Waters.[29] The 1930 Hague Conference extended innocent passage to ships making for or coming from inland waters. The *travaux preparatoires* show,

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[26] G. Fitzmaurice, *Some results of the Geneva Conference of the Law of the Sea*, 8 Int. and Comp. Law Q, 73, (1959) noted at p. 93 that: "From these provisions ......it follows that although passage *involves* entry into the territorial sea, it must be distinguished from entry as *such*. It is entry for certain purposes only, *viz*, in effect (taking the normal cases), to pass right through without going to a port or other shore locality; or to proceed to a port, or to pass out from a port. To enter the territorial sea for another purpose may be legitimate (depending on the circumstances), but it is not passage; and therefore whatever justification it may have (and it need not necessarily be lacking in that), this must derive from other sources, and cannot be founded on the right of innocent passage".[26]

[27] Ibid. at p.93 note 18.

[28] See, P. C. Jessup, *the Law of Territorial Waters and Maritime Jurisdiction*, (1927) reprint (1970), at 123.

[29] See, Harvard Research Draft, The *Law of territorial waters and maritime jurisdiction*, 23, AJIL, Special Supplement, (1929) at p. 241- Comment to Article 14.

that the *raison d'être* for including voyages to and from internal waters within passage was 'to avoid being more restrictive than the 1923 Statute on the International Regime of Maritime Ports' in the territorial sea approaches to ports.[30] Thus, O'Connell observed that "the inclusion of passage to and from ports in internal waters is intended to reflect the supposition that there are rules of international law reflecting freedom of access to ports, and that the coastal State would not be free to deny ships transit rights for the purpose of access".[31]

In the *Nicaragua* case the ICJ confirmed that:

> in order to enjoy access to ports, foreign vessels posses a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters. Article 18 (1), paragraph (b) (of LOSC) does no more than codify international law on this point. [32]

According to Churchill and Lowe:

> The 1930 Hague Conference articles introduced a new element into the definition of passage, not previously adopted in State practice, by including ships travelling through the territorial sea to and from internal waters within the scope of the right of innocent passage. This was not because there was considered to be any right analogous to innocent passage, to enter or leave internal waters; thus coastal States retained the right to take, impose and enforce conditions for admission to internal waters (TSC, art.16(2); LOSC, art. 25(2)) Rather, it was done for the convenience of bringing such ships within the legal regime of ships in innocent passage, for general purposes of coastal State control and jurisdiction. The Territorial Sea Convention adopted the same position, in article 14(2); and that article was carried over into the Law of the Sea Convention, modified slightly so as to include within the scope of 'passage' the voyages of ships navigating the territorial sea in order to call at a roadstead or port facilities outside internal waters (LOSC, art. 18(1)). [33]

The right of innocent passage must be distinguished from a right of access to internal waters. There is no general right of innocent passage in internal waters. Art 25 (2) of LOSC allows the coastal state 'to take the necessary steps to prevent any breach of the conditions to which the admission of ships to internal waters is subject'. Art 211(3) allows the coastal state to establish its own anti-pollution requirements as a condition for entry into its ports or internal waters. Therefore one can conclude that while art 18(1) (b) affirms a right of innocent passage for ships in transit to and from internal waters, this does not give them a right of entry into the territorial sea analogous to innocent passage of ships in lateral transit through those seas. If a ship has no right to a destination in internal waters, it has no legitimate purpose under art 18 (1) of LOSC to enter the territorial sea, which can be founded on a right of innocent passage.

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[30]For an account of the negotiating process at the Hague Conference see, P.C. Jessup, *Editorial comment: the International Law Commission's 1954 Report on the regime of the territorial sea*, 49 AJIL, 221, (1955) at p. 226.
[31] O'Connell op. cit. Vol. I at p. 269.
[32] Judgement op. cit. para 213-214 at p.111.
[33] Churchill and Lowe op. cit. at p. 82.

The Attican Unity case

In 1977 the Greek ship the *Attican Unity* sailed from Antwerp to Cape Town carrying general cargo and a variety of chemicals[34]. Off the Belgium coast it caught a fire and the master decided to return to Antwerp. The Dutch Pilotage Authority prohibited the ship from entering Dutch territorial waters and radioed the Belgian pilot that it could not pass and had to be put about. The Pilot initiated a starboard manoeuvre. The fire intensified, explosions occurred and the situation became extremely dangerous. A salvage inspector, with the consent of the master, interrupted the manoeuvre and proceeded to beach it off *Cadzand* in the Netherlands a few hundred meters from the Belgium frontier. After burning for days salvors gave up attempts to save the ship and cargo. The Netherlands then assumed responsibility for salvage incurring costs of 10 mil Guilders. The State claimed damages from the salvors on the basis that by entering Dutch territorial waters in defiance of the prohibition they acted unlawfully.

The *Hoge Raad* (Supreme Court of the Netherlands) held that the State derives from its sovereignty over Dutch territorial waters the authority, in principle, to prohibit foreign ships from entering those waters, but this power had to be exercised subject to international law. Under the 1958 Convention the coastal state is not allowed to prohibit a foreign vessel from entering the territorial waters if that vessel is entitled to claim the 'right of innocent passage' in terms of arts 14 to17 of the Convention.[35] The Hoge Raad held however that the *Attican Unity* was not entitled to claim innocent passage, since it entered the Dutch territorial waters for the sole purpose of beaching the vessel. Irrespective of its innocent character, entering the territorial waters for this purpose could not be classified as 'passage' under arts 14 (2) or (3). It would appear that the Court was of the opinion that innocent passage exists for normal traffic purposes, but not for ships in distress seeking refuge. In the words of the court:

> Nu duidt de betekenis van dit woord op zichzelf genomen al op een voortbewegen van het schip door (territoriale) wateren heen. En dit is geheel in ooreenstemming met de strekking van onschuldige doorvaart: het doel ervan is immers alleen om voor allen schepen de kortst mogelike route door de zeeen en van en naar de havens open te stellen, en niet om bijv toevlucht te bieden aan schepen in nood.[36]

Under art 14(2) (LOSC art 18(1)), passage means traversing the territorial sea or, proceeding to internal waters or, making for the high seas. In this regard the court observed that:

> De Engelse tekst geeft door zijn zinsbouw en woordkeus naar mijn mening beter dan de Nederlandse aan dat begrip „doorvaart'' „passage'', mede afhanklik is van de bedoeling waarmee het schip de territoriale wateren is binnen gekomen...... Nog duidelijker wordt een en ander in de tekst van het Verdrag van Montego-Bay waar de betekenis van „passage" en van „innocent passage" niet meer in

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[34] Hoge Raad 7 Febuary 1986, Nederlandse Jurisprudentie no. 477 (1986). English commentary by H. Meijers in NYIL (1987) at pp. 402-407.

[35] Attican Unity judgement paras 13 and 14 at p. 1834.

[36] Ibid. para. 18 at p.1835.

H. Meijers commented in a "noot" at p. 1838 that: "zowel in het huidige gewoonterecht als in het vedragsrecht van 1958 betekent het recht op onschuldige doorvaart alleen maar een vaarrecht voor normale verkeersdoeleindes"

een artikel, maar in twee(de art 18 en 19...) omschreven, terwijl (o.m.) is toegevoegd de zin: „Passage shall be continuous and expeditious....

On the facts the Hoge Raad found that the *Attican Unity* entered the Dutch territorial waters for the sole purpose of beaching the vessel. This did not constitute 'passage' under Art 14:

En – anders dan bij de doorvaart van de Attican Unity van Antwerpen op weg naar Kaapstad – toen was de bedoeling, the purpose, van de bergers om het schip op het strand te zetten. .. Terecht, naar mijn mening, betoogt de Staat dat in zo'n geval niet van „doorvaart" kan worden gesproken, en dus evenmin van het in lid 3 van art. 14 als onderdeel van de normale navigatie genoemde stopen, noodzakelijk geworden ten gevolge van overmacht .[37]

Accordingly, the Netherlands was entitled to take steps to prevent the *Attican Unity* from entering its territorial sea. However, as Meijers, submitted the court ignored the fact that the *Attican Unit* was in distress, which by itself restricts the discretion of the coastal state.[38]

The Long Lin case

In March 1992 the Chinese-flagged ocean vessel, the *Long Lin* collided with another vessel in the North Sea. It was severely damaged, losing cargo overboard and leaking bunkers from ruptured fuel tanks. The ship's agents requested the Netherlands authorities to allow the ship to enter the territorial sea and proceed to a shipyard for repairs. Besides technical conditions, the authorities required a financial security in the sum of 10 mil Gulden to cover the State's expected costs for sinking and pollution etc. P& I insurers offered a guarantee, on condition that they retain the right to limit their liability. The authorities did not accept this reservation and impeded the ship from entering the territorial sea. The court annulled this order. [39]

The State Raad (Judicial Division of the Council of State) held that the *Long Lin* could not rely on innocent passage, since it was damaged and to be in passage a ship must be on a quick and non-stop voyage through the territorial sea for normal traffic purposes.

In the words of the court:

Een beroep op het 'recht van onschuldige doorvaart' in de zin van art. 14 van het Verdrag insake de territoriale zee en de aansluitende zone (Verdrag van 29april 1958, Ttb. 1959, 123) komt appellante niet toe. Het begrip 'doorvaart' als bedoeld in art. 14 betekent immers gebruik maken van een snelle en ononderbroken vaarroute door de territoriale zee ten behoeve van normale verkeersdoeleinden (vergelijk ook art. 18 van het Verdrag van de Verenigde Naties inzake het recht van den zee van 10 dec. 1982, Trb. 1984, 55). In het onderhavige geval was sprake van het in beschadigde toestand binnevaren van de Nederlandse territoriale- en kustwateren.[40]

[37] Ibid. para. 19 at p. 1835.

[38] Ibid. at pp. 1837-1838.

[39] Raad van State, 10 April 1995, no. R01.92.1060, Nederlands Juristen Blad pp. 299-300 (1995). English summary in NILOS Newsletter no. 13, September 1995 available @ www.uu.nl.

[40] Long Lin judgement at p.299.

Ships in a situation such as the *Long Lin* are not engaged in a continuous and expeditious voyage through the territorial sea and therefore cannot meet this requirement of passage. Arts 18 (1) and (2) read together makes it clear that passage must always be continuous and expeditious except under the circumstances of paragraph (2). The exception allows ships in distress only stopping and anchoring in limited circumstances. *Prima facie* this means that most (if not all) maritime casualties in the territorial sea will not be able to comply with the definition of passage in art 18 of LOSC and as a result lose their right of innocent passage.

Having found that the *Long Lin* was not in passage, the State Raad held that the Netherlands by virtue of its territorial sovereignty had the authority, in principle, to prohibit non-innocent entry. According to the court international law however does not permit the Netherlands to prevent a foreign ship in distress and in need of repairs from entering the territorial sea to seek safety in a port or elsewhere on the coast. In such cases, the gravity of the ships' situation should be weighed-up against the threat the ship poses to the interests of the coastal state.

In the words of the court:

De Staat der Nederlanden en daarmee verweerder ontleent de bevoegdheid tot het opleggen van een verbod in beginsel aan de sovereiniteit van het Staat (vergelijk HR 7 febr. 1986 (Attican Unity), NJ 1986, 477 en S&S 1986, 61). Daartegenover staat echter dat verweerder op grond van het volkenrecht niet zover mag gaan dat hij het voor een schip dat in nood verkeert en reparatie behoeft onmogelijk maakt om de territoriale –en kustwateren binnen te varen en in een haven, of elders bij de kust, veiligheid te zoeken. Er dient in een dergelijk geval een afweging plaats te vinden tussen enerzijds de ernst van de situasie waarin het schip zich bevindt en anderzijds de bedreiging die het schip kan vormen voor de kuststaat.[41]

It would appear that the State Raad applied the customary law right of refuge, which has traditionally been applied to ships seeking the safety of a port to refuge in the territorial seas. Ships in distress have, quite apart from the right of innocent passage, a right in international customary law to seek shelter in a port or in territorial seas (see below). In order to approach a port of refuge it should be allowed to pass through the territorial sea and if it is necessary to ride out a storm or carry out emergency repairs it should be able to anchor in those seas. On the guarantee, the court held that the coastal state may require some financial security for the potential costs, but that the amount of the guarantee should not exceed the expected cost for the state in the event of an unfavourable ending.[42] This underlines that coastal states may impose reasonable conditions for entry into the territorial sea on maritime casualties.[43] In this respect the State Raad held that the decision to deny the ship the right to limit its liability and to enter Dutch territorial waters lacked motivation and annulled the prohibition on entry.

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[41] Ibid. at p.300.

[42] Judgement ibid. at p.300.

[43] See, De La Rue and Anderson who noted at p. 825 that: "In some cases vessel access to ports or territorial waters has been allowed only subject to conditions such as the provision of a bond or guarantee to pay for pollution, or other damage, or expenses in taking precautions".

Innocence

The second element is innocence. In addition, to complying with the requirements of passage foreign ships in the territorial sea must also be innocent. Unlike art 14 (4) of the Territorial Sea Convention (TSC), which simply stipulated that passage is innocent "if it is not prejudicial to the peace, good order or security of the coastal State", art. 19(2) of LOSC added a list of 'activities'. If any of these is in engaged in by a foreign ship, LOSC considers passage to be prejudicial to coastal state interests and therefore 'non-innocent'.

The relevant part of art 19 reads:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any one of the following activities:

....

(h) any act of wilful or serious pollution contrary to this Convention;

....

(l) any other activity not having a direct bearing on passage.

Wilful and serious pollution

A foreign ship which engages in "any act of wilful and serious pollution contrary to [the] Convention" under art 19 (2) (h) while navigating in the territorial sea, is considered to be in passage which is prejudicial to the peace, good order or security of the coastal state under art 19(2), and thus loses its right of innocent passage. The criteria are cumulative. Only pollution which is both 'wilful' and 'serious' can deprive a ship of its innocent character. The ILA's Conclusion No. 7: vessel-source pollution and loss of the right of innocent passage noted that:

The criteria of "wilful" and "serious" in Art. 19(2) (h) and 230(2) of the 1982 Convention are not defined in the 1982 Convention. It is nevertheless clear that these criteria are cumulative and that "wilful" reflects a requirement of some level of intent. The criterion of seriousness may in certain situations also be met by relatively limited operational discharges if taking place, for instance, in already heavily polluted enclosed seas or areas which are highly sensitive to pollution and are recognized as such at the international level.[44]

This paper deals with pollution arising from maritime casualties. Accidental discharges would normally be 'serious' and can meet this criterion. The requirement of 'wilful' implies that the pollution has to be intentional, though it is not clear what form of intent is required. Most writers believe that because intent is a requisite, it covers pollution from dumping and serious illegal operational discharges,[45] but excludes accidental pollution. The ILA also noted that: "while accidental discharges are often "serious", they cannot meet the criterion of intent."[46] Birnie and Boyle suggests that: " The significant point is that only pollution which is 'wilful

[44] Franckx op. cit. at p.125.
[45] In *U.S. v Royal Caribbean Cruises, Ltd*, (24 F. Supp. 2d 155 (D.P.R.)) the District Court of Puerto Rico treated a 30 gallon oil spill in the territorial sea of the USA which posed no "immediate threat to the marine environment" as "non-serious" therefore allowing only for monetary penalties. See, De La Rue and Anderson op. cit. at p. 918.
[46] Franckx op. cit. at p. 127.

and serious' and contrary to the Convention will deprive a vessel in passage of its innocent character, which necessarily excludes accidental pollution from having this effect."[47] Should one therefore conclude that a coastal state may not interfere with a maritime casualty causing accidental pollution, as this would be hampering its right of innocent passage? In view of the wide intervention powers conferred on coastal states by art 221 this can hardly be the case.

As Smith convincingly argued:

First, Article 19 would deny to the coastal state the legal authority to prohibit passage or exercise plenary authority with respect to vessels discharging pollution unless that discharge is 'wilful'. There would seem little question that the 1958 Convention contemplated coastal competence to prevent passage to polluting vessels as non-innocent. Indeed, it is difficult to comprehend an argument that the preservation of aesthetic and recreational amenities, resource productivity, related general economic welfare, and the physical well-being of the population does not constitute a core interest embraced in the language 'peace, good order or security'. The Convention's introduction of a standard of intent is, therefore perplexing. The polluter's state of mind would not seem relevant to the issue of the magnitude and character of the threat to the coastal state. As one commentator (Schneider[48]) has succinctly put it:'[t]he consequences, including harm to marine resources, amenities, and other coastal resource interests, can be just as prejudicial if a foreign ship "with gross negligence, " or merely "accidentally" or "inadvertently, "causes them'. In short, the *mens rea* component of the Convention's definition of innocence is consistent with neither the underlying logic nor the current state of the customary regime.[49]

Hakapaa also reasoned that: "As far as the 1958 Convention is concerned, it would seem that at least a major deficiency in the ship's condition, causing severe environmental danger (e.g. defective steering gear in an oil tanker) may prove prejudicial to the (unspecified) "good order" of the coastal state, thus rendering the passage non-innocent."[50] It is not clear whether art 19 of LOSC has broadened or narrowed innocent passage compared to art 14 of TSC. The better view is that art 19 does not change the law but produces a more objective definition of innocent passage, which gives coastal States less room for subjective interpretations leading to abuses of their right to prevent non-innocent passage.[51] If, the substance of law has not changed, it follows that under Art 19 (1), which provides that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State", the coastal State could still today deprive a damaged tanker causing accidental pollution of innocent passage.

With respect to art 19(2) of LOSC, it is submitted that, 'wilful' can without stretching the term be interpreted to include not only malicious intent but also recklessness or gross negligence. Such an interpretation would for instance cover accidental pollution in

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[47] P. Birnie and A.Boyle, *International law & the environment,* 2nd ed (2002) at p. 372.
[48] Schheider, *World public order of the environment,* Ph.D diss., Yale (1975) at p. 158.
[49] B. D. Smith, *State responsibility and the marine environment,* Oxford (1988) at pp. 199-200.
[50] K. Hakapaa, *Marine pollution in international law material obligations and jurisdiction,* (1981) at p. 185.
[51] Birnie and Boyle op. cit. at p.372 noted that: "Innocent passage is defined by the 1958 Territorial Sea Convention as passage which is 'not prejudicial to the peace, good order or security of the coastal state'. This vague terminology appeared to allow coastal states ample room for subjective judgements of the question of innocence, and it is arguably not an accurate reflection of the treatment of innocent passage in the *Corfu Channel* case. That decision implied a rather more objective test, and it is this approach which is much more fully reflected in Article 19 of the 1982 UNCLOS. This provision was not intended to change the law, but to clarify it in rather more satisfactory terms, which affords less scope for potentially abusive interference with shipping."

circumstances where a substandard ship is sent to sea and it breaks up causing a pollution disaster. State practice seems to have gone beyond the ordinary meaning of the language used in art 19 (2) (h). As De La Rue and Anderson observed: 'by 1978 the view was generally taken that a stranded vessel disgorging oil would no longer be in passage, nor necessarily innocent.'[52] According to the ILA, 'state practice with respect to art 19 (2) (h) indicates that only a small number of states incorporates any activity similar to "wilful and serious pollution" in its legislation. In addition, none of these states define or give guidelines for the interpretation or application of the elements "wilful and serious".' [53]

Hakapaa and Molenaar concluded that:

> .... ,in certain instances, state practice seems to reach beyond the conventional limits of coastal State jurisdiction. In particular, the application of the concept of innocent passage to vessel-source pollution as laid down in the 1982 Convention has not been uniformly adopted in national legislation.
> On the prescriptive side this is apparent in the absence of proper incorporation of the elements of 'wilful and serious' in national practices. Passage is often considered non-innocent even if not causing 'wilful and serious' pollution as required by the 1982 Convention.
> ....
> At least in one respect, however, it would seem that the trend of state practice points to solutions somewhat deviating from the rather narrow language of the Convention: many of the coastal States claim today broader powers to interfere with foreign vessels threatening the coastal State interests with potential environmental harm. [54]

It would appear that the criterion of 'wilful' has been made redundant by an emerging state practice of refusing entry to the territorial sea to damaged and leaking tankers. If it was not already redundant by virtue of the overall general provisions of art 19 (1). The main concern of coastal states is with 'leper ships' e.g. ships whose condition has deteriorated to the extent that they are extremely likely to cause a pollution disaster (for example the crack across the deck of the *Castor*). These ships are called 'rust buckets'.[55] Art 19(2) (h), however, does not provide a basis for the coastal state to expel or divert from its territorial sea ships which have not actually polluted. Under art 19 (2) (h) non-innocence can only arise where there has been serious pollution, but not where a ship presents a significant pollution threat. A number of proposals were made during the negotiations at UNCLOS III, especially by Canada at the fourth session (1976) which included phrases such as "the causing of significant pollution or severe threats of such pollution" or "any act or omission involving or leading to grave and imminent dangers of pollution which may reasonably be expected to result in major harmful consequences to the coastal state". It would appear that these proposals were 'too far-reaching for most of the maritime States' and did not secure the necessary support.[56]

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[52] De La Rue and Anderson op. cit. at p. 821.
[53] Franckx op. cit. at p.128.
[54] K. Hakapaa and E. Molenaar, *Innocent passage past and present*, 23, Marine Policy, 131, (1999) at pp.144-145.
[55] See, The sailor's illustrated Dictionary, Lyons Press (2001) at p. 384.
[56] See, Hakapaa op. cit. at p.185; and Rosenne and Yankov op. cit. para 19.6 at p. 171.

Pollution threats - Leper ships and maritime casualties

Speaking about art 19 (2) of LOSC Hakapaa and Molenaar suggest that:

> The list is long, but as indicated by subparagraph (l) the list is not intended to be exhaustive and that other activities, which have no 'direct bearing on passage' may be considered prejudicial to peace, good order or security of the coastal State and thus make the passage 'non-innocent. According to the 1982 Convention, however, only activities are here of relevance. Apparently, poor condition, lacking equipment, dangerous cargo, etc. are not factors to be taken into account in the context. [57]

The *travaux preparatoires* supports this proposition. At UNCLOS III, the International Chamber of Shipping criticised the "open-ended" character of the list and suggested that paragraph 2(l) should be amended to read: "Any similar activity not having a direct bearing on passage." The Federal Republic of Germany made proposals at the seventh (1976), ninth (1980) and eleventh (1982) sessions modelled on the International Chamber of Shipping's suggestion designed to remove the open-ended nature of paragraph 2(l). None of these was adopted by the Conference. [58] Thus, Rosenne and Yankov suggest that: "a coastal State has some discretion in determining what activities could render passage of a foreign ship as non-innocent. The appearance of the word "activities" in paragraph 2(l) reemphasizes the behaviour of the ship as the determining factor."[59] The fact that art 19(2) mentions activities suggest that only an activity could render passage non-innocent. A maritime casualty which threatens to pollute (for example a ship with a hole in the hull from which oil has thus far not leaked) does not necessarily represent an activity, but an event, yet there can be no doubt that such a ship could be prejudicial to the environmental interests of the coastal state.

The ILA recognised that this question is not satisfactorily addressed by art 19 of LOSC:

> As Art. 19(2) only refers to activities, this would seem to suggest that nothing but activities could deprive passage of its innocent character. Ultimately this line of reasoning leads one to the conclusion that something which cannot be regarded as an activity, could in principle never be brought under the heading "prejudicial to the peace, good order or security of the coastal State". Such a conclusion is admittedly too categorical and ignores the powers coastal states have in certain situations, for example the right of intervention.[60]

Thus, it considered that:

> An exception should be made for threats to pollution of the territorial sea resulting from maritime casualties that take place in the territorial sea and beyond. Although not explicitly referred to in the 1982 Convention, a coastal state retains in principle a right vested in general international law and based on its sovereignty over the territorial sea, to take and enforce measures to protect its interests. Such measures must at all times be reasonable, which requires taking account of such principles as necessity and proportionality. It seems acceptable not to regard maritime casualties any longer as "passage" under Art. 18 or, alternatively, as something having a "direct bearing on passage" under Art. 19(2) (l). In either case, a ship involved in a maritime casualty and polluting or threatening to pollute the territorial waters of the coastal state would lose its right of innocent passage.
>
> A ship which is not involved in a maritime casualty but whose condition is so utterly deplorable that it is extremely likely to cause a serious pollution incident with major harmful consequences, including

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[57] Hakapaa and Molenaar op. cit. at p. 132.

[58] See, Rosenne and Yankov op. cit. para 19.7 and 19.8 at p. 173.

[59] Rosenne and Yankov ibid. para 19.10(l) at pp. 177.

[60] Franckx op. cit. at p.126.

the marine environment, would not be able to exercise the right of innocent passage either. This does not mean that a coastal state can deny passage to such ships under *all* circumstances, for example in cases of distress. Even then, however, the interests of the ship have to be balanced with the interest of the port/coastal state. [61]

The ILA's reasoning is somewhat illogical and confuses the concepts of 'passage' and 'innocence' with the right of intervention in the territorial sea. While their conclusions can be supported, the bases for the conclusions are nor satisfactorily e.g. the idea that an exception should be made in art 19 (2) for a maritime casualty which would give the coastal state a right of intervention under general international law, a right which it already has. Coastal states derive the right of intervention in the territorial sea from their sovereign rights under general international law. In customary international law the rights of the coastal state in its territorial sea include the power of intervention, but its jurisdiction in this area is subject to the "right of innocent passage". Intervention and innocent passage are thus distinct questions. Art 19 deals with innocent passage (and art 19(2) with 'innocence') and cannot be interpreted as giving any additional competence in relation to intervention. The latter already exists both in customary and conventional law and is recognised by art 221. It is thus unnecessary to create an exception for intervention in art 19(2). Existing concepts of 'passage' 'innocence' and 'intervention' give the coastal state the means to deal with threats from maritime casualties. A maritime casualty, for example a holed ship engaged in salvage operations would not be regarded as being in 'passage' under art 18. The salvage operations could also be classified as an activity not 'having a direct bearing on passage' under art 19(2) (l) and thus non-innocent.

Leper ships raise more problematic interpretation issues. If only activities are relevant pursuant to art 19 (2), a ship's poor condition could not render passage non-innocent under that paragraph. But as Molenaar points out: "Such situations would seem to qualify as prejudicial to the coastal State pursuant to Article 19(1), even though it does not concern an activity".[62] This means that even if the passage of a leper ship cannot be regarded as an 'activity' under art 19(2), it could nevertheless fall outside the basic definition of 'innocence' in art 19 (1). Threats of pollution could come within the scope of art 19 (1). And so could non – serious acts of pollution and non-wilful acts which are not covered by art 19 (2) (h). This would be the logical place to deal with pollution threats from leper ships and maritime casualties. As noted, State practice confirms that leper ships threatening to pollute are no longer regarded by coastal states as being in passage nor are they necessarily innocent. The question can then be posed (and could have been posed for some time past) whether there is an emerging rule of international customary law which the ILA's statement clarifies.

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[61] Franckx op. cit. at p.127.
[62] E. J. Molenaar, *Coastal state jurisdiction over vessel-source pollution*, (1998) at p.198.

Intervention in the territorial sea

Ever since the *Torrey Canyon* accident and the response of the UK in bombing it on the high seas, it has been widely conceded that coastal states have wide powers of intervention in the territorial seas and elsewhere to protect their coastline from the threat of pollution from a maritime casualty. The Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was adopted in 1969 after the *Torrey Canyon* disaster.

It permits state parties to take:

> Such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in major harmful consequences. [63]

The term 'maritime casualty' would cover ships with structural damage as well as leper ships:

> "Maritime casualty" means a collision of ships, stranding or incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo. [64]

The right of intervention on the high seas has become part of customary law.[65] The Convention applies only to measures on the high seas and in the EEZ. In the territorial sea coastal States derive the right of intervention from their normal sovereign rights under general international law. The right to intervene in maritime casualties in the territorial sea would appear to be greater than on the high seas. This is supported by the *travaux preparatoires* of the Intervention Conference. A proposal to extend the Convention to the territorial sea was not accepted. A group of States, led by Canada, took the view that the coastal state already had 'virtually unhampered' rights of intervention in the territorial sea and that 'it would erode the sovereignty which under international law the coastal state enjoyed over its territorial sea'.[66] Following the *Amoco Cadiz* accident in 1978 further attempts were made to extend the geographical scope of the Intervention Convention to the territorial sea. Again these moves failed as coastal states felt that the Convention would place restrictions on their 'largely unfettered powers' to take measures in the territorial sea against maritime casualties, ships which coastal states regarded as 'no longer in passage nor necessarily innocent.'[67]

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[63] Arts 1, 2(1), Annexes I and II.

[64] Art 3. The identical definition is contained in art 221(2) of LOSC and in art 2 (6) of MARPOL 73/78.

[65] See, Birnie and Boyle op. cit. at p. 379.

[66] See, D. W. Abecassis, *Oil pollution from ships*, 2nd ed. (1985) para 6-18 at p.121.

[67] De La Rue and Anderson op cit noted at p. 821 that: "The *Amoco Cardiz* disaster in 1978 led to calls for the powers of the coastal State to be extended still further. One of the issues of the day was whether the Convention should be extended to apply not only to the high seas but in the territorial sea as well. However, this suggestion met with opposition because the view was widely taken that states already had these powers by virtue of their normal sovereign rights. In customary international law the jurisdiction of the coastal state over its territorial seas is subject to the so-called "right of innocent passage", but by 1978 the view was generally taken that a stranded vessel disgorging oil would no longer be in passage, nor necessarily innocent. The view was therefore taken that it would in fact reduce rather than extend the powers of the coastal states if the Convention were to apply in the territorial waters, as it would impose restrictions upon an otherwise largely unfettered right of intervention."

According to art 221:

Nothing in this Part shall 'prejudice the right of States, pursuant to international law, both customary and conventional to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threats of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

In reaction to the *Amoco Cadiz* accident some states, including France, argued strongly that the reference in the Convention to 'grave and imminent danger of pollution' set too high a threshold and that intervention should be permitted at an earlier stage.[68] The text of art 221 was altered during the seventh session (1978) to omit any reference to 'grave and imminent danger',[69] and it now assumes a right of intervention when there is merely 'actual or threatened damage' which may reasonably be expected to result in 'major harmful consequences' to the coastal state's interests.[70] It would appear that the right of intervention in the territorial sea is more extensive than on the high seas and can arise in cases where the threat of pollution is below the art 221 threshold of pollution resulting in major harmful consequences. [71] The ILA for example pointed out that " Implicit in Art 221 of the 1982 Convention is a similar or more extensive right for maritime casualties in its territorial sea". A pollution threat which might not result in major harmful consequences, but which nevertheless pose 'a substantial threat of significant pollution' would be sufficient to take a ship out of innocent passage and place it in the zone where intervention would be justified. [72]

As Birnie and Boyle point out "the main significance of the right of intervention is thus that it allows coastal authorities to override the ship's master's discretion in seeking salvage assistance, and may enable them to direct damaged vessels away from their shore".[73]If a tanker accident occurs in the territorial sea, the coastal state may take any measures it considers necessary and appropriate to prevent or minimise pollution subject only to the principles of necessity and proportionality. It may take command of the situation and give instructions to the salvors on how to deal with the maritime casualty. The national legislation of many coastal states confer wide powers on their authorities to determine what action is necessary and appropriate, without necessarily imposing a duty on the authority to consult with the shipowner or pay compensation for damage caused by disproportionate measures.[74]

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[68] See, Rosenne and Yankov op.cit. para 221.2 at pp. 304-306.
[69] Rosenne and Yankov ibid. para 221.9(d) at p. 313.
[70] There is much debate whether the two intervention regimes which belong to different historical periods can coexist. Many commentators believe that the Convention has been made redundant by art 221 of LOSC. It would also appear that to IMO's knowledge the treaty has never been applied. See, Blanco –Bazan, *The environmental UNCLOS and the work of IMO in the field of prevention of pollution from vessels*, in A Kirchner (ed) International marine environmental law (2003) at pp. 35-37.
[71]Franckx, op. cit. at p. 127 note 278.
[72] Phrase used by Barr J in the Tuledo case see *infra*.
[73] Birnie and Boyle op. cit. at p.380.
[74] For intervention in the territorial sea see, De La Rue and Anderson op. cit. at p. 821.

Vessels in distress

The fact that a prejudicial foreign ship can be deprived of innocent passage rights, as described above, does not mean that the coastal state can deny it passage rights in all circumstances. For humanitarian and safety reasons, international law grants exceptional rights to ships in distress to enter the territorial waters and ports of a foreign state to seek refuge. As Jessup noted the sovereignty of the coastal state over the territorial waters "is restrained by the right of innocent passage and the right to seek shelter in distress".[75] The substantive law on the right of refuge is to be found in customary law; mostly in case law, bilateral treaties and the writings of jurists. Distress rights arise in customary international law as a separate exception to coastal state sovereignty from innocent passage. Accordingly, if a ship in distress loses the right of innocent passage it does not operate to deprive the ship of its entry rights.[76] In a note on the *Attican Unity* case, Meijers explained it as follows:

> Een schip dat, zoals de Attican Unity, door explosies en brand wordt geteisterd heeft – geheel onafhankelijk van het recht op onsculdige doorvaart dat wel in arrest vigeert- het (internationale) recht om de kust op te zoeken ten einde aan de noodtoestand zo goed mogenlijk het hoofd te kunnen bieden. Voor zover zulks nodig is voor het bestrijden van zeenood, heeft zo een schip dehalve niet alleen het recht om de territoriale zee te gebruiken, maar ook om door de binnewateren te varen en in een haven, of elders op de kust, veiligheid te zoeken. Een beroep op zeenood dat terecht wordt gedaan, creeert een zelfstandige exceptie op de territoriale soevereiniteit van een Staat over al zijn kustwateren. [77]

In the *Lin Long* case the State Raad apparently took this criticism into account. As noted, the Court held that although this badly damaged ship was not in innocent passage it was nevertheless in distress and, in customary international law the coastal state's sovereign rights to deny it access to the territorial sea were restricted in so far as the gravity of the ship's situation had to be weighed-up against the threat the ship posed for the coastal state.

The distress rule is an ancient one. It goes back to the writings of Vattel (1714-67) and Ortolan (1864) and was recognised in cases such as the *Eleanor* (1809)[78], the *Creole* (1853)[79] and the *Rebecca* (1929)[80], though there are no cases (as far as we could establish) in which the right had ever been challenged. The case law mostly deals with jurisdictional immunities.[81] O,Connell suggest that treaty practice had established the rule and cites an agreement between the US and Spain of 1795 in support.[82] Chircop refers to similar bilateral treaties for example the Jay Treaty, 1794 between the US and UK and the UK-Oman, 1891 treaty.[83] The more recent Convention Concerning Fishing in the Black Sea, 1959 entered into between Bulgaria,

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[75] Jessup op. cit. at p. 204.
[76] D. Devine, *The Cape's False Bay: a possible haven for ships in distress*, 16, SAJIL, 80 (1990-1991) at p.84.
[77] The *Attican Unity* judgement "noot" at pp. 1837-1838.
[78] (1809) Edw.135.
[79] (1853) Moore, IA, Vol. IV, 4375.
[80] (1929) UN Rep., Vol. IV, 444.
[81] For a discussion of the case law, see Jessup ibid. at pp.194-204.
[82] O,Connell op. cit. Vol II at pp. 853-854.
[83] Chircop op. cit. at pp. 212-213.

Romania and the former USSR identified a number of ports of refuge that fishing boats from those countries could enter to shelter from bad weather or in case of damage.

Schwarzenberger gives the following account of the historical development of the rule:

For centuries, the position of foreign ships in coastal waters was precarious. If prohibitions against the entry of foreign ships existed, the full rigour of the law might be enforced against them. As a matter of grace, the necessity which forced such ships to contravene local law might be taken into account. Gradually, the privileges of ships in distress were laid down in specific clauses of numerous treaties between maritime Powers. By means of the operation of the most favoured-nation standard, the scope of such rules was still further extended.

Rules of this kind were considered so much in accordance with a constructive interpretation of the working principle of reciprocity behind international law and the courtesy of the sea that, since the nineteenth century, far-reaching immunities of ships in distress from local jurisdiction were taken much for granted in relations between civilised nations. At this stage they came to be treated as rules of international customary law or, in other words, *opinio juris sive necessitatis* attached to this beneficial international custom. Moreover, the original character of these rules as treaty clauses impressed on them the stamp of *jus aequum.* They were not to be interpreted as *jus strictum*, but in an equitable manner. Thus, ships in distress have not only the right to seek shelter in the territorial sea, but also the right of free access to national ports and, while in the port of the coastal State, they enjoy certain immunities from local jurisdiction.[84]

Ports lie within internal waters and are subject to the full sovereignty of the coastal state. In the absence of a treaty right, foreign ships in principle have no right of entry to those waters. Ships in distress are an exception to the sovereignty of the coastal state to control access to its ports. As Schwarzenberger *supra* noted ships in distress also have the right to seek shelter in the territorial sea. Distress could arise from different causes such as bad weather, collision damage, structural failure, machinery breakdown, fuel exhaustion, piracy or other emergency. Although a ship does not have to be in total distress, the test is strict. [85] "The necessity must be urgent" and there must exist "in the mind of the skilful mariner a well grounded apprehension of the loss of vessel and cargo, or of the lives of the crew and the passengers." [86]

It is debatable whether ships in distress enjoy full exemption from coastal state pollution jurisdiction. Hakapaa argues that the preferable solution is that the distress rule modifies coastal authority, but that the ship remains subject to its pollution control. As he aptly put it:

The plea of "distress should certainly not be employed as a pretext to harm coastal interests but solely as an honest request for temporary refuge...

An example would be the case of spilling of harmful substances – e.g. oil – within the internal waters as a direct result of the distress causing the entry of the vessel. Such spilling might be unavoidable in view of the ship's condition and, in fact, might even prove necessary in order to prevent further damage to the marine environment. The Harvard rule appears to subject such incidents, as well, to coastal state jurisdiction. On the other hand, the fact that the discharge is linked directly to the original incident causing the distress might also be argued to exclude coastal state jurisdiction as derogating from the very idea of taking refuge in a foreign port – but for the incident, beyond the reach of coastal

[84] G. Schwarzenberger, *International Law*, 3rd ed. Vol. 1 (1957) at pp. 197-198.
[85] See, O'Connell op. cit. Vol II at pp. 855-856 for cases involving *force majeure*.
[86] The *Eleanor* op. cit. at p. 159.

competence, the release within the internal waters would never have occurred. One would presume that coastal states are not prepared to accept such a general rule of self-restraint. It is quite another matter that in emergency situations the coastal state might usually exempt the foreign vessel from criminal responsibility.[87]

The contemporary rights of ships in distress – pollution casualties

The precise nature of right of entry in distress is not clear. Is it an absolute right, or can the coastal state limit or deny the right? To put it in a different way does the coastal state have a legal right to refuse to allow a ship in distress (such as the *Prestige* or the *Castor*) to enter into its ports or territorial waters in circumstances where it poses a substantial pollution risk?

As Hakapaa said in 1981, even before the 'maritime leper' became a phenomenon:

> It is further doubtful whether, even in cases of unchallenged emergency, the right of entry could be absolute. The distress of the ship itself may also pose serious hazard to the port in which the ship is seeking shelter. A recent example was that of the Japanese nuclear ship the NS Mutsu, which, after a leak in its nuclear system was repeatedly refused entry into ports of its own flag.
> There seems to have been little comment on this point, but Hydeman and Berman are obviously correct when concluding that:
> "it would not appear to be inconsistent with existing law to permit the exclusion of ...a vessel where the potential damage to the coastal State is greater than the threat to the vessel".[88]
> However, it is to be presumed that in such a case "the threat to the littoral State should be quite compelling. [89]

Molenaar concurs and emphasises that art 25 (3) of LOSC (art 16(2) TSC) allows coastal states to set conditions for entry into their ports and internal waters:

> While ships in distress should in most cases be given access to ports, there might be circumstances in which the port (or coastal) State's interests override those of the ship in distress. Moreover, there seems to be no reason why ships in distress should at all times be exempted from compliance with conditions for entry into port. Article 16 (2) TSC confirms the port State right to prescribe conditions for admission into internal waters and to take the necessary steps to prevent the breach of these conditions. Although not explicitly referring to ports these are presumed to be included in internal waters.[90]

The greatest concern of coastal states is ships carrying nuclear materials. If a nuclear carrier had to make a port call necessitated by mechanical breakdown, it would arouse a political storm onshore and an international crisis. Whether the coastal state can refuse refuge to a plutonium ship is debatable.[91] During the 1992 voyage of the *Akatsuki Mari* carrying 1.7 tons of plutonium, Australia designated no port to which the ship could go in an emergency. It asserted that 'port access is normally granted to ships in distress but safety would be a paramount consideration in deciding whether to grant access to the plutonium ship'.[92] The

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[87] Hakapaa op. cit. at pp. 178-179.
[88] L.M. Hyderman and W.H. Berman, *International control of nuclear maritime activities*, (1960) at p. 164.
[89] Hakapaa op. cit. at p. 168.
[90] Molenaar op. cit. at pp. 101-102. The possibility to deny access is further confirmed in art 211(3) of LOSC which allows States to establish their own anti-pollution requirements as a condition for entry to their ports.
[91] O' Connell op. cit. Vol II p. 848 suggests that: 'The port authorities may deny access to nuclear-powered ships'.
[92] For the Australian response see, Statement by the Minister for Foreign Affairs and Trade, Senator Gareth Evans, reprinted in P. Hewitson (ed), *Australian practice in international law 1992,* 14, AYIL (1993) pp. 444-446.

better view is that the coastal state may deny port access to a nuclear carrier on the grounds of protecting its vital interests, since an accident involving a release of plutonium could have catastrophic radiological consequences for the environment and the public.[93]

The right of refuge evolved in the era of sail when ships were far smaller in size and hardly ever threatened the coastline of the littoral state. Since these earlier times the conditions of shipping have changed fundamentally. For example, one of the first ocean-going steam tankers the 5,010 ton *Murex* (1892-1926) was 42 times smaller than the average modern tanker.[94] The past decades witnessed a heightened environmental awareness over the risks of pollution. The sinking of large oil tankers highlighted the scale and severity of such accidents, whose seriousness derives from the volume of oil that could spill in sensitive coastal waters. Such accidents harm coastal communities, fisheries, wildlife and the marine ecology. In short, commercial ships in distress can cause catastrophic damage and, hence the interests of the coastal state would usually override the economic interests of the maritime adventure.

The safety of the crew is the first priority in any maritime casualty. The duty to rescue persons in distress is fundamental in the law of the sea, is enshrined in the SAR Convention and in the legislation of most countries. Invariably, coastal states consider the saving of the lives of the crew as their top priority and usually evacuate the master and crew for example by rescue helicopter followed by an instruction to the salvors to tow the ship out to sea. This raises the question whether a ship in distress has a right of refuge to save the ship itself and the cargo where human life is not at risk.

Churchill and Lowe suggest that:

> If a ship needs to enter a port or internal waters to shelter in order to preserve human life, international law gives it a right of entry. This was recognised in cases such as the *Creole* (1853) and the *Rebecca or Kate A. Hoff* case (1929).It is, however, unsafe, to extend that principle further. In particular, it is by no means clear that a ship has a right to enter ports or internal waters in order to save cargo, where human life is not at risk. At least in circumstances where the condition of the ship carries a risk of serious pollution, the better view is that the coastal States may forbid such ships to enter their internal waters if measures have been taken to save the lives of persons on board: the decision should be taken by weighing the gravity of the ship's situation against the probability, degree and kind of harm to the coastal State that would arise were the ship allowed to enter.[95]

The right of refuge evolved essentially from humanitarian considerations.[96] Historically, the right was not only limited to the preservation of human life but included property considerations. There were *dicta* such as those in the United States Supreme Court case, the

[93] See, J. M. Van Dyke, *Sea shipments of Japanese plutonium under international law*, 24, ODIL, 399 (1993).
[94] See, S. Howarth, *Sea Shell: the story of Shell's British tanker fleets (1892-1992)* at p. 24.
[95] Churchill and Lowe op. cit. at p. 63.
[96] See, O'Connell op. cit. Vol. II at p. 853.

New York (1818)[97] and the Canadian case the *May* (1931)[98] which suggested that the right attached to the ship and could be exercised where the ship and cargo were in jeopardy. Distress could arise in less serious situations where the lives of persons were not necessarily in imminent danger. Ships were allowed to enter a port for emergency repairs, vital bunkering or provisioning. Certain immunities were extended to the ship, its cargo and the passengers.[99]

The *Tuledo* case

In 1990 the *MV Tuledo,* a bulk-carrier was carrying a cargo of muriate potash form Canada to Denmark when it encountered very rough seas, developed a 10 meter hole in the hull, and started to list.[100] The No 4 hold had flooded. The master altered course for Bantry Bay on the southern tip of Ireland. An explosion caused by the dynamic force of water inside blew the hatch cover off and it was exposed to "greensea". Navigation became dangerous and the master sent out a Mayday call. The Royal Air Force rescued the crew. A salvage tug responded to the casualty and coupled a tow-line to the ship in appalling conditions. The hole became progressively larger, though the ship was in no imminent danger of sinking. The salvors preferred to tow it to Cork, which was the nearest port of refuge. It was not allowed to enter Irish territorial waters and had to be towed to Falmouth in hurricane conditions. The tow parted off the Isles of Scilly and it drifted haphazardly towards the English Channel. The tow was restored. By then the ship had developed a large hole, right through the hull and the sea washed out all cargo. Potash is not a significant pollutant. As the vessel approached Falmouth it began to sink dangerously low and the harbour master was not prepared to allow it to enter the port. It was then beached near Falmouth on soft sands. The fuel tanks had not breached and there was no oil spillage. The 410 tons of heavy fuel oil and diesel remaining on board was pumped into a small tanker. The insurer declared the ship a constructive total loss. The wreck was eventually raised and towed 200 miles west of the Bay of Biscay where it was scuttled in deep water. [101]

In the action, the shipowners claimed damages for the loss of the *Tuledo* and its cargo from the Irish government on the grounds of an alleged breach of customary international law as a

[97] (1818) 3 Wheat.59.
[98] [1931] 3 DLR 15.
[99] The *Creole* case *supra*.
[100] ACT Shipping (Pte) Limited v Minister of the Marine (The Tuledo) [1995] 3 I.R. 406.
[101] The decision by Ireland to refuse refuge to the MV *Tuledo* was largely influenced by the *Kowloon Bridge* incident, and the *Tribulus*, another bulk carrier which was given refuge in Bantry Bay two weeks previously and leaked fuel oil to the detriment of aquaculture interests. It subjected the Irish government to severe political pressure in the Oireachtas. The *Kowloon Bridge* floundered in 1986 on the south west coast of Ireland after it was allowed to anchor and undergo repairs in Bantry Bay. The ship lost its starboard anchor and proceeded to sea where it soon afterwards lost its steering gear, was abandoned by the crew and grounded. 800 tons of fuel oil escaped killing thousands of seabirds and polluting 80 miles of coastline with associated damage to fisheries and tourism. It was carrying a cargo of iron ore which also escaped and spread over the seafloor near the wreck site destroying important herring spawning grounds. This incident is referred to by Kasoulides, op. cit. at pp. 186 -187 as an example of the "disastrous consequences" which may result if a foreign vessel in distress is given refuge.

consequence of the ship being refused refuge in Irish territorial seas off the Cork coast. Admiralty Judge Barr held that customary international law recognised that foreign ships in distress have "a prima facie right to refuge in the waters of an adjacent coastal State", and that this customary right merged into Irish domestic law[102], but in a much more circumscribed form.

The crucial question of law which the High Court of Admiralty had to consider was to assess the parameters of the converse right (if any) of the coastal state to refuse to allow the *Tuledo* a place of refuge in an Irish port or anchorage despite the gravity of the ship's situation. At the outset the Court noted that 'the custom grew up when ships were sail-driven and far smaller than the average modern commercial vessels. In earlier times allowing a ship in distress refuge very rarely presented any risk to the coastal state. The question of refusing sanctuary to a peaceful merchant ship in distress very seldom arose and accordingly there was no need for rules regulating the right of coastal states to exclude foreign ships in distress from their waters'. Barr J however went on to state that:

> ...in modern times there has been a fundamental metamorphosis in the development of shipping and in the growth of maritime commerce. In the past several decades commercial vessels in serious distress may present a major risk of damage to the receiving state. Oil pollution is an obvious example. The risk of sinking in or near an important port or waterway where the wreck will obstruct or hinder navigation is another. In short, the other side of the coin, risk of damage to the receiving state has developed a far greater degree of importance in modern times and, in practice, has significantly modified the customary right of entry to a port or safe haven enjoyed by ships in serious distress.

Since the late 1970's there have been many examples of incidents in which coastal states have refused to allow salvors to tow disabled ships posing a pollution risk into their ports or territorial waters. In all these cases the master and crew had either abandoned ship or were evacuated. For example in the Castor case, Spain took the crew off and then claimed that the ship retains no right to refuge.[103] This demonstrates that states clearly distinguish between the humanitarian right to save life and action to save the ship and cargo. Barr J stated as follows:

> In the modern era there appears to be clearly discernable change of emphasis in the attitude of maritime states towards casualties seeking shelter in their waters, in that greater importance is given to the distinction between ships in distress where a humanitarian consideration of risk to life is involved and those, such as the MV Tuledo, where the risk to vessel and cargo is purely economic in nature. It is now commonplace for foreign ships which are in the latter category to be refused entry to the territorial waters of states from which access is sought. R. B. Clark in Waters around the British Isles, at p.188 refers to" .....the action frequently taken by coastal states of barring the salvor and the disabled vessel from their waters or ports.

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[102] Interestingly, the defendants argued *in limine* that the decision to refuse the *MV Tuledo* refuge was a decision of the Irish government at the international law level and that it did not give the ship a right of redress against the State. It was contended that, at best, Singapore as the flag state could possibly have a claim against the coastal state. Singapore had not advanced any such claim. The High Court held that right of refuge has long since merged into Irish domestic law from international customary law, before the enactment of the Constitution of 1937 and that the State is answerable in its domestic courts to the plaintiff for unlawful failure to honour it.
For a discussion on the entry rights of ships in distress in South Africa see, Devine, op. cit. who noted at pp 82-83 that the customary right has been recognised by the South African courts and forms part of the common law.
[103] See, Chircop op. cit. p. 20.

In support of this practice the Court cited the following examples from Clark: the *Andros Patria* (1978),[104] the *Prisendam* (1980)[105], the *Eastern Mariner 1* (1981),[106] the *Stainislaw Dubois* (1981)[107] and the *Christos Bitas* (1978)[108], all also referred to by Kasoulides.[109]

The Court also referred to the problem created for salvors by the frequent refusal of states to accept leper ships into their ports, as described by Darling and Smith[110] and Brice. The latter author observed that: "In practice, salvors often have difficulty in finding ports or places of refuge when towing badly damaged ships. Port authorities often refuse entry altogether or impose stringent and unacceptable terms. They are often afraid for the well-being and reputation of their ports if the ship were for example to sink at her moorings. This has led to salvors being left with what are sometimes called "leper ships." If they leave them at anchor but abandoned and unlit then they may be liable for damages in the event of a collision or sinking. If the ship is not "salved" they recover no salvage for there has been no "cure"." [111] Speaking of the International Salvage Industry Survey (1992), which made reference to the salvor's "persistent operational difficulties such as refusal to grant safe havens", Barr J stated:

"This would appear to be confirmation of a widespread contemporary practice of refusing access to disabled vessels. I am satisfied that a modern practice of states is evolving whereby humanitarian and economic aspects of maritime distress are distinguished and that access to safe havens is frequently refused where safety of life is not involved.

The point here is that the Court in effect held that this practice is evolving into a rule of customary international law that allows the coastal state a converse right to refuse port access or entry into the territorial seas to a vessel in serious distress where human life is not at risk. The International Salvage Convention, 1989 confirms the right of the coastal state to protect its coast from pollution and to direct the salvors on how to deal with a maritime casualty.

Art 9 provides:

Nothing in this Convention shall affect the right of the coastal state concerned 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 or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal state to give directions in relation to salvage operation.

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[104] Discussed in Chapter 1.

[105] The *Prisendam*, a passenger liner caught fire in the Gulf of Alaska, was refused entry to Alaskan territorial seas and eventually sank.

[106] The *Eastern Mariner 1*, a bulk carrier was damaged in heavy seas and took refuge in Bermudan waters but was ordered to depart although it was unseaworthy. The vessel was towed out to sea by government-chartered tugs, was abandoned and sank.

[107]The *Stainislaw Dubois* was a gas carrier damaged in a collision, but no port would grant refuge and the ship was eventually scuttled.

[108] The *Christos Bitas* was refused entry by the UK and was scuttled on the Atlantic.

[109] Kasoulides op. cit. at pp. 185-186.

[110] Darling and Smith, *L.O. F. and the new salvage convention*, (1991) at p. 14.

[111] Brice on maritime law of salvage, 4th ed. (2003) para. 1-317.

This article protects the sovereign right of a coastal state to refuse port access to a potentially pollutant casualty and if it is necessary and proportionate to direct it away from the shore. Barr J held that art 9 recognised the right of a coastal to protect its interests in the context of a request for refuge' and 'reflects an established practice by maritime states in modern times'.

Barr J set the parameters of the coastal state's right to refuse refuge as follows:

In summary, therefore, I am satisfied that the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognised practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede to any such request. Where in a particular case, such as the MV Tuledo, there was no risk to life as the crew had abandoned the casualty before a request for refuge had been made, it seems to me that there can be no doubt that the coastal state, in the interest of defending its own interests and those of its citizens, may lawfully refuse refuge to such a casualty if there are reasonable grounds for believing that there is a significant risk of substantial harm to the state or its citizens if the casualty is given refuge, and that such harm is potentially greater than that which would result if the vessel in distress and/or her cargo were lost through refusal of shelter in waters of the coastal state. The abandonment of a ship in distress before refuge is sought is an important ingredient in assessing whether or not a casualty should be granted refuge by the coastal state. There are two reasons why that is so; first, the absence of any risk to human life excludes the most compelling reason in support of an application for refuge. Secondly, abandonment of a ship carrying a substantial, valuable cargo is patently an act which would be resorted to by an experienced master only in circumstances of major distress, and this in itself is cogent evidence that the casualty is seriously damaged and, therefore may cause significant harm to the coastal state and/or its citizens.

Encouragement of professional salvors, though laudable in itself, does not seem to me to be a factor of major significance in making of a decision by a state whether or not to receive a maritime casualty. Salvors operating under a "no cure, no fee" contract will normally prefer the nearest port or anchorage of refuge – all the more so if the casualty is substantially damaged and at risk of total loss. In circumstances where it is apprehended that if refuge is granted to a maritime casualty there is a significant risk that substantial harm may be done to the receiving state or its citizens, then contractual loss which may result to the salvor if entry is refused is not, per se, a factor of major significance, in the context of decision-making by the coastal state unless the latter loss is likely to be greater than the former.

The first and foremost reason for the right of refuge is to assure the safety of the crew. Thus if the vessel carries a risk of serious pollution and the master and crew abandon ship, the ship itself and its cargo no longer retain the right of refuge.[112] The ruling supports the thesis that the right of entry in distress applies where economic interests are at risk (e.g. the ship and cargo), but it is subject to the principle of proportionality. The Courts' decision that the coastal state has a right in international law[113] to refuse refuge in the interest of protecting its own interests and those of its citizens against a significant risk of substantial harm, can also be supported by the principle of self-help. Devine for instance argues that the principle of self help can be invoked to prevent or reduce imminent substantial damage to the coastal state.[114]

[112] See, Chircop op. cit. at p.20.
[113] Interestingly, the Court held that the Minister did not and could not refuse refuge under the Oil Pollution Act, 1977, which implemented the Intervention Convention, since the Act applies when ships are outside the territorial seas of the State. The Court held that he relied on the rights of the State under customary international law.
[114] Devine, op. cit. at p. 84-85.

As a matter of domestic law the Court applied the Wednesbury test of unreasonableness adopted by the Irish Supreme Court in O'Keefe v An Bord Pleanala[115], which set out that a court may quash an administrative decision on the grounds of unreasonableness or irrationality. In international law the decision of the state to refuse refuge must also be reasonable, taking into account the principles of proportionality and necessity. In holding that the decision of the Minister to refuse refuge to the *MV Tuledo* was reasonable the Court carefully balanced the gravity of the ship's situation against the probability; scale and type of damage that could follow if it were allowed to enter. This involved a risk assessment. It was found possible that the vessel could sustain further damage and eventually break up and sink. For example it was reasonable to assume that the dynamic effect of the sea swirling in the No 4 hold would in time cause a failure of plates and frames on the starboard side of the hull (as happened later). All the crew had been taken off before the request for refuge was made and hence danger to life did not arise. There was 410 tons of bunker and fuel oils onboard the *MV Tuledo*, which could have caused a significant pollution problem, similar to, though not as extensive as the *Kowloon Bridge* incident. In the prevailing weather conditions there was a significant risk that the towing line from the tug might part. If, in the rough seas, the tow line could not be restored in time, the *MV Tuledo* would have foundered on the south Irish coast. There was also a slight risk that if the tow was lost, it might collide with one of the Kinsale gas platforms. If it were allowed to enter Irish territorial waters, in the course of being brought to a safe anchorage, it could have sunk in Bantry Bay or in Cork harbour, causing not only a pollution problem but also a hazard to navigation.

Barr J applied the principle of proportionality as follows:

> It might be argued that in condemning the MV Tuledo to a hazardous passage in appalling weather and sea conditions on route to Falmouth, the likelihood was that the tow would be unsuccessful and/or the casualty would break up or suffer such further major damage that she would founder before reaching that port or, alternatively, become so badly damaged (as happened) that she would not be allowed the benefit of that sanctuary. It might well be contended that Captain Kelly's decision created a high risk for the MV Tuledo and her cargo which would have been substantially less if the casualty had been granted the benefit of an Irish port or anchorage of refuge thus avoiding the substantially longer passage to Falmouth and the hurricane conditions which were encountered in course of it. However, the other side of that coin is also important. If the casualty was at risk of sinking or of sustaining further major damage (as happened to her eventually on passage to Falmouth) or if the tow parted as she approached the Irish coast and by reason of adverse weather and sea it was not possible to re-couple the MV Tuledo with the Simon, then there would have been a serious risk of substantial damage to Irish interests, the effect of which might far exceed in losses the total value of the casualty and her cargo.

The *Tuledo* was the first (and only case as far as we could establish) in which a court had to weigh-up the interests of the coastal state against those of a ship and its cargo by applying the principle of proportionality to a factual situation. The case is a good example of how the

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[115] [1993] IR 39.

application of the principles of proportionality should actually operate in practice. The *Tuledo* is also to be welcomed for its evaluation of the risks involved in bunker spills. Bunker oils are highly viscous and persistent. Even a small bunker spill can cause considerable damage. Although virtually every vessel is powered by diesel engines burning fuel oils, bunker spills are mostly associated with aging bulk carriers. In the 1990's there were a spate of incidents in which large bulk carriers carrying heavy iron ore cargoes broke in two and sunk with heavy loss of human life or foundered after losing shell plating in severe weather conditions.[116] The IMO has addressed these problems in the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 and in SOLAS amendments relating to bulk carrier safety, 2002. The amendments in addition to other important safety features require double skin constructions for all new bulk carriers of 150 meters or larger. For existing large bulk carriers the bulkheads between the foremost No 1 and No 2 holds and the bottom tanks have to be strengthened so as to be able to withstand flooding and related dynamic effects. [117]

The *Cape Africa* incident

South Africa has also put limitations upon the right of refuge and makes a clear distinction between the humanitarian right to save life and action to save the ship and cargo. [118] Since the *Treasure* disaster[119] the South African Maritime Authority (SAMSA) has become increasingly concerned about places of refuge[120]. The *Ikan Tanda* was pulled off from a grounding after its bunkers were off-loaded and 12,000 tons of fertilisers dumped, but entry into Table Bay or False Bay for damage inspection was denied out of fear that the wreck would sink and cause a navigational hazard. It was scuttled 200 nm off-shore in October 2001. In that year, another bulk carrier, the *Bismihita'la*, took a severe list and was also scuttled on the high seas after refusals to grant refuge, from South Africa and Namibia.[121]

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[116] See, S. Roberts and P. Marlow, *Casualties in dry bulk shipping (1963-1996)* 26, Marine Policy, 437 (2002).
[117] SOLAS Chapter XII- Additional Safety Measures for Bulk Carriers.
[118]See, R Field, *Lat. 34. 21 S: Long. 18.30 E – Cabo Tormentosa*, paper delivered at the 17th International Tug & Salvage Convention (2002) who noted at p. 8 that: "SAMSA's attitude seems to be dictated to some extent by its perception that interested and/or affected parties are often rather economical in regard to the condition of the vessel needing refuge."
[119] In 2000, the bulk carrier, the *Treasure* carrying 1,300 tons of bunker fuel sank 30 km off Cape Town. About 20,000 penguins were affected by the spill, though most were rescued in the largest ever species transfer operation.
[120] In 2000, the *Belofin 1*, a listing cruise liner being towed to a scrap yard, was ordered to stay 50 miles west off Robben Island, filled up with water and sank. It carried 1,100 tons of bunker fuel which caused an oil slick of some 590 square miles. Kuswag 4 dispersed the oil after the sinking and none came ashore. The following year, another scrap cruise liner, the *Sun* developed a severe list, but the convoy was ordered to go out as far as possible from the coast. The *Sun* had some 420 tons of heavy fuel oil and 25 tons of lubricants onboard. Presumably this prompted SAMSA to expel it from South African waters. The liner sank 80 miles off Algoa Bay in deep water. In both cases the tugs lacked the pulling capacity to undertake the voyage around the Cape of Good Hope in stormy conditions. For a discussion of these incidents see Field ibid. p. 6 and p. 8. Untowworthiness would of course be prejudicial to the interests of the coastal state, and thus relevant to the question of 'innocent passage'. It is also doubtful that towing a scrap vessel through the territorial seas constitutes 'continuous and expeditious' passage.
[121] Both incidents are noted in the International Salvage Union Bulletin, No 21, (September 2002) at p. 8.

In May this year the 149,533 ton Taiwanese-flagged bulk carrier, the *Cape Africa*, carrying iron ore from Brazil to Japan reported extensive structural damage in hold No 3. As a precautionary measure the master and crew were flown off by helicopter. The ship was taken in tow by the salvage tug, the *Smit Amandla* (*ex John Ross*) 160 nm west of Cape Town. It had 1,900 tons of heavy fuel oils on board. SAMSA ordered that it remain at least 120 nm off Cape Town until such time as all bunkers had been transferred. It had a hole in the hull 23 meters long and 5 meters high on the port side. The weather remained fair throughout the operation and structural and stability surveys revealed that the ship's condition was stable. It was sitting comfortably in the water and was responding satisfactorily to the tow. During the first attempt to tranship the bunkers, high swells, which peaked at 5 meters, prevented the salvage tug, *Nicolay Chiker* from hooking up to the *Cape Africa* and connecting a series of hoses to its fuel tanks. The next day swell conditions had moderated and 903 tons of fuel oil could be pumped into the *Nicolay Chiker* and taken to Cape Town. It returned two days later and removed all pumpable fuel and non essential oils onboard the *Cape Africa*. [122]

While it is sometimes impossible to transfer oil at sea safely and efficiently this operation did not endanger the marine environment. The safety of the salvage team and the protection of the marine environment were of paramount importance in this salvage. The bulk carrier's condition was closely monitored by a salvage team made up of professionals with special expertise in assessing risks and the condition of the casualty. The Antarctic supply vessel, *S.A. Agulhas* was standing by as a logistic base and had a helicopter on board to assist in the transfer of salvage personnel and equipment. The helicopter was also on CASEVAC standby, should any member of the salvage team sustain an injury and require urgent medical treatment and evacuation to Cape Town. If any oil had escaped during pumping operations it could have been dispersed easily by the *Kuswag VI*, which was standing by. The patrol aircraft *Kuswag VIII* also made regular over flights in the area. In the worst case scenario - if the *Cape Africa* had broken up and sank – it was at a position 160 nm off Cape Town beyond the reach of the inshore shelf current which extends out to the 500 meter depth line. The salvage master projected that from that location offshore currents would have moved oil from any such disaster in a north westerly direction with no risk to the coast. On the Atlantic the relatively small volume of oil would quickly have been be assimilated by ocean processes.

If the holed *Cape Africa* had been allowed to enter False Bay or near-shore coastal waters at that stage, then there could have been a risk of a major bunker spill, similar to that caused by the *Treasure*, the impact of which would have far outweighed the value of the ship and its

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[122] The facts are based on various press statements issued on SAMSA's website @ www.capeafricasalvage.co.za

cargo. Its' hull and machinery was insured for US $ 24 mil and the iron ore cargo was valued at US $ 2.8 mil. SAMSA adopted a precautionary approach in response to the bunker threat posed by the vessel.[123] In the light of all the precautionary measures put in place by South Africa to protect the marine environment as well as the safety of the salvors, it is submitted, that the arrangement to offload the Cape Africa's heavy fuel oils at an offshore location 160 nm west of Cape Town was reasonable and the proportionate response consistent with the *Tuledo* case. Once the bunkers were removed the necessity to expel the ship from the coastline no longer existed.[124] It was allowed to enter False Bay to carry out emergency repairs in a safe anchorage off Simonstown. South Africa acknowledged that the ship was still in distress on the open sea and in need of repairs in a sheltered anchorage.[125] Salvors unsuccessfully tried to weld a cofferdam over the hole to create a watertight area in which repairs could be carried out. SAMSA then considered that a place of refuge is not a location in which to conduct permanent repairs. This is consistent with the notion that a ship in distress has a right to seek temporary refuge from the elements. SAMSA put in place environmental protection measures to protect the ecologically sensitive waters in False Bay[126] and instructed the salvors to remove the iron ore cargo from the *Cape Africa* to lighten the vessel, reducing its draught, so that it could enter a South African port for repairs. A specialised transhipment vessel, the *Bandar,* off- loaded the iron ore with ship-ship cranes and discharged the cargo in Saldanha Bay. The *Cape Africa* was finally towed into Cape Town port for temporary repairs.

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[123]The press statement by the *Cape Africa* Joint Response Committee issued on 14, May 2004 stated as follows: "The Department of Environment Affairs & Tourism and the South African Maritime Safety Authority subscribe to the precautionary approach as outlined in South Africa's environmental legislation. In line with this approach a series of discussions were held and analysis undertaken that led to a number of agreements and conditions to safeguard South Africa's sensitive coastline. These included an agreement that if there was a high risk of sinking, she will not be allowed to enter South Africa's nearshore coastal waters; an initial offshore location with favourable current patterns that would miminize any risk in the event of an oil spill; the removal of oil from the vessel before she is allowed closer than 120 miles from the coast; the availability of an oil pollution abatement vessel on site with additional backup vessels on standby; regular overflights by the patrol aircraft 'Kuswag VIII'; to effect repairs in False Bay and not in the environmentally more sensitive Saldanha Bay – which was later also found to be too shallow for the vessels draft-; need for financial guarantees by the ship's owners; proactively putting in place measures to safeguard sea birds (particularly penguins); and agreeing on the best route for the vessel to False Bay. There are ongoing discussions between the South African Maritime Safety Authority, environmental stakeholders and salvors to ensure that any risk of environmental pollution is kept to the absolute minimum".

[124] See, Devine op. cit. pp. 85- 87.

[125] The Statement by the Joint Response Committee, 14th May 2004 stated that: "Given that no South African port can accommodate the draft of the vessel, the only viable alternative is the repair of the structural damage in a sheltered anchorage. Given the extensive nature of the damage, the 'Cape Africa' will have to be towed into a bay, where it will be naturally protected from adverse sea and weather conditions during the repair process".

[126] The Joint Response Committee's 4 June 2004 statement stated that: "Of paramount importance during the 'Cape Africa's time at anchor in False Bay, considered by the South African Maritime Authority to be a place of refuge for the damaged vessel and not a location in which to conduct permanent repairs, is the protection of the marine environment. To this end, both proactive and reactive environmental protection measures are in place. The Department of Environmental Affairs & Tourism's oil pollution patrol and abatement vessel – 'Kuswag IV' – remains in the vicinity of the casualty – for the purpose of oil pollution patrol as well as monitoring of adherence to anti-pollution and garbage disposal measures. The salvage team has strict ant-littering and garbage disposal control measures in place, including the regular removal of this waste in an enclosed waste skip by launch vessel to Simon's Town (sic). The oil pollution patrol aircraft – 'Kuswag VIII' – continues to patrol False Bay on a regular basis. As part of the precautionary measures put in place prior to the 'Cape Africa's entry into False Bay, contingency plans remain in place for all river estuaries and for Seal Island and the Boulders Penguin Colony".

Stricken tankers - the Prestige disaster

Laden oil tankers present risks greater than any other ocean cargoes. When a big tanker accident occurs the most effective response will often be to offload the cargo before it breaks up and causes large-scale pollution. This can best be carried out in a port or sheltered waters near the coast offering protection from the swell while the receiving vessel is alongside the tanker. As IMO noted 'ships like the *Castor* in most cases do not want to proceed into a port in built-up areas, with all the obvious risks, ranging from fire and explosion to pollution. What they need is a safe location where the ship can be secured and the cargo transferred.' [127] A refusal of refuge by coastal states, compels the salvors to carry out lightering operations with a lower chance of success in hazardous conditions out on the open ocean. The considerable efforts made by salvors to transfer oil cargoes on the ocean safely were demonstrated by the *Andros Patria*, the *Khark 5*, and the *Kirki*. Not only does it cause greater difficulties and dangers for salvors, but exposes the tanker to a greater risk of deteriorating into a major pollution incident. Sending a laden tanker away from the coast into rough seas creates the obvious risk of further damage to and a tearing of the hull. If the hull should disintegrate and bulkheads collapse, the main beam may crack and it will then suddenly sink.

It wasn't until the *Prestige* sank 135 nm off the northwest coast of Spain in November 2002 and caused a huge disaster that the effects of refusing refuge to a laden taker were addressed by the international community in guidelines on places of refuge. *The Economist* reported that the disaster was avertable, even after the *Prestige* had run into difficulties.[128] It had a 10 meter crack amidship below the waterline through which heavy oil began to leak. The first oil slick was 500 m wide trailing some 36 km in the wake of the tanker. This was a minor spill compared to the large-scale pollution which occurred when the ship sank.[129] It was taken in tow soon afterwards by two ocean-going tugs and still had sufficient hull strength and buoyancy to be towed to a place of refuge without breaking up or sinking.[130] The UK, France and nearby Spain[131]and Portugal refused such permission. Environmentalists argued that if Spain had activated an effective oil spill contingency plan to deal with this emergency as required by the International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990, the oil leak from the tanker could have been contained inside a small bay.

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[127] W. O'Niel, *Places of refuge: the IMO perspective*, 21, International Salvage Bulletin (September 2002) at p. 4.

[128]See, *Almighty mess, almighty row*, Nov 20th 2002. The Economist Global Agenda @ www.economist.com

[129] For ENVIRSAT images of the oil slicks from the Prestige, see European Commission Joint Research Centre document, *Developing a better understanding of illegal discharges of oil at sea*, @ www. oceanides. jrc.cec.eu.int

[130] The American Bureau of Shipping's Technical analyses related to the Prestige casualty (March 4, 2003) found that: "Had the vessel been afforded a safe refuge, protected from the wave bending movements and dynamic forces experienced in the open ocean, it would have remained intact and afloat for a sustained period, certainly long enough to lighter the oil cargo off the vessel and prepare it for repairs." Available @ www.egale.org.

[131] Spain stated that it was motivated by fears that the tanker would break up near the shore causing worse damage. The *Agean Sea* grounded in La Coruna harbour in 1992, caught fire and spilled 80,000 tons of crude oil.

Instead Spain ordered the salvors to tow the tanker further away from its coast into heavy swells. The crack split open and the oil slick worsened, spreading 150 km in the wake of the tanker and being driven by strong winds towards the Spanish coast. As the salvage team feared, buffeting by waves damaged the tanker further causing the disintegration of the hull. After a struggle for six days to keep the *Prestige* afloat in appalling conditions, using five tugs, it broke in two, spilled some 11,000 tons of oil and sank. From a distance of 145 nm from the coast the oil slick from the sunken tanker spread and was driven on-shore by strong winds. The oil spill killed some 15,000 sea birds and polluted 1064 beaches on the Galician coast over a distance of 290 km. All fishing was suspended along 400 km of the Spanish and Portuguese coast. The slick also threatened the Portuguese and French coastlines. Portugal feared that the tides and winds would wash oil onto its shores. It hired a Norwegian floating rig to pump oil from the sea. France put floating barges on standby to protect its coastline, and requisitioned French trawlers to assist in the oil-skimming operations at sea.[132]

A further complication arose after the *Prestige* sank. It sank in 3,500 meters waters with 60,000 tons of oil still on board. It was anticipated that the cargo would congeal in the cold depth and stay there. But about a week after the sinking two new oil slicks were detected in the vicinity of the sunken tanker. These slicks were washed ashore by heavy seas around Cape Finisterre and Torinana. Over 60 small slicks subsequently surfaced. The French mini-sub Nautile probed the wreck and discovered that oil was oozing from several holes in both the bow and stern sections. In a remarkable salvage operation the *Nautile* plugged some holes using robotic arms.[133] But oil continued to leak from the sunken tanker. The problem with any patching method is that the hull could rupture under the intense pressure at 3,500 meters below sea level. Salvage plans are being discussed to pump the oil to the surface by lowering a robotic drill into the hull of the *Prestige*, pumping rape seed oil into the holds to thin the oil and then pumping the mixture to the sea surface. [134] It would require the use of remotely operated vehicles, but there are only a few ROV's which can operate at such depths. Another option being considered is to encase it in concrete, but this would be very costly and difficult.

[132]See, *Fresh troops sail into oil battle*, BBC News world edition, Dec 9th 2002 @ www.bbc.co.uk (2004/06/06).
[133]See, *Submarine to examine sunken oil tanker*, New Scientist news service, Dec 2nd 2002 @ www.newscientist.com See also, *Sub dives to plug oil tanker leaks*, CNN.com, Dec 19th 2002 @ www.cnn.com
[134] See, European Commission Joint Research Centre document, op. cit. @ www. oceanides. jrc.cec.eu.int

Protection of the marine environment

What is a somewhat uncharted question is whether the scuttling or sinking of a vessel as a result of a refusal of refuge violates the provisions of Part XII of LOSC. Arts 192-195 on the protection and preservation of the marine environment reflect generally accepted principles or rules of customary law.[135] It would appear that extensive treaty practice on pollution from ships and possibly also dumping had established the principle even before the entry into force of LOSC in 1994.[136] Part XII is viewed by Birnie and Boyle as 'an agreed codification of existing principles which have become part of customary international law'.[137] Agenda 21 of the Rio Declaration on Environment and Development endorsed the view that the provisions of LOSC on the protection and preservation of the marine environment reflect international environmental law.[138] Part XII is also the subject of litigation before the ITLOS between Ireland and the United Kingdom in the MOX case.[139] Its provisions have served as a framework for the development of numerous IMO Conventions and regional seas agreements. As Sands *supra* noted "The legal force of the principles established in UNCLOS as customary obligations is further supported by the widespread state practice pursuant to treaty and national rules which address particular sources of marine pollution as set out in Part XII."[140]
Art 192 sets out the primary obligations of all states 'to protect and preserve the marine environment.' The content of this obligation is elaborated in more detail in art 194 and subsequent articles. Pursuant to art 194 (2) 'states are to take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from *incidents* or activities under their jurisdiction or control *does not spread beyond the areas* where they exercise sovereign rights in accordance with the convention. The measures taken must include measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and preventing intentional and unintentional discharges'.[141]

These provisions extended the general rule enunciated in the Trail Smelter arbitration[142] that 'a state is under an obligation not to allow its territory to be used to the detriment of another state' to the marine environment as a whole including the high seas.[143] Art. 193(2) deals with

[135] P. Sands, *Principles of international environmental law*, 2nd ed. (2004) at p. 396.
[136] See, Churchill and Lowe op. cit. at pp. 337-338.
[137] Birnie and Boyle op. cit. at pp. 351-352.
[138] Agenda 21, paras. 17.1 and 17.22.
[139] MOX case (Provisional Measures) ITLOS No. 10 (2001).
[140] Sands op. cit. at p. 396.
[141] Art. 194 (3) (b).
[142] 33 AJIL (1939), 182 & 35 AJIL (1941) 684.
[143] Birnie and Boyle op. cit. noted at p. 352 that: "It is evident from the Convention, first that its protection extends not only to states and their marine environment, but to the marine environment as a whole, including the high seas. This goes beyond the older customary rule based on the Trail Smelter arbitration, and reflects its extension to global common areas contemplated by Principle 21 of the Stockholm Declaration."

activities or incidents under the jurisdiction or control of the coastal state. As stressed by Rosenne and Yankov 'the *ratione loci* of sub-article (2) embraces besides the territorial seas also the continental shelf and EEZ, over both of which the coastal state exercises jurisdiction'.[144] *Prima facie* this means that the coastal state is under an obligation to deal with a maritime casualty in its EEZ to ensure that pollution does not spread and damage the environments of other states or the high seas. As a rule the coastal state has no jurisdiction over incidents on the high seas. Arguably, if a coastal state should intervene with a maritime casualty on the high seas under the 1969 Intervention Convention, it assumes control over that incident in terms of art 193(2) on the *ratione materiae* grounds. Moreover, in such case it actually exercises treaty control over the incident and, consequently the duty would arise in art 195 not to transfer hazards or damage from one area to another.

Art 195 reads:

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

At UNCLOS III during the fifth (1976) and sixth (1977) sessions, the Informal Composite Negotiating Text redefined 'the obligation of states from one of merely guarding against the effects of transferring pollution, to a duty to "so act as not to transfer" pollution damage or hazards'.[145]This verifies its legally binding nature. "Transfer" means a physical movement from one area to another, including in the context of ballast water the transfer of alien species. The phrase "States shall act so as not to transfer" presents the duty in a negative form. Thus, Rosenne and Yankov argued that 'disputes can conceivably arise out of the actions – or inactions – of States based on this provision'. [146] Its relevance in the debate on places of refuge is that a state may try to argue that if through inaction it refused a request for refuge to a tanker and it subsequently breaks up out on the ocean, causing damage to another state, then there would be no breach of the article. But a refusal of refuge and keeping the vessel away from the coast to avert coastal pollution is more than inaction. It amounts to the "taking of measures to prevent, reduce and control pollution," which falls within the scope of the article.

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[144] Rosenne and Yankov op. cit. Vol IV commented at p. 65 para 194.10(e) that: "Paragraph 2 is a specific application of the general rule that a State is under an obligation not to allow its territory, or any territory over which it is exercising jurisdiction or control, to be used to the detriment of another State. The expression "jurisdiction or control, "which appears twice in this paragraph, is clear in the first place; there, having regard to the language used in the Convention, it will embrace the continental shelf and the exclusive economic zone, over both of which the coastal state exercises jurisdiction. That can be termed jurisdiction *ratione loci*. In the second place, however, it would appear to refer to "incidents or activities," and can be termed jurisdiction *ratione materiae*. It will be noted that the language of paragraph 2 embraces all "activities," and not merely "sea-bed activities, "the term used in article 208." While it would appear to be clear that coastal state jurisdiction in the territorial sea is *ratione loci*, it may be questioned whether jurisdiction in the EEZ can be based on simply *ratione loci* , or should it not be considered as a combination of jurisdiction *loci ratione* and *ratione materiae*.

[145] Rosenne and Yankov ibid. pp. 71-72 para 195.5.

[146] Ibid. p. 72 para 195.6.

Part XII of LOSC imposes a duty on states to prepare for foreseeable emergencies and develop contingency plans. States are not at liberty to order a ship like the *Prestige* out to sea to go and sink somewhere and cause a huge disaster; they are bound to deal with such emergencies in terms of LOSC and the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPPR). Art 194(3) (b) specifically requires states to take measures to prevent accidents and deal with emergencies. Art 198 requires that once a state becomes aware of imminent or actual pollution of the marine environment, it must give immediate notification to other states likely to be affected as well as IMO. Art 199 requires states to co-operate, in accordance with their capabilities, in eliminating the effects of such pollution and preventing or minimizing the damage and to develop contingency plans.
As Birnie and Boyle succinctly put it:

> Quite apart from their obligation to co-operate, states may also be required to respond to pollution emergencies individually, in cases where the incident falls within their jurisdiction or control. Failure to do so may then amount to a breach of the state's obligation in customary law to control sources of pollution, even if the emergency itself is not attributable to state action or inaction. This assumption is consistent with the 1982 UNCLOS, which requires states to ensure that pollution arising from 'incidents or activities' under their jurisdiction or control does not spread beyond areas where they exercise sovereign rights, or is not transferred to other areas. Moreover, Article 194 specifically mandates measures to prevent accidents and deal with emergencies emanating from all sources of marine pollution. [147]

The next question which arises is under which circumstances should the coastal state give refuge to a stricken tanker. Clearly, no tanker disgorging oil or threatening to break up near the shore should be brought into a port or coastal waters. The coastal state would, in fact, be under a duty to intervene in these circumstances by ordering the tanker away from its coast. Part XII embraces the entire marine environment, including the coastal states' own environment. Art 194(5) requires special protection for rare and fragile ecosystems as well as the habitats of depleted, threatened or endangered species and other forms of marine life. Occasionally the successful scuttling or sinking of a stricken tanker as a result of a refusal of refuge has been the most effective response to a threat of catastrophic pollution. The *Atlantic Empress* sank with 270,000 tons of crude oil onboard 300 miles north east of Tobago distant from sensitive marine areas in the Caribbean Sea, after the coastal state had ordered it out to sea and neighbouring states refused it entry to their territorial waters. The response of the coastal state was seen to be vindicated by the absence of any pollution after the sinking.[148]

Coastal states understandably do not want a damaged laden tanker in their ports or coastal waters with all the risks ranging from fire and explosion to oil pollution. The reaction of coastal states has been to refuse refuge to such ships and thereby deflect the problem

[147] Birnie and Boyle op. cit. at p. 378.
[148] See, De La Rue and Anderson op. cit. at p. 568 and p. 824.

elsewhere. In many incidents authorities have refused refuge to maritime casualties posing any risk of pollution, no matter how small. It is often, however, possible to bring a laden tanker in at an early stage when it still has hull strength and buoyancy and safely off-load its cargo onto another tanker in a sheltered position. The tanker's passage into the place of refuge should of course be monitored in accordance with an effective contingency plan.[149] Although there is an element of risk inherent in oil transfer, if it is carried out in a sheltered spot the risk could be contained or minimized by bringing it to a location with favourable current and wind patterns, lying booms around it and pre-positioning anti-pollution vessels, skimmers, dispersants and other oil spill equipment. The detailed requirements for all the appropriate measures to prepare and respond to such incidents are found in the 1990 OPPR Convention. If the tanker remains out on the open ocean and breaks up it can cause greater environmental damage not only to the coastal state's environment but pollution can spread (as happened in the *Prestige*) and affect neighbouring states. If a coastal state should refuse refuge and not deal with a pollution emergency falling within its jurisdiction and control and pollution should spread affecting the marine environment of other states or the high seas, it could possibly amount to a breach of arts 194 or 195 of LOSC. It would also appear that in customary law the authority of the coastal state to protect its own interests by way of intervention must be exercised so as to prevent harm to the interests of others. Smith suggests that the 'right of intervention' is defined by the constraints of proportionality and due response; the coastal state is not vested with territorial control and discretion in the exercise of jurisdiction.' [150] According to the author a failure to exercise a right of intervention with due diligence so as to prevent environmental harm to others states could lead to a claim for state responsibility. If the damage by pollution is quantifiable in monetary terms, reparation may become due, by virtue of arts 232, 235 or 304 of LOSC or by virtue of the general principle of international customary law embodied in the expresssion *sic utere tuo ut alienum non laedas*. Art 235 is self explanatory and reads:

States are responsible for the fulfilment of their international obligations concerning the protection and the preservation of the marine environment. They shall be liable in accordance with international law.

Art 232 reads:

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

According to Rosenne and Yankov 'reparation for any damages suffered through the application of article 221 on intervention comes within the scope of article 232.' [151] Notably,

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[149] Contrast, the Mimosa incident previously mentioned and noted in De La Rue and Anderson op. cit. at p. 825.
[150] Smith op. cit. at p.251.
[151] Rosenne and Yankov op. cit. para 221.9 (c) at p. 313.

art 232 confirms that measures taken under art 221 must be reasonable and proportionate in the light of available information. Art 232 would cover the loss of a ship and cargo caused by disproportionate measures, as well as pollution damage to other states and their citizens arising from excessive intervention or failure to respond to foreseeable pollution emergencies. But when may the coastal state refuse refuge to a stricken tanker? First of all coastal states must implement efficient contingency plans to improve their capacity to respond to pollution emergencies. In each case the coastal state has to make a risk assessment as was done in the *Tuledo* case. While no special rules are called for tankers, the coastal state should carefully balance greater potential risks to the marine environment against the threat of minor pollution which a tanker poses to its coastline. If it is likely that substantially greater damage would be caused to the marine environment if the ship were expelled, this would outweigh the coastal states' interests. Also, the decision whether not to give refuge to a ship in distress should be taken by weighing up the interests of the ship and cargo against the probability, the degree and type of harm to the coastal state that could arise if it were allowed into a place of refuge.

The IMO guidelines on places of refuge.

Under the heading "Co-operation" art 11 of the International Salvage Convention provides:

A State Party, shall whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, 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.

As Kennedy and Rose point out "it is largely exhortatory, and at the very most requires State parties merely to take into account the need for co-operation.................... State parties are not required to go further and to ensure that such co-operation actually takes place."[152]

After the *Prestige* disaster the IMO Assembly adopted guidelines on places of refuge for ships in need of assistance. Resolutions, guidelines and codes of the IMO Assembly and its committees are of course not legally binding.[153] They represent soft law and only become rules when incorporated in the 1972 SOLAS Convention or MARPOL 73/78. The guidelines do not apply to situations where persons on board are in distress. These are governed by the rules applicable to search and rescue operations under the SAR Convention.[154]

Paragraph 1.3 recognises that "when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its

[152] Kennedy & Rose, *Law of salvage*, 6th ed (2002) at para 1050.
[153] See, Churchill and Lowe op. cit. at p. 266.
[154] IMO guidelines paragraphs 1.14 - 1.16.

cargo and bunkers, and to repair the damage. Such an operation can best be carried out in a place of refuge". And Paragraph 1.4 states that: "However to bring such a ship into a place of refuge near the coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation."

Paragraph 1.5 contains the most important provision:

> Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with consideration of 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.

While the guidelines cannot impose any obligation on the coastal state to grant access, they do recommend that it must weigh-up all the factors and risks in a balanced manner and give shelter whenever reasonably possible. Paragraph 3.12 reads:

> When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.

This formulation is inconsistent with the decision in the *Tuledo* case that: "foreign ships in distress have a prima facie right to refuge in the waters of an adjacent coastal state." As pointed out previously the court held that the coastal state may refuse refuge if there are reasonable grounds for believing that there is a significant risk of substantial harm to the state or its citizens if the casualty is given refuge, and that such harm is potentially greater than that which would result if the vessel in distress or cargo were lost through refusal of shelter in waters of the coastal state. Accordingly it would seem that ships in distress have a right of refuge in order to save the ship and /or cargo, but that this right is subject to the principle of proportionality. While non-binding guidelines cannot modify the rights of ships in distress, they nevertheless do represent an important declaration by IMO which regrettably does not accurately reflect the legal position.

As Van der Velde observed:

> ....the wording "there is no obligation for the coastal State" could lead to the mistake that States are free to decide whether or not to grant access and that States cannot be hold (sic) liable for that decision. It might be better to provide:
> *When permission to access to a place of refuge is requested, the coastal State should weigh all the factors and risks in a balance and give shelter whenever reasonable (sic) possible.* [155]

The Erika II package traffic monitoring directive is much more satisfactorily. Art 20 (under the heading of Places of Refuge) provides as follows:

> Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate in the waters under their jurisdiction, ships in distress. Such

[155] W. van der Velde, *The position of coastal states and casualty ships in international law*, CMI Yearbook 2003, 446 at p.487.

plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority.

Following the *Prestige* incident and a resolution adopted by the European Parliament,[156] the Ministers in the Transport Council, in December 2002 called for an accelerated implementation of this Directive by the 1st of July 2003. [157] The European Commission is currently evaluating the emergency response procedures in place in Member States.

The IMO Guidelines for action expected from coastal states recommend in paragraph 3 that such states should assess on a case-by-case basis suitable places of refuge as part of their contingency plans in preparation for an incident. The assessment involves an objective analysis of the advantages and disadvantages of allowing a ship in, taking into account a long list of factors which are set out in Appendix 2 (such as whether the places of refuge are located in a sensitive area, near fishing grounds, currents and prevailing winds, depth of water, sheltered anchorage, and the availability of shore facilities ect.). When an incident occurs, paragraph 3.9 recommends that the maritime/port authorities of the coastal state should make an event-specific assessment. This analysis concerns the seaworthiness of the ship and factors such as buoyancy, stability, means of propulsion, power generation, docking capacity, nature of the cargo, bunkers, and in particular whether the ship is carrying hazardous goods, salvage arrangements and whether the ship is insured ect. Paragraph 3.10 recommends that an inspection team of experts should board the ship, when appropriate and (if time allows) should gather evaluation data. As one of the participants at the CMI 2004 Conference said, 'communication with a ship in distress in a storm may be difficult, and it may be simply impracticable to put an inspector on board to conduct a survey of the ship's condition'. [158]

Paragraph 3.11 recommends that the final analysis should make a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment. Such a comparison should cover each of the following points: (i) safeguarding of human life at sea; (ii) risk of fire, toxic risk ect. at the place of refuge; (iii) if the place of refuge is a port, risk of disruption of the port's operations (i.e. navigational hazards to channels, docks, equipment and other installations); (iv) evaluation of the consequences if a request for a place of refuge is refused, including the possible effects on neighbouring States; and (v) due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance.

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[156] Its Resolution on improving safety at sea in response to the Prestige accident (2003/2066 (INI) dated 23 September 2003.
[157] See, R. Shaw, *Places of refuge – international law in the making?* CMI Yearbook 2003 at p. 339.
[158] R. Shaw, *Designation of places of refuge and mechanism of decision making*, CMI Yearbook 2003 at p. 448.

The criteria described in (iv) would appear to cover situations where there is a possibility that pollution could spread and damage or threaten the marine environment and affect neighbouring states such as happened when the *Prestige* sank. The duty of states to prevent harm to the marine environment as a whole and other state's environments cannot be appropriately addressed here in that a more exhaustive evaluation of these risks would be called for. Similarly, the wording 'due regard should be given to the preservation of the hull, machinery and cargo of the ship' could be interpreted to mean that the ship and cargo no longer retains the right of refuge. As argued, the right of refuge applies where economic interests are at risk, but this right is subject to the principles of necessity and proportionality. To quote Devine:

> Pollution prejudice or potential pollution prejudice will have to be weighed in each case against potential prejudice to other interests. Minor pollution damage will never justify expulsion of the ship, if expulsion presents a potential threat to the safety of the ship, to persons on board or a grave threat to the marine environment.[159]

The IMO guidelines provide a practical framework within which all factors can be assessed and, taking into account the risks involved, the most appropriate decisions on whether or not to give refuge to ships in distress can be made. Since the guidelines do not indicate how much weight should be attached to each factor, maritime/port authorities can in future give due consideration to the list in a balanced manner and this could help reduce accidents and environmental catastrophes. The IMO Legal Committee is working on the issues of liability and compensation.[160] At the CMI Vancouver 2004 Conference it was suggested that the ideal solution would be an international convention on ports of refuge and ships in distress.[161]

Conclusions

Since the late 1970's, coastal states have with increasing frequency refused entry to their territorial sea and ports to damaged vessels. When a ship has suffered an incident it needs access to a port or sheltered waters in the territorial sea so that its cargo and bunkers can be lightened and the ship repaired. It is rarely possible to carry out lightering operations safely and efficiently in open sea conditions. If a laden tanker is forced to remain on the open sea it is at risk of suffering further hull damage and becoming a greater pollution hazard. This raised the question whether such vessels have a right of entry which can be founded on the right of innocent passage. Ships claiming innocent passage must first of all be in passage as defined in art 18 of LOSC. It can be generally accepted that bringing a damaged vessel into the territorial sea for lightering operations cannot be regarded as 'passage' because it is not in

[159] Devine op. cit. at p. 91.
[160] See, E. van Hooydonk, *The obligation to offer a place of refuge to a ship in distress*, CMI Yearbook 2003, 403 at p. 438.
[161] See, van Hooydonk ibid. at pp 443-445.

'continuous and expeditious passage' for normal traffic purposes. A stricken tankers manoevering around the territorial seas in search of sheltered waters are also not in 'purposeful passage' in the sense of art 18. Passage covers navigation by ships in transit through the territorial sea and for the purpose of proceeding to and from internal waters, but excludes entry *per se* into those seas. Art 18 entitles a ship while in passage to stop and anchor in the territorial sea and would allow it decelerated navigation and some ancillary acts such as carrying out emergency repairs or extinguishing a controlled fire. If however, salvage operations and towage form part of such activities the ship would no longer be in passage.

The second element is innocence. A laden tanker threatening to break up or already disgorging thousands of tons of oil like the *Prestige*, cannot be considered to be innocent. Art 19(2) (h) of LOSC considers any act of wilful and serious pollution to be non-innocent. Accidental discharges are often serious but cannot meet the criterion of intent. This does not mean that unintentional pollution will be innocent in all circumstances. Under art 14 of the 1958 TSC accidental pollution would have been classified as non- innocent. Given that the law has not changed it seems that the list of activities in art 19 is non-exhaustive. Unintentional serious pollution could therefore come within the scope of the general principle in art 19(1). Further virtually any kind of pollution in already heavily polluted enclosed seas or sensitive areas could be regarded as serious pollution. It is also generally accepted that a maritime casualty is to be classified as something short of having "a direct bearing on passage" under art 19(2) (l). Pursuant to either arts 19 (1) or 19 (2) (l) a maritime casualty causing serious pollution or threatening to cause serious pollution in the territorial waters of the coastal state would lose its right of innocent passage. Leper ships such as the *Castor* would also lose the right of innocent passage. While a ship's poor condition cannot be classified as an activity, it could qualify as prejudicial to the coastal state pursuant to art 19 (1) on the basis of a threat of serious pollution which it poses. The modern wide spread state practice of refusing places of refuge confirms that leper ships which are likely to cause serious pollution are no longer regarded by coastal states as being in innocent passage.

The coastal state has in principle a right in international law by virtue of its sovereignty over the territorial sea to deny the non-innocent passage of foreign ships. Also, the coastal state has extensive rights of intervention derived from the concept of self help or necessity and based on its sovereignty over the territorial sea to act against maritime casualties to protect its interests. The right of intervention within the territorial sea is greater than on the high seas and EEZ. Under art 221 intervention is allowed beyond the territorial sea in the case of a pollution threat which may reasonably be expected to result in major harmful consequences. Within the territorial sea intervention is permitted at an earlier stage where the threat might

not necessarily result in such a high threshold of harm, but where it poses a significant risk of substantial pollution for the coastal state. Intervention entitles a coastal state, where it is necessary to protect its coastline to direct a damaged vessel away from its shore, where the vessel can reasonably be expected to pose a significant risk of substantial pollution. However, this does not mean that the coastal state can expel maritime casualties under all circumstances. In every case the interests of the ship and cargo have to be balanced with the interests of the coastal state in accordance with the principles of necessity and proportionality.

The basis for places or ports of refuge may be found in the customary right of refuge of ships in distress. The sovereignty of the coastal state over the territorial sea is restrained by the right of ships in distress to seek refuge. The right of refuge is primarily humanitarian rather than economic. It is not an absolute right. Where the master and crew have abandoned ship, the coastal state in the course of defending its interests, may refuse refuge to a ship in distress if there are reasonable grounds for believing that there is a significant risk of substantial harm to the coastal state's interests and that it is potentially greater than that which would result if the ship and cargo were lost. Crude oil and bunker spills are obvious examples. The risk of sinking in a place where the wreck will endanger or hinder navigation is another. In general, if there is at a high degree risk of sinking and the ship carries a hazardous cargo or has bunkers on board, the interests of the coastal state will outweigh the economic interests of the maritime adventure. Hence if a risk analysis in such a case should indicate that there is a significant risk of pollution harm the coastal state has a right in international law to refuse access to its ports and territorial sea until such time as the cargo and bunkers have been offloaded. In all cases the interest of the ship and the greater marine environment, including that of other states, must be balanced against the interest of the coastal state, taking into account the risks involved and the principle of proportionality. The right of entry in distress applies to the preservation of economic interests in a limited manner. Where minor pollution is a factor and the ship is not so badly damaged that it presents at risk of sinking and thereby causing a hazard to navigation, the ship would retain a right of refuge to save ship and cargo.

The *Prestige* incident has shown that if a coastal state should refuse refuge to a laden tanker this could affect neighbouring states and result in much greater damage to the environment than would result if the ship were given access to sheltered waters in a port or bay to secure its cargo. The general obligation to protect and preserve the environment in art 192 of LOSC usually cannot provide a basis for imposing a duty on coastal states to offer refuge to stricken tankers. Part XII is not open to such a broad interpretation. Neither was this contemplated by participants during negotiations at UNCLOS III. Coastal states will not accept an interpretation that would erode their sovereignty and extensive powers of intervention within

the territorial sea. Part XII does however impose specific duties on coastal states to draw up contingency plans and deal with emergencies by taking measures to ensure that pollution from incidents under their jurisdiction and control does not spread and is not transferred from one area to another. Failure to give refuge to a tanker that later sinks somewhere and causes a huge oil spill with resultant damage to the environments of other states may amount to a breach of the coastal state's obligations to protect and preserve the marine environment generally under art 192 and to control specific sources of pollution. Under arts 232 or 235 of LOSC the coastal state could possibly be liable to neighbouring states for reparation for quantifiable damage suffered by virtue of an unreasonable and disproportionate response to a request for refuge. Pursuant to art 232 the coastal state would also be liable to the flag state for the loss of a ship and cargo caused by disproportionate measures taken beyond the territorial sea under art 221. The *Prestige* incident sends a clear message that a coastal state must balance very carefully greater potential risks to the marine environment and other states against the threat of minor pollution which a laden stricken tanker poses to its coastline.

We can conclude that the old right of entry in distress is still legally relevant but has been significantly modified by modern state practice. The decision to grant refuge to a ship in distress rests with the coastal state. The coastal state must however weigh up all the risks in a balanced manner and give shelter whenever reasonably possible. Such decision should be based on a risk assessment and it has to be objective, transparent and verifiable. Finally, there are many defects in the IMO guidelines. Nevertheless, the guidelines give practical guidance to coastal states on the application of the principles of necessity and proportionality. Hopefully, they will assist maritime / port authorities to make the most appropriate decisions.

In conclusion, it should be said that the issue of places of refuge is an important one. It raises problematic issues dominated by coastal state sovereignty claims that will not be resolved easily in a convention on places of refuge and ships in distress The IMO guidelines are not mandatory and legally binding. For now and until an international convention can be negotiated, it is submitted that, the law of the sea as clarified in the *Tuledo* with it's emphasise on necessity and proportionality reflects the current international law on places of refuge.

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