

¿NUNCA MAÍS?

Places of refuge – Coastal liability for environmental damage

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1 Introduction

Shipping is considered an environmentally friendly way of transporting goods, because ships can carry large weights with relatively low consumption of energy. Accidents are, however, inevitable consequences of maritime activity. Carriage of harmful substances can in this respect represent serious risk of damage to the marine environment, as these substances disperse rapidly in water, making it difficult to contain the damage. It is therefore vital that coastal states establish measures to reduce the extent of damage when accidents do occur. One such measure is to bring the distressed vessel to a place of refuge.

“Places of refuge” is the collective term for sheltered coastline areas where a ship in distress may seek refuge. The use of the neutral term “place of refuge” rather than the more commonly used “port of refuge” is intentional. Places of refuge are hence not restricted to ports, but may take the form of other geographical areas that in case of emergency can be used to provide facilities and services to ships in distress.¹

The environmental benefits of bringing a vessel in distress to a place of refuge are many. Places of refuge are located in the internal waters of a state, where the waters are relatively tranquil compared to the open sea. This decreases the chance of deterioration of structural damages and increases the possibility of containing the substances that have already escaped from the vessel. In addition, clean up operations are more easily carried out in sheltered areas of the coast. The access to equipment for emergency unloading of the ship and damage control are normally better at a place of refuge. Moreover, the vessel may be repaired in order to continue its journey.

¹ Report of the Maritime Safety Committee, IMO doc. MSC 74/24

Recent events have brought considerable attention to the issue. In November 2002, the Bahamian registered tanker *Prestige*,² carrying 77,000 tons of crude oil suffered a structural damage outside the coast of North Western Spain. Spanish authorities declined the ship's request for refuge, and ordered her far out to sea. After several days of heavy weather, her condition deteriorated, and she eventually broke in two and sank to a depth of 3, 5 kilometres deep 270 kilometers off the coast, where she continued to leak. As a result, of 1900 kilometers of coastline in Spain and France was polluted, while oil from the vessel was also reported washed ashore in Portugal and Britain. The Spanish authorities' decision not to grant refuge has been heavily criticised. It is likely that the damage caused could have been significantly reduced or all together avoided if the vessel had been granted access to a place of refuge. The title of this thesis reflects the slogan of the Galician community in the wake of the accident: "Nunca Más" or "Never Again".

Fortunately, Norway has so far been spared accidents the size of *Prestige*. Yet, the risk of such accidents happening along the Norwegian coast is rising, as the transport of oil from the northern parts of Russia is increasing. Earlier, the main channels for Russian oil export were the Bosphorus and the Baltic Sea. The heavy traffic in these areas has, however, resulted in transport restrictions, which have forced the Russians to look for alternative routes. Since it started in 2001, we have witnessed an explosion of such transport. In 2003, 250 ships carried 11 million tons of oil products along the Norwegian Coast from Russia.³ This may, however, prove to be a mere beginning. If Russian plans for a pipeline to Murmansk operative in 2007, are brought to completion, the Russian oil transport is estimated to increase to 100 million tons per year in 2015, implying five to six oil transports along the Norwegian Coast per day.⁴

² Summary based on Shaw p. 333

³ Johnsen, p. []

⁴ Johnsen, p. []

1.1 The problem

Despite the fatal consequences of refusing access as illustrated by the *Prestige* incident, ships are in many cases refused access to places of refuge. Why is this? The answer lies in the fundamental conflict that coastal states are confronted with when facing a vessel in distress; while providing a safe haven for ships in distress in most cases will help reduce overall environmental and economic damage, the ultimate outcome is always uncertain and the potential consequences to the location of refuge grave. The risks involved in bringing a distressed vessel into a place of refuge were illustrated by the incident involving the *Treasure*⁵ in South Africa in 2000. This vessel, suffering from structural damage, was allowed to enter Table Bay to be inspected by the South African Maritime Safety Authority (SAMSA). As it was found to have a 170 square meters hole in its hull, the SAMSA ordered the vessel to unload her cargo in Cape Town or leave Table Bay. Yet, because of delay on part of the owner to contract salvage, she subsequently sank under tow, just 10 kilometres off the coast. As a consequence, 1400 tons of crude oil from the ship's bunkers was spilt, causing extensive damage to the marine environment in the area, and also leading to a stricter South African attitude on access to its territorial waters.

Despite the risks involved, the decision to grant refuge will in many cases prove to be the best environmental option. This is illustrated by the *Sea Empress*⁶ casualty. The vessel, which was laden with 130,000 tons of crude oil, ran aground off the port of Milford Haven in the United Kingdom in February 1996. A large quantity of oil was spilt in order to lighten the vessel and avoid sinking, but once refloated, the ship was brought into port, where the remaining cargo was successfully unloaded.

The fundamental problem relating to places of refuge is that whilst the environmental benefits of granting refuge are widely recognised, coastal states are not particularly keen to take responsibility for granting them. This practice has been named the “not in my backyard” syndrome. For obvious reasons, this practice is unfortunate. This dissertation

⁵ Summary based on Maddern p. 104

⁶ Summary based on Shaw, p. 334

deals with some of the legal issues that can be highlighted in this respect, most notably the rights and obligations of the parties involved and the liability issues that arise from a place of refuge situation.

1.2 The object

The object of this dissertation is twofold. Chapter 2 seeks to outline the legal status coastal states in a place of refuge situation, by examining, first, whether coastal states in general can be said to have a duty under international law to accommodate ships in distress at a place of refuge. Secondly, the same question will be examined with respect to Norwegian law. Chapters 3 and 4 are concerned with the liability and compensation issues that arise once the ship has been granted or refused access to a place of refuge. Chapter 5 seeks to present solutions to the problems identified in the foregoing chapters.

1.3 Limitation of the subject

Due to the restricted scope of this dissertation, it is necessary to limit the subject in a number of respects. Firstly, the discussion is restricted to places of refuge in the internal waters of a state.⁷ Secondly, I will only consider the right of entry to a place of refuge of vessels that represent an environmental risk to the coastal state. Situations where human life is in danger fall outside the scope of this thesis.

2 The obligation to provide a place of refuge

There are two main grounds on which the duty to provide a place of refuge can be based. The obligation to provide refuge may first of all arise from a distress situation. Secondly, the coastal state may be obliged to provide refuge on the basis of its environmental commitments.

⁷ Theoretically, one could imagine places of refuge in the territorial sea.

2.1 International law: The obligation to assist vessels in distress

2.1.1 The starting point: Sovereignty

Places of refuge located in the internal waters of a state are subject to the full sovereignty of the coastal state. This principle of international customary law is codified in the United Nations Convention on the Law of the Sea (UNCLOS) article 2 (1), which reads: “The sovereignty of a coastal state extends, beyond its land territory and internal waters, and, in the case of an archipelagic state, its archipelagic waters, to the adjacent belt of sea, described as the territorial sea.”

By virtue of their sovereignty, states are only subject to obligations by way of consent or through the emergence of customary law, and have exclusive right to exercise control and jurisdiction. This includes the right to regulate access to its internal waters, cf. the Nicaragua case of International Court of Justice, where it was held that “by virtue of its sovereignty [...] the coastal state may regulate access to its ports”.⁸

2.1.2 Exceptional rights of vessels in distress

Under international law, the right of a coastal state to regulate access to its internal waters is subject to a single exception, namely the right of vessels in distress to seek refuge.⁹ The right to seek refuge is an ancient principle of international customary law¹⁰ rooted in humanitarian concerns,¹¹ forming part of a series of exceptional rights granted to vessels in distress. Other rights arising from the distress situation include the right of vessels in distress to stop and anchor in the territorial sea¹² and the exemption from charges in port.¹³ Given that the right of entry in distress is rooted in humanitarian

⁸ Nicaragua v. United States

⁹ Churchill, p. 63, Chirop, p. 212-216, Ruud I, p. 126, Blanco-Bazan, p. 2, Hooydonk II, p. 126-130

¹⁰ Chirop, p. 207

¹¹ Hydeman, p. 157, Chirop, p. 216

¹² UNCLOS Article 18 (2)

¹³ Hooydonk II, p. 133

concerns, it is uncertain whether the principle can be extended further than to the protection of human life, and must therefore be given further consideration.¹⁴

2.1.3 International conventions and the right to refuge

The rights and obligations of a coastal state when faced with a request for refuge are not identified in any current international convention. The only provision of international conventional law that contains a direct reference to the place of refuge situation is article 11 of the Salvage Convention of 1989, under the heading “Cooperation of contracting States”:

“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” (emphasis added).

The question remains, however, whether article 11 can serve as a legal basis for an obligation to admit ships in distress to a place of refuge. The preparatory works reveal that some delegations favoured “that there should be a clearly spelled out obligation for states to admit vessels in distress into their ports.”¹⁵ Among those who were against it, some argued that it was unfortunate to include such a “public law rule” in a private law convention, while others felt that such an obligation would undermine the interests of coastal states. As a result, one landed on the rather vague formulation in article 11. The preparatory works and the particular rules of interpretation that apply to international law speak in favour of narrow interpretation of the provision, whereby the coastal state hence has a general duty to cooperate with salvors, but no absolute obligation to grant access as such.¹⁶ One may argue that the duty to cooperate under Article 11 should be

¹⁴ Churchill, p. 63

¹⁵ IMO doc. LEG 83/13/3

¹⁶ Chirop, p. 218-220.

interpreted as a duty to facilitate entry to places of refuge whenever reasonably possible, as successful salvage in many cases will depend on the coastal state's granting of a place of refuge.

State practice since the 1970s has, however, gone in favour of restricting admittance of vessels in distress where human life is not in danger.¹⁷ This development can be seen a reaction to an altered risk picture, justified in the principle of protection whereby a state has the right to act when its security is threatened.¹⁸ Indeed, both public awareness of the risks involved in bringing a casualty vessel into a place of refuge and the risk itself have increased, as developments since the 50-60s has allowed for larger ships and potentially more hazardous cargos to travel seas, leading to further reluctance to grant coastal refuge to vessels in distress.

2.1.4 International customary law and the right to refuge

The current status of the right to seek refuge under international customary law is equally uncertain. This is reflected in a recent report on Places of Refuge submitted by Comité Maritime International¹⁹ (CMI) to the International Maritime Organisation's²⁰ (IMO) Legal Committee. The report is based on a survey among the National Maritime Law Associations of the IMO member states. The report states that a large number of delegations supported the view that "The right, according to international customary law, for a vessel in distress to be granted a place of refuge no longer appears to be recognised by many states as an absolute right and has become clouded."²¹

¹⁷ Chirop, p. 215

¹⁸ Chirop, p. 216

¹⁹ CMI is a non-governmental organisation that works to promote unification of maritime law. CMI has established a working group on Places of Refuge under the chairmanship of Stuart Hetherington, which has conducted a survey among its national member associations. The information obtained in this survey formed basis for the drafting of guidelines on Places of Refuge within the IMO.

²⁰ The IMO is an inter-governmental organisation within the United Nations umbrella that was established by the IMO Convention in 1958.

²¹ IMO doc. LEG 89/7

Customary law is based on general practice that among states is recognised as law.²² When an alleged right no longer conforms to state practice, and is not recognised by states as law, it ceases to be customary law. We can therefore establish that vessels in distress no longer enjoy an absolute right of entry. Indeed, the recent incident involving the Norwegian vessel *Tampa* has shown that the right of entry in distress may not even be absolute in cases where human life is in danger.²³

On the other hand, there is little support for an absolute right to refuse entry. As stated above, a state may invoke the customary law principle of protection when its security is threatened. The notion of security was originally reserved protection of territorial sovereignty, but has gradually developed to include protection of a state's environmental interests.²⁴ The principle of protection is evident in the Intervention Convention, which under given circumstances may provide a basis for refusing access to internal waters. Article 1 (1) states that the coastal state may 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 the threat of pollution of the sea by oil, following upon a marine casualty or acts related to such casualty, **which may reasonably be expected to result in major harmful consequences**" (emphasis added). As evident from this quote, the right to intervene is subject to conditions.

In order to lawfully refuse access on the basis of the principle of protection, the states vital interests must be at stake. The admittance of the vessel must hence constitute an actual and serious threat to the security of the coastal state. Almost any ship may pose a potential threat to the environmental interests of states, but access cannot be denied such vessel on the basis of the principle of protection.²⁵ Moreover, the coastal state cannot invoke the principle of protection were it willing to grant entry subject to financial

²² Statute of the International Court of Justice article 38 (1) b)

²³ The MV *Tampa* was refused entry by Australian authorities following its rescue of a group of Afghan refugees from a shipwreck in 2001. For further reading, see Røsæg, p. 43-82

²⁴ Chirop, p. 217

guarantees, as mere economic interests are not protected under the principle of protection.²⁶

This is illustrated by article 9 of the Salvage Convention, which recognises the coastal state's right to protection, but only subject to conditions: "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 operations" (emphasis added).

2.1.5 Case law

That the right to refuse access is subject to conditions was also expressed in a decision by the Irish High Court of Admiralty when the principle of protection was invoked by the coastal state. The case concerned the vessel *Toledo*, which had been refused access to Dutch internal waters. The decision was challenged by the shipowner. The tribunal stated that "Where in a particular case, such as the *Toledo*, 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 was lost through refusal of shelter in the waters of the coastal state**"²⁷ (emphasis added).

²⁵ Hooydonk II, p. 127-128, Hydeman, p. 157-158

²⁶ Hooydonk I, p. 425

²⁷ ACT Shipping (OTE) Ltd. v. Minister for the Marine

A similar approach is evident in a decision by the Dutch Judicial Division of the Council of state. The case concerned the vessel *Long Lin*,²⁸ which collided outside the coast of the Netherlands in March 1992, and was severely damaged. The vessel requested the authorities' permission to enter Dutch territorial waters, but this was only granted subject to an unconditional financial guarantee from the shipowner. The ship's P&I Club agreed to issue the guarantee provided that they would retain their right to limit liability. This was not accepted by the authorities, which then refused to grant entry. The decision of the authorities was challenged by the shipowner and the Dutch repair yard that had lost the repair order as a consequence of the refusal. The court stated that international law does not permit the authorities of a coastal state to prevent a vessel in distress from seeking refuge in port or near the coast. In such a case the decision of whether or not to grant entry should weigh the gravity of the ship's situation against the threat the ship constitutes to the coastal state.²⁹

The approach of the court here reflects a balance of interest theory, in which the principle stakes may be summed up as follows: The right of entry traditionally recognises the involuntariness of the distress situation, and that certain exceptional rights arise from the emergency situation. The right to seek refuge promotes the safety of the ship and its crew, and will in many cases reduce the extent of the damage, by making possible reparations and emergency unloading of the cargo. The right to entry in distress further serves the economic interests of the shipping industry, because it reduces the chance of loss of the ship and its cargo. Hence it also promotes economic predictability that in turn serves more global interests, especially if one takes into account the importance of shipping as a means of transport that causes relatively less operational pollution compared to land based transport. In order to encourage the carriage of goods by sea, one must make sure that the costs related to it can be kept at as low a level as possible. Finally but not least, recent incidents involving casualty ships have shown that granting refuge may also serve environmental interests, as accidental pollution from vessel is better contained if refuge is granted.

²⁸ Based on English summary in NILOS Newsletter, No. 13 (1995)

²⁹ This approach is supported by Churchill, p. 60-63, Blanco-Bazan p. 3 and Hydeman p. 157-158

On the other hand, the right of protection recognises that granting refuge may conflict with the environmental interests of the coastal state. Such interests include the protection local nature and wildlife. For vessels carrying toxic or other harmful substances admittance may conflict with the coastal state's public health and safety interests. Reluctance to grant refuge may also be rooted in political concerns, as a decision to grant entry is likely to produce discontent in the communities surrounding a place of refuge. As much as one is willing to recognise the ultimate environmental benefits of granting refuge, it may be difficult to accept that local communities are sacrificed to this effect. Finally, economic concerns also play a role. Economic activities such as fishing and shellfish harvesting, tourism and other means of livelihood in coastal areas may be threatened, or willingness to admit vessels may depend on the possibility of recovering the state's expenses when pollution does occur.

2.1.6 The new IMO guidelines on places of refuge

The balance of interest theory is reflected in the IMO guidelines on Places of refuge for ships in need of assistance (IMO guidelines), which were adopted at the IMO Assembly in November 2003.³⁰ The guidelines recognise 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 cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge."³¹ However, the guidelines go on to recognise the environmental and economic risks involved for the coastal state, and the problem of resistance from local authorities in the area.³² On this basis, the guidelines establish that "granting access to a place of refuge could involve a political decision that can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from the bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast."³³

³⁰ Resolution A.949(23)

³¹ IMO guidelines section 1.3

³² IMO guidelines section 1.4

³³ IMO guidelines section 1.7

The guidelines on Places of Refuge are not legally binding, but are expected to have considerable effect in setting a standard for proper procedure in place of refuge situations. The political sensitivity of this issue was illustrated in the drafting of the guidelines in April 2003, during which Spain, at the time still recovering from the Prestige accident, sought to amend the guidelines in various ways.³⁴ The Spanish delegation among other wanted to remove one of the most critical provisions of the guidelines, which states: “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.”³⁵

The overall effect of the guidelines remains to be seen. Soft law instruments may, however, serve as an expression of legal status quo, which may develop to become part of international customary law.³⁶ One may read the IMO guidelines as expressing what the majority of states consider *opinio juris* on the subject, namely that the decision should be taken by weighing the interests of the vessel, the coastal state and the environment.

2.1.7 The EU Traffic Monitoring Directive

The balance of interest approach is also apparent in the EU Traffic Monitoring Directive through its reference to the IMO guidelines.³⁷ The directive is part of the Erika II package, named after the *Erika*³⁸ accident of December 1999, which revealed serious gaps in European maritime safety regulation. This oil tanker loaded with 31.000 tons of heavy fuel oil suffered distress outside the coast of France, and requested refuge in the port of Saint-Nazaire. The request was declined, whereupon the vessel was ordered out

³⁴ The account of the incident is based on Shaw, p. 336

³⁵ IMO guidelines section 3.12

³⁶ Ruud II, p. 25-26

³⁷ Directive 59/2002

³⁸ Summary based on information from IOPC Fund web page, available at <http://www.iopcfund.org/erika.htm>

on the high sea, where it broke in two and sank, causing extensive damage to the coast of France.

The Traffic Monitoring Directive places upon the member states an obligation to make plans for accommodation of distressed vessels, including designation of places of refuge: “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 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 the authorization by the competent authority. Where the member states consider it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response. Plans for accommodating ships shall be made available upon demand. Member states shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph.”³⁹

The directive was adopted by the EEA committee on 31 January 2004, making Norwegian Authorities obliged to transpose the directive into Norwegian law, in accordance with the EEA agreement. As a consequence of the directive, the Norwegian Coastal Directorate has established a procedure for decision-making, that aims at bringing distressed vessels into places of refuge and even beach them when necessary, based on the IMO guidelines. This procedure will be discussed further below.

2.2 International law: The duty to protect and preserve the environment

The 20th century saw significant developments with regard to international environmental law, and it is today legitimate to ask whether the admission or refusal of a vessel in distress can be said to constitute a breach of the environmental obligations of states under international law.

³⁹ This deadline was postponed to 1 July 2004, but Norway complied with the original deadline.

Neither of the provisions that will be discussed in the following deals directly with the coastal state's duty to provide refuge. The incidents involving the *Erika* and the *Prestige* have shown, however, that under given circumstances the environmental obligations of coastal states cannot be fulfilled without offering a place of refuge. The following chapter gives a presentation of the environmental duties that may serve as legal basis for an obligation to grant refuge.

2.2.1 The starting point: Sovereignty

A traditional starting point of international law is that states are free to decide how to make use of their own territory in recognition of the principle of sovereignty.⁴⁰ This is reflected in UNCLOS Article 193, which establishes that: "states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." The provision states that the sovereignty of states is restricted by the duty to protect and preserve the marine environment as stated in UNCLOS article 192. This provision does not give much guidance with regard to the more precise content of this duty. A more detailed description of the obligation is, however, provided in the subsequent provisions.

Article 194 (1) requires states to take all necessary measures to protect and preserve the marine environment in general, by "using for this purpose the best practical means at their disposal and in accordance with their capabilities." This is in recognition of the common but differentiated responsibility for preserving the environment, with particular regard to the scarce resources of developing countries.⁴¹ A characteristic feature of a place of refuge situation is that it may involve several coastal states that are all reluctant to take responsibility of the distressed vessel. An example of a so called "maritime leper" situation is provided by the case of *Castor*⁴². This 30,000 ton tanker, fully laden with gasoline, suffered structural damage in the Mediterranean in December 2000. For

⁴⁰ Ruud I, p. 82

⁴¹ Birnie, p. 352

⁴² Summary based on Shaw, p. 332-333

the purpose of lightening the vessel of its cargo, requests to allow her into a place of refuge were made. Several states refused to grant refuge, amongst which Algeria, Gibraltar, Greece, Malta, Morocco, Spain and Tunisia. After being towed around the Mediterranean for 40 days, the cargo was finally transferred successfully to another tanker at sea. Although it is always difficult to predict what the consequences of taking the vessel into a place of refuge would have been, the risks involved in letting a damage tanker drift around in what was at times heavy weather for 40 days were presumably greater. In accordance with UNCLOS, all states have an obligation to prevent damage to the environment in general. But the content of the duty will vary in recognition of the different resources states have at their disposal. In the *Castor* case one could perhaps argue that the responsibility for taking in the vessel should rest with the state or states that have at their disposal the best resources for handling a place of refuge situation.

2.2.2 The duty to prevent harm to the territory of other states

The principle of sovereignty may also be in strong conflict with the right of other states when it comes to environmental questions, as effects of environmental damages are seldom confined to a specific area. Each state's territory makes part of an indivisible system in which actions of one state will have important spillover effects on others. Consequently, the obligation to prevent environmental harm to other states is a principal tenet of international environmental law.⁴³

The duty to prevent harm to other states' territory was first formulated in the famous quote from the Trail Smelter arbitration of 1941, that reads as follows: "The Tribunal finds that under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."⁴⁴

The obligation not to cause harm to the territory of other states is now recognised as a principle of international customary law. The principle is codified in UNCLOS article

⁴³ Smith, p. 72

⁴⁴ United States v. Canada

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

Recent events have shown that the refusal to provide refuge may conflict with the duty to prevent harm to other states’ territory. This is exemplified by the *Prestige* accident, where damage was caused to the coasts of France, Portugal and England as well as Spain after refuge was denied by the Spanish government. Yet, harm to other states could also arise from the admittance of a vessel to a place of refuge that proves unsuitable. When faced with a casualty vessel, part of the decision as to whether to grant a place of refuge should therefore consist in an assessment of the potential harm to other states that refusing or granting a place of refuge may result in.

2.2.3 The duty to prevent harm beyond the territory of any state

Refusal to grant entry to a place of refuge may also cause harm beyond the territory beyond any state, e.g. the high seas. The starting point is that the high seas are free, meaning that the high seas are open to all states. This principle of international customary law was first codified in the High Seas Convention of 1958. Today, the principle is given expression in UNCLOS article 87(1), which establishes the freedom of navigation, overflight, fishing etc.

Yet, article 87 (2) also establishes that this freedom must be exercised “with due regard for the interests of other states in their exercise of the freedom of the high seas”. It is clear that when the refuge question arises, ordering the vessel out on the high seas may result in damage to fish and other resources of the sea and thus conflict with the freedoms of other states, as well as represent an obstacle to the freedom of navigation of other ships.

One might therefore ask if the obligation to protect and preserve the environment as states in UNCLOS article 194 (2) may serve as a legal basis for an obligation to prevent harm to the area beyond any state’s territory. Such obligation receives confirmation by

Principle 21 of the Stockholm declaration of 1972, which reads “states have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states **or of the areas beyond the limits of national jurisdiction**” (emphasis added). Although the declaration is not legally binding, it signals an expansion of the environmental obligation to prevent harm to the territory of other states as established in the Trail Smelter arbitration.⁴⁵

Both the duty to prevent harm to other states’ territory and the high seas is further elaborated in UNCLOS Article 195, which prescribes how states should act to fulfil their environmental obligations. “In taking measures to prevent, reduce and control pollution of the marine environment, states shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.” In a place of refuge context, this provision is perhaps the most pertinent, because these decisions inevitably consider transfer of damage. In case of refusal, damage may be transferred to a neighbouring state or to the high seas. But also the decision to grant refuge may constitute an act that indirectly transfers damage from the high sea to the coastal state and its surroundings.

2.2.4 The duty to prevent harm to the state’s own territory

The coastal state’s sovereign right to decide how to make use of its territory is thus primarily restricted by the obligation to prevent harm to the territory of other states and the area beyond the territory of any state. But states also have a duty to prevent harm to its own territory were failure to do so results in violation of human rights. A possible basis for such duty is the European Convention on Human Rights (ECHR). The convention does not contain any provision dealing with the protection of environmental interests, but the European Court of Human Rights (ECtHR) established that serious pollution may constitute a breach of article 8 concerning the right to a home and family life in the case of *Lopez Ostra v. Spain*.⁴⁶ The case concerned the authorities’ failure to act in accordance with its supervisory powers to prevent and control pollution, which

⁴⁵ Birnie, p. 352, Ruud I, p. 86

⁴⁶ *Lopez Ostra v. Spain*

was considered a violation of article 8. The court prescribed that it was the duty of the state to strike a fair balance between the interests of the individual and that of the community as a whole. In a place of refuge context, failure to strike balance may arise where the rights of individuals who live in immediate proximity of the place of refuge are sacrificed to avoid damage to the coastal community as a whole. Where pollution results from such granting of a place of refuge, this may firstly conflict with the right to a home and private life. Moreover, if the vessel is leaking poisonous or otherwise dangerous substances, this may conflict with the right to health and life.

In many cases, harm to the state's own territory will result regardless of whether refuge is granted or not. An example of the contrary is provided by the incident involving *Khark 5*.⁴⁷ This tanker suffered an explosion north of the Canary Islands in December 1989, and was subsequently denied access to a place of refuge by the Moroccan and Spanish authorities. Despite the fact that more than 85,000 tons of oil escaped, little or none reached shore, as what was not recovered dissolved before it reached shore. The case being exemplary, one must, however, not overestimate environmental benefits of refusing refuge. The successful dissolving of large quantities of oil in water is dependent on many factors, among them distance from the coast, wind and weather conditions, water temperature etc. In the specific case of Norway, one may for instance predict that relatively low water temperature would hinder an effective dissolution of spilled oil.

2.3 Norwegian Law

As one of very few countries, Norway has enacted legislation concerning the right of vessels to enter Norwegian internal waters. Regulation of 24 December 1994 No. 1130 on the entry into and passage through Norwegian Territorial Waters in peacetime of foreign, non-military vessels section 14 second paragraph reads as follows: "Foreign, non-military vessels which are obliged to seek a port of refuge for the reasons specified in section 10, second paragraph [force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft which are in danger of distress], may

⁴⁷ USGN case history

enter Norwegian internal waters without prior written application.” This is, however, modified by section 12, second paragraph, which states that “Foreign non-military vessels may, when particular circumstances so require, be refused entry to Norwegian internal waters.” Under Norwegian law, the starting point with regard to vessels in distress is thus that they have right to enter internal waters. Where a vessel represents a serious risk of pollution, this may, however, constitute a particular circumstance on the basis of which access may be lawfully denied.

So being, when will then a vessel granted refuge under Norwegian law? Admittance of vessels to places of refuge is part of the national emergency response to pollution, responsibility of which was transferred from the Ministry of the Environment to the Ministry of Fisheries and Coastal Affairs on 1 January 2003.⁴⁸ The authority to exercise the responsibility is placed with the Norwegian Coastal Administration’s Department for Emergency Response (DER).⁴⁹ The department has, in accordance with article 20 of the Traffic Monitoring Directive, identified places of refuge along the coast. It has also established a Procedure for Places of Refuge, based on the IMO guidelines on Places of Refuge. The DER procedure applies to situations in which vessels threaten the safety at sea or represent a risk of damage to the environment.⁵⁰ It establishes that a place of refuge shall be used where this offers a net safety and environmental profit.⁵¹ A net safety and environmental profit exists where the expected total damages as a result of refusal exceed the expected total damages as a result of permission.⁵² In reaching the decision, the DER shall evaluate different factors and risks in cooperation with the parties involved in the place of refuge situation.⁵³ The DER procedure holds that a decision to grant or refuse refuge shall be reached by the DER director after a joint assessment of the different factors.⁵⁴

⁴⁸ Regulation to the Pollution Act of 20 December 2002 no. 1629

⁴⁹ Act relating to harbours and fairways of 8 June 1984 no. 51 section 4

⁵⁰ DER procedure section 1 first paragraph

⁵¹ DER procedure section 6 first paragraph

⁵² Velde, p. 489

⁵³ The factors are set out in appendix 3 to the DER procedure.

⁵⁴ Procedure section 7.1

2.4 Concluding remarks

The discussion in this chapter has revealed that the legal position of coastal states in place of refuge situation is in no way unambiguous. The right of vessels in distress is no longer recognised as an absolute right under international customary law. On the other hand, there is little support for an absolute right of refusal. The emerging theory is that the decision on whether or not to grant refuge should be taken on a case by case basis, in which the different interests involved are weighed and given due consideration. The balance of interest theory is reflected in the IMO guidelines, which provide a standard for proper procedure against which the actual conduct of the coastal state can be assessed. The guidelines are not legally binding, but may be taken to express *opinio juris* on the subject. One could ask if the reference to the IMO guidelines in the Traffic Monitoring Directive make them more than soft law in the EEA Party states.⁵⁵ At any rate, there is reason to expect that the guidelines will play an important role in assessing the situation in the wake of an admission or refusal that results in environmental damage within the European Union and elsewhere. In Norway this standard has been implemented in an administrative procedure for decision-making when faced with a request for refuge, which establishes that refuge shall be granted when this offers a net safety and environmental profit. As we shall see in chapter 4, this standard will have implication for the question of coastal state liability under Norwegian law.

Another question that has been raised is whether the environmental obligations of a coastal state may oblige it to grant or refuse access. The discussion has revealed that, under given circumstances, coastal states cannot refuse access without violating its environmental obligations under international law. On the other hand, admission of a vessel may also be an infringement of such obligations. International environmental law does hence not provide a clear and predictable basis for establishing when the state may lawfully grant or refuse entry.

The conclusion must be that no general rule as to when coastal states are obliged to grant refuge can be established, yet that the decision to grant or refuse entry may

⁵⁵ Ringbom, p. 161

conflict with rules of proper procedure and the environmental obligations of states. The following chapters look at the extent to which this exposes the coastal state financially.

3 The coastal state's right to compensation

3.1 Introductory remarks

Recent decades have witnessed increased focus on the protection and preservation of the marine environment which has resulted in a new generation of IMO conventions on liability and compensation damage caused by pollution from vessels (the framework conventions). Traditionally, maritime claims have been subject to limitations that lack counterparts in land based activity. The right to limitation of maritime claims is based on the London Convention of 1976 (LLMC Convention). A Protocol to the convention was signed in 1996. Both are incorporated into Norwegian Law in chapter 9 of the Norwegian Maritime Code (NMC).⁵⁶ The right to limit liability is a recognition of the considerable risk involved in shipping, making limitation of liability necessary to promote a certain degree of economic predictability. It is, however, plausible that the right to limit liability has no counterpart outside maritime law, which may indicate that its existence today is stronger rooted in tradition than reason.⁵⁷

Systems that ensure adequate compensation in the event of pollution are vital to coastal states faced with vessels in distress. Were liability regimes secure that coastal states are adequately compensated, they will be less reluctant to admit a distressed vessel.

When the issue of places of refuge was first raised in the IMO in 2001, the focus of the work was to consider the legal issues relating to the establishment of places of refuge.⁵⁸ This work did, however, reveal several unanswered questions relating to liability and

⁵⁶ The Norwegian Maritime Code of 24 June 1994 no. 39

⁵⁷ Falkanger I, p. 184-185

⁵⁸ IMO doc. LEG 83/13/3

compensation.⁵⁹ This chapter considers the legal and financial exposure of coastal states in the role of claimant in refuge situation where a vessel poses an environmental threat.

3.2 The framework conventions

Liability for pollution caused by oil spills from tankers is regulated by the Civil Liability Convention (CLC Convention), which was adopted as a direct consequence of the *Torrey Canyon*⁶⁰ disaster in 1967. This tanker laden with 120.000 tons of crude oil ran aground off the coast of south-west England. The oil leaked from the ship, causing severe damage to the coasts of England and France. The total losses far exceeded the compensation available under the then applicable Brussels Limitation Convention of 1957, which made evident the need for a new liability regime for oil pollution from tankers.

The CLC Convention imposes strict liability on the registered owner of the vessel. At the time of its adoption in 1969, this represented a dramatic departure from the traditional principle of fault liability in maritime law. It soon became clear that the limitation figures under the CLC Convention provided inadequate compensation in cases of serious oil pollution. This led to the adoption of the Fund Convention in 1971, under which an international fund (the IOPC Fund)⁶¹ financed by the cargo interests was established. The purposes of the Fund Convention are to secure additional compensation where the compensation under the Civil Liability Convention is inadequate and to relieve the shipowner of some of the financial burden connected with oil spill damage. The Fund will pay compensation even when the shipowner is uninsured or otherwise incapable of meeting his financial obligations. The conventions are incorporated into Norwegian law by chapter 10 in the NMC.

In 1996, the IMO adopted the HNS Convention that will provide compensation for victims of accident involving hazardous and noxious substances. The convention is

⁵⁹ IMO doc. LEG 87/17

⁶⁰ Summary based on Falkanger I, p. 204

⁶¹ International Oil Pollution Compensation Fund

based on the CLC and Fund regimes, but goes further in that it covers not only pollution damage but also damage connected to fire and explosion, including loss of life and personal injury as well as damage to property. The latest IMO Convention on liability for environmental damage is the Bunkers Convention. The HNS and Bunkers are still awaiting ratification by the required number of states to come into force.

3.3 The problem: Gaps in the compensation regime

Despite these conventions, problems related to gaps in the compensation regime do however persist. If some of these will be removed by the entry into force of the HNS and Bunkers conventions, others will be offered no foreseeable remedy. This chapter seeks to identify and explain these gaps.

3.3.1 The pollution damage is not covered by any of the four conventions

One of the problems a coastal state may be faced with in a place of refuge situation is that the damage incurred is not covered by any of the four framework conventions. The most evident gap relates to damage caused by bunker oil and hazardous and noxious substances, as the Bunker Oil and HNS Conventions have not yet entered into force.

The HNS Convention will enter into force 18 months after ratification by “at least 12 states, including 4 states each with no less than 2 million units of gross tonnage”⁶² providing that the persons who are obliged to contribute to the HNS Fund in these states “have received during the preceding calendar year a total quantity of at least 40 million tons of cargo contributing to the general account.”⁶³ The current number of ratifications is six.⁶⁴

While the HNS Convention remains unratified, compensation for pollution damage caused by ships carrying such substances is regulated by the Norwegian Pollution Act (POA).⁶⁵ Section 53 fourth paragraph establishes that POA chapter 8 on liability for

⁶² HNS Convention article 46 (1) a)

⁶³ HNS Convention article 46 (1) b)

⁶⁴ Angola, Morocco, Russian Federation, Samoa, Slovenia and Tonga (as at 30 August 2004)

⁶⁵ Act relating to protection against pollution and relating to waste of 13 March 1981 no. 6

pollution damage applies to pollution from ships insofar as the liability is not specifically regulated by other legislation, cf. POA section 53 first paragraph. The NMC does not regulate liability for pollution from other sources than oil; hence the rules in POA chapter 8 apply. POA section 55 first paragraph establishes strict liability on the operator of the polluting activity. When it comes to pollution from ships this will normally be the shipowner.⁶⁶

Liability under POA chapter 8 is unlimited. Maritime claims are, however, subject to the rules in NMC Chapter 9.⁶⁷ The shipowner is therefore entitled to limit his liability accordingly. The liability limits depend on whether the applicable convention is the 1976 LLMC Convention or the 1996 Protocol. NMC section 170 establishes that the 1996 Protocol applies unless the party that invokes the right to limit liability has its main office or is resident of a foreign state that has ratified the 1976 LLMC Convention but not the 1996 Protocol. Under the 1976 Convention the limit for damage other than personal injury is 167.000 Special Drawing Rights⁶⁸ (SDR), which is raised according to the gross tonnage of the vessel. The limitation amount for a vessel with a gross tonnage of 50.000 tons is for example approximately 7, 5 million SDR, which equals about 9 million euros. Under the 1996 Protocol, the limitation amount for a vessel of the same size is approximately 15 million SDR, which equals about 18 million euros. Under the HNS Convention, a ship of 50.000 tons gross tonnage will have a limitation amount of 82 million SDR, or about 96 million euros. It seems that the differences between status quo and the limits under the dormant convention speak for themselves with regard to the insufficiency of the compensation under the LLMC Convention.

The Bunkers Convention will enter into force one year after the convention has been ratified by “eighteen states, including five states each with ships whose combined gross

⁶⁶ Falkanger I, p. 217

⁶⁷ POA section 53 first paragraph

⁶⁸ Special Drawing Rights are an international value used to provide a regular comparative evaluation by the International Monetary Fund of the currency of member nations, cf. Tetley

tonnage is not less than 1 million".⁶⁹ So far, five states have ratified the Bunker Oil Convention.⁷⁰ While the convention is not in force the liability for such oil spills is regulated by NMC section 208, which imposes strict liability on the shipowner for such damage, cf. NMC section 191. The liability is, however, subject to limitation in accordance with NMC chapter 9.⁷¹ The entry into force of Bunkers Convention will not lead to a change in this respect, seeing that the limitation amounts are linked to those of the LLMC Convention.⁷² Hence, the only difference the Bunkers Convention will make in Norwegian legislation is to oblige the shipowner to maintain compulsory insurance cover and secure the claimants right to direct action against the P&I Clubs.

Opinions are divided as to when, and indeed if, these conventions will come into force, given the amplitude of the political disagreement they are subject to. A step in the right direction is, however, the European Union's formal approval of the Member states' intention to ratify the HNS and Bunker Oil Conventions by 30 June 2006.⁷³ If that happens, and the necessary number of states representing the required number of cargo interest is thereby fulfilled, the HNS and Bunker Oil Conventions will enter into force 18 months and 1 year after this respectively.

3.3.2 Limitation provisions

The coastal state may, however, find itself exposed financially even when the damage falls within the scope of the CLC and Fund Conventions. This is the case where the damages following an accident exceed the limits of compensation available under these regimes.

⁶⁹ Bunker Oil Convention article 14 (1)

⁷⁰ Jamaica, Samoa, Slovenia, Spain and Tonga (as at 30 August 2004)

⁷¹ NMC section 208 third paragraph

⁷² Article 6 "Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended."

⁷³ Council decision 2002/762/EC

The insufficiency of the compensation was made evident by the *Prestige* accident. The compensation from the ship owner under the Civil Liability regime is limited according to the gross tonnage of the vessel. Under the 1992 Protocol that applied in the case of *Prestige*, the compensation for vessels with a gross tonnage of between 5.000 and 140.000 tons was 3 million special drawing rights (SDR) plus 420 SDR for each additional unit of tonnage over 5000.⁷⁴ The gross tonnage of *Prestige* was 42,820 tons. The compensation available from the shipowner was thus approximately 16 million SDR, which equals about 22 million euros. The compensation from the Fund is not dependent on the size of the ship, but is limited to a maximum amount per incident. The *Prestige* was subject to the 1992 Fund Protocol, under which the maximum compensation available was 135 million SDR, or approximately 175 million euros. This maximum amount includes the sum paid by the shipowner or his insurer under the 1992 Civil Liability Protocol.⁷⁵

This amount stands in stark contrast to the claims submitted in the wake of the accident. As at 5 November 2004, claims totalling 676 million euros have been presented in Spain. In France, claims totalling 89 million euros have so far been received. In addition, the Portuguese government has submitted a claim for 3.3 million euros for clean up and preventive measures.⁷⁶ The total amount of the claim is, however, expected to rise as the Fund has estimated the total losses to exceed 1 billion euros.⁷⁷

As a direct consequence of the accidents involving *Erika* and *Prestige*, the IMO decided to raise the compensation available under the Civil Liability and Fund regimes by 50 %. The new limits entered into force on 1 November 2003, as the “2000 Amendments” to the Civil Liability and Fund Conventions. As illustrated by the *Prestige* incident, this increment is not sufficient to close the gap between the compensation available and losses incurred after large oil spills. Subsequently, the IMO adopted a Protocol to the

⁷⁴ IOPC Fund 1992 Claims Manual of November 2002 p. 8

⁷⁵ IOPC Fund 1992 Claims Manual of November 2002 p. 10

⁷⁶ Updated claim figures are available at www.iopcfund.org/prestige.htm

conventions in May 2003, for the establishment of a Supplementary Fund, which raises the maximum compensation available under the Civil Liability and Fund Regimes to 750 million SDR, or approximately 1 billion euros. So far, six states, which received a total amount of 392 million tons of oil last calendar year, have ratified the Protocol.⁷⁸ The EU states have undertaken to ratify the Protocol “within a reasonable time, and if possible, before 30 June 2004”.⁷⁹ The Protocol will enter into force three months after it has been ratified by at least eight states which have received a combined total of 450 million tons of contributing oil in a calendar year. This is likely to be fulfilled by early 2005.⁸⁰

The entry into force of the Supplementary Fund will do away with much of the existing gap between compensation and loss. In the meantime, the problem has been sought avoided by coastal states through the demanding of financial security as a condition for granting entry. This was the case with the *Long Lin*,⁸¹ which was denied entry to Dutch waters following the insurers’ refusal to grant a guarantee that exceeded the amounts to which they had right to limit liability. Demand for financial guarantees exceeding the compensation limits under the liability conventions constitutes a breach of the international obligations of party states. The practice thereby undermines the international compensation regimes. This development is unfortunate, because lack of uniformity may lead to increased strain on states that play by the rules.⁸²

Insufficient compensation as a result of the right to limit liability is not really a gap in the compensation regime, as the amounts of compensation are limited intentionally.

⁷⁷ Note by the IOPC Fund Director, “Prestige – Estimate of the cost of the incident and level of payments”, 11 February 2004

⁷⁸ Denmark, Norway, Finland, France, Ireland, and Japan (as of 14 September 2004). Updated number of ratifications is available at www.iopcfund.org/news.htm#supfund

⁷⁹ Council decision 2004/246/EC

⁸⁰ IOPC Fund at www.iopcfund.org/news.htm#supfund

⁸¹ Cf. account above

⁸² So called “place of refuge shopping” may also arise as a result of states being party to different Protocols to liability conventions, see Ringbom, p. 149

Nevertheless, unsatisfactory compensation may lead victims of environmental damage to look to hold others, like the coastal state, liable for the damage.

3.3.3 Exceptions to the shipowner's liability

Under the Civil Liability and Fund regime the shipowner may be exonerated wholly or partially from his liability vis-à-vis claimants that have wilfully or negligently contributed to the damage, cf. NMC section 192 second paragraph, which incorporates CLC Convention article III (3) and Fund Convention article 4 (3). Similar provisions are found in article 7 (3) of the HNS Convention and article 3 (3) of the Bunker Oil Convention. The exoneration of the shipowner is in recognition of contributory negligence on part of the claimant.

An example of exoneration of the shipowner on the grounds of public authorities' contributory negligence for oil pollution damage is provided by the incident involving the *Agean Sea*.⁸³ The vessel, which was carrying 80.000 tons of crude oil, ran aground while approaching the harbour in La Coruña, Spain in December 1992. In the subsequent proceedings before the Coruña Court of Appeal, the blame for the grounding of the vessel was held by the court to be divided between the master of the ship and the state-employed pilot responsible for guiding the vessel to shore. The shipowner was thus exonerated for 50 % of the established claim forwarded by Spain.

3.3.3.1 Contributory negligence

It seems clear from the case of the *Agean Sea* that exoneration may take place vis-à-vis public authorities. The question remains however, whether the shipowner may be exonerated for liability vis-à-vis the coastal state if the decision to grant or refuse refuge has negligently contributed to the damage. There seems to be nothing in the convention to prevent exoneration at the sacrifice of the coastal state as such, given that it has acted negligently. Negligence may arise both from admittance and refusal to admit a vessel in distress. The authorities may act negligently in granting access, by ordering the vessel into a place of refuge that is too shallow or otherwise unsuitable. Negligence may also

⁸³ The summary of the incident is based on that of De la Rue, p. 93-94

arise from the latter situation, where a vessel is ordered out and consequently breaks in two and causes pollution. Both these situations raise difficult questions of causation. The causation issue was discussed in the *Agean Sea* case, where shared responsibility was established on the grounds that the incident would have been avoided if either of them had acted with proper care. Matters are, however, complicated when a vessel is causing pollution at the time of the negligent act by the injured party. This was the case with the *Prestige*, which was leaking oil before the request for refuge was made. The granting of refuge would almost surely have resulted in some pollution due to the already incurred damage. When the vessel was ordered out to sea, where it caused further pollution, it is difficult to establish which part resulted from the original damage and which part that was a consequence of the decision to order the ship to sea. Whether public authorities' decision to grant or refuse access to a place of refuge may constitute contributory negligence will be discussed further below.

An important difference between the CLC and Fund Conventions with regard to exoneration of the shipowner because of acts or omissions by the claimant is that there is no exoneration of the Fund with regard to preventive measures.⁸⁴ This has not been reflected in the Norwegian law provision that incorporates the CLC and Fund Conventions.⁸⁵ The relevant provision merely states that the liability can be abated where the injured party has wilfully or negligently contributed to the damage. The issue for consideration is whether Norwegian authorities can avoid exoneration of the Fund by claiming that the place of refuge decision was a preventive measure. This is a question about the relationship between national and international law. Norwegian law is presumed to correspond to international law. The principle of presumption secures that the content of international law is not lost through translation.⁸⁶ Where, like here, there is no indication that the difference is intentional, Norwegian law must be considered to have the same content as the conventions it is based on. If the decision to grant or refuse access is found to fall within the category of "preventive measures", the

⁸⁴ Fund Convention article 4 (3)

⁸⁵ NMC section 192

⁸⁶ Ruud II, p. 42-42

Norwegian authorities will therefore have access to the Fund for recovering its expenses even where it is found to have acted negligently.

3.3.3.2 Preventive measures

According to the Fund Convention article 1 (2) cf. CLC Convention article 1 (7), preventive measures are “any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage”. This definition provides three main criteria for falling within the scope of “preventive measures”. First of all, the measure has to be reasonable. Secondly, the object of the measure must have been to prevent or minimize pollution damage. Finally, the definition is limited to measures taken after the occurrence of an incident.

The notion of “preventive measures” is elaborates in detail in a technical paper submitted by the International Tanker Owners Pollution Federation Limited to the 7th Intercessional Working group of the 1971 IOPC Fund.⁸⁷ According to the paper, a “preventive measure” must pass a “test of reasonableness”, which prescribes that the measure, in light of the technical appraisal at the time the decision was made, must have been likely to succeed in minimizing pollution damage. That the measure proves to be ineffective or even counterproductive with regard to minimizing pollution does not in itself make it unreasonable. The decisive criterion for passing the test of reasonableness is thus that the decision to grant or refuse refuge, in light of the information available at the time of its implementation, appears likely to minimize damage. The problem in place of refuge situations is that pollution will often result in either case. In order to pass the test of reasonableness, the decision should be made according to which of the two alternatives are best suited to minimize pollution damage. Evidently, this is not easy. One must, however, build on the experience provided by actual events. The *Erika* and the *Prestige* have shown that the environmental problems do not go away by ordering the vessel out to sea. There is reason to underline the particular problems connected with oil pollution in this regard. Because oil does not easily dissolve in water, spills on

⁸⁷ Criteria for the admissibility of claims for Compensation: 1. Compensation and Property damage, appendix 13/1 in De la Rue, p. 1185 et seq.

the high sea will in many cases affect the coast. This may less frequently be the case with other substances, which may evaporate from the sea surface relatively quickly.

Another source of interpretation is the IOPC Fund Claims manual.⁸⁸ With respect to the second criterion, this states that the measure must have as its primary purpose to minimize pollution damage to be labelled preventive.⁸⁹ In a place of refuge context, one might argue that where a decision on whether or not to grant refuge is motivated by political interests, for instance the coastal state's strained relationship with the vessel's flag state, it is not a preventive measure. Where the decision is based on such ulterior considerations, there is no reason to grant it immunity.

In accordance with the third criteria, only measures that are taken after the occurrence of an "incident" are considered preventive with regard to the CLC and Fund Conventions. The term "incident" is defined in CLC article I (8) as "any occurrence, or a series of occurrences having the same origin, which causes pollution damage or creates an imminent threat of causing such damage." The requirement is to secure that only measures that are necessary are given immunity. In a place of refuge context, this is not likely to cause problems in relation to vessels that suffer from structural damage at the time of requesting refuge. Where the incident has not yet resulted in pollution damage, an evaluation of the nature and risks of the distress becomes necessary.⁹⁰ An oil tanker that suffers from engine failure is in distress, but the extent to which its situation causes imminent threat of pollution damage, will depend on how far the vessel is from the coast, weather conditions and so on. An instructive example is provided by the incident involving the Russian oil tanker *Moscow* outside the coast of the North Cape in June 2003.⁹¹ The vessel, which was laden with 102.000 tons of crude oil, suffered engine failure at 19 nautical miles off the coast and started to drift towards land. Because the coast in the area is rocky, there was a large risk of the vessel running

⁸⁸ An online version is available at www.iopcfund.org/npdf/92claim.pdf

⁸⁹ IOPC Fund 1992 Claims Manual p. 19

⁹⁰ Ringbom, p. 154, footnote 33

⁹¹ Summary of events based on article in *Aftenposten* "Oljetransport til besvær"

aground as it approached shore. Luckily, the crew was able to start the engine before anything happened. The incident does, however, illustrate that even a vessel in perfect structural shape may represent an imminent threat of pollution.

The incident also revealed a serious gap in Norwegian oil pollution emergency response when it became clear that the nearest tug that had capacity to handle a vessel of this size was 10 hours away, as it has not been possible to maintain commercial tug operation in the North of Norway. The authorities have since established public tug capacity in the area.

It seems then that a decision on whether or not to grant refuge should not automatically be labelled a preventive measure. If the coastal state acts negligently and thereby increases the extent of damage, the reasonable consequence is that this is reflected in a reduction of the compensation. This is in consequence of the general duty to mitigate loss.⁹² This duty is clearly spelled out in the CMI guidelines on Oil Pollution Damage⁹³ section 1 (2) which reads: “Compensation may be refused or reduced if a claimant fails to take reasonable steps to avoid or mitigate any loss, damage or expense.” These guidelines aim to state the extent to which claims under the CLC and Fund Conventions are thought to be recoverable in different countries, with regard to the criteria developed by the IOPC Fund.⁹⁴ Under Norwegian law, breach of the duty to mitigate loss is regarded as contributory negligence on part of the claimant, cf. the Norwegian Tort Act section 5-1 (2).

Even if the decision to grant or refuse entry cannot be labelled a preventive measure, the Fund is unlikely to claim exoneration on the grounds of contributory negligence of the coastal state, seeing that the Fund is an intergovernmental organisation in which the states are represented. As pointed out in a recent article, one can, however, not expect the P&I Clubs to hesitate in invoking contributory negligence to the defence of the shipowner.⁹⁵ The possibility of exoneration of the shipowner thus represents a risk for

⁹² CMI guidelines on Oil Pollution Damage paragraph 1 (2)

⁹³ Adopted at the 1994 CMI Conference in Sydney

⁹⁴ De la Rue, p. 1179-1180

⁹⁵ Ringbom, p. 135

the coastal state of not being adequately compensated, which may affect its attitude towards admitting vessels in distress.

4 Coastal state liability

Where the damage has occurred following a controversial admittance or refusal of a vessel to a place of refuge, and the international compensation regimes do not apply or prove insufficient, claimants might look to hold the coastal state responsible. This chapter looks at different bases for Coastal state liability, but should by no means be considered to give an exhaustive account.

4.1 Channelling of liability

The CLC/Fund regime hold that liability for oil pollution from tankers shall be exclusively channelled to the registered owner, cf. Civil Liability Convention article III (4), which is incorporated in Norwegian law through NMC section 193 (2). The same applies to oil pollution from other vessels, cf. NMC Section 208, despite the fact that the Bunkers Convention has not yet entered into force.⁹⁶ A similar channelling provision is found in the HNS Convention Article 7 (5).⁹⁷

The channelling of liability to the shipowner implies that liability cannot be invoked against the parties protected under this provision, among them any person taking preventive measures.⁹⁸ To what extent a decision on whether or not to admit a vessel to a place of refuge qualifies as a preventive measure is discussed above. If the coastal state's decision to grant or refuse refuge is considered a preventive measure, it may only

⁹⁶ The Bunkers Convention secures channelling of liability to the shipowner in Article 3. Contrary to the other framework conventions, the shipowner is not always the registered owner, but may also be the bareboat charterer, the manager or the operator of the vessel, cf. Bunkers Convention Article 2

⁹⁷ While this convention is not in force, the liability is directly regulated in the Pollution Act, which channels liability to the operator, cf. POA section 55 first paragraph

⁹⁸ NMC section 193 (2) litra e)

be sued for liability when the damage resulted from their personal act or omission committed with the intent to cause such damage or from gross negligence and with knowledge that such damage would probably result, cf. NMC 193, second paragraph.⁹⁹ This is not likely to occur, because where the decision to grant or refuse access is taken with intention of causing damage or in gross negligence with knowledge that such damage would probably result, it cannot be regarded a preventive measure. The test of reasonableness with regard to preventive measures fails long before one enters the stage of gross negligence with knowledge that damage would probably occur, let alone where there is intent to cause damage.

CLC Article III (5) establishes that “Nothing in this Convention shall prejudice any right of recourse of the owner against third parties”, including the protected parties under CLC Article III (4). In the corresponding provision in NMC section 193, third paragraph, the owner is prevented from seeking recourse against most of the protected parties, among them any person taking preventive measures, unless they have acted with intent to cause damage or in gross negligence with knowledge that such damage would result. Norwegian law thus prescribes a more far-reaching channelling of liability than the CLC Convention.¹⁰⁰

Where the decision to grant or refuse refuge is not considered a preventive measure, the coastal state may be held liable outside the Framework conventions. To what extent the coastal state can be held liable for pollution damage following a place of refuge decision, relies on national legislation. As pointed out above discussed above, chapter 8 of the Pollution Act supplies the NMC with regard to pollution from ships insofar as the question of liability is not separately regulated by other legislation or a contract, cf. POA section 53 fourth paragraph cf. first paragraph. The question of coastal state liability for pollution from vessels will therefore have to be considered on the basis of the Pollution Act.

⁹⁹ The corresponding provision in CLC Article III (4) uses the term “recklessly” rather than “gross negligence”. The difference does not appear to be intentional, and does in my opinion make little difference, as the decisive factor lies in the formulation “with knowledge that such damage would probably result”, which raises the threshold both in relation to recklessness and gross negligence.

¹⁰⁰ The preparatory works to the NMC assume that the convention does not prevent this, cf. Ot.prp.nr.21 (1994-1995) p. 13-14

4.2 Liability under the Pollution Act

POA Section 55 (1) imposes strict, unlimited liability on the operator of the activity that causes the environmental damage; “The owner of real property, an object, an installation or an enterprise that causes pollution damage is liable to pay compensation pursuant to this chapter regardless of any fault on his part if the owner also operates, uses or occupies the property, etc.” In shipping, this will normally be the registered owner of the vessel.¹⁰¹ The shipowner’s right to limit liability in accordance with the LLMC Convention may, however, result in a situation in which the compensation from the shipowner is not sufficient to cover all claims. As a consequence, injured parties may seek to hold others, among them the coastal state, responsible.

4.2.1 Liability under POA section 55 second paragraph

Under POA section 55 the channelling of liability to the owner or operator is not absolute. So called indirect tortfeasors can be held liable for contributory negligence in accordance with POA section 55 second paragraph:

“Any person that by supplying goods and services, carrying out control or supervisory measures or similar means has indirectly contributed to pollution damage is liable only if he has done so intentionally or negligently. In evaluating fault, it shall be taken into account whether the claims the injured party may reasonably make in regard to the activity or service have been disregarded. , however, this provision does not in any way restrict the liability that follows from the compensation rules otherwise applicable.”

The issue to be considered here is whether the authorities can be held liable under this provision for pollution damage stemming from the decision to grant or refuse refuge. Under section 55 second paragraph, the contributory negligence may consist in “supplying goods and services, carrying out control or supervisory measures or similar means”. The preparatory works to the pollution act specifically state that public

¹⁰¹ Falkanger II, p. 155 et seq.

authorities may be held liable under section 55 second paragraph, for instance where the pollution control authorities give orders that result in environmental damage.¹⁰²

In deciding whether fault has been exercised, one must evaluate whether reasonable claims of the injured party have been neglected. The standard does not refer to legitimate concrete expectations of the injured parties in particular cases, but rather to what is proper procedure in different circumstances.¹⁰³ The wording corresponds to that of the Norwegian Tort Act¹⁰⁴ section 2-1, which was formulated with particular regard to the liability of public authorities.¹⁰⁵ The legal basis of this provision is of great relevance to the interpretation of POA section 55 second paragraph.¹⁰⁶ The preparatory works to the Tort Act state that the threshold for establishing liability should be higher with regard to public control and service activities than other activities.¹⁰⁷ This is also evident in Norwegian case law concerning liability for public services; cf. the *Tiranna* judgment,¹⁰⁸ which is also referred to in the preparatory works to the Pollution Act section 55 second paragraph.¹⁰⁹ The decision concerned the requirements of due care in relation to public services. The tribunal held that with regard to liability for public services, the tortious act must constitute a “significant deviation” from what is considered proper procedure in the given circumstances.¹¹⁰ Recent years has seen a development in favour of lowering the threshold for establishing fault liability of public authorities, cf. the judgments of *Furunculous*¹¹¹ and the *Selbu Lake*.¹¹² These judgments recognise that a less stringent requirement of de care applies to public service activities,

¹⁰² NOU 1982:19 p. 55-57 and 250

¹⁰³ Falkanger II, p. 158-159

¹⁰⁴ Tort Act of 13 June 1969 no. 26

¹⁰⁵ Ot. Prp. Nr. 33 (1988-89) p. 108 and Lødrup, p. 181

¹⁰⁶ Bugge, p. 278

¹⁰⁷ Ot. Prp. Nr. 48 (1965-66) p. 59 et seq. and Hagstrøm, p. 389-390 cf. Ot. Prp. Nr. 48 (1965-66) p.57

¹⁰⁸ Rt. 1970 p. 1154

¹⁰⁹ NOU 1982:19 p. 55-57

¹¹⁰ Rt. 1970 p. 1154

¹¹¹ Rt. 1992 p. 453

¹¹² Rt. 1999 p. 1517

but that the same cannot be said for public control functions.¹¹³ As mentioned above, the decision to grant or refuse access to a place of refuge is part of public emergency response to pollution. The main purpose of the activity is thus not to assist the vessel in distress, but to control and prevent acute pollution. Since the *Tiranna* judgment was referred to in the preparatory works of the Pollution Act in 1982, there has moreover been a huge development in environmental law, towards stricter liability. In light of this development and current case law, it is therefore unlikely that the norm established in this case can be relied on in the assessment of public authorities' contributory negligence in a place of refuge decision.¹¹⁴ The assessment of public authorities' contributory negligence according to POA section 55, second paragraph, is thus subject to normal requirements of due care.

4.2.2 Proper procedure

As discussed in chapter 2, the Coastal Administration's Department for Emergency Response (DER) has established a procedure for decision-making in place of refuge situations (the DER procedure). In assessing whether requirements of due care have been neglected, such written rules of conduct are of particular significance.¹¹⁵ Where, like here, the rules of conduct aim at preventing the damage caused by the breach, this may constitute "negligence per se".¹¹⁶

The decision on whether or not to grant or refuse access to a place of refuge involves exercise of statutory power. A condition for invoking liability for such decisions is that the exercise of statutory power is wrongful.¹¹⁷ Wrongfulness arises from breaches of the rules of proper conduct that applies in different circumstances.¹¹⁸ The assessment of wrongfulness thus coincides with assessment of fault.¹¹⁹ In addition to the requirements laid down in the DER procedure, the assessment of due care will therefore be

¹¹³ Rt. 1992 p. 453, on p. 478-479, Rt. 1999 p. 1517, on p. 1529-1530 and Lødrup, p. 191

¹¹⁴ For further reading see Lødrup, p. 186-193, Bugge, p. 278-279 and Hagstrøm p. 385 et seq.

¹¹⁵ Hagstrøm, p. 272 et seq.

¹¹⁶ Lødrup, p. 131

¹¹⁷ Graver, p. 507-508 and Rt. 1992 p. 453 on p. 476

¹¹⁸ Graver, p. 509

¹¹⁹ Wrongfulness is also used in the assessment of fault, cf. Lødrup p. 160-162

supplied by general rules of proper conduct in public administration.¹²⁰ Some of these are laid down in the Administrative Procedure Act,¹²¹ while others are non statutory principles of Norwegian administrative law.

The DER procedure holds that the decision on whether or not to grant refuge should be taken by considering different factors and risks identified in the following in cooperation with the other parties involved in the situation.¹²²

Aspects relating to the vessel	To be discussed with
The seaworthiness of the vessel	Crew, person responsible at the scene of the incident, the Coastal Directorate, salvage company
The vessel's cargo and bunkers (particularly HNS cargo)	Crew, shipowners, the Coastal Directorate
The intentions and recommendations of the Master, shipowner and salvors	Salvors, the Coastal Directorate
The possibility to enact damage reducing measures before the vessel is transported to a place of refuge	Crew, shipowners, the Coastal Directorate, person responsible at the scene of the incident
The vessel's position in relation to the most suitable place of refuge	Pilot, control centre, person responsible at the scene of the incident
The ownership and insurance situation of the vessel	Master, shipowner, insurers, the Coastal Directorate
Salvage contracts	Master, shipowner, insurer, salvage company
Aspects relating to the place of refuge	To be discussed with
Safety of human beings en route to and at	The Coastal Directorate, the Directorate for

¹²⁰ For a detailed presentation of the contents of these rules, see Eckhoff, p. 423 et seq.

¹²¹ Act relating to procedure in cases concerning the public administration of 10 February 1967

¹²² The table gives a translated version of annex 3 to the DER procedure

the place of refuge	Civil Protection and Emergency Planning, Consultation in accidents involving chemicals, the Centre for information on poisonous substances
Different needs relating to the size of the vessel (for example 100.000 dwt minimum 1000 m diameter)	
The risk of pollution	Crew, person responsible at the scene of the incident and/or the Coastal Directorate
The vulnerability of the area in proximity of the place of refuge	The County administrator
Alternative shelter en route to the place of refuge	Pilot, control centre
Preparation for entry to a place of refuge; calculations and consequences	Salvage Company, expert opinion within the Coastal Administration, for instance Global Maritime in Stavanger
Other problems or consequences of granting a place of refuge	Port authorities, municipal government
At the place of refuge: Works to be carried out, infrastructure with regard to emergency unloading of the cargo and other reparations	Port authorities, municipal government
Aspects relating to physical conditions	To be discussed with
Weather, sea, current, tide and wind conditions	Pilot, control centre
Navigation conditions: Possibility of anchoring, space to manoeuvre, depth and base conditions etc.	Pilot, control centre

Failure to take into account some or all of the factors referred to above is a breach of the DER procedure, which in itself may constitute negligence. Moreover, the aim of such written rules of conduct is to secure correct exercise of administrative discretion. Failure

to assess the various factors may therefore constitute wrongful exercise of administrative discretion. In order to establish liability on the basis of negligence, there must be causation between the breach and the damage. This is the case where the DER for instance has failed to take into consideration the size of the vessel and subsequently directs it to a place of refuge where the water is too shallow, causing the vessel to run aground and cause pollution.

Although the factors in the DER procedure might not give an exhaustive account of the concerns that should be attached weight in a place of refuge situation, the taking into account of ulterior considerations may constitute wrongful exercise of administrative discretion. An ulterior consideration in this respect would for instance be that refuge was refused because the shipping company had previously failed to pay for rescue services supplied by the Coastal Administration. In order to establish liability on part of the authorities on this basis, here must be causation between the taking of ulterior considerations and the damage caused.

The DER procedure moreover holds that the DER shall consult with the parties involved in the place of refuge situation before reaching a decision. Failure to do so may lead to breaches of the rules of the general rules of proper conduct in public administration. The Administrative Procedure Act section 17 obliges public authorities to ensure that a case is sufficiently scrutinised before a decision is reached, and failure to fulfil this duty is a breach of proper procedure. In order to establish liability, the breach of proper procedure must have caused the damage. Was a decision for instance to be taken without proper consultation with the crew or others competent of assessing the condition of the vessel, the DER could be ignorant of the risks involved in ordering the vessel out to sea. If damage is caused as a result of the negligent ignorance on part of the DER, they may be held liable.

The decisions may also suffer from lack of impartiality on part of the decision maker, which is breach of the general rules of proper conduct in public administration. The requirements as to impartiality are listed in the Administrative Procedure Act section 6, after which a Public Official shall be disqualified where he or she has personal connections to the case or the parties to the case, or where other special circumstances

are apt to impair confidence in his or her impartiality. In a place of refuge situation, disqualification may result where the decision maker has economic interests in the shipping company that owns the distressed vessel or where he or she lives in the community that is exposed to the risk of environmental damage posed by the ship.

The DER procedure further prescribes that the competent decision maker is the DER director. If the decision is taken by another administrative body, this may constitute lack of personal competence. This is nearly always the case when the decision is taken by an administrative body that is a subordinate or a co-ordinate to the competent body, while a superior administrative body that has power of instruction over the competent body can normally make the decision without this constituting lack of personal competence.¹²³ This being said, there seems to be an exception when the authority to make the decision is deliberately placed with a subordinate body because of its particular qualifications on the subject.¹²⁴ The DER is a professionally specialised administrative body. Although it is ultimately subject to the instruction of the Ministry of Fisheries and Coastal Affairs, it is organised and staffed as a politically independent unit. Its director is presumed to have a good understanding of the refuge situation which should make him or her particularly capable of reaching a well balanced decision. The relative objectivity of the DER director makes him or her particularly suited to handle potentially difficult political decisions in a balanced manner. There is hence reason to believe that the authority to grant and refuse entry is meant to rest solely with the DER.

Similar efforts to depoliticize the place of refuge question have also been made in the United Kingdom, where the responsibility lies with a Secretary of state's Representative for Maritime Salvage and Intervention (SOSREP), who is "free to act without recourse to higher authority."¹²⁵

In order to establish liability on this basis, there must be causation between the lack of personal competence and the damage caused. Damage may for instance arise where the decision maker does not possess the knowledge required for assessing the situation. If

¹²³ Eckhoff, p. 427

¹²⁴ Eckhoff, p. 124-125

¹²⁵ Maritime and Coastguard Agency, "The role of the SOSREP"

the decision maker is not familiar with salvage law, he or she may be ignorant to the “no cure – no pay” principle, which may colour the salvors’ assessment of the risks involved in bringing a vessel into a place of refuge.¹²⁶

The discussion above merely aims at presenting examples from which liability may arise. Liability under POA section 55, second paragraph, is dependent on the exercise of fault. In assessing the fault, one must evaluate if there has been a breach of proper procedure. Proper procedure in a place of refuge situation is prescribed both by specific written rules of conduct in the form of the DER procedure and general rules of conduct in public administration. Breach of proper procedure may constitute negligence in itself. In this sense, the assessment of liability for place of refuge decisions bears resemblance to strict liability.

Legal theorists are divided in the view of whether public authorities are strictly liable for invalid administrative decisions.¹²⁷ The distinction makes little difference in reality, because strict liability depends on wrongful exercise of statutory power, which may also constitute negligence. Further discussion goes beyond the scope of this thesis.¹²⁸

If the DER is found to have acted negligently, the Norwegian state will be liable in accordance with vicarious liability under section 2-1 of the Tort Act, unless the damage was caused by an act or omission by the employee which goes beyond what can reasonably be expected with regard to the activity in question.¹²⁹

The Pollution Act concerns liability for pollution damage that occurs a) In Norway or the Exclusive Economic Zone of Norway, or b) outside these areas if the damage is caused by an incident or activity within Norwegian Sea or land territory.¹³⁰ Where the admission or refusal of a vessel in distress has caused transboundary pollution, there is

¹²⁶ Shaw, p. 341

¹²⁷ Lødrup, p. 192

¹²⁸ The subject is discussed in depth by Echhoff, p. 449, Graver, p. 508 and Hagstrøm, p. 53 et seq.

¹²⁹ Further discussion goes beyond the scope of this thesis, but can be found in Lødrup, p. 183-186

¹³⁰ POA section 54

thus nothing to prevent foreign claimants to seek compensation by holding Norwegian authorities liable in Norwegian courts.¹³¹ The Pollution Act thus provides a basis for liability vis-à-vis transboundary claimants.¹³²

4.3 Liability for environmental damage under international law

In chapter 2 of this thesis I discussed the obligations imposed on coastal states by international environmental law. The issue to be considered here is if and to what extent coastal states may be held liable under international law for environmental damage arising from a place of refuge situation.

4.3.1 Inter state liability

UNCLOS establishes an obligation to prevent harm to other states' territory and to the area beyond any state's territory. As we have seen in chapter 2, the place of refuge situation may conflict with these obligations. The question is to what extent the coastal state can be held liable for such infringements. The basis for such liability under UNCLOS is Article 235 (1): "states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."

This provision establishes inter state liability for breach of environmental obligation. This means that if Norway through the admittance or refusal of a vessel to a place of refuge has failed to fulfil its obligation not to cause damage to the territory of Sweden, the latter may invoke liability through legal action. States are liable "in accordance with international law."

This leaves open the question of whether liability is dependent on fault or not.¹³³ The distinction between strict and fault liability for breach of international obligations makes little difference in reality, as the

¹³¹ See the case of Saugbrugsforeningen, Rt. 1992 p. 1612, where a Swedish environmentalist organisation was found to have the same right to sue as Norwegian claimants under the Pollution Act section 54 (1) b). The ordinary requirements for legal interest and capacity must obviously be fulfilled, cf. Hov, chapter 7 II and 8 II and III

¹³² The Pollution Act thus fulfils Norway's obligation under UNCLOS article 235 (2), which will be discussed below

main criteria is that the state has committed a wrongful act. The point is that wrongfulness may also constitute fault, cf. the position under Norwegian administrative law described above. Further discussion of this goes beyond the scope of this thesis.¹³⁴

Disputes concerning alleged breaches of environmental obligations are subject to mandatory procedures in accordance with UNCLOS Part XV Section 2, cf. UNCLOS Article 297 (1) c). Under this section, states have on beforehand decided to resolve disputes at by one of the following means; The International Tribunal on the Law Of the Sea (ITLOS), the ICJ or an arbitral tribunal, cf. UNCLOS article 287. Such legal actions are, however, seldom taken by states. This does not mean that breaches of environmental duties do not occur. It may be reasonable to presume that the other states affected by the *Prestige* accident would have a good case against Spain under international law. Yet, reluctance to take legal action persists due to the fact that the affected states often have similar interests as the state guilty of infringement. In the case of the *Prestige*, the affected states were all other coastal states, which may find themselves in a similar position in the future.

The starting point is that international law regulates affairs between states, and that individuals cannot act as legal subjects. Individuals are thus prevented from appearing as parties before international bodies of dispute settlement. This does not mean, however, that individuals do not have rights under international law, since the home state may act as plaintiff on their behalf. This was done by Saint Vincent and the Grenadines in the *Saiga* case before the ITLOS.¹³⁵

The individuals' dependency on their home state does, however, put important limitations on the efficiency of UNCLOS, as it prevents individuals from invoking their rights where the home state is not willing to act on their behalf. In situations where individuals in one state accuse another state of infringement of their rights under

¹³³ Nordquist, p. 412

¹³⁴ For in depth discussion on this issue see Cassese, p. 187 et seq.

¹³⁵ Saint Vincent and the Grenadines v. Guinea

international law, the home state may be reluctant to act because of fear of affecting the political relationship between the states.

The position of individuals is sought improved by placing upon the states an obligation to provide compensation for pollution damage in their national jurisdictions. The duty is established in the second paragraph of UNCLOS Article 235: “states shall ensure that recourse is available in accordance with their legal system for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.” Where the duty is fulfilled, individuals may seek compensation for pollution damage in accordance with municipal law. The extent to which public authorities can be held liable depends on domestic law. We have seen above that public authorities may be held liable for pollution damage under Norwegian law. One should, however, underline that Norwegian law represents a more radical approach in this respect than many other legislations, where the dominant view is that “the King can do no wrong”.¹³⁶ Some interpret Article 235 (2) to mean that if a state has not fulfilled its duty to secure that recourse is available under municipal law, it may be liable for acts or omissions of persons under its jurisdiction itself.¹³⁷ If so is the case, such liability can only be invoked by other states.

4.3.2 Liability vis-à-vis individuals

As discussed in chapter 2, human rights may provide legal basis for a duty to prevent harm to the state’s own territory. If individuals had to depend on the home state to act as plaintiff on their behalf in these circumstances, it would prove very ineffective, as states are unlikely to raise the matter where it is accused of breach by its own citizens. Recent years have seen a development in favour of increased right for individuals to petition international bodies, especially when it comes to human rights. Individuals’ right of access to court is for instance specifically provided for in ECHR article 34.¹³⁸ Where

¹³⁶ Lødrup, p. 186-187, Hagstrøm, p. 468

¹³⁷ Hetherington I, p. 373

¹³⁸ Subject to exhaustion of local remedies, cf. Møse, p. 125

pollution caused by granting or refusing a place of refuge is found to violate the rights under the ECHR, the coastal state may be liable to provide just satisfaction under Article 41: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

The ECHR places upon the states an obligation to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”¹³⁹ This does not mean that the state’s responsibility is restricted to its own citizens; cf. the quote from the ECtHR which affirmed that “the responsibility of Contracting states can be involved by acts and omissions of their authorities which produce effects outside their own territory.”¹⁴⁰ Where the admittance or refusal of the vessel by Norwegian authorities causes damage that violates the human rights of transboundary claimants these may hence invoke liability.¹⁴¹

Moreover, individuals may invoke breaches of fundamental human rights regardless of whether or not this is provided for by specific treaty provisions.¹⁴² This recognises that the breach of such rights constitutes a violation against the individual itself.¹⁴³ For instance, exposure to environmental damage may be a violation of the right to a healthy environment. The right is thought to form part of so called third generation human rights, but this is not confirmed by any specific treaty provision.¹⁴⁴ This being said, the concept of fundamental rights should not be extended too far, as it may lead to a devaluation of human rights in general. The right to a healthy environment should hence not be recognised as a fundamental right in itself. If on the other hand the taking in of a vessel to a place of refuge leads to a chemical leakage that may be prejudicial to the

¹³⁹ ECHR article 1

¹⁴⁰ Turkey v. Cyprus

¹⁴¹ Birnie, p. 265

¹⁴² Fleicher, p. 322

¹⁴³ Fleicher, p. 322

¹⁴⁴ Birnie, p. 254

safety of the local community, this may constitute a violation of the right to life, which must be said to form part of such fundamental rights.¹⁴⁵

5 The way ahead

Chapter 2 concluded that the rights and obligations of coastal states in place of refuge situations are not clear. Since the issue was first put on the agenda by the IMO agenda in 2001 following the Erika and Castor incidents, numerous suggestions have emerged as to how this problem should be addressed. A concrete result of this work is the IMO guidelines on Places of Refuge, which were adopted in 2003. The problem is that the guidelines are not legally binding. A suggestion that would solve this problem is to implement the guidelines in a legally binding treaty.¹⁴⁶ Critics of this approach argue that the balance of interest theory reflected in the IMO guidelines is problematic because it leaves the final decision to the coastal state, while it is also party to the case. The argument is that the double role of the coastal state makes it incapable of balancing its own interests and the interests of the vessel in a just manner.¹⁴⁷ This critique may be justified, but the alternative suggestions reveal that the balance of interest theory may be the only feasible option. States would most certainly not accept that the decision was to be taken by a supranational body. A solution to the lack of impartiality could be to place the authority with a national decision-making body, which possesses the required neutrality and expertise. Steps in this direction have been taken in Norway and the United Kingdom.¹⁴⁸

¹⁴⁵ Møse, p. 190 et seq.

¹⁴⁶ Leg 89/7 section 20

¹⁴⁷ Hooydonk I, p. 431-432

¹⁴⁸ The DER Director in Norway and SOSREP in the UK. For further discussion see Velde, p. 488

Others argue that the IMO guidelines need to be revised to clarify that the coastal state is not free to decide whether or not to grant access in a given situation.¹⁴⁹ In order to serve as part of international regulation, the guidelines have, in my opinion, to be amended to include a measure for when refuge is to be granted that gives more direction than the present “whenever reasonably possible.”¹⁵⁰ An example of such measure is the provision in the DER procedure to the effect that refuge should be granted when this offers a net safety and environmental profit. The IMO guidelines should therefore include a provision that reads: “When faced with a request for refuge, the coastal state should weigh all the factors and risks in a balanced manner and give refuge where this gives a net safety and environmental profit.”

That being said, the guidelines present a further problem which is that of not addressing the liability and compensation issues that may arise from the admittance or refusal of a vessel to a place of refuge, cf. section 1.17. An alternative to incorporation of the IMO guidelines is to establish a more clearly spelled out obligation to grant refuge under given circumstances, which addresses the liability issues arising from the situation.¹⁵¹ This could either be done by amending one of the existing conventions that touch on the subject to this effect or by drafting a new convention on places of refuge.¹⁵² Some legal theorists favour the latter approach.¹⁵³ This has also been recommended by the European Parliament¹⁵⁴ and in a recent report of the CMI, which was discussed at the IMO Legal committee meeting in late October this year.¹⁵⁵ The suggestion met resistance with the International Group of P&I Clubs in a subsequent report to the Legal

¹⁴⁹ A suggested rephrasing of section 3.12 of the guidelines has been put forward by Velde, p. 487; “When permission to access a place of refuge is requested, the coastal state should weigh all the factors in a balanced manner and give refuge whenever reasonably possible.”

¹⁵⁰ Cf. IMO guidelines section 3.12

¹⁵¹ A suggested phrasing is put forward by Velde, p. 491; “states are obliged to offer ships in need a place of refuge when this is necessary and proportionate to the damage. A state shall be liable for the damages caused by an unjust refusal to offer a place of refuge.”

¹⁵² Support for the former approach is supported by Velde, p. 491-492

¹⁵³ Hooydonk I, p. 443-445, Gaskell, p. 20-21

¹⁵⁴ European Parliament resolution of 23 September 2003 (P5_TA(2003)0400), paragraph 38

committee.¹⁵⁶ The report argues that it is too early to determine whether there is need for a new convention addressing the liability issues, seeing that the HNS and Fund Convention have not yet entered into force. The P&I clubs were originally positive to a new convention on places of refuge.¹⁵⁷ The current resistance seems to be motivated in the realisation that such convention would inevitable lead to a raising of the limitation amounts under the framework conventions. The Supplementary fund is exclusively financed by the cargo interests. The Oil Companies International Marine Forum (OCIMF) has initiated a campaign to make the shipping industry take its share of the financial burden.

The October meeting revealed that most delegations did not support the proposal for a new convention on places of refuge. The delegations expressed concern that the CMI report did not address “certain fundamental and well-established principles in the international liability and compensation regime”, and that the current regime “worked reasonably well”.¹⁵⁸ Moreover, the delegation pointed out that the gaps in the compensation regimes identified in the report should be closed by the ratification and implementation of the dormant HNS and Bunkers conventions rather than through creating a new convention. The real motivation behind the states’ reluctance to a new convention seems to lie in fear of this leading to a more exposed position. It seems that the confusion surrounding the gaps in the compensation regime has defended the states from being exposed to liability in the past.

The discussion in chapters 3 and 4 has revealed that the entry into force of the CLC and Bunkers Convention and the Supplementary will constitute important advances. Nevertheless, the coastal state will still risk not being adequately compensated and even being held liable itself where the decision falls outside the scope of preventive

¹⁵⁵ IMO doc. LEG 89/7

¹⁵⁶ IMO doc. LEG 89/7/1

¹⁵⁷ Hetherington II, p. 461

¹⁵⁸ IMO doc. LEG 89/WP/6/Add.1

measures. Some have therefore proposed further regulation in this area.¹⁵⁹ One such suggestion is to include the coastal state that grants refuge among the protected parties under CLC Article III (4) and the correspondent provisions in the other framework conventions.¹⁶⁰ This would remove the possibility of holding the coastal state liable where refuge is granted. But the decision to grant refuge is not always the correct one. Where the coastal state has chosen to bring the casualty vessel into port where this clearly is not likely to minimize the risk of pollution, this should have consequences for its legal position.

It seems reasonable that immunity should not depend on whether a place of refuge is granted or not, but rather on whether the decision is the correct one in the given situation. This reasoning is reflected in the immunity of “any person taking preventive measures”. As long as the coastal state fulfils the requirements for preventive measures, it will be secure, even from exoneration of the Fund. If the coastal state fails to meet these criteria, this is reflected in exoneration of the shipowner and Fund and the possibility of holding the coastal state liable. The requirements for being labelled a preventive measure should work as an incentive for coastal states to take due considerations in their assessment of the situation, and thereby hopefully increasing the number of environmentally and economically sound decisions. This way the notion of “preventive measures” sets a standard for decision making with regard to places of refuge, which could preferably be presented more clearly. Taking into account the states’ reluctance to adopt a new convention, this could for instance be set out in a set of guidelines on liability and compensation corresponding to the present IMO guidelines.

The last word in this case has certainly not been spoken. Recent years’ attention on the subject of places of refuge has , however, contributed to considerable clarification, both with regard to the rights and obligations of the parties involved and the liability and

¹⁵⁹ CMI has suggested a provision to this effect in IMO doc. LEG 89/7

¹⁶⁰ A suggested phrasing has been put forward by Stuart Hetherington, to secured that no claims for compensation can be made against “(g) any state, port authority, all servants and agents and any other person or corporate entity granting a place of refuge to a vessel”, cf. Hetherington II, p. 436

compensation issues arising thereof. One can only hope that the experience drawn from this work is taken into consideration by the next state faced with a potential catastrophe, in recognition of the plea following the Prestige accident, ¡Nunca más!

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