

**THE OBLIGATION TO OFFER A PLACE OF REFUGE
TO A SHIP IN DISTRESS**

A plea for granting a salvage reward to ports
and an international convention on ports of refuge

ERIC VAN HOOYDONK*

Contents

1. Introduction
2. The right of ships in distress to enter a port of refuge
 - 2.1. The problem
 - 2.2. First theory – The absolute right of access
 - 2.2.1. Scope and legal basis
 - 2.2.2. Critical Assessment
 - 2.3. Second Theory – The absolute right of refusal
 - 2.3.1. Scope and legal basis
 - 2.3.2. Critical Assessment
 - 2.4. Third Theory – Balancing Interests
 - 2.4.1. Scope and legal basis
 - 2.4.2. Critical Assessment
 - 2.5. Fourth theory – Good management on the basis of the right of access
 - 2.5.1. Scope and legal basis
 - 2.5.2. Critical assessment
- 2.6. Conclusions
3. Liability of port and other authorities
4. Compensation for port and other authorities
5. Towards an international convention on places of refuge and ships in distress?
6. Conclusions

1. Introduction

The need for specific legal arrangements governing ships in distress and places of refuge is one of the most topical problems in both public and private maritime law. Quite apart from the headline-grabbing shipping disasters involving the loss of the Erika (1999) and the Prestige (2002), several other incidents, such as those involving the Castor in the Mediterranean (2000) and

* Prof Dr Eric Van Hooydonk, Advocate at Antwerp, Senior Lecturer at the University of Antwerp.

the Vicky off the Belgian coast (2003), also attracted the attention of the IMO¹, the CMI², the Bonn Agreement for cooperation in dealing with pollution of the North Sea³, the European Union, the national maritime authorities, the maritime industry in general – comprising ship owners and operators, P & I Clubs, port authorities, vessel traffic services, rescue services, pilots and salvors – and environmentalists. Ultimately the impact of pollution on local economies and the environment was enough to arouse the concern of a broad swath of public opinion.

The reason for this contribution is the sudden move to the top of the agenda of the subject of places of refuge in 2003. Pursuant to the EU Traffic Monitoring Directive, a number of European member states designated places of refuge, and the CMI has established an International Sub-Committee on Places of Refuge⁴. Furthermore the European Parliament has asked the European Commission to formulate proposals for liability and compensation rules by February 2004⁵. In December 2003 the IMO approved the IMO

¹ See http://www.imo.org/Newsroom/mainframe.asp?topic_id=72 (consulted on 8 February 2004).

² See *CMI Yearbook 2002*, Antwerp, 2003, 117-146 and <http://www.comitemaritime.org/worip/place.html> (consulted on 8 February 2004).

³ During the fifteenth meeting of the Contracting Parties to the Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, at Stockholm from 23 to 25 September 2003 it was decided that in 2004 a definitive chapter of the Counter Pollution Manual on Places of refuge would be prepared on the basis of the relevant instruments and reports of the IMO and the European institutions (including EMSA) (Summary Record, items 2.18-2.20).

⁴ The first meeting of the Sub-Committee was held in London on 17 November 2003. The Sub-Committee is the successor to the Working Group that the CMI had established in the past.

⁵ In its Resolution on improving safety at sea in response to the Prestige accident (2003/2066(INI)) dated 23 September 2003 the European Parliament:

“9. Notes that the Prestige disaster has clearly shown that arrangements to accommodate vessels in distress are inadequately regulated; calls on Member States to cooperate with EMSA in ensuring timely and full compliance with national emergency planning arrangements and the designation of safe havens, with Member States in particular specifying under what circumstances they will make the use of safe havens compulsory and providing them with the resources needed to implement their respective emergency plans;

10. Calls on the Commission to submit proposals not later than February 2004 for financial compensation for safe havens and to study the possibility of establishing a financial liability regime for ports refusing to give access to ships in distress;

11. Insists that each Member State must have at its disposal a clear decision-making structure and chain of command for maritime emergencies, together with an independent authority that in turn has at its disposal the necessary judicial, financial and technical say in taking decisions having binding effect in emergencies within territorial waters and the exclusive economic zone;

12. Calls on the Commission to arrange for EMSA to take an inventory of the different command structures and authorities responsible in maritime emergencies (cf. the French ‘Préfecture maritime’ and the British Secretary of State’s Representative), and to submit recommendations for exchanging best practice, promoting cooperation between Member States and introducing European guidelines or minimum requirements in that connection;

[...]

38. Calls on the Commission and on Member States to make their best efforts to reach an agreement within the IMO on an international public law convention on places of refuge”.

“Guidelines on places of refuge for ships in need of assistance”⁶ and an international workshop on ports of refuge was organized at the University of Antwerp⁷. On that occasion, the European Commission said that a response to the request of the European Parliament will only be forthcoming towards the end of 2004. The considerations set out in the following are an attempt to contribute to the now open debate about the need for a specific legal framework for places of refuge and ships in distress. It is expected that a significant response will come at the CMI conference due to be held in Vancouver from 31 May to 4 June 2004⁸.

⁶ Resolution A.949(23).

⁷ International Workshop on Places of Refuge, UA City Campus, 11 December 2003 (jointly organized by the European Institute of Maritime and Transport Law and the European Seaports Organization). The present contribution is a written text based on a PowerPoint presentation made at this workshop by the author. For the papers presented and the proceedings, see http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004).

⁸ See in connection with places of refuge and ships in distress i.a. Blanco-Bazan, A., *Places of refuge*, intervention at the 30th annual conference on international law, Ottawa, 18-20 October 2001, 4 p.; Boisson, Ph., *Politiques et droit de la sécurité maritime*, Paris, Bureau Veritas, 1998, 197 e.v., nos. 356 e.v.; Browne, B., *Places of refuge - The IUMI Solution*, paper presented at the IUMI Congress in Seville in September 2003, 26 p.; Devine, D.J., “Ships in distress - a judicial contribution from the South Atlantic”, *Marine Policy*, 1996, 229-234; de Zayas, A.-M., “Ships in distress”, in *Encyclopedia of public international law*, XI, Amsterdam, North-Holland, 1989, 287-289; Griggs, P., “Places of refuge”, http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004); Hetherington, S., “‘Prestige’ Can the Law Assist ?” <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); Janbon, L., “Les lieux de refuge”, *Droit maritime français*, 2003, 157-167; Kasoulides, G.C., “Vessels in distress. ‘Safe havens’ for crippled tankers”, *Marine Policy*, 1987, 184-195; Le Garrec, M.-Y., “L’intervention de l’autorité portuaire dans le contrôle des navires”, *Droit maritime français*, 2003, (476), 483-489; Maes, F., “De Belgische wet ter bescherming van het mariene milieu (1999) en zeeverontreiniging”, to be published in Van Hooydonk, E. (Ed.), *Zeeverontreiniging. Preventie, bestrijding en aansprakelijkheid*, Antwerp/Apeldoorn, Maklu, 2003, item 7.2.4; Oya Özçayır, Z., “Ports of refuge”, *JIML*, 2003, 486-495; Rézenthel, R., “L’accès aux ports des navires en détresse”, *Droit maritime français*, 2000, 276-281; Rézenthel, R., “Le port de refuge: de la bouée de sauvetage à la bombe”, *Revue de droit de l’environnement*, 2002, 94 et seq.; Shaw, R., “Places of refuge: international law in the making ?”, *JIML*, 2003, 159-180, <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); Timagenis, G.J., “Places of Refuge as a Legislative Problem”, <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); van der Velde, W., “The position of coastal States and casualty ships in international law”, not yet published, 38 p.; Van Hooydonk, E., “Casualty ships, vessels in distress and maritime lepers”, *Lloyd Special Report*, November 1999, 21-25; Id., “Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a Condition for Entry into Ports”, in Huybrechts, M. (Ed.), Van Hooydonk, E. and Dieryck, C. (Co-eds.), *Marine insurance at the turn of the Millennium*, II, Antwerp/Groningen/Oxford, Intersentia, 2000, 117-136; Id., “Ports of refuge for ships in distress: not in my front pond ?”, *Transport Insurance in Belgium*, Special Lloyd, December 2003, 3-11, http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004); Young, C., “The International Maritime Organization and the development of an international legal framework for places of refuge”; http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004).

2. The right of ships in distress to enter a port of refuge

2.1. The problem

The basic question is whether a ship in distress has the right to enter a port of refuge, or, alternatively, whether a coastal state and/or port authority has the right to refuse a ship in distress. This question must be clearly distinguished from the question of whether the state is required to designate and establish named places of refuge in advance. In principle the answer to the second question must be no, except where specific texts, such as the European Traffic Monitoring Directive⁹, impose this obligation. In the following it will be examined whether ships in distress have the right to enter places of refuge of any nature whatsoever. There are no simple yes or no answers to this question. A range of views has been defended in case law and legal theory. In the author's opinion there are essentially four different approaches.

2.2. First theory – The absolute right of access

2.2.1. Scope and legal basis

According to this first theory ships in distress always have the right to enter any port or place of refuge whatsoever regardless of the cause of the distress. This is an old rule of international customary law, which is defended in virtually all manuals of international law¹⁰, including the most recent¹¹.

⁹ See below, item 2.4.1.

¹⁰ Colombos, C.J., *The International Law of the Sea*, London, Longmans, 1962, 160, § 181; Jennings, R. and Watts, A., *Oppenheim's International Law*, I, Peace, Parts 2 to 4, London / New York, Longman, 1996, 624, § 204; Reuter, P., *Droit international public*, Paris, Presses Universitaires de France, 1973, 265. For further analyses, see de Zayas, A.-M., *o.c.*, 287-289; Hydeman, L.M. and Berman, W.H., *International Control of Nuclear Maritime Activities*, Michigan, University of Michigan/Ann Arbor, 1960, esp. 153-162; Nelissen, F.A., *Scheepswrakken en wrakkeschepen. Een volkenrechtelijke beschouwing vanuit milieu-perspectief*, Deventer, W.E.J. Tjeenk Willink, 1997, 60; O'Connell, D.P., *The International Law of the Sea*, II, Oxford, Clarendon Press, 1984, 853-858; Van Bogaert, E., "Het internationaal havenstatuut", *Mededelingen Marine Academie*, vol. XXIV, 1976-77, (95), 111-112; Van Hooydonk, E., *Beginselen van havenbestuursrecht*, Bruges, Die Keure, 1996, 504, no. 178. Vattel already only accepted that a state had the right to refuse foreigners access to the territory of the state "pourvu que l'on ne refusât point les secours de l'humanité à ceux que la tempête ou quelque nécessité contraignait de se présenter à la frontière" (Vattel, *Le droit des gens*, I, Parijs, J.P. Aillaud, 1835, 381 (Liv. II, Chap. VII, § 94)). According to Degan, the distress exception has no parallel on the mainland (Degan, V.D., "Internal Waters", *Netherlands Yearbook of International Law*, vol. XVII, Martinus Nijhoff Publishers, 1986, (3), 11).

¹¹ See for example Alland, D., *Droit international public*, Paris, Presses Universitaires de France, 2000, 679, no. 649; Beckert, E. and Breuer, G., *Öffentliches Seerecht*, Berlin/New York, Walter de Gruyter, 1991, 138, no. 368; Bleckmann, A., *Völkerrecht*, Baden-Baden, Nomos Verlagsgesellschaft, 2001, 207, no. 627; Booysen, H., *Volkereg*, Kaapstad/Wetton/Johannesburg, Juta, 1989, 332; Brownlie, I., *Principles of public international law*, Oxford, Oxford University Press, 2003, 315 (cautiously however, using the word "perhaps"); Gardiner, R.K., *International law*, Harlow, Pearson Longman, 2003, 408; Goy, R., "Les droits des navires de commerce en séjour dans les ports", in *Espaces et ressources maritimes*, 1995, n° 9, Paris, A. Pedone, 1996, (298), 303; Hillier, T., *Principles of Public International Law*, London/Sydney, Cavendish, 1999,

It is an exception to the rules of international customary law that provide that in normal circumstances foreign ships have no right of access to ports, that coastal states may close their ports to international traffic¹², and that they can make access dependent on compliance with standards relating to the safe condition of the ship. In normal circumstances and insofar municipal law gives them this power – which is usually the case – the authorities of the coastal state can refuse access to a port to a ship that constitutes a danger by reason of its damaged condition¹³. The right of access in the event of maritime distress overrides these normal powers of the coastal state. Even states that have in general adopted restrictive policies regarding access to their ports, recognize the right of access in the event of maritime distress¹⁴.

Foreign ships in distress have the right to seek and obtain shelter in ports, and also to take such shelter in the territorial sea, in roadsteads, straits, bays, rivermouths, lakes, rivers, canals, even in ports closed to foreign commerce and military ports, until the state of distress is over. The cause of, or the responsibility for, the state of distress is irrelevant: a ship cannot be lawfully refused shelter and help even if her captain or crew have brought about the danger by their own negligence; it is the objective situation that is important¹⁵. The causes of a state of necessity can be various: storms, faulty navigation, mutiny, an absolute necessity for provisions, the need for vital repairs, etc.¹⁶. Damage to the ship thus is a valid ground to invoke distress¹⁷. As Nelissen pointed out, the distress concept covers situations of deficient manoeuvrability or similar situations whereby assistance or repairs are needed¹⁸. Nor has the type of the ship any relevance: entry can be claimed by

191; Ipsen, K., *Völkerrecht*, Munich, C.H. Beck'sche Verlagsbuchhandlung, 1999, 722, no. 8; Lowe, V., "The United Kingdom and the Law of the Sea", in Treves, T. (Ed.), *The Law of the Sea. The European Union and its Member States*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, (521), 524; Malanczuk, P., *Akehurst's Modern Introduction to International Law*, London/New York, Routledge, 1999, 175; Nguyen, Q.D., Daillier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002, 1156, no. 669; Schermers, H.G. and van Houtte, H., *Internationaal en Europees recht*, Antwerp, Kluwer, 1987, 131; Shearer, I.A., *Starke's International Law*, London, Butterworths, 1994, 185; Sinkondo, M., *Droit international public*, Paris, Ellipses, 1999, 255; see also Verdross, A. and Simma, B., *Universelles Völkerrecht*, Berlin, Duncker & Humblot, 1984, 653, § 1036 (mentioning the controversy over the right to refuse ships posing a threat to the coastal state).

¹² See Van Hooydonk, E., *Beginselen van havenbestuursrecht*, o.c., 501-505, no. 178, and the accompanying references.

¹³ Compare Pamborides, G.P., *International Shipping Law. Legislation and Enforcement*, Athens/The Hague/London/Boston, Ant. N. Sakkoulas Publishers/Kluwer Law International, 1999, 30, where it is stated "that the right of the coastal state to deny access to foreign merchant vessels which would or could constitute a threat to that state is today fully recognised and indeed practised by all the major maritime nations of the world". However, the author does not examine the special legal position of ships in distress.

¹⁴ Lucchini, L. and Voelckel, M., *Droit de la mer*, II.2, Paris, Pedone, 1996, 296, no. 903.

¹⁵ Degan, V.D., o.c., 11.

¹⁶ Degan, V.D., *ibid.*, 11.

¹⁷ For the latter aspect, see also Hydeman, L.M. and Berman, W.H., o.c., 155, footnote 104.

¹⁸ Nelissen, F.A., o.c., 14.

Places of Refuge

all kinds of ships and boats, including merchantmen, men-of-war, fishing and pleasure craft, hovercraft, etc. – even by boats propelled by oars, and windsurfers¹⁹. Of course the right of access in the event of maritime distress may not be abused²⁰. On the other hand, the mere fact that a ship is engaged in an illicit activity cannot be a reason for denying the right of entry²¹. As Blanco-Bazan stated, coastal States cannot excuse themselves from fulfilling their obligations on grounds that the ship ignored basic safety provisions, is not insured, or fraudulently has put itself in a distress situation in order to obtain admission into internal waters or in ports. Coastal States should first remove distress, then deal with any other matter²².

The right of access is reinforced by the fact that the ship in distress is regarded as either wholly or partly immune to the application of local law, and either wholly or partly exempt from local levies and taxes. The ship in distress has involuntarily entered the port and is therefore the beneficiary of exceptionally favourable arrangements²³. The rationale of international customary law is “that the local State shall not take advantage of the ship’s necessity”²⁴. The UN Law of the Sea Convention confirms this immunity by making the exercise of the authority to enforce environmental rules by coastal states and port states dependent on the condition that the ship must have

¹⁹ See esp. Degan, V.D., *o.c.*, 10-11; de Zayas, A.-M., *o.c.*, 287; with respect to the right of access of warships to the territorial sea see also de Vries Reilingh, O.G., “Warships in territorial waters, their right of innocent passage”, *Netherlands Yearbook of International Law*, vol. II, Leiden, A.W. Sijthoff, 1971, (29), 31; with respect to the access of these ships to ports, see Goy, R., “Le régime de l’accès au port des navires de guerre en temps de paix”, *Collection espaces et ressources maritimes*, 1994, N° 8, Paris, A. Pedone, (115), 119; Hydeman, L.M. and Berman, W.H., *o.c.*, 256; Laun, R., *Le régime international des ports*, Paris, Hachette, 1928, 63.

²⁰ Whether there is truly maritime distress or otherwise depends on the actual circumstances of the incident. The maritime distress must be “real and irresistible” (as with “The Eleanor”: cf. Simmonds, K.R., *Cases on the Law of the Sea*, I, New York, Oceana Publications, 1976, (98), 123-124). When a ship at sea is confronted with a mechanical defect and has the choice of entering a shipyard in state A or yard in state B, where the choice for the one yard does not entail a significantly more dangerous or less secure approach, the invocation of maritime distress would appear to be unfounded. When the master comes to the reasonable conclusion that the ship must urgently enter a specific, particularly suitable yard, and there is no alternative, maritime distress may undoubtedly be invoked as a basis for the right of access.

²¹ Devine, D.J., *o.c.*, 230. Comp. art. 24 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), which provides under the heading “Distress”: “1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril”.

²² Blanco-Bazan, A., *o.c.*, 3.

²³ See Devine, D.J., *o.c.*, 230.

²⁴ Colombos, C.J., *The International Law of the Sea*, London, Longman, 1972, 330, quoting Jessup; also Degan, V.D., *o.c.*, 12.

voluntarily entered the port or off-shore terminal²⁵, which is not the case when a ship enters a port by reason of maritime distress²⁶. However when a ship intentionally brings about a distress situation, it is at fault and will lose its potential immunity²⁷.

The theory of the absolute right of access is confirmed by various international²⁸, European²⁹ and national legal rulings as well as by the texts

²⁵ Art. 218.1 LOSC provides: “When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference” (emphasis added).

Art. 218.3 provides: “When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred” (emphasis added).

Art. 220.1 provides: “When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State” (emphasis added).

²⁶ See Molenaar, E.J., *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague/Boston/London, Kluwer Law International, 1998, 187.

²⁷ Devine, D.J., *o.c.*, 232.

²⁸ The Rebecca Case: General Claims Commission United States and Mexico, 2 April 1929, Kate A. Hoff v. The United Mexican States, *The American Journal of International Law*, vol. 33, 1929, 860, where it was held that a ship foundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf, and that the fact that the vessel may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea of distress is unjustifiable. In the case of the *May*, the Canadian Supreme Court held that mere failure of a pump was not a valid basis for claiming distress, since failure of the pump did not make navigation dangerous (Hydeman, L.M. and Berman, W.H., *o.c.*, 154, footnote 103 and the accompanying references).

²⁹ Case C-286/90, *Poulsen* [1992] ECR I-6019, paras 35 et seq., where reference is made to public international law. The opinion of Advocate-General Tesouro emphatically stresses the right of access and immunity provided by international law: “Un bateau de pêche d’un pays tiers qui s’est réfugié dans un port communautaire en invoquant un état de nécessité jouit-il de l’immunité ? C’est-à-dire est-il possible qu’il garde à son bord une cargaison de saumon pêché dans une zone interdite par le règlement sur la conservation sans pour autant encourir des sanctions de la part de l’État du port?”

Cette question part à l’évidence du principe que l’État côtier est habilité à inspecter un bateau de pêche d’un pays tiers qui est amarré dans son port et - surtout - qu’il peut poursuivre pénalement le capitaine de ce bateau de pêche pour avoir gardé à bord cette cargaison de saumon, même si l’intention de débarquer et de mettre en vente le saumon en question dans l’État membre intéressé n’est aucunement établie. Comme nous venons de le dire, à moins que des éléments en ce sens (intention de vendre ou, en tout cas, de débarquer le saumon) puissent être constatés, un État membre devrait, selon nous, s’abstenir d’intenter une action pénale contre le capitaine du bateau de pêche en question.

Places of Refuge

of various conventions. During the preparatory work on the Convention on the International Regime of Maritime Ports³⁰ the right of access was regarded as being so self-evident and absolute that the parties to the convention considered that it was not necessary to make specific mention of it in the convention itself³¹.

The French version of the Geneva Convention on the Territorial Sea and the Contiguous Zone recognized the right to “relâche forcée”, i.e. calling at a port of refuge³².

De toute façon, il est par ailleurs indéniable, en vertu du droit international, qu'un navire qui se trouve en état de nécessité peut trouver refuge dans un port, même lorsque l'admission dans ce port lui est normalement interdite, hypothèse qui est assurément à exclure dans le cas qui nous occupe, puisque le port de Hirtshals, où l'Onkel Sam a trouvé refuge, est également celui dans lequel le bateau en question fait normalement relâche.

Le droit international admet en outre l'état de nécessité comme un motif d'exclusion de l'illicéité d'un comportement non conforme à une obligation internationale; l'exemple qui revient est précisément celui de la disposition qui permet aux navires de se réfugier dans les eaux territoriales et/ou dans les ports d'un État étranger en cas d'avarie et d'autres situations de détresse. Une telle hypothèse est expressément envisagée à l'article 14, paragraphe 3, de la convention de Genève sur la mer territoriale et la zone contiguë (qui a été repris, pour ce qui nous intéresse, à l'article 18, paragraphe 2, de la convention de Montego Bay), en vertu duquel on admet que, dans l'exercice du passage inoffensif, les navires étrangers jouissent du droit d'arrêt et de mouillage seulement dans la mesure où cela rentre dans l'exercice normal de la navigation ou s'impose aux navires “en état de relâche forcée ou de détresse”.

En pareil cas, la doctrine est presque unanime à considérer que le navire en question ne peut pas être soumis aux lois de l'État du port en raison du simple fait qu'il est entré dans le port, à moins, évidemment, que les activités litigieuses aient eu lieu dans le territoire relevant de la souveraineté de l'État en question.

En définitive, il appartient au juge national de vérifier si en l'espèce il y a eu état de nécessité, c'est-à-dire si l'Onkel Sam a été contraint ou non d'entrer dans le port danois en raison de l'état des moteurs et/ou des conditions météorologiques. Comme le droit communautaire ne précise pas la portée de la notion d'état de nécessité, qui revêt de l'importance en l'espèce, le juge national devra se référer à la pratique internationale, qui n'est certainement pas négligeable”.

³⁰ Gidel, G., *Le droit international public de la mer*, II, Vaduz/Paris, Topos Verlag/Librairie Edouard Duchemin, 1981 (reprint), 51. During the preparation of the Convention the Belgian representative Stievenard declared, “que le droit de refuge d'un navire en détresse est absolu, quel que soit son pavillon, et sans qu'il puisse y être apporté de restriction, même en cas de guerre” (Société des Nations - Deuxième Conférence Générale des Communications et du Transit, *Comptes rendus et textes relatifs à la Convention et au Statut sur le Régime International des Ports Maritimes*, Genève, 1924, 14). Mr van Eysinga of the Netherlands expressed the same view: “Le rapport de la Commission devra être rédigé de manière à ne pas laisser croire que la Commission admet la possibilité, pour un Etat, de refuser à un navire en détresse l'accès dans n'importe quel port” (*ibid.*, 12).

³¹ The International Statute of Maritime Ports itself applies to “ports of refuge specially constructed for that purpose” (art. 1 of the Protocol of signature of the Convention on the International Régime of Maritime Ports; see Hostie, J., “La convention générale des ports maritimes”, *Revue de droit international et de législation comparée*, 1924, (680), 684). As a consequence, ships using a port of refuge must be treated without discrimination and regulations and tariffs for such a port must be duly published.

³² Art. 14.3 of the Convention, which by way of exception accepts stopping and anchoring as the authorized exercise of the right of innocent passage, speaks of “[l]e navire en état de relâche forcée ou de détresse”. In the equally authentic English text (see art. 32) “détresse” is equivalent to “distress”; the French “relâche forcée” becomes in English (!) equivalent to “force

Moreover, the same convention and the UN Law of the Sea Convention offer ships in distress an additional and express basis for stopping and anchoring in the territorial sea itself, where in practice usable and naturally protected anchorages are often to be found³³. Indeed, the UN Law of the Sea Convention expressly provides that passage includes stopping and anchoring in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress (for example caused by mist, storm or a mechanical failure³⁴) or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress³⁵. Riphagen quite correctly concludes that ships involved in an accident in the territorial sea remain in passage. This also applies to ships in or outside the territorial sea that come to render assistance³⁶. Moreover, the UN Law of the Sea Convention only requires that passage itself be continuous and expeditious³⁷. This does not mean that a ship must always

majeure". Therefore, English "*force majeure*" (where the italicization is specific to the English text) appears to be different to French or Belgian "*force majeure*" (in Dutch "overmacht"). "Relâche forcée" and "relâcher" are expressions unique to the language of the sea in France and have a specific meaning: "[u]n navire relâche quand par suite de mauvais temps, d'avaries subies, etc., il est forcé d'interrompre son voyage et d'entrer dans un port qui n'est pas son port de destination" (Gruss, R., *Petit dictionnaire de marine*, Paris, Challamel, 1945, 170; cf. Moors, J., *Dictionnaire juridique français-néerlandais*, Brussels, C.A.D., 1977, 399, v∞ relâche). The *Van Dale* French-Dutch dictionary (ed. 1998) translates "relâche" as "oponthoud in een haven" (delay in a port), "onderbreking van de reis" (interruption of a voyage) or "(het) aandoen van een haven" (calling in a port) and "port de relâche" as "(nood)haven" (a port (of necessity)). The point is that when the Geneva Convention recognizes that a ship may validly stop and anchor during the course of her innocent passage of the territorial sea when she requires a port of necessity, this necessarily implies a recognition by treaty of the right to call in a port of refuge in the event of maritime distress. In other words the Geneva Convention implicitly, but indisputably, recognizes the existence of a right to call in a "port de relâche". In the UN Law of the Sea Convention English "*force majeure*" is made equivalent to the French "*force majeure*", while there is no longer any mention of "relâche forcée" (see art. 18.2). Apparently the intention was simply to bring the French text closer to the English, as the English one already used a notion derived from the French language. Any intention of excluding "relâche forcée" as a case covered by the provision concerned apparently did not exist. The conclusion must therefore be that the Geneva Convention, without being revoked in this respect at Montego Bay, implicitly but certainly acknowledged the existence of the right of access to a port of refuge in the event of maritime distress.

³³ After a collision with the wreck of the ro/ro vessel *Tricolor* on 1 January 2003, the oil tanker *Vicky* was sheltered in the Westhinder anchorage site off the Flemish coast.

³⁴ See Gidel, G., *Le droit international public de la mer*, III.I, Vaduz/Paris, Topos Verlag/Edouard Duchemin, 1981 (reprint), 210; Somers, E., *Inleiding tot het internationaal zeerecht*, Antwerp, Kluwer, 1997, 810, no. 65

³⁵ Art. 18.2 LOSC. Cavaré made the following commentary on the corresponding art. 14.3 of the Geneva Convention on the Territorial Sea: "C'est un incident technique qui le motive (réparation à une machine, p.e.), ou bien c'est une raison d'humanité qui le rend licite" (Cavaré, L., *Le droit international public positif*, II, Paris, Pedone, 1969, 757).

³⁶ Riphagen, W., "Le droit de passage inoffensif après la 3e convention", in *Perspectives du droit de la mer à l'issue de la 3e conférence des nations unies*, Paris, Pedone, 1984, (190), 207, no. 27.

³⁷ Art. 18.2 LOSC. Ships outside the territorial sea that intend to render assistance to persons, ships or aircraft within the territorial sea on the basis of art. 300 LOSC have themselves the right to enter the territorial sea (Center for Oceans Law and Policy (University of Virginia School of Law), *United Nations Convention on the Law of the Sea 1982. A Commentary*, II, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993, 162).

navigate at “full speed ahead” through the territorial sea. According to learned commentators, ships are only expected “to proceed with due speed under the circumstances, having regard to safety and other relevant factors”³⁸. A damaged ship may be handicapped as to speed and manoeuvrability; this, however, does not mean that she would not be entitled to passage as defined by international law: as stated, one has to consider the specific circumstances under which the ship is proceeding. *A fortiori* one could argue that, where the UN Convention even tolerates *stopping* in distress, no objection can be made to decelerated navigation owing to the distress situation.

International treaties concerning rivers, such as that on the Scheldt³⁹ expressly provide that the right to interrupt the voyage is inherent in the freedom of navigation. The Institute of International Law has, without much preliminary discussion, in itself an indication of the self-evident nature of this point of view, confirmed the right of access to ports of refuge⁴⁰ in resolutions dating from 1898⁴¹, 1928⁴² and 1957⁴³. Further there is a clear analogy with the

³⁸ Center for Oceans Law and Policy (University of Virginia School of Law), *o.c.*, II, 163.

³⁹ At the request of Belgium the London Conference declared in a memorandum dated 18 April 1839 concerning the treaty separating Belgium and the Netherlands: “La libre navigation de l’Escaut renferme, sans aucun doute, la faculté, pour tout navire, de stationner librement dans toutes les eaux de ce fleuve et de ses embouchures, si les vents, les glaces ou d’autres circonstances l’exigent, et il n’est pas à prévoir qu’aucune contestation puisse s’élever sur cet objet, qui pourra au reste, être plus positivement déterminé par règlement” (*Moniteur belge*, 21 June 1839).

⁴⁰ See also Degan, *V.D.*, *o.c.*, 11.

⁴¹ Art. 6 of the “Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers” of 23 August 1898 provides: “En cas de relâche forcée, l’entrée d’un port ne peut être refusée au navire en détresse, alors même que ce port serait fermé conformément à l’article 3 ou à l’article 4.

Le navire en relâche devra se conformer rigoureusement aux conditions qui lui seront imposées par l’autorité locale ; néanmoins ces conditions ne pourront pas être de nature à paralyser, par leur rigueur excessive, l’exercice du droit de relâche forcée.

Les autorités territoriales doivent aide et assistance aux navires étrangers naufragés sur leurs côtes ; elles doivent garantir le respect de la propriété privée, aviser le consulat des naufragés, assister les agents de ce consulat dans leur action dès qu’ils interviennent.

Il est à désirer que les Etats n’exigent que le remboursement des frais utilement exposés”.

⁴² Art. 5 of the “Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix” of 28 August 1928 provides: “En cas de relâche forcée, l’entrée d’un port ne peut être refusée au navire en détresse, alors même que ce port serait fermé par application des dispositions ci-dessus.

Le navire en relâche doit se conformer aux conditions qui lui sont imposées par l’autorité territoriale ; néanmoins, ces conditions ne peuvent pas être de nature à paralyser par leur rigueur excessive l’exercice du droit de relâche forcée”.

Art. 6 provides: “Les autorités territoriales doivent aide et assistance aux navires étrangers naufragés sur leurs côtes ; elles doivent assurer le respect de la propriété privée, aviser le consulat des naufragés, assister les agents de ce consulat dans leur action, dès qu’ils interviennent.

L’action des autorités consulaires de l’Etat du pavillon du navire naufragé ne peut s’exercer que dans la mesure où elle est compatible avec la législation en vigueur dans l’Etat territorial et, s’il y a lieu, conformément aux conventions.

Il est à désirer que les Etats n’exigent que le remboursement des frais utilement exposés”.

See *Annuaire de l’Institut de Droit International. Session de Stockholm 1928*, Brussels, Goemaere, (736), 737-738.

⁴³ Art. II of the resolution on “La distinction entre le régime de la mer territoriale et celui

International Health Regulations, which forbid the denial of access to ports of infected ships⁴⁴. The prohibition on repulsing infected ships was also to be found in many older treaties on sanitary police⁴⁵ when it was regarded as “un principe de droit international supérieur aux contingences de lieux et de nationalités et gravé dans la conscience commune”⁴⁶. Similarly, an analogy may be drawn with the duty to render assistance required by maritime law⁴⁷. The refusal of access to a ship in distress appears to be contrary to the spirit of the many conventions that require the state to duly equip itself so that it react adequately to shipping accidents. The SAR Convention⁴⁸ and related texts⁴⁹ oblige coastal states to organize efficient rescue services. In general there is an obligation on every state that disposes over suitable means to search for and to save persons in maritime distress, even when the ship is on the high seas⁵⁰. The

des eaux intérieures” of 24 September 1957 provides: “*Access and Passage*. In the territorial sea, foreign vessels have a right of innocent passage, including the right of stopping or anchoring to the extent that they are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its *internal waters* to foreign vessels except where they are in distress”.

See *Annuaire de l'Institut de Droit International. Session d'Amsterdam 1957*, II, Basel, Editions juridiques et sociologiques, (473), 474; see also Degan, V.D., *o.c.*, 11.

⁴⁴ Article 41 of the International Health Regulations of the World Health Organization provides to this day: “Subject to Article 73, a ship or an aircraft shall not be prevented for health reasons from calling at any port or airport. If the port or airport is not equipped for applying the health measures which are permitted by these Regulations and which in the opinion of the health authority for the port or airport are required, such ship or aircraft may be ordered to proceed at its own risk to the nearest suitable port or airport convenient to the ship or aircraft”. With respect to the regulations, see Bélanger, M., “Les actions de protection sanitaire en mer ou au port”, *Droit maritime français*, 1981, 579-589; Id., “A propos des dispositions sanitaires de la Convention de 1982 sur le droit de la mer”, *Droit maritime français*, 1984, 195-207. In this connection reference may be made to the m/v Aurora, a cruise liner. Following infection by the Norwalk virus the ship was in October/November 2003 forbidden to enter or discharge passengers in a number of ports in the Adriatic and Mediterranean seas.

⁴⁵ See Gidel, G., *o.c.*, II, 51-52; see also Bélanger, M., “Les actions de protection”, *o.c.*, 581; Hydeman, L.M. and Berman, W.H., *o.c.*, 134, esp. footnote 30, and 140.

⁴⁶ Grasso, G., “De l'interdiction des ports d'un Etat aux navires étrangers pour motifs sanitaires”, *Revue du droit public et de la science politique*, 1895 - 2, (32), 44.

⁴⁷ See i.a. art. 8 Collision Convention 1910, art. 11 Salvage Convention 1910, art. 12 Convention on the High Seas 1958, art. 98.1 LOSC, art. 10 Salvage Convention 1989, art. 255 and 265 Belgian Maritime Code, art. 62 and 63 Belgian Disciplinary and Criminal Code for Merchant Shipping and Offshore Fishing. Saving persons who have no right to enter the territory of the coastal state can nonetheless give rise to problems. For example, in 2001 Australia refused to grant access to the m/v Tampa following her rescue of the Afghan survivors of a shipwreck.

⁴⁸ International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979; see Mankabady, S., *The International Maritime Organization*, I, London, Croom Helm, 1986, 281-287.

⁴⁹ Art. 98.2 LOSC. The view that a natural consequence of this obligation is to include, when necessary, the granting of access in cases of distress or *force majeure*, is supported by A. Blanco-Bazan (*o.c.*, 2). The SOLAS Convention of 1 November 1974 also contains special provisions relating to the organization of search and rescue services (see Regulation 15 in Chapter V of the Annex).

⁵⁰ Declercq, J.P., note under Tribunal administratif de Rennes, 14 May 1987, in Centre de droit maritime et aérien (Nantes), *Annuaire de droit maritime et aéro-spatial*, tome X, Paris, Pédone, 1989, (387), 394.

UN Law of the Sea Convention obliges states to protect and preserve the marine environment⁵¹. In case of pollution danger, states shall cooperate and to this end they shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment⁵². The Parties to the OPRC Convention undertake to take all appropriate measures to prepare for and respond to an oil pollution incident⁵³ and shall establish a national system for responding promptly and effectively to oil pollution incidents, including the designation of competent authorities and contact points as well as a national contingency plan for preparedness and response⁵⁴. States are requested to review the salvage capacity available to them and to report to the IMO⁵⁵. Public authorities shall facilitate the arrival and departure of ships engaged in disaster relief work, the combating or prevention of marine pollution, or other emergency operations necessary to ensure maritime safety, the safety of the population or the protection of the marine environment⁵⁶. The North Sea states must organize surveillance activities with a view to fighting oil pollution⁵⁷. The obligation to grant access to ships in distress may be regarded as a corollary to these specific treaty obligations.

2.2.2. *Critical Assessment*

The common assertion that the right of entry is merely a rule of unwritten customary law gives the wrong impression: this right clearly has deeper and firmer roots than such an assertion suggests. Even so the theory does have its defects. First of all it does not perfectly conform to the modern practice of states, with ships in distress frequently being denied entry, and moreover, the theory of absolute right of entry ignores the environmental risks that the entry of a damaged ship might entail. It is therefore hardly surprising that other views have been propounded in recent years.

2.3. Second Theory – The absolute right of refusal

2.3.1. *Scope and legal basis*

The theory that coastal states or port authorities have a clear-cut right to refuse ships in distress and that in consequence there is no right of access

⁵¹ Art. 192 LOSC. In the opinion of W. van der Velde, this duty cannot be fulfilled without offering a place of refuge to ships in distress (“The position of coastal states”, *o.c.*, 11).

⁵² Art. 199 LOSC.

⁵³ Art. 1 (1) of the International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, *ILM*, vol. XXX, 1991, 733.

⁵⁴ Art. 6 (1) OPRC Convention.

⁵⁵ Item 1 of Resolution 8 of the OPRC Conference, attached to the OPRC Convention.

⁵⁶ See Standards 6.8-6.10 of the Facilitation Convention, London, 9 April 1965. Legal theory advances similar arguments (see Lucchini, L. and Voelckel, M., *o.c.*, 299, no. 904).

⁵⁷ Art. 6A of the Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, Bonn, 13 September 1983 (as amended) provides: “Surveillance shall be carried out, as appropriate, by the Contracting Parties in their zone of responsibility or zones of joint responsibility referred to in Article 6 of this Agreement. The Contracting Parties may bilaterally or multilaterally conclude agreements on or make arrangements for co-operation in the organisation of surveillance in the whole or part of the zones of the Parties concerned”.

whatsoever is supported only by a very small minority of international law specialists⁵⁸.

They argue first of all that the state has sovereignty over its territorial and inland waters⁵⁹ and that this sovereignty is not restricted by any express treaty provision regarding an alleged right of access⁶⁰.

Second, reference is made to the basic right of self-protection of states under international law and to the law of necessity⁶¹.

Third, the provision of the International Statute of Maritime Ports is invoked that allows deviations from the Statute when the safety or vital interests of the state are imperilled⁶².

Fourth, it is possible to argue *a fortiori* that if a coastal state is allowed to intervene on the high seas to prevent environmental pollution – for example by towing a tanker away or setting it on fire – it may most certainly refuse a ship of this sort entry to its ports.

In addition an argument is derived from the contemporary attitude of states to the effect that the international custom of guaranteeing access no longer exists. This is because the repeated refusals mean that the general practice of states (*usus*) has changed and the conviction that there is a legal duty to grant access (*opinio juris*) has been abandoned by states. Some writers have cautiously concluded that “le droit coutumier “de refuge” n’est pas à l’abri des “fissures” auxquelles s’expose une pratique qui offre de nombreux

⁵⁸ See in this respect Somers, E., *o.c.*, 35, no. 26.

⁵⁹ See art. 2.1 LOSC.

⁶⁰ In the *m/v Attican Unity* decision of 7 February 1986 the Dutch Supreme Court assessed the legality of the prohibition to enter the territorial sea imposed on a ship that was on fire. The Supreme Court was of the opinion that as the state drew its authority to impose a prohibition from its sovereignty over Dutch territorial waters, and as this prohibition had been imposed by or in the name of officials who had been made responsible for the supervision and administration of these waters, the absence of any legal framework or other generally binding provision on which the authority of the officials who had in fact imposed the prohibition was specifically based, could not lead to the conclusion that the prohibition had been given without authority (*Hoge Raad*, 7 Februari 1986, *m/v Attican Unity*, *Schip en schade*, 1986, 159, no. 61, *Nederlandse Jurisprudentie*, 1986, 1825, no. 477, with decision *a quo*, concl. Adv-Gen. Biegman-Hartogh, and note H. Meijers, *Netherlands Yearbook of International Law*, vol. XVIII, The Hague, Martinus Nijhoff, 1987, 402). In many other countries the public authority would have needed an explicit legal basis for refusing access to a ship (for Belgium, see e.g. art. 2, § 1 of the Law of 5 June 1972 on the safety of shipping and art. 5, 27 and 28 of the Royal Decree of 4 August 1981 laying down the police and shipping regulations for the Belgian territorial sea, the ports and beaches of the Belgian coast).

⁶¹ See with respect to the right of self-preservation and the right of necessity Nguyen, Q.D., Daillier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002, 786-787, no. 482; Van Bogaert, E.R.C., *Volkenrecht*, Antwerp, Kluwer rechtswetenschappen, 1991, 153, no. 51; for the principle of protection, see Korthals Altes, A., *Prijns der zee. Raakvlak van redding, strandrecht en wrakwetgeving*, Zwolle, W.E.J. Tjeenk Willink, 1973, 299-300; see also Nelissen, F.A., *o.c.*, 206-208.

⁶² Art. 16 reads: “Measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of Articles 2 to 7 inclusive; it being understood that the principles of the present Statute must be observed to the utmost possible extent”.

exemples de refus opposé à des navires cherchant refuge”⁶³; other authors have gone further and have concluded that the customary law right of access has entirely disappeared from the international law system⁶⁴.

Furthermore it has been asserted that the old customary law right of access was based solely in the desire to save lives and was therefore motivated by purely humanitarian considerations, which are irrelevant when it is a matter of protecting ships, cargoes, and commercial interests and when crews can usually be safely evacuated by helicopters, lifeboats and tugs⁶⁵.

Elsewhere it has been argued in some case law and legal theory that the right of access is a thing of the past because the right developed and won recognition in an era of relatively small sailing ships that did not constitute an environmental hazard. Nowadays there are enormous pollution risks that did not have to be considered in the 19th century. For this reason it is difficult to argue for a right of access in the modern context⁶⁶. On the other hand, it was expected that with modern marine technology distress situations should be fairly infrequent⁶⁷; consequently, customary law on ships in distress would lose weight in this respect as well.

Finally the right to refuse ships in distress is said to be recognized in the London Intervention Convention^{68,69}, the London Salvage Convention 1989⁷⁰,

⁶³ Lucchini, L. and Voelckel, M., *o.c.*, II.2, 298, no. 903, where it must also be immediately pointed out that neither of these authors question the existence of the right.

⁶⁴ For a highly critical opinion see Maes, F., *o.c.*, item 7.2.4.

⁶⁵ *Cf.* the subtle decision regarding the *m/v Toledo*, cited below, footnote 126. The Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) state that article 24 on distress is limited to cases where human life is at stake (p. 192).

⁶⁶ In the *m/v Toledo* case (cited below, footnote 126), the Irish High Court (Admiralty) took the view that the right of a foreign vessel in distress to a safe haven has been modified in modern times due to countervailing considerations such as oil pollution or the danger of a vessel sinking where it would block a port or hinder navigation.

⁶⁷ Hydeman, L.M. and Berman, W.H., *o.c.*, 155.

⁶⁸ On the basis of the London Intervention Convention of 29 November 1969, and probably also on the basis of international customary law (Birnie, P., “Protection of the Marine Environment: the Public International Law Approach”, in de la Rue, C., *Liability for Damage to the Marine Environment*, London, Lloyd’s of London Press, 1993, (1), 18) the coastal state may take all required measures on the high seas to prevent or combat pollution. In 1978 the British authorities used their authority to intervene beyond territorial waters to prevent salvors from towing the leaking “Christos Bitas” to Milford Haven. Under the heading “Measures to avoid pollution arising from maritime casualties”, art. 221 LOSC provides: “1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or 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. 2. For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo” (for a comparison with the Intervention Convention, see i.a. Birnie, P., *o.c.*, 19). According to some the basis of the authority to intervene is the necessity situation in which the state finds itself (Treves, T., “La navigation”, in Dupuy, R.-J. and Vignès, D. (Ed.), *Traité du Nouveau Droit de la Mer*, Paris/Brussels, Economica/Bruylant,

the European Directives on Port State Control⁷¹ and Traffic Monitoring⁷², the Bonn Agreement Counter Pollution Manual⁷³ and the recent IMO Guidelines on Places of Refuge⁷⁴.

1985, (687), 716), while according to others it is the right of self-protection (Douay, C., “Le régime juridique de l’assistance en mer selon la Convention de Londres du 28 avril 1989”, *Droit maritime français*, 1990, (211), 213; Korthals Altes, A., *o.c.*, 299). I. Nehlmeyer-Günzel has painstakingly and in the author’s view convincingly demonstrated that the British intervention in the Torrey Canyon disaster in 1967 could be based neither on self-protection nor on self-defence, nor on the necessity situation, although the latter could in principle be considered as a possible justification (*Der maritime Umweltschutz dargestellt anhand von Tankerunfällen*, Inaugural-Dissertation, Münster, Westfälische Wilhelms - Universität, 1986, 104 et seq.).

⁶⁹ With respect to the Intervention Convention it has been argued that the fact that this convention only refers to interventions on the high seas is an *a fortiori* confirmation that the coastal state can intervene in its territorial and internal waters. Denying the power of the state to intervene in the latter areas could give rise to absurd situations: a coastal state could intervene on the high seas to deal with a drifting ship, but would lose this power if wind and tide were to push the ship towards its territorial sea, and the state would have stop its efforts (Jeanson, Ph., “Les mesures d’urgence et la coordination interministerielle”, in *La protection du littoral. 2e colloque de la Société Française pour le Droit de l’Environnement*, Trevous, Publications Périodiques Spécialisées, 1979, (321), 344-345; comp. also Lucchini, L. and Voelckel, M., *o.c.*, II.2, 265, no. 885; Mankabady, S., *o.c.*, I, 366; Riphagen, W., *o.c.*, 207, no. 27). As is explained below this position can be disputed.

⁷⁰ Art. 9 provides under the heading “Rights of coastal States”: “Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized 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”.

Although the 1989 Convention does not seek to define the rights to intervene, the fact that it made specific reference to the right of the coastal state to give directions in relation to salvage operations might indicate that such a right is now generally recognized (Gaskell, N.J.J., “The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990”, *Tulane Maritime Law Journal*, 1991, (1), 20).

Art. 11 provides under the heading “Co-operation”: “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”.

This considers not only the problem of the maritime leper, which is discussed here, but also that of municipal legislation prohibiting foreign salvors from operating in national waters, while sending a local contractor might cause disastrous delays (Gaskell, N.J.J., *ibid.*, 20).

⁷¹ See in particular art. 11.6 of the Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), OJ L 157, 7 July 1995, 1 (as amended), which provides under the heading “Follow-up to inspections and detention”: “Notwithstanding the provisions of paragraph 4, access to a specific port may be permitted by the relevant authority of that port State in the event of *force majeure* or overriding safety considerations, or to reduce or minimize the risk of pollution or to have deficiencies rectified, provided adequate measures to the satisfaction of the competent authority of such Member State have been implemented by the owner, the operator or the master of the ship to ensure safe entry”. Although this text is drafted in permissive terms, it emphasizes the possibility of admitting ships in distress and can hardly be interpreted as a basis for the driving away of such ship by port states.

Places of Refuge

With specific regard to the territorial sea, it is argued that the right of innocent passage can only be exercised for the purposes of normal navigation⁷⁵. Ships not engaged in such normal passage fall under the unlimited sovereignty of the coastal state⁷⁶ and may be driven off by the latter⁷⁷. Moreover the right of innocent passage applies only to ships and not to wrecks⁷⁸. Further, it is argued that the passage of ships posing a threat cannot be regarded as innocent and these ships could therefore be stopped by the coastal state⁷⁹. Passage through the territorial sea to a port to which access has been refused can *ipso facto* not be demanded. Whenever entry into a port is denied, this has a direct repercussion on the right of passage through the

⁷² Directive 2002/59/EC of the European Parliament and the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5 August 2002, 10. For more about the Traffic Monitoring Directive, see below, item 2.4.1.

⁷³ Interim Chapter 26, that contains i.a. the following passage: "However, at present there exists no binding obligation on the part of a Contracting Party to offer predefined places of refuge or safe havens".

⁷⁴ See below, footnotes 142 and 157. Footnote 1 in Appendix 1 to Annex 1 to the IMO Assembly Resolution on Guidelines on Places of Refuge states: "It is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance".

⁷⁵ In the Long Lin case (cited below, footnote 126), the notion of passage was understood by the Dutch Supreme Court as making use of a fast and uninterrupted navigational route through the territorial sea for the purpose of normal traffic; according to the Court the shipping company could not invoke the right of innocent passage because the ship had entered Dutch territorial and coastal waters in a damaged condition. In the m/v Attican Unity decision (cited above, footnote 59) the Dutch Supreme Court declared that causing the entry into the Dutch territorial sea of a burning ship by salvors with the consent of the captain with the mere object of running the ship onto the coast could not be accepted as a passage. The Supreme Court that such an entry had "another intention" than that described in the definitions of passage set out in the Convention. Advocate-General Biegman-Hartogh had argued before the Court that the purpose of the right of innocent passage was only "to open the shortest possible route for all ships through the seas and to and from ports, and not for example to offer refuge for ships in distress". Legal theory had similarly argued that a ship that had sustained an accident and which was in the territorial sea and was causing environmental pollution there or threatened to do so, was no longer making a passage and thus falls entirely under the sovereignty of the coastal state, which may take all measures that it sees fit, at least insofar the proportionality principle is respected (see Churchill, R.R. and Lowe, A.V., *The law of the sea*, Manchester, Manchester University Press, 1999, 353).

⁷⁶ See also Churchill, R.R. and Lowe, A.V., *o.c.*, 87; Nelissen, F.A., *o.c.*, 77-78.

⁷⁷ O'Connell, D.P., *o.c.*, I, 269-270; see also Treves, T., "Navigation", in Dupuy, R.-J. and Vignès, D. (Ed.), *A Handbook on the New Law of the Sea*, II, Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1991, 911.

⁷⁸ See i.a. Lucchini, L. and Voelckel, M., *o.c.*, II.2, 223, no. 872.

⁷⁹ Art. 25.1 LOSC states: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent". Certain writers remarked that if the ship in distress constituted a threat to the peace, public order, or safety of the coastal state could under the Geneva Convention *ipso facto* be regarded as not innocent. "A logical outgrowth of this argument", they go on, "is that a vessel in distress could be excluded for the very reason that places it in distress. For instance, where a vessel is severely damaged, it may be unable to comply with local navigation or other types of safety regulations. Passage, therefore, would not appear to be "innocent" as this term is defined in the convention, and the coastal State could take action to prevent such passage" (Hydeman, L.M. and Berman, W.H., *o.c.*, 160 and 169).

territorial sea. Navigation to a port where entry is prohibited, is not to be considered a case of passage within the meaning of the treaty provisions governing innocent passage⁸⁰; the result is that no right to enter the territorial sea can be claimed either. Moreover the UN Law of the Sea Convention provides that, in the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject⁸¹. This implies that the coastal state may prevent ships that do not comply with the requirements for entering the internal waters (e.g. as to pollution prevention, manning and equipment) from passing through the territorial sea, or may even expel them from the territorial sea⁸². In general, foreign ships exercising the right of innocent passage through the territorial sea must comply with all laws and regulations adopted by the coastal state⁸³. The coastal state may adopt such laws and regulations in respect of i.a.⁸⁴ the safety of navigation and the regulation of maritime traffic, the protection of navigational aids and facilities and other facilities or installations, the conservation of the living resources of the sea, the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof⁸⁵. More in particular,

⁸⁰ Comp. Treves, T., "La navigation", *o.c.*, 754, footnote 9; Treves, T., "Navigation", *o.c.*, 910, footnote 208; see also Gidel, G., *o.c.*, III.I, 206: "Si le port n'est pas ouvert au commerce international, il n'y a pas lieu de considérer le navire comme étant juridiquement en "passage"; mais si le port est libre, le régime du passage doit s'appliquer au navire qui s'y rend"; also de Vries Reilingh, O.G., *o.c.*, 33-34; McDougal, M. and Burke, W.T., *The Public Order of the Oceans*, New Haven and London, Yale University Press, 1962, 237.

⁸¹ See art. 25.2 and also art. 211.3 LOSC. The foregoing principle can easily be illustrated from Belgian law, which no doubt is similar in this respect to that of many other nations. According to the police and shipping regulations for the Belgian territorial sea, the ports and beaches of the Belgian coast, no vessel may enter a harbour on the coast when, by reason of its size, draught or any other circumstance, it poses a threat or a risk to the safety of the vessel itself, or of navigation, to harbour and other works, or to the environment in general. Whenever special circumstances require so, the local authority in charge may grant however an exception, imposing certain conditions if needed (see art. 5, § 1 of the Royal Decree of 4 August 1981).

⁸² Somers, E., *o.c.*, 84, no. 67; comp. Gidel, G., *o.c.*, III.I, 215, footnote 1; see also art. VI of the resolution of the Institut de Droit International of 12 September 1969 concerning "Measures concerning accidental pollutions of the seas": "States have the right to prohibit any ship that does not conform to the standards set up in accordance with the preceding articles for the design and equipment of the ships, for the navigation instruments, and for the qualifications of the officers and members of the crews, from crossing their territorial seas and contiguous zones and from reaching their ports" (*Annuaire de l'Institut de Droit International. Session d'Edimbourg 1969*, II, Basel, Editions juridiques et sociologiques, (380), 382).

⁸³ Art. 21.4 LOSC.

⁸⁴ The list of matters which can be the subject of legislation contained in the text of the Convention is exhaustive (Treves, T., "La navigation", *o.c.*, 760-761).

⁸⁵ Art. 21.1 LOSC. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards (art. 24.2). Art. 211.4 LOSC adds: "Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels".

the UN Law of the Sea Convention confirms that states may establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals; they shall give due publicity to such requirements and shall communicate them to the competent international organization⁸⁶.

2.3.2. *Critical Assessment*

The above arguments appear to be more convincing than they really are. The theory of the absolute right of refusal ignores the virtually unanimous legal doctrine regarding international customary law as well as the various treaties and recent judgments that, as indicated above, do in fact confirm the right of access. An objection to this right on the basis of the mere sovereignty of the state over its internal and territorial waters, can therefore not be sufficient grounds for the refusal of access.

The arguments advanced by the opponents of the right of access based on the treaty status of the territorial sea are similarly irrelevant. The right of access in the event of maritime distress is a general and independent rule of law⁸⁷, which applies on the high seas, in territorial waters, internal waters, international rivers, lakes, canals and ports⁸⁸, and can therefore be invoked regardless of the right of innocent passage through the territorial sea⁸⁹. To the extent that the objections are based on the limitations of the right of innocent passage they are necessarily beside the point. It has moreover already been shown in the foregoing that pursuant to the treaty regime of innocent passage, ships in distress do effectively enjoy a right to innocent passage through the territorial sea⁹⁰ for as long as they do not become a wreck⁹¹. On the basis of

⁸⁶ Art. 211.3 LOSC.

⁸⁷ Meijers, H., *o.c.*, 1838.

⁸⁸ de Zayas, A.-M., *o.c.*, 287.

⁸⁹ The right of access in the event of maritime distress is much more absolute because the limitations on the right of innocent passage contained in the LOSC do not apply, it is more far-reaching because it even grants immunity from the application of the law of the coastal state and its scope of application *ratione loci* is broader because it grants not only right of access to the territorial sea, but also to internal waters and even to closed ports.

⁹⁰ Art. 17 LOSC, reflecting a rule of customary international law (Shaw, M.N., *International Law*, Cambridge, Cambridge University Press, 2003, 507). Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility (art. 18.1 LOSC). Undoubtedly it is possible to invoke the right of innocent passage to enter the territorial waters of another state with a view to reaching a shipyard on the inland waters of that state. The quoted article expressly provides that the passage also refers to sailing to a "port facility" (French: "installation portuaire"). A ship repair yard or dock is also a port facility of this kind. With respect to the notion of "port" in general, see i.a. Van Hooydonk, E., *Beginselen*, *o.c.*, 10-11, no. 16; see also Gidel, G., *o.c.*, II, 19: "Les ports sont les lieux généralement disposés par la nature et aménagés en vue de permettre le stationnement des navires aux fins d'y procéder en sécurité aux opérations que comportent le commerce et les transports maritimes ou les besoins de la navigation". Ports of repair are thus clearly regarded as ports.

⁹¹ For a further discussion of the definitions of ship and wreck, see Van Hooydonk, E.,

the numerous available definitions of a ship, Schubert among others distinguishes an objective and a subjective criterion. In objective terms the ship must be suitable for navigation, it must in consequence have a minimum of manoeuvrability and buoyancy. It does not have to have its own means of propulsion; only a ship no longer capable of being navigated is a wreck. In addition there is the subjective criterion of the abandonment or the *animus derelinquendi*, i.e. a ship becomes a wreck when it is abandoned, voluntarily or otherwise, by its owners or crew. Abandonment is, however, not the same as leaving the ship. When persons remain at the scene of the casualty in order to recover the ship, there is no abandonment⁹². In most cases ships in distress will not meet the criteria for being regarded as a wreck. In general it may be assumed that the mere fact that a damaged ship wishes to continue the voyage under the command of the master, perhaps with the help of tugs or salvage vessels, with or without the use of its own engines, and even incapable of being independently steered, shows that the damaged ship is still a ship and not a wreck. As we have already seen a ship in distress may even stop and anchor in the territorial sea⁹³. It is generally accepted that the passage of the territorial sea may not be conditional on obtaining authorization or consent⁹⁴.

“Some remarks”, *o.c.*, 121-123; see also i.a. Balmond, L., “L’Épave du navire”, in Société française pour le droit international, *Le navire en droit international*, Paris, Pedone, 1992, 69-98. Even when the ship is drifting without control, it does not necessarily or immediately lose its right of innocent passage. If the ship requests and expects towing assistance, and is therefore only temporarily adrift, it continues to enjoy the right to innocent passage. However, when the ship is irreversibly adrift, it becomes a wreck and no longer has a right to passage.

⁹² Schubert, F., “La condition juridique des épaves maritimes: problèmes de droit international public”, in *Espaces et ressources maritimes*, No. 5, Paris, Pedone, 1991, (125), 126-127; compare in this respect Lucchini, L. and Voelckel, M., *o.c.*, II.2, 41-42, no. 787.

⁹³ Sinking and then lying on the seabed of course no longer fall under the idea of “stopping and lying at anchor” (Nelissen, F.A., *o.c.*, 125, with reference to Münch). Nor does the notion of passage apply to the oil tanker that lies for several days at anchor in order to select a port of discharge, as this kind of anchoring serves only commercial interests (English view: see Lowe, V., “The United Kingdom and the Law of the Sea”, in Treves, T. (Ed.), *The Law of the Sea. The European Union and its Member States*, The Hague/Boston/London, Martinus Nijhoff Publishers, (521), 528).

⁹⁴ For example European member states and the United States of America made a formal protest to Libya when that state decided to impose notification requirements for the passage of its territorial sea; the note of protest recorded that no international regulation at all provides for a system of authorization for admission to the territorial sea (see i.a. Treves, T., “Codification du droit international et pratique des Etats dans le droit de la mer”, in Académie de Droit International, *Recueil des cours*, 1990, IV, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991, 113). This principle applies even with respect to nuclear-powered ships (Wolfrum, R., “The emerging customary law of marine zones: state practice and the convention on the law of the sea”, *Netherlands Yearbook of International Law*, vol. XVIII, 1987, Martinus Nijhoff Publishers, 131) and ships that carry radioactive, or other intrinsically dangerous or harmful substances (see art. 23 LOSC, that explicitly assumes the existence and the right of passage of these ships, and in this connection Treves, T., “La navigation”, *o.c.*, 766-767; also Treves, T., “Navigation”, *o.c.*, 926). According to the majority view even foreign warships enjoy a right of passage (see i.a. Brown, E.D., *The International Law of the Sea*, I, Aldershot, Dartmouth, 1994, 64-72). One of the arguments is that the treaties and conventions explicitly grant this right to “all ships” (see the headings of Subsection A of Section 3 of Part II of the UN Law of the Sea Convention). There are therefore no grounds for excluding ships on the way to a repair yard as a general category. In principle these ships too enjoy the right of passage.

If the authority has objections and wishes to prohibit the passage it must base its decision on clear grounds accepted by international law. The argument that the passage of ships at risk does not have the required innocent character is incorrect. Under the UN Law of the Sea Convention, passage can only lose its non-innocent character, when the active conduct of the ship falls under any of the non-innocent activities listed in the convention, such as “any act of *wilful* and serious pollution contrary to this Convention⁹⁵” and “any [...] activity not having a direct bearing on passage⁹⁶”; mere passive characteristics are not to be taken into account⁹⁷. For this reason a casualty ship navigating through the territorial sea cannot be said *ipso facto* to be non-innocent⁹⁸. Further, the UN Law of the Sea Convention expressly provides that the coastal state shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the Convention. In particular, in the application of the Convention or of any laws or regulations adopted in conformity with it, the coastal state shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage⁹⁹. Without the protection afforded by this rule, it might be possible for laws and regulations promulgated under the guise of protecting the marine environment or the prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations, to have the practical effect of denying or impairing innocent passage¹⁰⁰. The conclusion is that the theory of

⁹⁵ Art. 19.2, (h) LOSC.

⁹⁶ Art. 19.2, (l) LOSC. During the drafting of the UN Law of the Sea Convention there was even a proposal for expressly providing in the text of the convention that the listed activities of a non-innocent nature, including those activities that have no direct bearing on passage, are yet tolerated as being innocent if they are performed with the prior consent of the coastal state or if they are made necessary by reason of *force majeure* or with a view to rendering assistance to persons or ships in danger or in distress (see the successive text proposals in Center for Oceans Law and Policy, *o.c.*, II, 168-173).

⁹⁷ Brown, E.D., “Freedom of navigation: Progress Report on the Third United Nations Conference on the Law of the Sea”, in Glansdorp, C.C. (Ed.), *Marine traffic systems*, Delft, Delft University Press, 1976, (149), 154; Brown, E.D., *The International Law of the Sea*, *o.c.*, I, 57; Nelissen, F.A., *o.c.*, 74-75; Smith, B., “Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection”, *Columbia Journal of Transnational Law*, 1982, (49), 75.

⁹⁸ This is in fact confirmed in Smith’s criticism, which argues that the summary of “innocent” activities in the UN Sea Convention is far too limited, particularly where it determines that only intentional and severe pollution is regarded as being non-innocent. According to Smith, the LOSC is an encouragement to deny perhaps the most effective component of a state’s legal authority to prevent environmental damage: the right to prohibit entry into its territory of vessels possessing characteristics that render them a material threat (Smith, B., *o.c.*, 89-90). This critical analysis – which is shared by others (see for example Nelissen, F.A., *o.c.*, 121, with references) – merely confirms how much the UN Sea Convention really emphasizes the right of innocent passage. The fact that the passage of a burning ship can indeed be innocent, was confirmed by the Advocate-General in the Dutch Supreme Court in the ruling on the *m/v Attican Unity* (cited above, footnote 60). Even the infringement of national laws and regulations is not sufficient to disallow the innocent nature of the passage (see i.a. Brown, E.D., *The International Law of the Sea*, *o.c.*, I, 57).

⁹⁹ Art. 24.1 LOSC.

¹⁰⁰ Center for Oceans Law and Policy, *o.c.*, II, 226.

the absolute right of refusal of access for ships in distress cannot be based on the legal regime of passage through the territorial sea.

Nor can the Intervention Convention be invoked to restrict the right of innocent passage through the territorial sea, because the rules of the UN Law of the Sea Convention on innocent passage give the coastal state specific instruments for the protection of its interests¹⁰¹ and constitute a self-contained whole¹⁰². Next, the Intervention Convention is directed towards the adoption of specific measures of a physical nature, such as the towing, running aground, setting on fire or destruction of leaking tankers¹⁰³. Under the

¹⁰¹ Cf. art. 25 LOSC entitled "Rights of protection of the coastal State".

¹⁰² The powers of the coastal state in respect of the protection of its interests are exhaustively described and regulated in the treaty regulations concerning the right of innocent passage. In the author's view Nelissen responds rightly to the question of what powers of intervention the coastal state has in its territorial sea by observing that the drafters of the UN Law of the Sea Convention wished, in the absence of any specific provisions, to refer to the arrangements for innocent passage (Nelissen, F.A., *o.c.*, 118).

¹⁰³ Annex III to the European Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods defined the "Measures available to Member States under international law" under Article 6 (3) of the Directive as follows: "Where, following upon an incident or circumstance of the type described under Article 6 (1) and (2) in regard to a vessel falling within the scope of this Directive, the competent authority of the Member State concerned considers, in the framework of international law, that it is necessary to prevent, mitigate or eliminate a serious and imminent danger to its coastline or related interests, the safety of other ships, the safety of crews, passengers or people ashore or to protect the marine environment such public authority may, in particular:

- restrict the movement of the vessel or direct it to follow a certain course. This requirement shall not override the master's responsibility for the safe conduct of his vessel,

- request the master to provide the relevant information from the check list in Annex II of this Directive and confirm that a copy of the list or manifest or appropriate loading plan referred to under paragraph 9 of Annex I is available on board".

The right to refuse ships in distress access to ports or places of refuge is not mentioned here.

Annex IV to the new EU Traffic Monitoring Directive (cited hereunder at 2.4.1), which supersedes Directive 93/75/EEC, reads:

"Measures available to Member States in the event of a threat to maritime safety and the protection of the environment

(pursuant to Article 19(1))

Where, following an incident or circumstance of the type described in Article 17 affecting a ship, the competent authority of the Member State concerned deems, within the framework of international law, that it is necessary to avert, lessen or remove a serious and imminent threat to its coastline or related interests, the safety of other ships and their crews and passengers or of persons on shore or to protect the marine environment, that authority may, *inter alia*:

- (a) restrict the movement of the ship or direct it to follow a specific course. This requirement does not affect the master's responsibility for the safe handling of his ship;

- (b) give official notice to the master of the ship to put an end to the threat to the environment or maritime safety;

- (c) send an evaluation team aboard the ship to assess the degree of risk, help the master to remedy the situation and keep the competent coastal station informed thereof;

- (d) *instruct the master to put in at a place of refuge in the event of imminent peril, or cause the ship to be piloted or towed*" (emphasis added).

This text does not deny the right of entry for ships in distress either.

Intervention Convention, states “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 threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, *which may reasonably be expected to result in major harmful consequences*” (emphasis added)¹⁰⁴. The risks associated with the approach of a ship in distress must be exceptionally specific and serious before the state may intervene on the high seas. Concluding *a fortiori* from the power of the state to take measures in respect of ships at risk on the high seas that the state can always refuse such ships to proceed to a port of refuge is incorrect, because the drafters of the convention express no opinion either way about the right of access. It can therefore not be argued that the Intervention Convention provides a general legal basis for denying access to ships in distress.

Necessity within the meaning of general international law may only be invoked by a state when there is no other way of maintaining its existence: the breach of the law must be the last possible resort for defending the state’s essential interests against severe and immediate dangers. The right of necessity must be limited to strictly authorized applications; it is subject to very stringent conditions of application¹⁰⁵. Its use will always remain “*tout à fait exceptionnelle*”¹⁰⁶. A classic example of an intervention, whereby a foreign ship was destroyed on the high seas in order to limit the consequences of marine pollution¹⁰⁷, is the case of the *Torrey Canyon*¹⁰⁸, where the effective

¹⁰⁴ Art. I.1; see also art. I.1 of the 1973 Protocol to the Intervention Convention.

¹⁰⁵ Article 25 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) provides under the heading “Necessity”: “1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity”.

The Commentaries to the draft articles explain that stringent conditions are imposed before any necessity plea is allowed, and emphasize the exceptional nature of necessity (p. 202).

¹⁰⁶ Nguyen Q.D., Daillier, P. and Pellet, A., *o.c.*, 787, no. 482.

¹⁰⁷ Nguyen Q.D., Daillier, P. and Pellet, A., *ibid.*, 787, no. 482.

¹⁰⁸ The Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) expressly refer to this incident as an example of a necessity situation: “In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of

existence of a necessity situation was disputed by some legal theorists¹⁰⁹. In any case this incident resulted in the drafting of the aforementioned Intervention Convention, which consequently is regarded as the legal articulation of the right to intervene in a necessity situation¹¹⁰. If any parallels at all can be drawn between intervention on the basis of necessity and the refusal of access to a ship in distress because of the danger to the coastal state, one must logically conclude that the latter is only possible as *ultimum remedium*, and that every refusal of access must comply with the strict conditions on invoking the necessity situation. The fact that coastal states are often prepared to admit ships in distress after financial guarantees have been provided, shows in the author's view that the right to refuse ships of this kind can usually not be based on a necessity situation. Mere financial or economic concerns by the state cannot be regarded as vital interests the protection whereof justifies invoking necessity¹¹¹.

The International Statute of Maritime Ports is also incorrectly used by the defenders of the absolute right of refusal, precisely because the drafters of the statute assumed that the right of access was something self-evident and absolute¹¹².

The change in practice of some states might not simply indicate the disappearance of a rule of international customary law, but could equally be viewed, or perhaps should be viewed, as breaches of this rule¹¹³. The fact that a state may in certain circumstances refuse access, does not necessarily imply that this right of access does not exist, but may also be due to the relative nature of the right¹¹⁴. Recent state practice does in fact include various

a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed. No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution" (p. 199).

¹⁰⁹ Nehlmeyer-Günzel, I., *o.c.*, 122 et seq.

¹¹⁰ See above, footnote 68.

¹¹¹ See Nehlmeyer-Günzel, I., *o.c.*, 128, where it is stated in connection with the threat of economic loss in the Torrey Canyon case: "Diese rein materiellen Verluste und Aspekte nehmen jedoch kein existenzbedrohendes Ausmaß an und rechtfertigen aus diesem Grunde nicht die Berufung auf den Notstand".

¹¹² See above, footnotes 30 and 31.

¹¹³ According to the International Court of Justice there is no requirement that, in order to establish a rule of customary law, state practices should be in rigorous conformity with that rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule (ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1986] ICJ Rep 14, 97, no. 186). It is therefore a matter of examining the cases where access has been refused in further detail in order to see whether the refusal was based on the denial of the right of access and nothing else, or on exceptions to the rule invoked by the state. To the extent the latter is the case, the principle of the right of access would tend to be confirmed rather than undermined. Here the exception does indeed "prove" the rule.

¹¹⁴ The opinion of the Irish High Court (Admiralty) in the *m/v Toledo* case (cited below, footnote 127) was that the right of access in the event of maritime distress still applied, but that it was not an absolute right; for a similar opinion see Devine, D.J., *o.c.*, 230; Kasoulides, G.C., *o.c.*, 184.

examples of the reaffirmation of the right of access¹¹⁵. The practice of states reveals new and additional applications of the right: for example ships in distress have now been given the right to enter, by way of exception, the safety zones around artificial installations on the British continental shelf¹¹⁶.

The suggestion that the right of access would lose importance due to the improvement of marine technology and the fall in incidents of maritime distress is clearly contradicted by practical experience. The objection that the right of access is an anachronism because of the associated environmental risks is patently false. The recent incidents with the Erika, the Castor and the Prestige clearly demonstrate that in the light of modern environmental problems the right of access should be encouraged. Recent initiatives by the IMO, CMI and EU have in fact been directed towards restoring the right of access albeit as part of a step-by-step process. The interests of the environment are in most cases better served by granting access rather than sending the ship in distress back out to sea. The argument that the right of access is an anachronism in the modern shipping context is therefore invalid as well.

The position that the old right of access served only humanitarian objectives is contradicted by the fact that assistance must also be given to the ships themselves¹¹⁷ and that ships are traditionally exempt from levies and taxes¹¹⁸. If the maritime distress theory were to have only humanitarian objectives, it is difficult to understand why favourable financial arrangements should be granted to ships in distress – and their owners and/or operators. In the author's view the maritime distress theory does have humanitarian underpinnings but cannot be reduced to the merely humanitarian dimension: as expressed by French case law, there is a system of general generosity in respect of the ship in distress¹¹⁹. For these reasons, the position that the right

¹¹⁵ The internet page about places of refuge of the United Kingdom's Maritime and Coastguard Agency starts with the following statement: "Providing shelter for a casualty is in fact part of every port state's obligations. Thus the requirement to offer a place of refuge is not by any means a new burden on maritime states" (http://www.mcga.gov.uk/c4mca/mcga-dops_environmental/mcga-dops_cp_environmental-counter-pollution/mcga-dops_cp_sosrep_role/mcga-dops_cp_ncp_uk_response_to_salvage/mcga-dops_cp_places_of_refuge.htm) (consulted on 8 February 2004). This view was explicitly confirmed by R. Middleton, the competent representative of the Secretary of State (SOSREP), during the aforementioned international workshop held at Antwerp on 11 December 2003.

¹¹⁶ Lowe, V., "The United Kingdom", *o.c.*, 540-541; for other applications, see Bangert, K., "Denmark and the Law of the Sea", in Treves, T. (Ed.), *The Law of the Sea, o.c.*, (97), 103 (exception to the restrictions of the duration of access to internal waters for foreign vessels during wartime); Roucouas, E., "Greece and the Law of the Sea", *ibid.*, (225), 238 (exception to prior notification and authorization for foreign warships); art. 3 of the Spanish declaration upon signature of the LOSC, *ibid.*, (567), 568.

¹¹⁷ Art. 98.1 (c) LOSC obliges every state to require masters, after a collision, to render assistance "to the other ship, its crew and its passengers"; see also art. 8 Collision Convention 1910 and art. 11 Salvage Convention 1989, cited above, footnote 70.

¹¹⁸ See above, item 2.2.1.

¹¹⁹ A ship in distress is placed among civilized nations under the protection of good faith, humanity, and generosity (French case law: see Hydeman, L.M. and Berman, W.H., *o.c.*, 157).

of access cannot be claimed when the financial interests of the owner or the operator of the ship are at risk, appears to be incorrect.

The 1989 Salvage Convention was not intended to confirm the right of access, but neither was it intended to deny it, even though various special interest groups (including a rare alliance between ship owners and environmentalists) did make a vain attempt during the preparatory works to have the Convention include a clear obligation on states to admit damaged ships, open ports of refuge and prepare disaster plans. The preparatory work of the Salvage Convention shows no intentions whatsoever aimed at influencing or denying the right of entry in distress, although it was clear that parties did not wish to confirm the existence of this right in the convention either. One considered that the Convention had in the main to be a private law convention, and that it was not the proper instrument for establishing far-reaching duties of states¹²⁰. Whatever the case, the provisions of the Salvage Convention are clearly an advance on the merely contractual obligation resting on the owners of the salvaged property to co-operate with the salvors in order to obtain entry to a place of safety, which could not impose obligations on a third party such as a port authority¹²¹. Nonetheless the vagueness of the Salvage Convention is regrettable. Darling and Smith take the view that it is a matter for the national law whether a salvor is allowed to take legal action against a port authority in order to require it to permit entry to a port¹²². Like Gaskell one must conclude that the Convention only contains “a rather empty exhortation” regarding the admission of casualty ships¹²³. Nonetheless it is in no way possible to distil an absolute right to refuse ships in distress from the Convention¹²⁴.

The reference to EU law provisions that allegedly deny a right of access appears upon closer examination not to be particularly convincing either:

¹²⁰ See Gaskell, N.J.J., *o.c.*, 18; see also Douay, C., “Le régime juridique de l’assistance en mer selon la Convention de Londres du 28 avril 1989”, *Droit maritime français*, 1990, (211), 214.

¹²¹ Darling, G. and Smith, C., *LOF 90 and the new Salvage Convention*, London, Lloyd’s of London Press, 1991, 62.

¹²² Darling, G. and Smith, C., *ibid.*, 63.

¹²³ Gaskell, N.J.J., *o.c.*, 20. Recently, P. Bonassies commented on art. 11 of the Salvage Convention as follows: “Le texte témoigne certes de la bonne volonté du législateur international, mais l’imprécision qui l’entache lui enlève toute portée. Encore une disposition sans doute inoffensive, mais aussi bien inutile penseront à tout le moins les juristes français” (“La Convention de 1989 sur l’assistance”, *Droit maritime français*, 2003, (239), 247).

¹²⁴ Apparently, the customary right to enter a place of refuge was not even mentioned during the preparatory discussions. The emphasis was on the inclusion of an obligation to establish and pre-designate ports of refuge which would be open to ships in distress (see *The travaux préparatoires of the convention on salvage, 1989*, Antwerp, CMI, 2003, esp. 283-285, 680-681 and 701-702). An additional argument against the view that the 1989 Salvage Convention supports a general right to refuse access to ships in distress, is that the confirmation of the coastal state’s specific powers with respect to pollution threats contained in art. 9 would be totally irrelevant to refusals not based on environmental hazards but on the risk of the ship blocking the access routes to the port.

none of the quoted texts denies that such a right exists. On the contrary the general drift of these texts is to encourage the admission of ships in distress. The Bonn Agreement Counter-Pollution Manual referred to above merely denies the obligation to designate places of refuge in advance, but apparently it does not question the customary right of access.

A final objection to the theory of the absolute right of refusal is political rather than legal in nature and argues that the theory of an absolute right to refuse ships in distress leads to what can be termed a “not in my front pond syndrome”, analogous to the “not in my backyard syndrome”, with states all too easily driving ships in distress away, without having adequate regard for the interests of neighbouring states and coasts. A negative approach of this type leads to dangerous situations, incidents, and environmental disasters.

2.4. Third Theory – Balancing Interests

2.4.1. Scope and legal basis

A third view of the problem takes the line that there must always be a process of weighing the various elements against one another followed by an ad hoc decision. There is no question of an absolute right of access, nor of an absolute right of refusal, but rather one of a balance between the interests, rights, and/or risks concerned¹²⁵. When the interests or rights of the coastal state or the risks to which it is exposed are greater than those of the ship, access may be refused. This view has been applied in various recent judicial decisions (including the *Long Lin*¹²⁶ and the *Toledo*¹²⁷) and is supported by some legal writers¹²⁸. Hydeman and Berman contended that entry could be refused if the coastal state has reasonable grounds for concluding that the potential hazard to the safety of the coastal state outweighs the risk to life and property if entry is refused. The legal basis of this right of the coastal state was

¹²⁵ The literature, case law and administrative practice do not always make a clear distinction between interests, rights and risks.

¹²⁶ Raad van State (the Netherlands), 10 April 1995, m/v *Long Lin*, *Schip en schade*, 1995, 391, no. 95; see also Raad van State (the Netherlands), 10 April 1995, m/v *Long Lin*, *Schip en schade*, 1995, 394, no. 96.

¹²⁷ High Court (Admiralty) (Ireland), 7 February 1995, m/v *Toledo*, *ILRM*, 1995, 30. Barr J held: “[...] I am satisfied that the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognised practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede to any such request. Where in a particular case, such as the ‘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 were lost through refusal of shelter in the waters of the coastal state”.

¹²⁸ See i.a. Hydeman, L.M. and Berman, W.H., *o.c.*, 157 et seq.

sought in an obligation of the vessel to protect the interests of that state to the extent feasible, which would balance with the state's obligation to assist in the protection of persons and property aboard a vessel¹²⁹. A similar view was propounded by McDougal and Burke, who pointed out that coastal competence to exclude is not completely overridden by distress: "if the entry of a vessel in distress would threaten the health and safety also of the port and its populace, exclusion may still be permissible"¹³⁰. A similar weighing off of the needs of the ship and its company, and the threat it poses to the coastal state is defended by Meijers¹³¹.

In the view of the author this approach is also reflected in the demand for proportionality contained in the Intervention Convention¹³², in the IMO Guidelines on Places of Refuge¹³³ and in Article 20 of the European Traffic Monitoring Directive¹³⁴, which under the heading "Places of Refuge" provides:

"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 authorization by the competent authority. Where the Member State considers 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 in distress shall be made available upon

¹²⁹ Hydeman, L.M. and Berman, W.H., *o.c.*, 157.

¹³⁰ McDougal, M.S. and Burke, W.T., *o.c.*, 110, apparently agreed with by Nelissen, F.A., *o.c.*, 61.

¹³¹ Meijers, H., *o.c.*, 1838.

¹³² Art. V provides: "1. Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.

2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

3. In considering whether the measures are proportionate to the damage, account shall be taken of-

(a) the extent and probability of imminent damage if those measures are not taken; and
 (b) the likelihood of those measures being effective; and
 (c) the extent of the damage which may be caused by such measures".

Indeed there was little discussion between the parties to the convention about the proportionality condition, because reasonableness and proportionality are standards already imposed by existing international law (see M'Gonigle, R.M. and Zacher, M.W., *Pollution, Politics, and International Law*, Berkeley/Los Angeles/London, University of California Press, 1979, 164).

¹³³ See below, footnote 155.

¹³⁴ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5 August 2002, 10.

demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph¹³⁵.

2.4.2. *Critical Assessment*

A balanced approach is, as such, much to be preferred. The theory has the advantage that it recognizes the old right of access *and* takes into account modern environmental concerns and other relevant interests. Nonetheless, it shows a number of defects. First of all the legal basis is not at all clear. No basis can, for example, be found for the position adopted by Hydeman and Berman to the effect that the ship is required to protect, insofar possible, the interests of the coastal state. Nor does the IMO Convention on Oil Pollution Preparedness, Response and Co-operation (the OPRC Convention)¹³⁶ impose any such general obligation on ships. The only valid basis for this theory is the right arising from the necessity situation referred to above, but as we have seen this can only be invoked as the *ultimum remedium*. The mere fact that certain interests of the coastal state could be imperilled is insufficient¹³⁷. Long ago Grasso remarked with respect to the precautions applicable to ships infected with disease: “repousser tout court les navires infestés, ce n’est pas prendre

¹³⁵ Article 18 of the Directive on “Measures in the event of exceptionally bad weather” provides:

“1. Where the competent authorities designated by Member States consider, in the event of exceptionally bad weather or sea conditions, that there is a serious threat of pollution of their shipping areas or coastal zones, or of the shipping areas or coastal zones of other States, or that the safety of human life is in danger:

(a) they should, where possible, fully inform the master of a ship which is in the port area concerned, and intends to enter or leave that port, of the sea state and weather conditions and, when relevant and possible, of the danger they may present to his/her ship, the cargo, the crew and the passengers;

(b) they may take, without prejudice to the duty of assistance to ships in distress and in accordance with Article 20, any other appropriate measures, which may include a recommendation or a prohibition either for a particular ship or for ships in general to enter or leave the port in the areas affected, until it has been established that there is no longer a risk to human life and/or to the environment;

(c) they shall take appropriate measures to limit as much as possible or, if necessary, prohibit the bunkering of ships in their territorial waters.

2. The master shall inform the company of the appropriate measures or recommendations referred to under paragraph 1. These do not however prejudice the decision of the master on the basis of his/her professional judgement corresponding to the SOLAS Convention. Where the decision taken by the master of the ship is not in accordance with the measures referred to under paragraph 1, he/she shall inform the competent authorities of the reasons for his/her decision.

3. The appropriate measures or recommendations, referred to under paragraph 1, shall be based upon a sea state and weather forecast provided by a qualified meteorological information service recognised by the Member State” (emphasis added).

¹³⁶ Cited above, footnote 53. For a discussion of the Convention see i.a White, M.W.D., *Marine Pollution Laws of the Australasian Region*, Leichhardt (NSW), Federation Press, 1994, 70-72.

¹³⁷ Cf. Nehlmeyer-Günzel, I., *o.c.*, 130: “Eine solche Einführung eines Güterabwägungsprinzips hätte zur Folge, dass durch eine solche Abwägung, die ja nur subjektiv durch den handelnden Staat erfolgen kann, eine Absenkung der Wertschwelle stattfindet und das Notstandsrecht zu einem Allheilmittel für lediglich interessenbezogene Völkerrechtsverletzungen wird”.

des précautions, c'est recourir au moyen le plus violent et le plus sauvage de se dispenser d'en prendre"¹³⁸. Indeed, the approach discussed here is not entirely free of risk. In the author's opinion the risk-balancing theory offers too many opportunities for abuse. It could even be said that the arrival of an ordinary, undamaged ships could threaten the health and safety of the port and the local population: *something* can always go wrong. Hydeman and Berman acknowledge that the balancing of risks is often a delicate matter to put into practice: "For instance, exclusion might not be justified if the risk presented is only slightly greater than what the shore state would deem to be a normally acceptable risk. Illustrative of this kind of circumstance is a case of a nuclear vessel with a reliable reactor system, but with something less than entirely adequate containment. On the other hand, if the reactor has been damaged and the probability of a serious nuclear accident and damage to the shore State is high, exclusion might be reasonable. In weighing the alternatives, consideration must be given to the practicability of evacuating persons from a ship in distress. Of course, in the first instance the decision would be one for the coastal State, subject to later adjustment of claims"¹³⁹. It may be concluded from these arguments that the coastal state must always accept a certain degree of risk and that not every increase in risk gives the state the right to close its ports. Hydeman and Berman conclude that the threat to the interests of the coastal state must be "quite compelling" to justify the exclusion of a ship in distress¹⁴⁰. Indeed the exclusion of a ship in distress should be a highly unusual measure. It must be the ultimate recourse for diverting an immediate and particularly severe danger to the essential interests of the state. This follows directly from the basis of the authority of the state in this respect, namely the right to intervene in a necessity situation. One must be extremely careful when accepting the possibility of an exception. As Grasso noted in connection with a Brazilian regulation that permitted the "exceptional" refusal of ships infected with disease, the exception opens the doors to administrative whim and not infrequently leads to the invalidation of the rule itself¹⁴¹. The closing suggestion by Hydeman and Berman that it should be the authorities who take the final decision, and remedies would be only available subsequently in the form of claims for damages, of course does not comply with modern laws on the legal protection of the governed applicable in many states, and which give the citizen possibilities for action to immediately suspend the effect of an unlawful decision by the authorities.

In practice, therefore, the third approach often differs little from the second, because when the weighing off of rights, interests and risks is done by the authorities of the coastal state, the coastal state can hardly be regarded as

¹³⁸ Grasso, G., *o.c.*, 43 (also quoted in Bélanger, M., "Les actions de protection sanitaire", *o.c.*, 587). Grasso even went so far as to continue: "La première charité commence par soi-même, dit un proverbe connu, mais sacrifier les droits d'autrui à la conception de sa propre convenance, c'est la négation de toute loi morale et juridique".

¹³⁹ Hydeman, L.M. and Berman, W.H., *o.c.*, 157-158.

¹⁴⁰ Hydeman, L.M. and Berman, W.H., *o.c.*, 162.

¹⁴¹ Grasso, G., *o.c.*, 46.

being neutral in the matter. As long as there is no neutral decision-making body, there is a great temptation to allow the distressed ship to drift on. Moreover, there is a real danger that the decision maker will lack the necessary nautical expertise, be subject to political pressure, fail to give grounds for his decision and neglect to take account of regional and international interests. The third approach, therefore, is also likely to lead to further incidents and disasters.

2.5. Fourth theory – Good management on the basis of the right of access

2.5.1. Scope and legal basis

The author takes the view that a preferable approach would be based on a more sophisticated version of the third theory, entailing the addition of two components: the assumption that access exists and the principles of good decision-making.

Indeed the right of access must still be the point of departure. In effect there is widespread agreement that in technical terms the best way of preventing environmental pollution is to allow the distressed ship to enter a place of refuge¹⁴². Second there is the possibility that if states have too extensive powers to refuse ships, salvors will be discouraged. For example if the salvor is fairly sure that he will not be able to bring a leaking tanker into a place of refuge, he may well not be very interested in accepting the salvage contract. This would delay efficient salvage, with all the potential consequences this entails¹⁴³. A third aspect is that opponents of the right of access have not convincingly demonstrated that this right no longer exists. Even though it only has relative significance, it is in the author's view still part of the international legal system. In principle this right prevents the coastal state from refusing access¹⁴⁴. Finally a fourth aspect is clear from an analysis of the legal basis of the power to refuse, namely that refusal is an *ultimum remedium*, and that the state can only invoke the necessity situation subject to strict conditions¹⁴⁵. For these four reasons access must be the norm, and refusal the exception¹⁴⁶. The authorities should only be authorized to refuse a request for access when it has been shown that there are insuperable

¹⁴² The IMO Guidelines on places of refuge for ships in need of assistance state: "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" (item 1.3).

¹⁴³ Abecassis, D.W., "Some topical considerations in the event of a casualty to an oil tanker", *Lloyd's Maritime and Commercial Law Quarterly*, 1979, (449), 454.

¹⁴⁴ Nguyen, Q.D., Daillier, P. and Pellet, A., *o.c.*, 1156, no. 669.

¹⁴⁵ The view that the right of innocent passage is subordinate to the sovereignty of the coastal state and that there is a supposition in favour of the coastal state, has no foundation in law and denies that the right of innocent passage is an essential limitation on the sovereignty of the state (nonetheless see in this sense Hydeman, L.M. and Berman, W.H., *o.c.*, 175-176).

¹⁴⁶ In the *m/v Toledo* case (cited above, footnote 126) the Irish High Court (Admiralty) ruled that customary international law recognizes that foreign commercial vessels in serious distress have a *prima facie* right to the benefit of a port or anchorage of refuge in the nearest maritime state in which such facilities are available.

objections. Here the burden of proof must be borne by the authorities themselves, so that the right of every ship to access may be presumed. Indeed certain specific treaties confirm that states must take all necessary steps to help ships in distress¹⁴⁷, and this may be regarded as an expression of a general rule. Mere threat is therefore insufficient. In the first place the authority must do everything possible to facilitate the arrival of the ship in distress, using all the necessary safety measures and subject to the application of any special nautical instructions that may be imposed by the authority. The denial of access to a ship in distress simply because there is a possible danger to the coastal state is a wrongful act. Such an approach would undermine the right of access of ships in distress to an unacceptable degree¹⁴⁸. The 1981 case of the m/v Stanislaw Dubois is an interesting example. This ship was involved in a collision, leaving a large hole in the hull. The ship wished to enter the port of Rotterdam, although the water entering the hull could come into contact with drums containing carbide, which would result in an explosion. The shipping company vainly attempted to obtain an injunction ordering the municipal port authorities to grant access to the ship¹⁴⁹. The President of the Rotterdam court in summary proceedings examined whether the harbourmaster could reasonably decide in the known state of affairs that the ship had to be denied access. He observed that such refusal was possible, but must be justified in view of the important interests at stake, including those of the shipping company. “Ports”, the President rightly observed, “must make a certain effort to facilitate the repair of damaged ships, whenever this is possible. In doing so not every risk can be avoided”¹⁵⁰. Consequently there is or at least should be a requirement incumbent on coastal states to offer ships in distress a place of refuge. This would merely be the further articulation of the relevant provisions of the 1989 Salvage Convention. Moreover, it would

¹⁴⁷ See for example art. 9 of the Agreement on Waterway Transportation signed in Hanoi on 13 December 1998 by Cambodia and Vietnam, and art. 18 of the Agreement on Commercial Navigation on Lancang-Mekong River signed in Tachileik (Myanmar) on 20 April 2000 by China, Lao PDR, Myanmar and Thailand.

¹⁴⁸ Legal theory even goes so far as to remark in connection with the right of access in the event of maritime distress that the maritime distress makes the protection of the environment a matter of lesser priority and that it justifies the harming of same (Nguyen, Q.D., Daillier, P. en Pellet, A., *o.c.*, 786, no. 482). In this view maritime distress would thus have priority over environmental protection. This is merely a contemporary application of the old principle that has already been referred to above, namely that maritime distress entails immunity and justifies the infringement of the local law (including environmental law).

¹⁴⁹ President Arrondissementsrechtbank (District Court – 1st Instance in civil cases) Rotterdam, 5 April 1981, m/v Stanislaw Dubois, *Schip en schade*, 1981, 266, no. 94.

¹⁵⁰ Less self-evident was the consideration that the port authority may adopt a slightly greater margin when the ship was neither bound for the port concerned nor had it sailed from same, and that the disaster had not occurred in the immediate surroundings of the port. What the latter specification is based on is unclear. Whether the ship was normally a “customer” of the port, and where the accident occurred are irrelevant factors: the safety issues must in the author’s view be weighed purely in objective terms. Undoubtedly this is also the general thrust of the right of access in the event of maritime distress established in international law, to which no reference was apparently made in the aforementioned case.

only be the logical consequence of the existing international obligations of coastal and port states to organize services and properly equip themselves in order to be able to respond to maritime casualties and distress situations¹⁵¹. It may even be expected of the coastal state that it provides suitable supervision of the passage of casualty ships at risk and if necessary facilitate this passage by taking special technical-nautical measures¹⁵². The obligation of the coastal States to help removing the situation of distress persists even in cases where, on account of paramount coastal interests, the coastal State is unable to offer a place of refuge¹⁵³.

Furthermore it would be preferable for only a single decision-maker to have the power and ultimate responsibility for deciding on the reception of ships in distress¹⁵⁴. Moreover the decision-maker must be a neutral person, have the necessary expertise and obtain neutral expert advice, consult with port authorities, salvors, vessel traffic services, rescue services, ship repairers and pilots. He must make his decision on the basis of a specific contingency plan, and take regional and international interests into consideration (not just local interests). The latter may be based on the international legal principle of good neighbourliness (*bon voisinage*) and the principle of international solidarity. The decision-maker must also always state the reasons for his decision.

2.5.2. Critical assessment

The trouble with this approach is that it is still very much an ideal. The proposed guarantees for a correct weighing of interests have yet to be recorded in a general instrument of international law. Nonetheless the 1969 Intervention Convention does formulate similar principles relating to measures of intervention on the high seas when oil pollution is threatening¹⁵⁵. The European Traffic Monitoring Directive¹⁵⁶ and the recent IMO Guidelines

¹⁵¹ See above, item 2.2.1.

¹⁵² In 1999, the container vessel *m/v Ever Decent* was damaged after collision with the cruise liner *Norwegian Dream* 17 miles off the coast of Margate in Kent. *M/v Ever Decent* was allowed entry into the Belgian coastal port of Zeebrugge for repairs and unloading of cargo. Specific conditions were imposed, such as the disembarkation of pilots by helicopter, a tug escort, a speed limit and the obligation to report to the traffic center.

¹⁵³ Blanco-Bazan, A., *o.c.*, 3.

¹⁵⁴ Cf. *Command and Control: Report of Lord Donaldson's Review of Salvage and Intervention and Their Command and Control*, 1999, and the SOSREP structure based on same in the United Kingdom.

¹⁵⁵ Art. III of the Intervention Convention reads:

“When a coastal State is exercising the right to take measures in accordance with Article I, the following provisions shall apply-

(a) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

(b) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit;

(c) before any measure is taken, the coastal State may proceed to a consultation with independent experts, whose names shall be chosen from a list maintained by the Organization;

on Places of Refuge¹⁵⁷ also take a line similar to these suggestions and are therefore a step in the right direction. The ideal solution would be an international convention on ports of refuge and ships in distress.

2.6. Conclusions

Controversy continues to exist about the right of access to places of refuge for ships in distress. The old right of access, based on customary law, can no longer be regarded as absolute. However the absolute right to refuse ships in distress cannot be defended either. The view that the interests of the ship and the state and the risks to which they are exposed must be weighed off against one another, is defensible, but does entail a risk that the state will be inclined to refuse the ship, because it is both judge and interested party. When a ship is successively refused access by neighbouring coastal states, very dangerous situations often arise for both ship and environment. The best

(d) in cases of extreme urgency requiring measures to be taken immediately, the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing consultations already begun;

(e) a coastal State shall, before taking such measures and during their course, use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ships' crews, and to raise no obstacle thereto;

(f) measures which have been taken in application of Article I shall be notified without delay to the States and to the known physical or corporate persons concerned, as well as to the Secretary-General of the Organization".

Art. IV reads:

"1. Under the supervision of the Organization, there shall be set up and maintained the list of experts contemplated by Article III of the present Convention, and the Organization shall make necessary and appropriate regulations in connexion therewith, including the determination of the required qualification.

2. Nominations to the list may be made by Member States of the Organization and by Parties to this Convention. The experts shall be paid on the basis of services rendered by the States utilizing those services".

¹⁵⁶ See item 2.4.1 above.

¹⁵⁷ The IMO Guidelines on Places of Refuge quoted above provide i.a.:

"Decision-making process for the use of a place of refuge

3.12 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.

3.13 In the light of the outcome of the assessment provided for above, the coastal State should decide to allow or refuse admittance, coupled, where necessary, with practical requirements.

3.14 The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc."

The Guidelines also recommend i.a. to assess places of refuge in the form of contingency plans and to seek expert analysis, including a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment.

approach is to base the weighing off of interests and risks on an assumption of access and certain basic principles of due decision-making. In this way the old right to seek and obtain shelter can be reconciled with the interests of the coastal state and ships in distress can be assured of a maximum of acceptance in places of refuge.

3. Liability of port and other authorities

The question of to what extent port and other authorities are liable for incorrect decisions to grant or refuse access, was recently examined by the CMI by means of a questionnaire sent to national maritime law associations. At present there are no international arrangements in this respect. Moreover there is usually no specific national legislation either. National tort law appears to lead to highly divergent solutions. In Belgium for example, the authorities will be fully liable for a proven negligent decision that has been a contributing factor to a loss sustained by third parties¹⁵⁸ although this appears not to be the case in some other countries. The negligence may lie in a completely erroneous or all too superficial assessment of the relevant facts and the risks involved, an unreasonable refusal against the substantiated advice from neutral experts, or clear deficiencies in the coordination and communication set-up. The loss suffered may comprise the worsening of the damage to the ship, the increase of the harmful impact on the environment, greater assistance and salvage costs, and in extreme cases the loss of the ship, its cargo and the lives of the crew. Recourse actions by the shipowner against the authorities concerned are a possibility as well. International liability of states vis-à-vis neighbouring states suffering from oil pollution or the blocking of fairways to ports is not to be excluded either¹⁵⁹. The obligation on states to make an effort to provide ships in distress with a place of refuge that the author regards as essential should logically be sanctioned by internationally harmonized rules of liability.

Recently, it was suggested that officials too should be made criminally

¹⁵⁸ Cf. Van Hooydonk, E., "Overheidsaansprakelijkheid voor gebreken van de scheepvaartwegen", *A.J.T.-Dossier*, 1995-96, no. 9-10, (117), 128-129, no. 8.

¹⁵⁹ See art. 235 LOSC on responsibility and liability, reading:

"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.

2. States shall ensure that recourse is available in accordance with their legal systems 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.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds".

liable for the consequences of certain incorrect decisions¹⁶⁰. Such a provision would be analogous to the duty provided by international and national maritime law to help persons and ships in distress on the seas¹⁶¹ as well as with the national criminal law of countries such as Belgium¹⁶² that punishes the neglect of the duty to assist persons in peril. Nonetheless any additional provision of international law that makes government officials or port operators criminally liable must be very carefully weighed and may certainly not result in any counterproductive witch hunt. Only cases of manifestly reckless conduct and gross neglect of duty should fall under the application of criminal law.

If the access to ports of ships in distress is to be encouraged, it would most certainly be counter-productive to hold port authorities or their officials such as harbourmasters civilly or criminally liable for the pollution that may arise when the ship is admitted. When the port is required to admit a ship by a higher authority this would be even more pointless. In many criminal law systems an order from a higher authority is regarded as justifying the action¹⁶³.

To sum it up, it is clear that an international convention on ports of refuge

¹⁶⁰ Art. 6.1 of a proposal for a European Parliament and Council directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92, as amended by the European Parliament in first reading in January 2004) reads: "Member States shall ensure that the illegal discharge of polluting substances, the participation in, even by omission, and instigation of such discharge as well as technical manipulations of vessels to facilitate illegal discharges are regarded as criminal offences, when committed intentionally or by gross negligence". Art. 6.2 provides: "Any person (i.e. not only the shipowner but also the owner of the cargo, the classification society, the competent (port) authority or any other person involved), who has been found by a court of law responsible within the meaning of paragraph 1, shall be subject to sanctions, including, where appropriate, criminal sanctions".

¹⁶¹ See above, footnote 47; see among others le Hardÿ de Beaulieu, L., *Le droit belge de la mer*, Namur, Faculté de droit, 1990, 92-93, nos. 97-98.

¹⁶² Art. 422*bis* of the Belgian Criminal Code reads: "Sera puni d'un emprisonnement de huit jours à un an et d'une amende de cinquante à cinq cents francs ou d'une de ces peines seulement, celui qui s'abstient de venir en aide ou de procurer une aide à une personne exposée à un péril grave, soit qu'il ait constaté par lui-même la situation de cette personne, soit que cette situation lui soit décrite par ceux qui sollicitent son intervention.

Le délit requiert que l'absténant pouvait intervenir sans danger sérieux pour lui-même ou pour autrui. Lorsqu'il n'a pas constaté personnellement le péril auquel se trouvait exposée la personne à assister, l'absténant ne pourra être puni lorsque les circonstances dans lesquelles il a été invité à intervenir pouvaient lui faire croire au manque de sérieux de l'appel ou à l'existence de risques.

La peine prévue à l'alinéa 1er est portée à deux ans lorsque la personne exposée à un péril grave est mineure d'âge".

Art. 422*ter* reads: "Sera puni des peines prévues à l'article précédent celui qui, le pouvant sans danger sérieux pour lui-même ou pour autrui, refuse ou néglige de porter à une personne en peril le secours dont il est légalement requis; celui qui le pouvant, refuse ou néglige de faire les travaux, le service, ou de prêter le secours dont il aura été requis dans les circonstances d'accidents, tumultes, *nauffrage*, inondation, incendie ou autres calamités, ainsi que dans les cas de brigandages, pillages, flagrant délit, clameur publique ou d'exécution judiciaire" (author's italics).

¹⁶³ For Belgium, see art. 70 of the Criminal Code.

could articulate clear principles about liability questions of this kind as well.

4. Compensation for port and other authorities

If ships in distress are to gain easier access to places of refuge, port authorities and all the other authorities concerned must be able to count on receiving specific, reasonable and justifiable compensation. Here it is a matter of liability arrangements, financial securities and insurance considerations.

First of all the authority will have to take account of the liability conventions (LLMC, CLC, Fund, HNS, Bunker). Several of these instruments are not yet (or at least in their most recent versions) in effect. Moreover there is the question of whether all the potential damage that could be sustained by ports and other authorities could be compensated under these conventions. Given the restricted scope of application of the international conventions and the liability limits, there is a risk that certain losses will be compensated only partly or not at all. This question needs to be resolved by further legal research. All too often the authority will have to pursue extended and costly legal proceedings. Liability rules are a necessary element of satisfactory legal arrangements for places of refuge, but as such do not offer sufficient incentive to encourage ports to admit ships in distress¹⁶⁴.

The policy adopted by certain states of making admission contingent on (often extremely high) financial securities must also be questioned. At first sight such a policy might appear justifiable. However, the problem is that there is often no legal basis for demanding such securities in the national law of the state concerned¹⁶⁵. In some cases the policy of demanding financial securities is in formal conflict with right to the free use of the channel

¹⁶⁴ Mention should be made of the proposed European Directive on environmental liability with regard to the prevention and remedying of environmental damage, which is going through the co-decision procedure (see Common Position of the Council (EC) No 58/2003 of 18 September 2003, OJ C 277 E, 18 November 2003, 10).

¹⁶⁵ The right to demand a bond was provided for in the first draft of the European Directive on Port State Control, but was left out in the final version. As for the United States reference may be made to the arrangements regarding Certificates of Financial Responsibility set out in the Oil Pollution Act. The Belgian Marine Environment Protection Act, 1999 contains provisions on financial securities to be demanded by federal authorities but it is unclear to what extent these sums would be available to local port authorities. The relevant provisions of Chapter 5, Section 2 of the Act read as follows:

“Section 2. - Les accidents de navigation, la prévention de la pollution et l'intervention de l'autorité ayant compétence en mer

Art. 21. § 1^{er}. Le capitaine d'un navire qui est impliqué dans un accident de navigation dans les espaces marins doit, dans le plus bref délai, en informer l'instance désignée par le Roi, conformément aux modalités prévues en vertu de l'article 11 de la loi du 6 avril 1995 concernant la prévention de la pollution de la mer par des navires.

§ 2. Le capitaine est tenu de fournir sur le champ toutes les informations concernant l'accident et, sur demande, toutes les informations concernant les mesures en rapport avec l'accident qui ont déjà été prises par le navire.

§ 3. L'obligation d'information ne s'applique pas aux navires de guerre, aux navires utilisés comme navires auxiliaires et aux autres navires appartenant à un Etat ou exploité par cet Etat, qui

Eric van Hooydonk, The Obligation to Offer a Place of Refuge to a Ship in Distress

les utilise exclusivement à des fins non commerciales. Pour ces navires, la réglementation interne reste d'application.

Art. 22. § 1^{er}. Si l'autorité ayant compétence en mer est d'avis, lors d'un accident de navigation, que les mesures prises par le capitaine ou le propriétaire du navire n'évitent pas, ne réduisent que de façon insuffisante ou n'arrêtent pas la pollution ou le risque de pollution, elle peut donner des instructions au capitaine, au propriétaire du navire ou à ceux qui prêtent assistance, afin de prévenir, de réduire ou d'arrêter la pollution ou le risque de pollution causé par l'accident.

§ 2. Les instructions données au capitaine ou propriétaire du navire peuvent avoir trait :

(i) à la présence du navire et des biens qui sont à son bord à un endroit déterminé ou dans une zone déterminée;

(ii) au déplacement du navire et des biens qui sont à son bord;

(iii) à la prestation d'assistance au navire.

§ 3. Les instructions à ceux qui prêtent assistance au navire ne peuvent impliquer l'interdiction de la mise en oeuvre de l'assistance convenue ou de la continuation de l'assistance entamée.

Art. 23. § 1^{er}. Si les instructions données en exécution de l'article 22 de la présente loi ne réussissent pas à prévenir, à réduire à un degré suffisant ou à arrêter la pollution causée par l'accident, l'autorité peut prendre d'office toute mesure nécessaire afin de prévenir, de réduire ou d'arrêter les conséquences dommageables de l'accident.

Ces mesures peuvent notamment avoir pour objet :

(i) de faire une enquête sur la situation à bord du navire et sur la nature et l'état des biens qui se trouvent à son bord;

(ii) *de ramener le navire dans un port, si par cette mesure les conséquences dommageables peuvent être mieux prévenues, réduites ou arrêtées.*

§ 2. Les mesures doivent être proportionnelles aux conséquences dommageables ou potentiellement dommageables de l'accident de navigation et ne peuvent excéder ce qui est raisonnablement nécessaire pour éviter, réduire ou arrêter ces conséquences dommageables.

Art. 24. § 1^{er}. *L'autorité peut exiger que le propriétaire d'un navire, qui est impliqué dans un accident de navigation comportant des risques de pollution des espaces marins, verse un cautionnement à la Caisse de Dépôts et Consignations, à concurrence du maximum des limites de responsabilité éventuelles, conformément aux conventions internationales et à la loi belge.*

§ 2. *La consignation de cette somme peut, sans occasionner de frais à l'Etat, être remplacée par la constitution d'une garantie bancaire accordée par une banque établie en Belgique ou d'une garantie signée par un « Protection and Indemnity Club » et déclarée recevable par l'autorité.*

§ 3. *L'autorité peut retenir le navire en cas de refus de cautionnement ou de constitution d'une garantie bancaire.*

§ 4. *Si le navire a coulé, le tribunal compétent peut être requis de saisir d'autres navires du propriétaire dans les ports belges pour contraindre au cautionnement ou à la constitution de la garantie bancaire jusqu'à ce qu'il soit satisfait au cautionnement ou à la garantie" (emphasis added).*

In the absence of an express legal foundation, the authorities in countries such as Belgium and the Netherlands apparently may not invoke private law to demand a financial security from incoming ships in distress. An extra-contractual demand by the public authority based on tort law will usually encounter difficulties by reason of the absence of any fault on the part of the ship and in addition the lack of causal relationship. The latter problem also arises in connection with recovery of costs incurred on the basis of *negotiorum gestio* or unjustified enrichment. In the *m/v Rize K* ruling, which concerned a claim by the municipality of Flushing for the repayment of costs of fighting a fire on board a ship lying in the port, the Hoge Raad (Supreme Court) determined that the Dutch Brandweerwet (Firefighting Act) contained no public law provisions for the recovery of costs. Examination of the history of the law showed that such recourse was contrary to the intentions of the legislature. Once the public law recovery of the costs proved to be excluded for reasons of public policy, the recovery of the costs via the private law route would represent an unacceptable transgression of the public law arrangements. Consequently the municipality could not recover the firefighting costs (*Hoge Raad*, 11 December 1992, *m/v Rize K*, *Schip en schade*, 1993, 131, no. 35). The Arrondissementsrechtbank (1st Instance for Civil Cases) at Rotterdam ruled that the mounting of a watch on a sunken ship by a state patrol boat fell under the public, unilaterally assumed (core) task of the state regarding the administration of the shipping lanes and the assurance of the safe and

Places of Refuge

established by treaty (territorial sea¹⁶⁶ or an international river or canal¹⁶⁷). Similarly bond requirements undermine the prohibition on making the passage of the territorial sea dependent on authorization¹⁶⁸. The right of access of ships in distress as well as the exemption of such ships from levies and taxes (both established by customary law)¹⁶⁹ and above all the right to a limitation of the ship owner's liability¹⁷⁰ are often overlooked as well when a policy that seeks financial securities is adopted. Over seventy years ago the *Institut de droit international* wanted states to seek only the reimbursement of the effectively incurred costs from ships in distress¹⁷¹. The practice of seeking bonds also diminishes the status of the compensation system set out in the CLC Convention and the Fund Convention, which only allows the authorities to seek the repayment of preventive measures and clean-up costs within certain limits¹⁷². By seeking a bond, the authority threatens to take possession of money that it would not normally have a right to after pursuing normal

smooth handling of waterborne traffic, comparable to the services provided by the police in the event of traffic accidents on the roads. For this reason there is no further room in this field for entering into private law contracts and private law based cost recovery (Arrondissementsrechtbank Rotterdam, 7 December 1995, number in the rolls 2194/94, Staat der Nederlanden t./ Van der Endt-Louwerse B.V. and Gebr. Sluyter B.V., m/v Eemshorn, unpublished). On appeal the Hoge Raad did grant the state the right to recover the costs of supervision and surveillance on the basis of private law (Hoge Raad, 15 January 1999, m/v Eemshorn, *Nederlandse Jurisprudentie*, 1999, 1673, no. 306, with note by ARB, *AB rechtspraak bestuursrecht*, 2000, 1003, no. 196, with note by ThGD).

¹⁶⁶ See art. 26 LOSC and also Van Hooydonk, E., "Some remarks", *o.c.*, 132-134.

¹⁶⁷ With respect to the Western Scheldt see Van Hooydonk, E., "De geoorlooftheid van de eenzijdige Nederlandse eis tot borgstelling voor bijzondere transporten over de Schelde", note to an injunction of the Arrondissementsrechtbank at The Hague (summary proceedings), 6 June 1994, *Algemeen Juridisch Tijdschrift*, 1995-96, 63-67.

¹⁶⁸ See above, item 2.3.2.

¹⁶⁹ See Van Hooydonk, E., "Some remarks", *o.c.*, 133-134; compare however Malanczuk, P., *Akehurst's, o.c.*, 176: "Ships in distress possess some degree of immunity; for instance, the coastal state cannot profit from their distress by imposing harbour duties and similar taxes which exceed the cost of services rendered".

¹⁷⁰ Art. 24, § 1 of the Belgian Marine Environment Protection Act, 1999 (cited above, footnote 163) limits the amount of bonds to the maximum of the liability limits as established under international conventions and Belgian municipal law.

¹⁷¹ See the 1928 resolution, cited above, footnote 42.

¹⁷² See the definition of (pollution) damage in art. I.6 CLC Convention, art. I.2 Fund Convention, art. I.6 HNS Convention and art. 1.9 Bunker Convention. For detailed discussions, see i.a. Carette, A., *Herstel van en vergoeding voor aantasting aan niet-toegeëigende milieubestanddelen*, Antwerp/Groningen, Intersentia, 1997, 242 et seq.; de la Rue, C. and Anderson, Ch.B., *Shipping and the Environment*, London, Lloyd's of London Press, 1998, 75 et seq.; Vanheule, B., "Oil Pollution: The International Liability and Compensation Regime", *European Transport Law*, 2003, 547-576; Wu, C., *La pollution du fait du transport maritime des hydrocarbures*, Monaco, Pedone, 1994, 529 p.; for a detailed description of the refundable costs of public authorities, see i.a. International Oil Pollution Compensation Fund 1992, *Claims Manual*, London, November 2002, 31 p.; CMI's Working Group on Environmental Damage Assessment, "CMI Colloquium on Environmental Damage Assessment: Discussion Paper", in de la Rue, C. (Ed.), *Liability for damage to the marine environment*, London, Lloyd's of London Press / CMI, 1993, (249), 252-253; Comité Maritime International, *Guidelines on Oil Pollution Damage approved by the XXXVth Conference of the Comité Maritime International*, Sydney, 8th October 1994, 8 p. (esp. art. 10).

legal proceedings¹⁷³. It takes the law into its own hands and avoids having its claims assessed by an independent judicial authority. To the extent that the intervention of the authority can be regarded as a form of assistance to a ship in distress, the state also avoids being excluded from the salvage reward when it acts under a pre-existing legal obligation or when it does not obtain a useful result. There is also the risk that the authority will seek compensation for those measures that it obliges the ship to accept but which in reality are unnecessary¹⁷⁴. In practice states often do not even justify or itemize the requested sum¹⁷⁵, or turn out to be prepared after details have been requested or objections have been formulated to enter into negotiations about the requested sum, which gives the impression of arbitrariness and unequal treatment. A systematic policy of seeking bonds in every casualty, whereby a failure to provide such is unfailingly sanctioned with exclusion, goes beyond the powers that a coastal state can claim on the basis of the right of necessity under international law and thus by way of *ultimum remedium* only. Nor is there is any international uniformity in the respect of financial securities. Discussions about the amount of the security sometimes lead to a loss of valuable time and the cancellation of salvage and repair contracts. Ultimately a policy requiring the provision of a security could indeed have an inverse effect and itself lead to incidents and shipping disasters. The conclusion must be that such policies are not only legally controversial, but are also inherently dangerous. Such policies must be implemented with the greatest of care and an international legal framework is desirable. At the very least there should be a provision that a policy of seeking bonds must be based on clear provisions of municipal law, that the sums should be determined in accordance with transparent and objective criteria, and that furthermore no additional guarantees can be sought for those services to which general tariffs already apply (such as VTS or pilotage services).

On the other hand, the objective should be to provide additional encouragement for admitting ships in distress. It is not unthinkable that ports could be legally regarded as salvors. In essence a port is a vital link in every salvage operation. If there is no port to bring a ship in distress to, a salvor is not able to accomplish his task. Although the port is not the subcontractor of the salvage company in legal terms, it is in reality precisely that. Seen from this point of view, it appears to be justifiable to grant a port which has admitted a ship in distress – either voluntarily or under constraint – a salvage

¹⁷³ Thus preventive measures are only reimbursable if they have been reasonably incurred (see e.g. art. I.7 CLC Convention; further i.a. Jacobsson, M., “The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution Compensation Fund”, in de la Rue, C. (Ed.), *o.c.*, (39), 49).

¹⁷⁴ In France it was established that when the state imposed the use of salvage services (for example the use of deep-sea tugs working under contract from the state) that the shipping company deems unnecessary, the latter may refuse to pay for these imposed services (Douay, C., “Le régime juridique” *o.c.*, 213).

¹⁷⁵ Which the Dutch Hoge Raad (Supreme Court) ruled was unlawful in the aforementioned Long Lin case (judgment of 10 April 1995, cited above, footnote 126).

reward, or at least part of the normal salvage fee awarded to the salvors. This would encourage ports to make a more positive assessment of the requests of ships in distress or their salvors to obtain a place of refuge, and this in consequence could help reduce accidents and environmental catastrophes. Ports would thus not just have a right to receive compensation for the loss sustained on the basis of existing maritime law, but in addition could receive an attractive and relatively large fee. The relevant rules could be developed on the basis of existing principles of salvage law. The 1989 Salvage Convention leaves the matter of the participation of the authorities in salvage operations to be settled by national law, although in the author's view international uniformity would be preferable¹⁷⁶. An obvious example of a similar state of affairs are the tugs and other service providers who have a right to a salvage reward when they perform services that go beyond their normal duties¹⁷⁷. A port that receives a ship in distress does indeed act on the basis of an old rule of international law, but nonetheless supplies a service that goes beyond the normal routine of the daily shipping traffic using the port.

These advantages are apparently offset by a number of disadvantages. First of all the award of a salvage fee would to some extent run counter to the customary right to put in at a port of refuge free of charge¹⁷⁸. However this objection could be resolved in a convention on places of refuge, which would be able to codify and modernize international customary law. A second objection might be that authorities that have performed their statutory duties often have no right to a salvage fee under current salvage laws¹⁷⁹. A specific treaty provision could resolve this aspect as well. A third objection is that port

¹⁷⁶ Art. 5 provides under the heading "Salvage operations controlled by public authorities": "1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated". It may be noted that not all port authorities can be regarded as falling under the designation "public authorities" in the meaning of this provision. Private port operators, like those commonly found in the UK and private terminal operators do not qualify.

¹⁷⁷ Cf. art. 4 Salvage Convention 1910 and art. 17 Salvage Convention 1989.

¹⁷⁸ See above, item 2.2.

¹⁷⁹ Pursuant to the 1967 Protocol, the 1910 Salvage Convention also applies to assistance or salvage services rendered by or to a ship of war or any other ship owned, operated or chartered by a state or public authority; compare arts. 4 and 5 of the 1989 Salvage Convention. Some Belgian authors have argued that public vessels may claim salvage rewards and fees; the examples they have given include the (formerly) state-owned ferries on the Ostend-Dover route and the tugs belonging to the City of Antwerp (see De Smet, R., *Droit maritime et droit fluvial belges*, II, Brussels, Larcier, 1971, 635-636, no. 530; Smeesters, C. and Winkelmolen, G., *Droit Maritime et Droit Fluvial*, III, Brussels, Larcier, 1938, 427, no. 1232). According to J.P. Vanhooff, however, the ships of the navy and of the official rescue services, and the port authorities do not act "voluntarily" and for this reason they have no right to a salvage reward (Vanhooff, J.P.,

authorities have no business looking out for ways to collect salvage rewards. This is an unjustified criticism, as the purpose of granting an equitable salvage reward is of course not to encourage ports to view the attraction of ships in distress as a commercial venture. Rather the objective is to provide a reasonable incentive so that, should the case arise, the port will be more prepared to lend its cooperation. The granting of a salvage reward to the port is indeed yet another reason for leaving the final decision on the admission of ships to a neutral authority superior to the port which has no entitlement to a salvage reward. This would avoid any commercial intentions on the part of the decision-maker.

5. Towards an international convention on places of refuge and ships in distress?

The question of whether it is appropriate to put in place an international regime for ships in distress is certainly not new. As indicated above the subject was raised during the preparation of the 1923 Convention on the International Regime of Maritime Ports. In 1980 the matter was again raised within the framework of the Bonn Agreement, while in 1989 the discussion gave rise to the half-hearted arrangements of the Salvage Convention, which merely encourage authorities and salvors to cooperate but which leave the public law aspects of the problem untouched¹⁸⁰. The European legislature established provisions dealing with part of the problem in the Traffic Monitoring Directive, and the IMO recently adopted Guidelines on Places of Refuge. The question of whether an additional international legal instrument is required is now under discussion in the CMI.

In the opinion of this author, an international convention on places of refuge and ships in distress is both essential and attainable¹⁸¹. A convention of this sort would among other things set out principles regarding the right of

Gebundelde werken. Maritiem recht en maritieme verzekeringen, Antwerp, J.P. Vanhooft, 1986, 94). Likewise in countries such as the Netherlands (see i.a. Cleton, R., *Hoofdlijnen van het vervoerrecht*, Zwolle, W.E.J. Tjeenk Willink, 1994, 266), England (Brice, G., *Maritime Law of Salvage*, London, Stevens & Son, 1983, 15, nr. 29; Hodges, S. and Hill, C., *Principles of Maritime Law*, London, Lloyd's of London Press, 2001, 192-195; Rose, F.D., *Kennedy and Rose on Salvage*, London, Sweet & Maxwell, 2002, 327-330, nos. 688-693), the United States (Schoenbaum, T.J., *Admiralty and Maritime Law*, St. Paul (Minn.), 1987, 506-507, § 15-3) and Germany (Puttfarken, H.-J., *Seehandelsrecht*, Heidelberg, Recht und Wirtschaft, 1997, 313, no. 733) it is a requirement of principle that the assistance is offered voluntarily, i.e. without any prior contractual or legal obligation. Long ago a claim for a salvage reward entered by the City of Antwerp for fighting a shipboard fire with its tugs was rejected because firefighting is an obligation incumbent on the City and moreover it was "gratuite de sa nature" (Commercial Court Antwerp, 30 December 1904, *Pand.Pér.*, 1904, 972, no. 1495, *Jur.Anv.*, 1905, I, 103, *R.I.D.M.*, XXI, 125, *J.T.*, 1905, 154; *contra* Commercial Court Antwerp, 23 september 1909, *Jur.Anv.*, 1909, I, 63). This solution is very similar to that chosen by the Dutch Hoge Raad in the circumstantially comparable *Rize K* case (see above, footnote 165).

¹⁸⁰ See above, item 2.3.2.

¹⁸¹ It could even be said that the drafting of such a convention is at least partly an obligation: art. 211.1 LOSC obliges states to establish international rules and standards to prevent, reduce and control pollution from vessels, and art. 211.7 adds: "The international rules

access, decision-making methods, the civil and criminal liability of authorities, the compensation of losses accruing to ports, the allocation of salvage rewards and requests for financial securities¹⁸². At present the political climate is in favour of establishing such regulations as European public opinion has been mobilized in the wake of the recent shipping disasters. Mere Guidelines and contingency plans are in the author's view inadequate. They lack mandatory force and all too often people in the field are even unaware of these soft law provisions. Anyway, while such non-binding rules may in theory be useful to guide operational decision-making, they are quite unsuitable for regulating questions of liability and compensation. The latter aspects must be regulated on a global basis, as maritime law should by preference be harmonized throughout the world. The authority to make decisions about admitting ships is by contrast better regulated on a regional basis, for example by continent, by maritime basin, or coastal strip, as this is the scale on which the interests, dangers and risks must be assessed. Nevertheless, the latter principle itself could also be taken up in an international convention.

The traditional reluctance of national states to curtail their sovereignty in matters of this kind could be overcome by granting certain benefits, including coherent provisions for compensation and salvage rewards for ports. An international convention on places of refuge could indeed lead to a win-win situation for all concerned. Ship owners, P & I Clubs, salvors and ship repairers would gain from the explicit confirmation of the right of access as a basic point of departure, the formulation of guarantees for good decision-making by the authorities, and clear and uniform rules regarding government liability. The advantages for coastal states would include legal certainty regarding their own liability and that of ship owners, in addition to clarity about the organization of decision-making, which would alleviate local political influences and political responsibility, and a reduction of the risk of environmental disasters as a result of the improvement of the legal framework. Port authorities would also benefit from a convention that clearly assigns decision-making authority to a higher national or (if desirable) international authority, so that their own responsibility would more clearly demarcated. More legal certainty will also reduce the risks for ports and ultimately the convention would provide ports with a guaranteed right to

and standards referred to in this article should include *inter alia* those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges". It may therefore be concluded that LOSC assumes that international regulations regarding shipping accidents must be established. In any case others have already argued the case for the establishment of a convention on places of refuge (see i.a. Abecassis, D.W., *o.c.*, 454; Gaskell, N.J.J., *o.c.*, 20-21; Kasoulides, G.C., *o.c.*, 195). Recently, the European Parliament called on the European Commission and on Member States to make their best efforts to reach an agreement within the IMO on an international public law convention on places of refuge (see above, footnote 5).

¹⁸² The IUMI too recently argued for a convention on places of refuge (see further Browne, B., *o.c.*, 14 et seq.).

compensation as well as a salvage reward on top. As for the environmental movement it could move a step closer to the realization of the “nunca mais” ideal that it has pursued ever since Prestige. The enormous impact of such disasters should in itself be considered to constitute a “compelling need” which is a precondition to start work on a new maritime law convention¹⁸³.

6. Conclusions

The legal arrangements governing places of refuge and ships in distress have been much improved by the adoption of the European Traffic Monitoring Directive and the IMO Guidelines on Places of Refuge. Nonetheless numerous defects are still evident. At present there is still no entirely unambiguous reply to the question of whether ships in distress have the right to enter a place of refuge. The liability rules applicable to coastal states and ports are uncertain and lack any international uniformity. Ports have no reasonable incentive to admit ships in distress. The matter is dominated by legal uncertainty and this increases the risk of disasters occurring with “maritime lepers”. In view of the widespread public interest in the subject, the author considers that an attempt should be made to arrive at an international convention that does justice to the concerns of all interested parties and encourages them to take a more positive view of new cases of ships requiring assistance. It would be unforgivable if the endeavour to arrive at an effective convention on places of refuges and ships in distress were to be delayed and that in the meantime yet another tanker were to break in two.

Antwerp, 14 February 2004

¹⁸³ See P. Griggs, “Obstacles to uniformity of maritime law. The Nicholas J. Healy lecture”, *CMI Yearbook 2002*, (Antwerp, 2003), (158), 164-166.