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

Ports of refuge for ships in distress: not in my front pond?

When in 1999 a "Lloyd Special Report"[1] and speakers at an international maritime insurance congress held in Antwerp[2] in the same year called for greater attention to be given to the legal arrangements governing ships in distress, nobody expected that this particular problem would rise so quickly to the top of the international maritime agenda. 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 the "Vicky" off the Belgian coast (2003), also attracted the attention of the IMO[3], the CMI[4], the Bonn Agreement for cooperation in dealing with pollution of the North Sea[5], 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 short contribution is the sudden change of tempo that the subject of ports of refuge has experienced in 2003. The Belgian and Flemish authorities recently designated a number of Ports of Refuge, and the CMI has established an "International Sub-Committee on Places of Refuge"[6]. Furthermore the European Parliament has asked the European Commission to formulate proposals for liability and compensation arrangements by February 2004[7]. In December 2003 the IMO approved the IMO "Guidelines on places of refuge for ships in need of assistance"[8] and an international workshop on ports of refuge was organized at the University of Antwerp[9]. 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 2004[10].

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

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.

A PDF-version of this article with a complete critical apparatus of 45 footnotes can be obtained on simple request by sending an e-mail to: eric.vanhooydonk@skynet.be

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.

First theory – the absolute right of access

According to this first theory ships in distress always have the right to enter any port 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 law, including the most recent[11]. 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 arrangements.

> **"The right for ships in distress to enter any port of refuge whatsoever regardless of the cause of the distress is an old rule of international customary law, which is defended in virtually all manuals of international law, including the most recent."**

This theory is confirmed by various international[12], European[13] and national legal rulings as well as by the texts of various conventions. During the preparatory work on the Convention on the International Regime of Maritime Ports[14] 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 itself. The French version of the Geneva Convention on the Territorial Sea and the Contiguous Zone recognizes the right to "relâche forcée", i.e. calling at a port of refuge[15]. International treaties concerning rivers, such as that on the Scheldt[16], expressly provide that the right to interrupt the voyage is inherent in the freedom of navigation. The Institute of International Law has confirmed the right of access to ports of refuge in resolutions dating from 1898[17], 1928[18] and 1957[19]. Finally there is a clear analogy with the International Health Regulations[20] and the duty to render assistance required by maritime law[21].

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 this suggests. Even so the theory does have its defects. First of all it does not 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.

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 refuge.

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Second Theory – the absolute right of refusal

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 whatsoever is supported only by a very small minority of international law specialists[22]. They argue first of all that the state has sovereignty over its territorial and inland waters and that this sovereignty is not restricted by any express treaty provision regarding an alleged right of access. Second, reference is made to the basic right of self-protection of states under international law. Third, it can be argued a fortiori that if a coastal state is allowed to take action 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. 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. Finally the right to refuse ships in distress is said to be recognized in the London Salvage Convention 1989[23], the European Directives on the Port State Control[24] and Traffic Monitoring[25] and the Bonn Agreement Counter Pollution Manual[26].

The above arguments appear to be more convincing than they really are. This theory ignores the virtually unanimous legal theory regarding international customary law and the various treaties that, as indicated above, do in fact confirm the right of access. Ships in distress even have a right to innocent passage through territorial waters for as long as they do not become a wreck[27]. 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 rule[28]. 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 right. Recent state practice does in fact include various examples of the reaffirmation of the right of access[29]. 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 themselves and that ships are traditionally exempt from levies and taxes. The reference to international and EU law provisions that allegedly deny a right of access appears upon closer examination not to be particularly convincing: none of the quoted texts denies that such a right exists.

Another objection 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.

Third Theory – balancing interests

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 concerned[30]. 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"[31] and the "Toledo"[32]) and is supported by some legal writers[33]. In the view of the author this approach is also reflected by Article 20 of the European Monitoring Directive, which under the heading "Places of Refuge" provides among other things: "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 authorisation by the competent authority".

> **"The balanced approach has the advantage that it recognizes the old right of access and takes into account modern environmental concerns and other relevant interests. Nonetheless it is not entirely free of risk and is likely to lead to further incidents and disasters."**

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 this approach is not entirely free of risk. In practice 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 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.

Fourth theory – good management on the basis of the right of access

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 refuge[34]. For this reason access must be the norm, and refusal the exception. The authorities should only be authorized to refuse a request for access when it has been shown that there are insuperable 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 distress[35], and this may be regarded as an expression of a general rule.

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.

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). He must also always state the reasons for his decision.

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 threatening[36]. The European Traffic Monitoring Directive[37] and the recent IMO Guidelines on Places of Refuge[38] 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.

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 parties, although this appears not to be the case in some other countries.

Recently, it was suggested that officials too should be made criminally liable for the consequences of certain incorrect decisions. 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 seas[39] as well as with the national criminal law of countries such as Belgium[40] 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 the criminal law.

"If the access to ports of ships in distress is to be encouraged, it would most certainly be counter-productive to hold officials such as harbourmasters criminally liable for the pollution that may arise when the ship is admitted."

If the access to ports of ships in distress is to be encouraged, it would most certainly be counter-productive to hold officials such as harbourmasters 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 action[41].

To sum it up, it is clear that an international convention on ports of refuge could articulate clear principles about liability questions of this kind as well.

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. 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 distress.

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 concerned. The right of access, the exemption from levies and taxes established by customary law and above all the right to a limitation of the ship owner's liability is often overlooked when a policy that seeks financial securities is adopted. Nor is there is any international uniformity in this respect. 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.

In the author's view, 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 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 preferable[42].

"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."

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 charge[43]. 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 laws[44]. A specific treaty provision could resolve this aspect as well. A third objection is that port 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 and which has no entitlement to a salvage reward; this would avoid any commercial intentions on the part of the decision-maker.

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 untouched[45]. 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.

"An international convention on places of refuge and ships in distress is both essential and attainable."

In the opinion of this author, an international convention on places of refuge and ships in distress is both essential and attainable. A convention of this sort would among other things set out principles regarding the right of 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 securities. 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. The latter principle 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 liability, 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 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 maís" ideal that it has pursued ever since Prestige.

The theory of an absolute right to refuse ships in distress can lead to a "not in my front pond syndrome". © PHOTO ISU

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 homogeneity. 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 parties concerned 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 meanwhile yet another tanker were to crack in two.

"An international convention on places of refuge could indeed lead to a win-win situation for all concerned."

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1 Van Hooydonk, E., "Casualty ships, vessels in distress and maritime lepers", *Lloyd Special Report*, November 1999, 21-25.

2 Van Hooydonk, E., "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.

3 See *http://www.imo.org/Newsroom/mainframe.asp?topic_id=72* (consulted on 15 december 2003).

4 See *CMI Yearbook 2002*, Antwerp, 2003, 117-146.

5 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 of 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).

6 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.

7 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".

8 Resolution A.949(23).

9 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.

10 See in connection with ports of refuge and ships in distress i.a., apart from the contribution quoted in fn 2, Boisson, Ph., *Politiques et droit de la sécurité maritime*, Paris, Bureau Veritas, 1998, 197 e.v., nrs. 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; Hetherington, S., "'Prestige' Can the Law Assist ?" *http://www.comitemaritime.org/future/futuridx.html* (consulted on 15 December 2003), Janbon, L., "Les lieux de refuge", D.M.F., 2003, 157-167; Kasoulides, G.C., "Vessels in distress. 'Safe havens' for crippled tankers", *Marine Policy*, 1987, 184-195; Maes, F., "De Belgische wet ter bescherming van het mariene milieu (1999) en zeeverontreiniging", te verschijnen in Van Hooydonk, E. (ed.), *Zeeverontreiniging. Preventie, bestrijding en aansprakelijkheid*, Antwerpen/Apeldoorn, Maklu, 2003, punt 7.2.4; Oya Özçayir, Z., "Ports of refuge", *JIML*, 2003, 486-495; Rézenthel, R., "L'accès aux ports des navires en détresse", D.M.F., 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 15 December 2003); Timagenis, G.J., "Places of Refuge as a Legislative Problem", *http://www.comitemaritime.org/future/futuridx.html* (consulted on 15 December 2003).

11 See for example Alland, *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; 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; Hiller, T., *Principles of Public International Law*, London/Sydney, Cavendish, 1999, 191; Ipsen, K., *Völkerrecht*, München, 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 Quoc Dinh, Daillier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002, 1156, no. 669.

12 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.

13 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 Tesauro emphatically stresses the right of access and immunity provided by international law.

14 Gidel, G., *Le droit international public de la mer*, II, Vaduz/Parijs, Topos Verlag/Librairie Edouard Duchemin, 1981, 51. During the preparation of the Convention the Belgian representative Stiévenard 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).

15 Art. 14.3.

16 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 réglement" (*Moniteur belge*, 21 June 1839).

17 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".

18 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".

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

20 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".

21 See i.a. Art. 8 Collision Convention 1910, Art. 11 Salvage Convention 1910, Art. 12 Convention on the High Seas 1958, Art. 98 UNCLOS, 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.

22 See in this respect Somers, E., *Inleiding tot het internationaal zeerecht*, Antwerp, Kluwer, 1997, 35, no. 26.

23 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".

24 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).

25 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.

26 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".

27 See Van Hooydonk, E., "Some remarks", o.c., 121-123.

28 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.

29 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 15 December 2003). 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. Recent national legislation in the U.K., Denmark and Greece likewise contains confirmations or applications of the right of access.

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

31 Raad van State (the Netherlands), 10 April 1995, mv Long Lin, *Schip en schade*, 1995, 391, no. 95.

32 High Court (Admiralty) (Ireland), 7 February 1995, mv Toledo, *ILRM*, 1995, 30.

33 See i.a. Hydeman, L.M. and Berman, W.H., *International Control of Nuclear Maritime Activities*, Michigan, University of Michigan/Ann Arbor, 1960, 157 et seq.

34 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).

35 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.

36 See Art. III and IV of the 1969 Intervention Convention.

37 See item 2.4 above.

38 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."

39 See above, footnote 21.

40 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'abstenant 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'abstenant 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, *naufrage*, inondation, incendie ou autres calamités, ainsi que dans les cas de brigandages, pillages, flagrant délit, clameur publique ou d'exécution judiciaire" (author's italics).

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

42 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.

43 See above, item 2.2.

44 See i.a. Rose, F.D., *Kennedy and Rose on Salvage*, London, Sweet & Maxwell, 2002, 327-330, nos. 688-693.

45 Art. 11 of the Convention 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".