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## A study on the legal problem of places of refuge from the view of marine environmental protection

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**WORLD MARITIME UNIVERSITY**  
**Dalian, China**

**A Study on the Legal Problem of Places of Refuge  
from the View of Marine Environmental Protection**

By  
**LI MAOFENG**  
China

A research paper submitted to the World Maritime University in partial  
fulfillment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

**(MARITIME SAFETY AND ENVIRONMENT MANAGEMENT)**

**2006**

## **Declaration**

I certify that all the material in this research paper that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this research paper reflect my own personal views, and are not necessarily endorsed by the University.

LI MAOFENG

DATE: 20TH MARCH 2006

## **Acknowledgement**

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Thank you all very much.

**Title: A Study on the Legal Problem of Places of Refuge from the View of Marine Environmental Protection**

**Degree: MSc**

**Abstract**

Due to have no access to places of refuge, the laden tankers in distress, the so-called international 'leper', and the salvors have suffered unreasonable loss. In this research paper, the issues related to the places of refuge from the environmental protection point of view have been discussed. In order to find a proper solution to the problem, the existing legal system concerning Places of Refuge has been viewed and legislative approaches have been proposed.

All MARPOL ships are granted to have right to discharge their appropriate residues to port reception facilities due to the entry into force of the six technical annexes. The whole tanker in distress, however, is regarded to be not receptive under the current international legal system. Nonetheless, the oil pollution accident, the "Prestige", altered this phenomenon. The coastal States are no longer stander-by because the refusal is also a risk of oil pollution which may be bigger than providing a place of refuge. Therefore, recognizing the serious threat posed to their own marine environment by oil pollution incidents involving ships, some coastal States have been designated places of refuge either in specific practice or through national legislation. However, the approaches differ from one country to another.

After analyzing the existing legal system relating to places of refuge and the rules on marine pollution, this research paper comes to the simple solution which can be regarded as a further step for preventing, reducing and controlling pollution from marine accident. The place of refuge is just a reception facility for a whole ship in distress. Therefore, the place of refuge can be a component of national or local contingency planning. The

related issues such as pollution preparedness, response, liability and compensation should be considered in a broader way. As the conclusion of this research paper, the legislative approaches are proposed.

**KEYWORDS:** Places of refuge, Marine pollution, Contingency planning

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## **List of Abbreviations**

<b>BIMCO</b>	Baltic and International Maritime Council
<b>BUNKER</b>	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
<b>CAS</b>	Condition Assessment Scheme
<b>MSA</b>	Maritime Safety Administration
<b>CLC</b>	International Convention on Civil Liability for Oil Pollution Damage , 1992
<b>CMI</b>	Comité Maritime International
<b>EC</b>	European Commission
<b>EEZ</b>	Exclusive Economic Zone
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>FUND</b>	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992
<b>HNS</b>	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996
<b>IMO</b>	International Maritime Organization
<b>INTERTANKO</b>	The International Association of Independent Tanker Owners
<b>INTERVENTION</b>	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969
<b>IOPC</b>	International Oil Pollution Compensation
<b>MARPOL</b>	International Convention for the Prevention of Pollution

from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78)

<b>MEPC</b>	Marine Environment Protection Committee
<b>MSEM</b>	Maritime safety and Environment Management
<b>MSA</b>	Maritime Safety Administration
<b>OPRC</b>	International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990
<b>OPRC/HNS</b>	Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol)
<b>SAR</b>	Search and Rescue
<b>SALVAGE</b>	International Convention on Salvage 1989
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea 1982
<b>UK MCA</b>	United Kingdom Maritime and Coast Guard Agency
<b>UNAOA</b>	United Nations Atlas of the Oceans
<b>WMU</b>	World Maritime University

## **Chapter I Introduction**

The problem of places of refuge is one of the issues arising from the 'Erika', the 'Castor' and the 'Prestige' maritime accidents, and indeed from other shipping accidents, though it belongs to the fairly old custom to help ships in need. The problem is about how to handle ships which are in distress especially the laden tankers, the so-called international 'leper', to provide places of refuge for emergency use or not. The ports are reluctant to admit them because of the risk of pollution within the port and the subsequent damage and loss of business. However, send the ships back out to sea could seriously increase the likelihood of an accident and with it the risk of more widespread pollution that could cause more environmental damage than might otherwise have been accommodated in a place of refuge. Compare the 'Prestige' to the 'Sea Empress', this view is self-evident.

However as a result of recent incidents, it has been proved that accidents cannot be ruled out completely and port and other national authorities will from time to time be faced with this dilemma. The dilemma might be made less acute if on any stretch of coast on the main shipping routes there were designated ports or anchorages which would be available to a ship in trouble. To do this, international legislation is necessary and arrangements such as preparedness for oil pollution and compensation are indispensable.

After the 'Castor' incident the then Secretary-General of International Maritime Organization (IMO) Mr. O'Neil urged IMO Members to place the issue of offering refuge to disabled ships high on the Organization's agenda. During the opening remarks to the 45th session of the Sub-Committee on Fire Protection, O'Neil (2001) told the meeting that:

That incident brought to light, once again, the question of "ports of refuge", a question which has been raised from time to time over the past few years. It was against the background of similar incidents that the working group established by the Maritime Safety Committee last month [December 2000] to consider post Erika safety-related issues, listed the issue of "ports of refuge" among the topics selected for further consideration. It therefore seems to me that the time has come for the Organization to undertake, as a matter of priority, a global consideration of this problem and to adopt any measures required to ensure that, in the interests of safety and environmental protection, coastal States review their contingency arrangements so that disabled ships are provided with assistance and facilities as may be required in the circumstances.

Inspired by Mr. O'Neil's speech, this research paper is dedicated to examine the issue of places of refuge from the environmental protection perspective. In the light of the past experiences, the forthcoming legislation on place of refuge for the protection will be a new breakthrough for the whole body of international maritime law on marine pollution. It is in accordance with the proactive philosophy of IMO on legislation for the safety and environment issues. In this connection the issue of place of refuge is worth for study.

### **1.1 Importance of the Study**

It has been noted that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge. However, to bring such a ship into a place of refuge near a coast may endanger

the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation. Therefore, one can appreciate the reluctance of coastal States to put their citizens or their coastlines at risk.

On the other hand, the need of distribution of oil worldwide makes the tanker fleet necessary. Therefore the measures to prevent and mitigate oil pollution have been the long lasting goal of the related organizations both international and national. A lot of Conventions, rules and codes have been made to achieve this goal. When the laden tanker in distress came, however, it is regarded as international 'leper' who can not be granted for places of refuge under current international regime. The lives can be protected by International Convention on Maritime Search and Rescue, 1979 (SAR Convention), the interests of salvors or the ship owners can be ignored by the coastal States as well. But the spilled oil doesn't know the boundary of the EEZ or territory sea. It can spread with the current and wind. The coastal States are always the most possible victims in such case as in the 'Prestige'. Then this point can be easily accepted, that is, even if the coastal States' interests should be only concerned, a solution to the places of refuge is also necessary.

Last but not least, the author is from a branch of China Maritime Safety Administration (MSA) who is in charge of safety, environmental protection and security of shipping. Now the five-tiered ship's oil spill emergency plans have been developed by China MSA. In current edition of the emergency plans, however, there is no single word about designation of places of refuge. As a big and prosperous shipping nation from the third world, China also faces high risk of oil pollution. This paper is supposed to be a recommendation of incorporating the designation of places of refuge into the local and national oil pollution emergency planning.

## **1.2 Objectives of the Study**

There are three objectives in this research paper. The first objective is to examine the

issue of places of refuge and its legal background. The environmental disaster following the sinking of the 70,000 tonnes tanker the 'Prestige' off the coast of Spain in December 2002 has focused attention on the topic of places of refuge for distressed ship. The theory of "not in my backyard" has been challenged since then. Then what is the essence of the problem and how does the international and national law regulate it are the major concerns.

Following the first objective, from which place of refuge is found mainly to be a pollution prevention consideration, the second objective is to analyze the international legal system on marine pollution. The issue of "places of refuge" is related to many aspects in maritime world. However, it was the marine pollution to the coastal States that really draw the attention of the need to provide places of refuge for the privilege of preserve the environment.

The third objective is to identify the proper solution to the problem from the perspective of marine environment protection. Though many researchers have been addressing the problem in various depths, the problem remains on underway stage and yet to be studied. Based on the production of renowned scholars who are conducting research on "places of refuge", the author tries to find a solution to topic in a new way.

### **1.3 Scope, Methodology and Structure**

In the whole program of Maritime Safety and Environment Management (MSEM 2006) of World Maritime University (WMU) in Dalian, China, the term of "places of refuge" is often mentioned especially in the subjects of maritime law, maritime labor, and contingency planning and risk assessment. The handouts and class materials given by the lecturers have provided important information to contribute the study. A literature search was extensively undertaken to examine what findings have been achieved by current scholars from both Comite Maritime International (CMI) and IMO programs.

The author has been involved in oil pollution accidents investigation for many times. Ten years' work experience in the department of marine pollution control of Guangdong Maritime Safety Administration is also helpful to the study. This experience helps to accumulate related case studies in this field as well.

This research paper looks at the public international law aspects of the places of refuge and new developments in IMO legislation. The author thinks the place of refuge is mainly an environmental protection problem from the simplified perspective. The focus is exclusively on the public international law on marine pollution, while the safety concerns on fire or explosion risk to port infrastructure and the private law affairs such as salvage, wreck removal, liability and compensation, financial security will not be discussed in depth. Also, the technical details such as how to select a place of refuge and how to carry out risk assessment are not covered.

After a short introduction, the paper starts with an overview of the 'Erika', the 'Castor' and the 'Prestige' marine accidents and the consequences for European and international legislation. One of the major concerns aroused from the accidents is the places of refuge for the ship in distress. The author points out that the pollution accidents are the prime cause of the popular topic on places of refuge. In Chapter III, the legal background on places of refuge is introduced to find out whether there exists an obligation to offer a place of refuge for ship in distress at both international and national level. To realize that place of refuge is mainly an environmental protection problem, Chapter IV is designed to analyze the current international instrument on marine pollution in order to find out a proper position for places of refuge. Based on the previous discussion, the author then points out the essence of the problem and the legislative solution in Chapter V. Lastly, a brief conclusion with recommendation is given in Chapter VI.



## **Chapter II The Recent Maritime Accidents Spark the Problem of Places of Refuge**

### **2.1 Introduction**

The term of “places of refuge” became popular after the classical the ‘Erika’, the ‘Castor’ and the ‘Prestige’ cases. However, the ‘Sea Empress’ case was earlier than the three ones but it did not bring a big repercussion. What is the significance of these accidents? How can these cases be perfectly used to find a solution to the problem of places of refuge? This chapter is designed to answer the questions.

To begin with, it should be known what the characteristics of these accidents are. Then the different aftermaths between the ‘Castor’ and the ‘Prestige’ should be known. Lastly, compare the aftermaths to the successful case, the ‘Sea Empress’, the privilege of providing places of refuge can be argued to certain extent.

### **2.2 The ‘Erika’ and Follow-up**

The ‘Erika’, a 25 year-old single-hull oil tanker flying the Maltese flag, broke in two some 40 nautical miles off the southern tip of Brittany, polluting almost 400 kilometers of French coastline on 12 December 1999. Before sinking, when she was battling bad weather, the ‘Erika’ was refused refuge by France. The damage caused to the environment and the exceptionally high cost of the damage to fisheries and tourism make the ‘Erika’ oil spill one of the major environmental disasters in Europe.

The wreckage of the ‘Erika’ aroused much public concern about the safety of maritime

transport. It also highlighted the risk presented by old, poorly maintained ships and the need to reinforce and harmonize European rules on maritime safety and the control of ships in ports in particular, going further, where necessary, than International Maritime Organization guidelines and standards.

After the accident was reported, the European Commission (EC) prepared measures in record time designed to increase maritime safety off the coastlines substantially. Three months later, on 21 March 2000, the EC adopted a first series of proposals, known as the Erika I package, which was quickly followed, in December 2000, by a second set of measures, the Erika II package designed to provide in depth answers to the lacuna. The Erika I package provides an immediate response to certain shortcomings highlighted by the 'Erika' accident. It steps up controls in ports, monitors the activities of classification societies and speeds up the timetable for eliminating single-hull tankers.

This first package of measures was agreed upon by European Parliament (EP) and the Council as part of the co-decision procedure. It will be formally adopted and enter into force 18 months later, the time needed for Member States to take the necessary internal measures.

Adoption of the Erika I package, however, is only one step in the Community action program. The Erika II package contains measures including establishment of a Community fund to compensate the victims of oil spills up to €1 billion, closer monitoring of traffic in European waters, and creation of a European maritime safety agency. However, in the greater safety in maritime traffic and more effective prevention of pollution by ships, it makes it compulsory for each Member State to have ports of refuge for vessels in distress. This was regarded as the beginning of regional obligation for the designation of places of refuge. The Erika II package came into force in August 2002. According to the European Directive for a monitoring and information system, the European Members should have presented their plans about

places of refuge before 1 July 2003 (EC, 2002, pp.1-4).

In short, in response to the 'Erika' incident, designation of "ports of refuge" which was later replaced by a wider term "places of refuge" was first made compulsory for the EU member States. This is the consequence of the 'Erika' case.

### **2.3 The 'Castor' and its Significance**

At the beginning of 2001, the Cyprus-registered ship with cargo of gasoline, the fully laden 31,068 DWT tanker, the 'Castor' developed a structural problem in the Mediterranean Sea en route from the Romanian port of Constanza to Lagos, Nigeria. The ship suffered damage to the hull resulting in a 24m crack (below) running from port to starboard halfway along its length. The ship was deemed to present a serious risk of explosion and rupture of the hull and the authorities of Morocco and Gibraltar prohibited its entry into waters or ports under their jurisdiction. The 'Castor' then sailed towards the vicinity of the south-eastern coast of Spain, accompanied by the salvage tug, with which the tanker's owner had agreed to effect transshipment of the cargo under a commercial salvage contract. The Spanish Maritime Authority requested the ship to keep at a distance from the Spanish coast.

A report, issued following the inspection of the ship by the Spanish authorities, described the situation as one of extreme seriousness due to the high risk of explosion, and recommended that the ship should not enter any ports and should keep at a distance from the coast to minimize the consequences of a possible catastrophe.

Bringing the ship close to the Spanish coast for unloading, either by transshipment to another ship or by discharge to land installations was rejected as presenting a higher risk for the population, coastal properties and the environment than transshipment on the high seas. Spain stationed a helicopter, two salvage vessels, a maritime rescue rapid intervention craft as well as a Spanish Navy patrol boat in the area.

After units of the Spanish maritime rescue service had evacuated the 26 crew members, ship owners, salvage operators and other interested parties were informed that appropriate measures should be adopted to ensure that the ship withdrew from its current position and remained at a distance of at least 30 nautical miles from the Spanish coast, in the light of the unacceptable risk posed to Spanish coastal interests. Eventually, after being similarly unable to find shelter off Algeria, the 'Castor' was towed to a relatively sheltered spot off the coast of Tunisia where her cargo was safely unloaded (UNAOA, 2005).

Fortunately, the 'Castor' finally found a "place of refuge" after had been towed over 2,000 miles without any assistance from the coastal States. The coastal States including Spain were lucky this time. The incident did not lead to a disaster. But what a price for the salvor and the ship owner! The international maritime community certainly can not easily live with it. The then IMO Secretary-General Mr. O'Neil called for the problem of safe havens for ships in distress to be tackled with some urgency. However, the Spanish government Stated that the basic policy of its Government was the safeguarding of human life at sea and the combating of pollution in waters under its SAR responsibility, in compliance with its international obligations, and that it had accordingly proceeded to the successful rescue of the whole crew of the damaged ship. It also stated that its Government had also an inescapable obligation to defend the safety of its coastal population and of property and environment along the Spanish coast, which should not be put at risk as a result of a commercial operation for the salvage and recovery of the ship's cargo. It can be understood that the Spanish declaration represents the view of many coastal States.

After the 'Castor' case, Spain endorsed the call for action to establish sheltered waters on terms acceptable to coastal States, stressing also the need for IMO as a matter of urgency to approve and facilitate preventive action such as the improvement of port

State inspections, the responsibilities required of classification societies and the withdrawal from service of single hull oil tankers.

If the place of refuge which is the combination of anchorage offshore and a shipyard has already been designated, the 'Castor' can transfer its cargo in the anchorage as it finally did and then sail to the shipyard without high risk of explosion. Generally speaking, the fire protection safety criterion of a gas carrier is higher than the others. In the author's opinion the fire risk for a stricken ship accommodated in an anchorage far away from the community is acceptable. The left thing is the pollution from the cargo or fuel oil which should be thought as a major risk.

#### **2.4 The 'Prestige' and its Consequences**

On 13 November 2002, the 'Prestige', flying the Bahamian flag, laden with about 77,000 tonnes of heavy fuel oil suffered structural damage in heavy seas some 30 miles off Cape Finisterre, Spain. About 3.15 p.m., the ship reported structural damage in its starboard ballast tanks and started leaking oil from its bottom openings. Rescue operations were promptly conducted by Spanish maritime authorities, and the crew, except the captain and two cabin members, were immediately evacuated. On 14 November, as a result of heavy winds and currents, the stricken tanker was 4.5 miles off Cabo Toriana. Despite various requests from the Prestige's captain and the Dutch salvage operator, the Spanish authorities refused to provide the tanker a place of refuge close to shore where, among other things, its cargo could be safely unloaded. Instead, they required the captain to restart the engine and gave instructions to the salvage operator to tow the ship away from the Spanish coast towards open sea in order to have more time to tackle eventual pollution. On 18 November the Portuguese navy prohibited the salvage operator to continue towing the 'Prestige' in the direction of the Portuguese EEZ and forced a change of route towards the high seas and even rougher waters. For six days the damaged tanker was towed around the Atlantic Ocean like a

bomb ready to explode whilst nobody knew what to do with it. The case began to attract attention of the world. On 19 November, after almost a week in extremely severe weather conditions, the 'Prestige' broke in two and eventually sank about 133 nautical miles off the Galician coasts to a depth of some 3,500 meters, making the recovery of its cargo desperately difficult. It is estimated that around 40,000 tons of heavy fuel oil has been spilled into the ocean, blackening nearly 2,000 kilometers of coastlines from Galicia to southern France; affecting marine wildlife and habitats and causing inestimable damage to marine capture fisheries, shellfish farming and the tourism industry in the area. Oil has also entered Portuguese waters, but the extent of pollution is as yet unknown. The 'Prestige' sinking is considered to be one of the worst environmental catastrophes in history and the ecological damage could last for decades (Frank, 2004, pp.2-3).

This time Spain became the biggest victim. Worse still, Spain was blamed for her refusal of granting place of refuge. In fact, the refusal did not prevent the pollution but was thought to lead to a disaster. But the Spain government officers insisted that the decision to send the tanker away from the coast was based on strictly technical criteria aimed at reducing any possible danger the ship may have brought to the coast (Fairplay, Dec.2005).

It has been argued that Spain had made a wrong decision. Even if considering her own environmental interest alone, Spain should take the sea condition especially the wind and current into consideration when the risk assessment was made.

The 'Prestige' incident highlights the industry's concern surrounding coastal States' continued reluctance to admit ships into ports of refuge. When ships are not granted such refuge, the potential for a serious incident is frequently increased and the safety of the crew jeopardized. On 19 November 2002, INTERTANKO and BIMCO issued press Statement. The Statement said that the time had come for globe recognition for

places of refuge. Under such pressure, EU, IMO and some coastal States hastened their work on places of refuge and other related issues ( INTERTANKO, 2002) .As a consequence, the sinking of the ‘Prestige’ triggered a call for re-evaluation of the existing international legal framework governing merchant shipping and worked as a catalyst for new developments both at the European and international level. The European Union (EU) has taken a lead in this process. Its current study discusses the main legal issues raised by the accident, assessing the limits of the existing rules contained in the UNCLOS and the IMO’S regulatory regime as well as the major steps taken to fill current gaps. Particular attention is given to the manner in which the EU and its Member States have influenced the post-Prestige developments.

In IMO, in response to the ‘Prestige’ accident, the Marine Environment Protection Committee (MEPC) adopted in December 2003 a revised accelerated phased-out scheme of single hull tankers, an extended application of the Condition Assessment Scheme (CAS) and a new regulation about a ban on the carriage of heavy grades of oil in single hull tankers. These amendments to MARPOL have entered into force.

The legal issues arising out of the ‘Castor’, the ‘Erika’, and the ‘Prestige’ casualties are on-going, but it is self evident that if each of these ships had been allowed into a place of refuge where her cargo could be transferred the very substantial costs incurred, and in the case of the ‘Prestige’ the substantial losses, could have been significantly reduced. The price of such a step would have been the running of a risk of pollution of the immediate area which must be acknowledged to be significant, but in the cases the impact would have been unlikely to prove as expensive as what eventually occurred.

## **2.5 The ‘Sea Empress’- a Successful Case**

In this case, the involved tanker was a Cyprus-registered one, laden with a cargo of 130,018 tonnes of Forties light crude oil, ran aground off the port of Milford Haven, UK

on 15th February 1996. In the course of salvage operations it was decided by the salvors that it was necessary to lighten the vessel by pressurizing her cargo tanks with compressed air, even though it was accepted that the inevitable result of this would be to drive out through her damaged bottom a certain quantity of her oil cargo. It was said that a larger quantity of cargo than anticipated was lost through her bottom damage when the vessel was held on rocks as the falling tide reduced the hydrostatic pressure which had retained the cargo in the damaged tanks. Nevertheless when the 'Sea Empress' was eventually refloated on 21 February she still had on board some 58,000 tonnes of crude oil. During the salvage operation a number of proposals were made that the vessel should be taken out to sea as soon as possible. However, the final decision was taken to bring the vessel into Milford Haven where she was moored at a jetty and her remaining cargo removed safely. There was no doubt some reluctance on the part of the Milford Haven Port Authority to allow a severely damaged tanker into the Haven, but the decision to allow her in was proved to be the correct one in the circumstances.

The decision in every case will turn on its particular circumstances, but some general policy principles may be drawn from this example. The reluctance of a government or port or local authority to allow a damaged ship into the waters under its control is entirely understandable, if there is a serious risk of pollution as a result. However, there will be many cases when positive action which results in some inevitable pollution may be the right course in order to avoid or minimize the threat of greater pollution (Shaw, 2004a, p.334).

The 'Sea Express' case provides the world a successful experience on places of refuge. From then on, this case has been mentioned from time to time to verify the feasibility of the designation and properly granting places of refuge. Generally speaking, under modern technical circumstance, accidents can be mitigated through careful arrangement.



## **2.6 Summary**

The above involved ships are all tankers, two of which were lucky enough for free from oil pollution damage compensation. The other stricken ones made them famous for the notorious pollution. In addition, none of the tankers was flying the flag of the involved coastal States. What if, you may wonder, they were the nationalities of the coastal States? The problem may be not so complex, but the ship in distress can also be discarded to the high sea. So it can still be an international problem. Therefore the above mentioned accidents are doomed to be the landmarks on the long process of creating international instruments to prevent the similar accidents.

Though the topic of places of refuge is an old phenomenon related to many aspects including search and rescue, salvage, environmental concerns, modern concept of places of refuge is an environmental problem. In his study, Mukherjee (2005b) states:

Even if it is sought for the purpose of saving and preserving property, refuge is not normally refused unless there is an environmental dimension to the request. Indeed, if refuge-seeking ship is a polluter, there is no doubt that the coastal State to whom request is made will be quick to assert the legal position that prima facie it has a right to refuse that ship entry its waters.

Apparently, it is the characteristics of pollution from the ship in distress that makes the places of refuge as a problem.

To sum up, pollution accident is the prime cause of the popular topic on places of refuge. Thus, from the beginning the problem should be scrutinized from the perspective of marine environment protection. The legal basis in the existing international instruments, especially the laws on marine pollution need to be checked for the solution.

## **Chapter III Legal Concerns on Places of Refuge**

### **3.1 Introduction**

In the field of maritime law, the term of “places of refuge” has not yet appeared in any of the relevant conventions but it already can be found in other instruments. In Europe, after the ‘Erika’ accident, the European Commission (EC) prepared the Erika II package in which requires each Member State to have ports of refuge for vessels in distress. This was the first appearance of “port of refuge” which later changed to a wider term “places of refuge”. Inspired by Erika II package, IMO adopted two resolutions addressing the issue of places of refuge. In the Guidelines of the resolutions, the definition is:

Place of refuge means a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation and to protect human life and the environment (IMO, 2003a).

However, the notion behind the term place of refuge for ships has already been in the existing conventions (e.g. Salvage 1989, UNCLOS 1982, SOLAS 1974, OPRC 1990, etc.). It has been argued whether there exists a conventional obligation for coastal State to offer a place of refuge to a ship in distress. Therefore it is necessary to check it in depth. In addition, national legislative experiences on place of refuge are worth of study.

## **3.2 The International Legal Background Concerning Places of Refuge**

### **3.2.1 The Intervention Convention—Obligation to Protect the Environment of High Sea**

In Chinese, high sea is the same meaning as public sea. It is an axiom that public interest should be preserved by all. Nowadays, however, the high seas are still regarded as a natural dustbin. In the case of the ‘Prestige’, the laden tanker was expelled to the high seas where is thought to be no landlord. Fortunately, there are still Conventions which regulate the protection of the environment of high seas. The Intervention Convention is the one.

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (“the Intervention Convention”) enables State parties to take proportionate and necessary measures on the high seas to “prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from oil pollution, following upon a maritime casualty” (Article I). By a protocol in 1973 this was extended to cover substances other than oil such as chemicals, gases and radioactive materials. The Intervention Convention requires these powers to be exercised in consultation with other concerned States where practicable. Article VI provides that any State party which has taken measures in contravention of the Intervention Convention which cause damage to others shall be obliged to pay compensation; furthermore Article VIII provides for a system of dispute resolution leading to Arbitration.

The Intervention Convention has been ratified or acceded to by over 70 States including the United States of America, all coastal EU States and China.

In the ‘Prestige’ case, besides Spain, assuming there are other States which were polluted by the spilled oil, and also assuming the refusal for providing places of refuge

contributes to the accident, should Spain be liable according to the International Convention? The answer should be “yes” according to Article VI of the Intervention Convention. However, the difficulty is how to confirm the negligence of the coastal State. In the case of the ‘Prestige’, it is not a Spanish registered ship and the cause of the pollution is primarily the ship itself. Anyway, there is no obligation for the coastal State to provide places of refuge for ship in distress in the Intervention Convention.

### **3.2.2 The Salvage Convention—the Duty to Help**

Van Hooydonk (2000) says the duty to render assistance to vessels and persons in distress at sea is an axiom of international maritime law. This view likes to see the right of entry as a general principle with only very few and strict limitations. Hetherington (2004a) considers the right of a ship in distress to enter a port is not an absolute right. Either way it is clear that the duty to help is too general to know what specific actions are expected under which circumstances.

When IMO was considering the draft provisions of the International Convention on Salvage (eventually adopted in 1989), the concept of providing refuge for ships in distress was proposed in the late 1980s. At the time, it was suggested that there should be an obligation on States to admit vessels in distress into their ports. Although this was endorsed by some delegations, others expressed doubt on the desirability of including such a "public law" rule in a private law convention. It was also pointed out that the interests of coastal States would need to be duly taken into account in any such provision. Doubt was also expressed whether such a provision would in fact affect the decisions of the authorities of coastal States in specific cases.

As a result, Article 11 of the Salvage Convention was eventually adopted. It reads:

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 provisions of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

As Mukherjee (2005a) addressed, the provision is a classic example of the proverbial mix of apples and oranges. In such a private convention, the customary law of salvage has been the main concerns. It is notable that both environmental organizations and ship owners, in a rare show of consensus during the preparatory work leading up to the convention, were in favor of strengthening this Article to place a duty on coastal States to allow vessels in distress to enter their ports. Unfortunately a proposal made to that effect was withdrawn for lack of support. A public law convention was thought to be the better place for the imposition of such an obligation. The intention of the 1989 Convention was neither to confirm nor deny a right of access to a port of refuge of a ship in distress. However, on the positive side, perhaps the soft obligations of Article 11 imposed on the coastal State have moved the matter a half step forward. The purely contractual obligation of the ship owner to cooperate with the salvor to secure entry to a place of safety can hardly be transposed to a coastal State authority, but with Article 11, there is at least some room for argument in favor of the salvor and the ship in distress as well. This is why the Article 11 is frequently cited in the study of places of refuge.

In 2001, CMI set up a working group and began to carry out a survey among its members on the following matters: Article 11 of the Salvage Convention; Articles 17, 18,

21, 192 to 199 and 221 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS); and Articles 3, 4, 5 and 6 of the International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990 (OPRC). The outcome can be found in the Report of the CMI to the IMO (CMI, 2003).

According to the report, slightly less than 50% of the States whose National Associations responded to the questionnaire have not ratified the Salvage Convention but even amongst those States who have ratified the Salvage Convention none have introduced any legislation which specifically gives effect to Article 11 and only three countries have designated any particular Places of Refuge. They are Germany, Norway and UK.

The Salvage Convention entered into force on 14 July 1996. Up to 31 December 2005, 52 Countries which represent 38.16% world tonnage had ratified this convention. China and UK are already member States while Spain is not yet (IMO, 2005a).

### **3.2.3 UNCLOS And OPRC Convention—Right of Entry and Protection of the Environment**

UNCLOS has been regarded as the constitution of the sea. Therefore, there should be principles for all issues relating to the law of the sea. With regard to the right of entry and protection of the environment, certain Articles can be related.

The first issue is whether there are stipulations about the right of ships in distress to enter a place of refuge because the places of refuge are thought to be in internal waters. Articles 17 and 18 of UNCLOS provide that ships of all States have a right of innocent passage through the territorial sea, and passage is defined as:

Navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal

waters; or proceeding to or from internal waters or a call at such roadstead or port facility.

Article 18 requires such passage to be “continuous and expeditious” but it does include stopping and anchoring if incidental to ordinary navigation or “are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 21 of UNCLOS expressly allows the coastal State to adopt laws and regulations relating to innocent passage through the territorial sea in respect of various matters which are enumerated such as “the preservation of the environment” and the “prevention, reduction and control of pollution”.

It can be inferred that ship in distress has the right to enter into the internal water of the coastal State under the Article 17 and 18 of the UNCLOS. However, this right is subject to the national legislation of the coastal State under the Article 21 of the UNCLOS.

According to the CMI (2003, p.119) whilst the governments of the great majority of respondents to CMI’s questionnaire have ratified the Law of the Sea Convention very few have given effect to any legislation with respect to ships which are the victims of force majeure or distress and their rights to seek shelter in a Place of Refuge. China and Norway have however enacted such legislation. However, the permission is subject to approve by the authority based on the specific circumstance.

The second issue is whether there is an obligation for coastal States to provide refuge for a ship in distress for the sake of protection marine environment. Articles 192 to 199 and 221 of UNCLOS touch on the topic of protection of the marine environment from pollution. Article 195 provides:

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

Only four countries, according to the CMI report, appear to have enshrined this principle in their National legislation, albeit somewhat indirectly. They are Brazil, China, UK and the US (CMI, 2003, p.119).

The third issue is about preparedness and response to marine oil pollution. Article 198 of UNCLOS requires a State which becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution to “immediately notify other States it deems likely to be affected by such damage, as well as the competent international organization.” Article 199 requires States to “jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.”

In the survey of CMI, the situation is whilst the governments of the majority have adopted contingency plans there are a number of significant maritime nations who have not, and very few of those which have been adopted contain provisions for the admission into a place of refuge of a vessel in distress which may threaten to cause pollution (CMI, 2003, p.120).

With regard to contingency plans, Article 6(b) of the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC) requires member States to prepare. OPRC entered into force on 13th May 1995. The main objectives of the OPRC Convention are to encourage States to develop and maintain an adequate capacity to deal with oil pollution emergencies and to facilitate international co-operation and mutual assistance in preparing for and responding to major oil pollution incidents.



OPRC Convention requires signatory States to have national and regional contingency plans and outlines the major elements to be addressed in them. On receiving a report of an oil pollution incident, a State party has to immediately respond and involve any other OPRC States in a coordinated response.

Shaw (2004a, p.331) describes the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation as the most tangible action which reflects the objectives of Article 11 of Salvage 1989. OPRC Convention has been ratified by a large number of States which are party to the 1989 Salvage Convention. This Convention does not expressly mention the admission of ships in distress to a place of refuge, but it does envisage the development by States of oil pollution response contingency plans, and some States (few in number) have such plans which expressly provide for the possibility of admission to their ports or havens of ships in distress which may prove to threaten pollution.

OPRC Convention is also specifically dedicated to the principle in Article 198 and 199 of UNCLOS. The three notorious cases (the 'Erika', the 'Castor', the 'Prestige') which led to the hot discussion of places of refuge are all related to oil pollution preparedness and response. Up to 31 December 2005, 86 States which represent 64.32% world tonnage have been the member of the OPRC Convention (IMO, 2005a).

### **3.2.4 New Attempt of IMO**

After the 'Erica', the 'Castor' and the 'Prestige' incidents, IMO takes a series of actions, including debate over whether an international convention should be adopted to address the problem. As a result, a set of IMO Guidelines has emerged in November 2003. This is an important step in assisting those ships involved in incidents that may lead to the need for a place of refuge to make the right decisions at the right time.

Guidelines on places of refuge for ships in need of assistance are intended for use when a ship is in need of assistance but the safety of life is not involved. The guidelines recognize that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge. However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis. In so doing, consideration would need to be given to balancing the interests of the affected ship with those of the environment.

It is not surprise to see the soft stipulation in these guidelines. In paragraph 3.12, for instance, it says:

When permission to access to 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 balance and give shelter whenever reasonable possible.

Without this guideline the coastal State will also weigh all the factors and risks in a balance and give shelter whenever reasonable possible. Therefore, the whole guidelines are nothing but technical directive.

### **3.2.5 Summary**

At present there is no express obligation on States to provide safe havens for vessels in distress although there may be difference in the interpretation of the Conventions. The lack of clear rules has favored the spread of a “not in my backyard” syndrome, making it

easy for coastal States to turn away damaged ships and push them out to open sea where severe weather conditions increase the risk of accident. Though the National Contingency Plans (which should be drawn up pursuant to UNCLOS and OPRC) should include information relating to suitable ports or places of refuge, they impose no obligation on State parties to allow access to such safe havens in any particular case.

### **3.3 National Legislative Approach and Practices**

#### **3.3.1 The Pioneers on Places of Refuge**

UK and Norway are two of three countries who have designated particular places of Refuge. In CMI (2003), it can be seen that the UK has had experiences of ships in distress both being refused and permitted. There is no such record in Norway. The UK is an EU member while Norway is not yet. Therefore it is not surprised for the two countries to be selected for closer study.

In maritime legislation, UK is always the pioneer. UK is a party of both Salvage Convention and OPRC Convention. In response to Article 6 of OPRC Convention the UK has prepared a National Contingency Plan pursuant to s. 293 Merchant Shipping Act 1995 as amended by the Merchant Shipping and Maritime Security Act 1997. Appendix H of the UK's National Contingency Plan has a section entitled "Shelter for Damaged Vessels". Part of the foreword to the section states:

It has long been established that whenever possible the best way of avoiding continuing an extensive pollution from a marine casualty is to remove the cargo of oil from the damaged ship into a sound vessel. As long as oil remains on board a casualty, particularly in an exposed situation where subsequent hull damage is likely, the greater is the chance of substantial spillage. If a casualty can be removed to a

sheltered place, the risk of spillage is lessened; an emergency cargo transfer operation can more safely be mounted; and counter-pollution resources can be more effectively deployed.

It is believed that 12 anchorages and ports have been earmarked (if required) for vessels in distress and that the Maritime and Coastguard Agency (MCA) has information on each such location including the maximum draft and length of vessels suitable for each particular location, the quality of the navigational access, the local facilities, environmental factors and in the case of anchorages, the quality of the shelter and holding ground. However this information is not in the public domain for which the European Commission criticised.

The National Contingency Plan recognises that there might be opposition to a decision to bring a vessel into or leave her in a safe haven from the parties concerned. In such cases, the government can play a significant role in assisting a competent salvor to minimise pollution damage by persuading a harbour master to allow a damaged ship to enter his port (despite the short term risk of some pollution and possibly commercial damage) but in so doing minimising the risks of a greater casualty (this was done in the “Sea Empress” incident in 1996). This led to the creation of the Secretary of State’s Representative (SOSREP) for Maritime Salvage and Intervention as a unique decision making body. Therefore, if persuasion does not work, the Secretary of State’s powers of intervention (usually exercised by SOSREP) may be used to direct those in control of the vessel to take, or not to take, the vessel to a sheltered area or to overrule a harbour master’s directions (Dangerous Vessels Act 1985 s3).

UK deems that there is a need for a Port of Refuge Convention which applies world-wide: the maritime leprosy problem needs international co-ordination. An obligation (similar to those which currently exist between the members of the OPRC

Convention) needs to be imposed on as many countries as possible world-wide. (UK MCA, 2001)

Norway has named 69 places and harbors of refuge in response to increasing tanker traffic from Russia. The places of refuge are listed in a government white paper outlining Norway's oil-spill response plan. The move comes in contrast to some European Union (EU) member States which have preferred to keep such locations secret and some which have failed to transpose commission legislation to designate places of refuge. In addition, Norway appoints one agency responsible for the decision to grant or refuse such a place. This agency is called the Norwegian Coastal Directorate's Department for Emergency Response (DER).

With respect to ships to ships which are victims of force majeure or distress and their rights to seek shelter in a place of refuge, Norway has made provision to enable vessels in distress to stop or anchor in the territorial sea and to enter internal waters when seeking a port of refuge and are required to notify the authorities

### **3.3.2 The Approaches of the Victim Countries**

Spain has experienced two of three mentioned tanker incidents (the 'Erika', the 'Castor' and the 'Prestige'). As the major victim of the 'Prestige' disaster, Spain's action on the issue of places of refuge has always been the focus.

Spain is not a party to the Salvage Convention. In IMO (2001) Spain considers that the right of a vessel in distress to enter a port, place of refuge or territorial waters must be interpreted solely as the right to preserve or save the lives of its crew and passengers, and that such right of entry cannot exist when measures have already been taken to save persons on board. This is the Spain's viewpoint after the 'Castor' incident in 2001.

In November 2002, the 'Prestige' disaster happened after it was expelled out of the

Spanish territorial sea. The spilled oil came back and Spain still became the biggest victim. Soon after that Spain became fleetingly notable for its attitude on places of refuge. In the aftermath of the ‘Prestige’ accident, the manner in which Spain handled the situation has been brought into the spotlight. It is the general opinion that, by granting the stricken tanker a place of refuge where it could safely unload its cargo in an early stage of the accident, the Spanish authorities would have probably avoided the disaster, minimized pollution and circumscribed its spread. Some pollution would have been inevitable, but it would have been restricted to a limited area. The Spain government defended that it was the only possible decision a maritime authority could have taken. Furthermore, the Spanish government argues that the consequences for the environment would have been “infinitely worse” if the ‘Prestige’ had sunk close to shore and has made it clear that if a similar situation were to recur, the decision would again be to tow the vessel out to sea.

Spain is one of the signatory States of OPRC Convention and has already adopted oil pollution contingency plan. But place of refuge was not incorporated in the contingency plan. With regard to the obligation of providing places of refuge for the stricken ship, the Spanish government adopted Royal Decree 210/2004 on the Monitoring and Information of the Maritime Traffic (6 February 2004) according to the EU Directive and the IMO Guidelines. The decree establishes the responsibility of Spanish Merchant Navy for drawing up the procedures to determine the objective criteria and rules according to which the maritime administration has to act when a ship in distress requests refuge. The decree establishes the following three points:

- (1) There is no obligation to provide refuge to a ship in distress.
- (2) The decision on access to a place of refuge will be taken by the General Director of the Spanish Merchant Navy on a case-by-case basis.
- (3) It is necessary to carry out an assessment of the consequences of leaving the ship

at sea or accepting it in a place of refuge.

(Roman, 2006, p.132)

In June 2005, it was reported that Spain undertook new study on places of refuge which should be concluded by the end of the year. The plan, which looks at creating places of refuge across Spain's entire coastline, is underway (Fairplay, June 2005). Apparently, Spain tries to take measures to prevent similar accidents to happen in the future. In fact, Spain, France and Portugal have adopted a policy of expelling ships they expect to endanger the environment from their EEZ. This unilateral action seems to be in conflict with international law and condemned by the maritime community.

### **3.3.3 China's Situation on Places of Refuge**

From the third world, China as well as other developing countries, depends maritime transportation very much. Old, substandard and flag of convenience in shipping increased the risk of safety and environment problems. Therefore, the issue of places of refuge is not only the problem of the Europe.

China has ratified the Salvage Convention but has not yet designated places of refuge for ships in distress. In Hong Kong, there are also no designated places but by reason of repeated use such places are well known to local salvors and others in the maritime community. However, Hong Kong asks financial security before granting access.

China is also the signatory member of OPRC Convention. China has adopted legislation to give effect to Article 3 of OPRC Convention. Article 66 of Law on Marine Environment Protection 1999 of PRC requires oil tanker, oil terminal and oil port develop oil pollution emergency plan. China has released National Contingency Plan for oil spill from ship. Till now, the five-tiered contingency plans have been developed. They are national, regional, port, terminal and on board ship. But in all of

these plans, no specific arrangement has been made for places of refuge.

China has enacted legislation under its Law on Maritime Safety 1983 and Rules Governing Vessels of Foreign Nationality 1979 which go some way to making specific provision for vessels in distress. For example, the prohibition on vessels entering the internal waters and harbours of the PRC does not apply where there have been unexpected circumstances, provided they report immediately to the competent authority. Vessels seeking a place of refuge are required to seek approval and take shelter or temporary berth at any place designated by the authorities.

Law on Maritime Safety of PRC is now just under amendment in order to replace the current edition which was adopted in 1983 and thought to be not suitable for the situation. In this new Law on Maritime Safety of PRC, there will be an Article to regulate the entry or leave departure of ship in distress. Part of the Article reads:

Ship loaded with flammable, explosive, toxic, radioactive or pollution hazardous substance, either in distress or involved in an accident, should report the situation and follow the directive of Maritime Safety Administration.

This can be seen as a sign of the national legislative approach to the problem of the international 'leper'. Further step will be concentrate on how to direct the ship in distress by the Maritime Safety Administration. Guidelines or specific regulations are thought to be under consideration.

### **3.3.4 Summary**

With regard to the case of places of refuge, there are still not enough international instruments to cover this field. Nevertheless, the stricken tanker may request for assistance at any time. This means that the marine environment of the coastal State is



subject to protect from accident pollution of the ship in distress. Therefore, national legislation is indispensable in finding solutions to the problem of places of refuge. In fact, the Norway and UK have provided considerable ways in the field. In fact, according to the CMI places of refuge questionnaire in CMI (2003, p.138), there are already 12 countries who had successfully permitted ship in distress entering places of refuge.

Schroeder (2006) undertook an international survey on the national practice on granting places of refuge. Completed questionnaires were received from respondents in 27 States. As shown in figure 1, the administrative body involved in making the decision to grant or refuse refuge while figure 2 shows the decision-making level in granting refuge. In both figure 1 and figure 2, multiple choices were included.

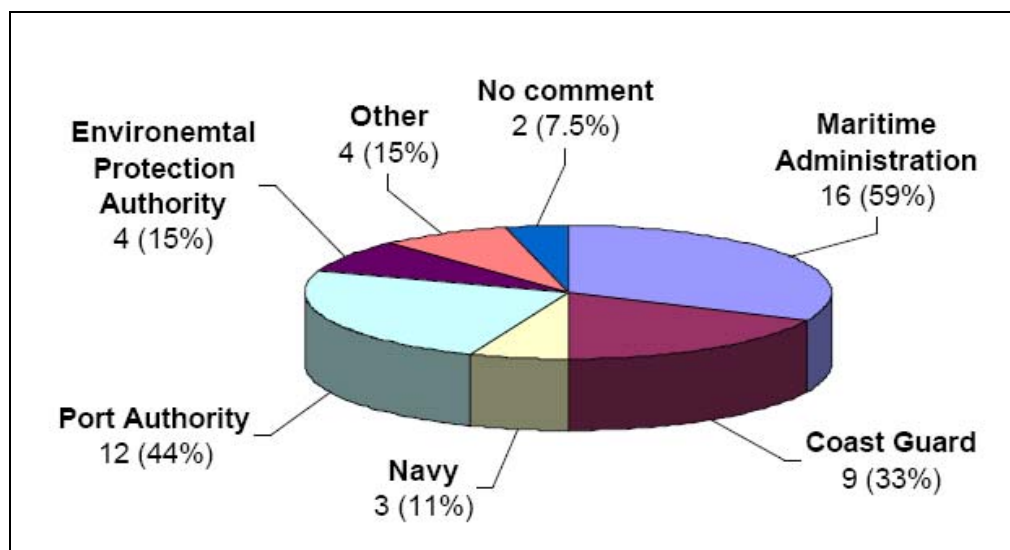


Figure 1-Summary of the administrative units responsible for granting refuge  
(Source: Schroeder, 2006, p.104)

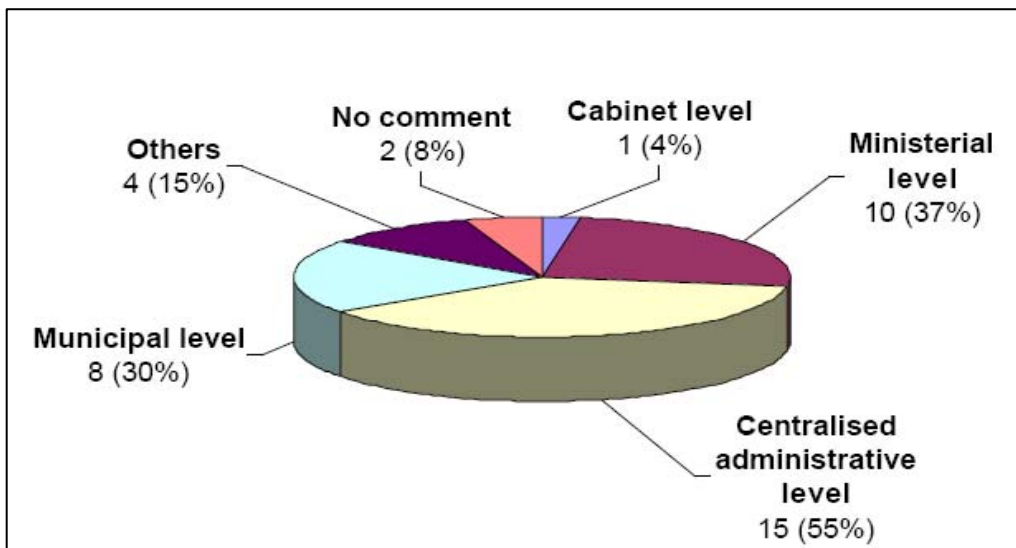


Figure 2-Summary of the decision-making level in granting refuge  
 (Source: Schroeder, 2006, p.105)

It can be seen that the administrative system is different from one country to another. The specific technical problems in decision making can only be solved in domestic coordination. This means the decision making process can vary even if under one uniform obligation. Anyhow, the successful national practices at least give the good examples for the legal framework and the feasibility of an international obligation to assist the ship in distress.

## **Chapter IV International Legal System on Marine Pollution from Ships**

### **4.1 Introduction**

From the previous chapters, it can be concluded that the problem of places of refuge falls mainly in the domain of marine pollution from ships. In maritime world, the subject of marine pollution is becoming more and more important. The problems relating to pollution of the seas are on-going, as evidenced by frequent disasters and the law appears to be continuously developing to cope with the consequences. Nowadays, a whole body on ship-source marine pollution governed largely by international Conventions has been crystallized. From the administrative point of view, the law on prevention of marine pollution from ships falls in three categories. They are preventive, combating and compensation.

However, the term of “places of refuge” has not been recognized in the existing instruments on marine pollution. Is the problem alluded or left as a gap in the law? To verify the inference, it is necessary to locate a proper position for the problem of places of refuge in the international legal system on marine pollution.

### **4.2 Types of Marine Pollution from Ships**

Generally the marine pollution from ships can be categorized into two types based on the cause of the pollution. The first type is the operational pollution. As shown in Table 1 (Gerard, 1994, p.41), in Shipping, the operational discharge or discharge of

bilge and fuel oil plus operational losses from oil tankers is much more than accidental discharge. So it is significant but always ignored for the slow effect and everyday appearance. The accidental pollution is the other type of marine pollution which contributes much small proportion to the marine pollution. Nonetheless, the accidental pollution outbreaks unexpectedly in short time and strike certain area disastrously. In practice, the stakeholders depending on the coastal resources can be kicked out of business in one night. Therefore the accidental pollution always catches much more attention than the operational pollution.

Table1-Estimates of the quantities of oil annually entering the marine environment (millions of tonne)

	Year of the estimate/publication			
	1973/1975	1981/1985	1990/1990	1992/1993
Natural sources	na	0.25	na	0.25
Oil exploration	na	0.05	na	0.05
Shipping				
Discharge of bilge and fuel oil plus operational losses from oil tankers	1.08	1.02	0.41	0.41
Tanker-accidents	0.20	0.41	0.11	0.11
Accidents with other types of ships	0.10	—	0.01	0.01
Other (ports, shipyards, scrapping, etc.)	0.75	0.07	0.04	0.04
Atmospheric deposition	na	0.30	na	0.30
Land-based sources	na	1.18	na	1.18
Total amount per year	—	3.28	—	2.35

Note: na = not available.

Sources: National Research Council (1991), *Tanker Spills, Prevention by Design* (National Academy Press, Washington, DC); GESAMP (1993), *Impact of Oil and Related Chemicals and Wastes on the Marine Environment* (IMO, London).

Operational pollution is from the everyday operation of ships. It can be reduced but impossible to eradicate. Automatic release and illegal or intentional discharge contribute to operational pollution. To reduce automatic releases, rules should be established for the improvement of design, construction and equipment of vessels. To reduce intentional discharges, laws should be passed prohibiting such discharges in certain or all areas of the sea and imposing penalties for violators of these laws. These

rules should be complemented by an effective enforcement system. Furthermore, where discharges are prohibited in large areas of the sea, this prohibition should be coupled with the establishment of port reception facilities for the disposal of operational residues. This is necessary because in fact, no matter how severe penalties may be, certain operational discharges cannot be avoided unless alternative disposal methods are devised. Ultimately, elimination of such pollution comes down to the problem of design, construction and equipment – either alone or in combination with reception facilities.

Therefore, ship's operational pollution has been attempted to be prevented and controlled by several measures. The first is prohibitions, for instance, creations of zones where discharges were prohibited and then the broadening of such zones. The second is by changes in the operation of the vessels. The load on top system belongs to this type of measure. The third is by structural changes of the ships, for example, the segregated ballast tank requirements for oil tanker. The last but not least, establishes reception facilities for ship to discharge the accumulated residues.

Accidental pollution is the aftermath following an accident, e.g. broken vessels. Clearly, since accidents cannot simply be prohibited, the objective must be to remove the causes of accidents. This can be achieved by requiring vessels, to observe certain standards of safety connected with their design (for example, double hull vessels) construction, equipment and manning. In addition the establishment of traffic separation schemes and sea lanes is connected with and aimed at preventing accidents. On the other hand if an accident took place, plans should exist (contingency planning) for the immediate reduction and control of pollution. The equipments for containment, recovery and reception should be readily available.

### 4.3 Rules on preventing and mitigating Pollution from Ships

With regard to marine pollution, currently there are six major Conventions (See Table 2) which have already been in force except Anti-fouling Convention and OPRC/HNS Protocol .

Table 2- Conventions on preventing and mitigating marine pollution

<b>Acronym</b>	<b>Formal name</b>	<b>EIF</b>
<b>ANTI-FOULING</b>	International Convention on the Control of Harmful Anti-fouling Systems on Ships	No
<b>INTERVENTION 1969</b>	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969	Yes
<b>DUMPING 1972</b>	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972	Yes
<b>MARPOL 73/78</b>	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto	Yes
<b>OPRC 1990</b>	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990	Yes
<b>OPRC/HNS</b>	Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol)	No

EIF=Entry into force  
Source: IMO(2005b)

The International Convention on the Control of Harmful Anti-fouling Systems on Ships was adopted in October 2001. It is not relevant to the problem of places of refuge.

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 , often called the Intervention Convention, affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty. The 1973 Protocol extended the Convention to cover substances other than oil. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, entered into force in 1975. This is not an IMO Convention. The above two Conventions can be seen as the evidences for the coastal States not to drive the stricken ships from the territorial sea to the high seas. The environment of the high seas is still governed by international Conventions.

International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78) entered into force in 1983, including Annex I and II. The MARPOL Convention is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. Together with the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS Convention), MARPOL Convention has been regarded as the most effective international instrument for the decline of marine pollution accident. In response to marine accidents, the annexes of the Convention have been frequently revised to keep up with the demand of the protection of marine environment. The double hull requirement, for instance, following the US Oil Pollution Act 1990, the 1992 amendments to Annex I made it mandatory for new oil tankers to have double hulls – and it brought in a phase-in schedule for existing tankers to fit double hulls, which was subsequently revised in 2001 and 2003 after the ‘Erika’ and the ‘Prestige’ accidents. Under a revised regulation 13G of Annex I of MARPOL, the final phasing-out date for Category 1 tankers (pre-MARPOL tankers) is brought forward to 2005, from 2007. In the six technical annexes the reception

facilities are required for the ports to receive the six types of residues. However, the major regulations are intended to direct crew on board ship to take appropriate measures to prevent marine pollution from ships. In the case of coping with a ship in distress, it is important for the coastal States or the port authorities to take relevant proper measures. Places of refuge can be seen as reception facilities for the whole ship in distress (Timagenis, 2004b).

International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 came into force in 1995. The Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol) follows the principles of the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC) and was formally adopted by States already Party to the OPRC Convention at a Diplomatic Conference held at IMO headquarters in London in March 2000. It has not yet entered into force. The OPRC and HNS Protocol are specially dedicated to contingency planning for the pollution accidents. Some countries have already made the designation of places of refuge as a part of the contingency planning. Timagenis (2004a, p.375) States the places of refuge is a further step in the context of the contingency planning for preventing, reducing and controlling pollution from marine accidents. Indeed, international rules relating to oil pollution do contain the similar obligation which would necessarily involve such a step. This is thought to be the right position for the legal status of places of refuge. If so, can this step be ensured by current liability and compensation regime? This is thought to be the paramount concern for the coastal States when request was made from a ship in distress.

#### **4.4 Rules on the Liability and Compensation for Pollution Damage**

With regard to the liability and compensation for pollution damage, currently there are four major Conventions(See Table 3).



Table3-IMO Conventions on marine pollution liability and compensation

<b>Acronym</b>	<b>Formal name</b>	<b>EIF</b>
<b>CLC</b>	International Convention on Civil Liability for Oil Pollution Damage, 1969/1992	Yes
<b>FUND Convention</b>	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971/1992	Yes
<b>HNS Convention</b>	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996	No
<b>BUNKER Convention</b>	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001	No

EIF=Entry into force  
Source: IMO(2005C)

The international regime in the subject of civil liability and compensation for oil pollution damage from a tanker is governed by International Convention on Civil Liability for Oil Pollution Damage, 1992 and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, together with their precursors of 1969 and 1971. The strict liability regime of the CLC is supplemented by the compensation regime of the FUND Convention. The CLC Convention has its own limitation regime which is then topped up by the limitation provided under the Fund Convention. When States provide their ports as places of refuge for ship in distress and damage then occurs, both to the interests of the States and to third parties, they are likely to be entitled to compensation under the CLC and FUND Conventions against the ship-owner, (assuming the Conventions are applicable) unless the ship-owner can bring itself within the exceptions contained in Article III paragraph 2,

or where the claimant has itself been negligent within Article III paragraph 3 of the CLC 1992.

For the pollution damage from non-tanker fuel oil, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 has been concluded to cover this field. The Bunker Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of fuel oil, when carried as fuel in non-tanker bunkers. The Bunker Convention, besides imposing limited liability on the registered owner of the vessel, also imposes limited liability on the 'operator' thereof. However it is still not in force.

For hazardous and noxious substances, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 has been adopted, but not enter into force. The Convention will make it possible for up to 250 million SDR (about US\$320 million) to be paid out in compensation to victims of accidents involving HNS, such as chemicals.

In the port of refuge situation leads to an oil or hazardous or noxious substance pollution scenario, liability will, when certain geographical and other convention requirements are met, be imposed on the ship owner in terms of CLC Convention 1992, HNS Convention 1996 or Bunker Convention, and on the IOPC Fund, HNS Fund or the IOPC Supplementary Fund in terms of the FUND Convention 1992, HNS Convention 1996, and the IOPC Supplementary Fund Protocol respectively. Liability is imposed for 'pollution damage' as therein defined. In all instances, liability can be subject to a limit. CLC Convention 1992, HNS Convention 1996, and Bunker Convention provide for the compulsory insurance of the ship owner. In case of port and other authorities providing refuge to the ship in distress, the damages that is not covered by compulsory insurance may at present feel inadequately secured. This leaves a substantial gap to be filled up.

In CMI (2003), the CMI Second Questionnaire containing further questions which had been identified. Those questions were devised with a view to seeking to ascertain what the likely liability would be for a country which grants a place of refuge to a ship in distress which then causes pollution or other damage, and conversely, what, if any, liability a country would have if it denied or refused a place of refuge to a ship in distress and damage occurs either within the jurisdiction or within the jurisdiction of a neighboring country. The questions formulated also sought to ascertain what liability would attach to a ship owner, what defenses that ship owner would have and what compensation regime would apply in a situation in which such damage occurred when a place of refuge had been granted or when a place of refuge had been denied. The final area in which questions were directed was as to whether or not any other person who provides assistance to a ship in distress in those scenarios would face liabilities.

In essence, most responses to date have pointed to the International Oil Pollution Conventions which are in effect internationally and the Bunker and HNS Conventions which are yet to be in effect as providing answers to the questionnaire. Some have referred to the channeling provisions in those Conventions and reference has also been made to local laws dealing with recovery of damages against negligent wrongdoers (CMI, 2003).

In the author's opinion, the current international legal frame work on pollution damage liability and compensation is comprehensive enough to cover every issue including those involved in the providing places of refuge. Today, it is impossible for ship without insurance can be engaged in international voyage especially the oil tanker. If the ship in distress were not in line with the current international liability and compensation system, the refusal should be regarded as reasonable. The owner of a ship is not liable if the pollution can be proved for the wrong decision of a State according to the 2(b) and 3 of Article III of CLC 1992. In this connection, State should be liable for the negligence of refusal a request of places of refuge.

## **Chapter V The Essence of the Problem and its Legislative Approach**

### **5.1 Places of Refuge as a Further Step to Prevent and Mitigate Pollution**

From the previous chapters, it can be concluded that ship-source pollution is the most important issue in the debate regarding places of refuge for ship in distress. The potential for an oil spill accident is a major concern, and all ships carry oil, either as fuel, or cargo, or both. Moreover, the laden tanker, the 'leper', has already been regarded as the most dangerous one. In addition, the chemical tanker, for example, the 'Ievoli Sun' case in 2000, is another dangerous type of ship, though the subdivision in chemical tanker is much smaller than oil tanker. Regardless of the fact that the number of oil spills in the coastal and marine environment has decreased in recent years, the fear of big accidents is still a big concern. The only uncertainty is when it will happen. Therefore the environment problem takes the priority in the holistic solution of the places of refuge.

Timagenis (2004a, pp.375-376) realized the problem and confirmed:

The essence of the problem is that no matter what preventing measures may be taken, accidents may be reduced but they will always happen. For this reason individual States and the international community should be ready to face the consequences of pollution from accidents.

This has been realized and contingency planning has developed. Thus for example

a general rule in this connection is included in Article 199 of UNCLOS, while the “Oil Pollution Preparedness, Response and Cooperation Convention 1990” is specifically dedicated to this issue.

This contingency planning includes provisions for the availability of people and equipment as well as the creation of regional stations all of which to be readily available to face a pollution incident. This contingency planning, however, faces the problem of combating pollution as an operational matter, i.e. as a matter to be faced in the form of the salvage operations by boats, skimmers, booms, pumps etc. The Places of Refuge is a further step in the context of contingency planning for preventing, reducing and controlling pollution from marine accidents. Practice proves that it is not enough to try to plug a ship or pump oil out of her and it is not enough to use floating booms to restrict the pollution. Something more permanent and more effective is required in order to confine the pollution and avoid its spread. This is the Places of Refuge.

Inspired by this confirmation, considering the formation and legal basis of the problem of places of refuge, the author thinks it is a marine pollution issue which can be solved under the framework of international convention on marine pollution. It is a further step to prevent and mitigate marine pollution from ships. The most appropriate Conventions are OPRC and OPRC/HNS Protocol.

## **5.2 The Need to add an Obligation in Public International Law**

There should be an obligation to be imposed on States to find a place of refuge for any

ship in distress. Three reasons can be based on this view. Firstly, it is unclear whether State is entitled to refuse entry and to impose special financial condition. The long standing customary right of entry of ship in distress is now challenged by the fear of environmental disaster from the huge cargo. However, the disaster has been proved not to be prevented merely by refusal of providing places of refuge. Secondly, State practice completely lack of uniformity. From UK, Norway to Spain and China, different approaches are taken from various points of view. Some measures, for example, expelling endangered ships from the EEZ, are in conflict with international law and will therefore not be enforceable. Lastly, the environment concern needs such a proactive measure. The international maritime community has addressed to prevention pollution for many years and made great progress to achieve the cleaner ocean goal. Unfortunately the problem of places of refuge is still said to be the major reason for the environmental disaster such as the 'Prestige' case. In this connection, the numerous international laws also are at a loss in this circumstance. Therefore, it is already the time for the competent international authority, for instance, IMO to take appropriate actions to solve the difficult problem. It is in line with the proactive philosophy of IMO. Otherwise, the laden tanker, the 'leper' problem can be never solved.

### **5.3 A New Convention or an Additional Regulation to an Existing Convention**

There are two types of viewpoint on how to impose an obligation to the member States. One is the establishment of a new convention on places of refuge. The other is a new amendment to an existing convention. Both are subject to discussion in IMO and among the scholars.

Van Hooydonk (2004) supports an international convention on places of refuge and ships in distress. He thinks the convention of this sort is both essential and attainable. This convention should sets 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. The philosophy of the UK is similar. That is there is a need for a Port of Refuge Convention which applies world-wide. An obligation (similar to those which currently exist between the members of the OPRC Convention) needs to be imposed on as many countries as possible world-wide (UK MCA, 2001).

In the author's opinion, there are some difficulties to the first viewpoint. Firstly, to adopt a new convention and make it compulsory is a time consuming work, especially for such a convention including both public and private international law issues. Nonetheless, the problem on the places of refuge is urgent for the stricken tankers. Secondly, the issues related to the places of refuge are not new and independent; they have already been implied in the existing conventions. Therefore it is difficult to coordinate so many international instruments in a new convention. The problems can not be solved merely through a new convention. If the new convention came into being, a series of amendments should also be done to the whole related conventions such as UNCLOS, OPRC, CLC and FUND Conventions. Therefore, this solution is thought to be not perfect.

The other solution is an amendment or protocol to the existing Convention, for example, UNCLOS, Salvage or OPRC Convention. Van Der Velde (2004, pp.497-498) provides such a solution and he states:

Additional international regulation is needed to confirm the existence of an obligation to offer a place of refuge. Instead of creating a special Convention, this regulation on places of refuge should preferably be added to an existing Convention. Next to a new codified Rule of International Law, more detailed regulation is needed to know under which circumstances States have the obligation to offer ships

in distress a place of refuge. This more detailed regulation can be given in guidelines.

In the author's opinion, this is a better solution because it is easily accepted by the coastal States in the light of the lesson from the 'Prestige' accident which has the positive effect that States become aware of the importance for their own marine environment and the world environment as well. As a practice, every convention is subject to amend to keep up with the industry development. This is why so many protocols or amendments to the existing conventions such as MARPOL, SOLAS and OPRC Convention especially after a marine accident. The precondition is the selection of a widely accepted IMO convention which is closely related to the characteristics of places of refuge. Based on previous discussion, the right convention should be OPRC Convention including OPRC/HNS Protocol. However, this is only the first step; there are a lot of pertinent issues to be solved.

#### **5.4 The Holistic Solution to the Problem of Places of Refuge**

The problem of places of refuge can not be solved through one perfect instrument. In the light of environment priority, the problem should be treated gradually through a step by step procedure. Firstly, as a further step to mitigate pollution, an obligation must be defined in the OPRC Convention regime through a proactive way from the environment protection perspective. Actually, in this step, the obligation is not whether to provide a place of refuge or not but the obligation to designate places of refuge in advance. The aim of this step is to make it compulsory for member States to designate places of refuge according to certain guidelines which is also made compulsory in this step. Secondly, more complex and technical guidelines are necessary to provide technical support. These guidelines help to designate places of refuge; establish an administrative and decision making system. Thirdly, the liability, compensation and financial security



problems should be considered under the developments of shipping industry. Lastly, UNCLOS, INTERVENTION and SALVAGE Conventions should be revised accordingly.

#### **5.4.1 An Obligation to Designate Places of Refuge**

An obligation to designate places of refuge needs to be imposed on as many countries as possible. The fear of pollution or associated hazards due to the vast quantities of oil and other hazardous cargo is the prime cause of the popular topic on places of refuge. Therefore, the issue of the places of refuge falls within the category of rules concerning abatement of pollution and contingency planning. Furthermore, the ship in distress often involves international interests who need international co-operation and co-ordination. In this connection, the widely accepted OPRC Convention is the most appropriate convention for this obligation to be added. Therefore it is likely to be entered into force for a consolidated new OPRC/HNS convention on a relative short term. After all, there are already three countries (Australia, Germany and New Zealand) that have contained provisions dealing with the admission of ship in distress which may prove a threat of pollution.

In this connection, the risk of fire and insufficient compensation from pollution damage is acceptable under the careful arrangement of safety and antipollution facilities in places of refuge and the assurance of current liability and compensation system. Think about the 'Prestige', it can survive seven days on the rough open sea; the time is enough for people to decrease the risk to an acceptable level. After all, the pollution accident is not an instantaneous one in general. Further think about the 'Castor', after nearly one month and 2,000 miles voyage, it can still perform a ship-to-ship transfer successfully. Hardly anybody doubts the refusal is mainly from a political point of view but not a technical and environmental perspective. Therefore, it is crucial for States to fully understand that, in most cases, offering a place of refuge to ships in distress is for their own interest and pushing away a stricken tanker pose a great threat to the marine

environment and local interests. In addition, coastal States have to realize that they have responsibilities under international law to deal with distress situations and to protect the marine environment and they can not simply ignore and pass on the problem.

In this new consolidated OPRC/HNS, there should be an Article on “National Contingency Plan”. This Article should ideal confirm:

(1) Every Party shall establish a national contingency plan for emergency guide in case of oil or hazardous noxious substance pollution from ships.

(2) The plan shall include:

(a) Places of refuge for ship in distress.

The designation and providing of places of refuge shall be according to the guidelines developed by the Organization.

(b) Organizational relationship of the various bodies involved, whether public or private, taking into account guidelines developed by the Organization.

In the definition Article, the “places of refuge” should be defined (inspired by the existing IMO Guideline on places of refuge for ships in need of assistance):

“Places of refuge” means combinations of anchorages and shipyards which are designated in advance for a ship in need of assistance. In these places, ship in distress can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment.

This is the beginning of the term “Places of Refuge” emerging in the international public

law convention. This should be followed by technical support guidelines and coordination of other pertinent conventions. It should be noted that the technical difficulties should not be regarded as the obstacle to impose the obligation in the Convention.

#### **5.4.2 New Guidelines on Places of Refuge**

New guidelines can be based on the existing guidelines in a strict way. Some parts of the Guidelines can be compulsory in the light of the precedent of International Maritime Dangerous Code. In the guidelines it should be further stated:

When a place of refuge is requested, there is an obligation for the coastal State to consider whether or not to grant it. A State shall be liable for the damages caused by an unjust refusal to offer a place of refuge.

However, the obligation does not mean places of refuge can be provided in any case. As have already established in the existing guidelines, they are designed to direct coastal States whether or not and how to provide refuge under the obligation. The guidelines should be comprehensive and subject to revise according to the effect of implementation.

#### **5.4.3 Liability, Compensation and Financial Security Problems**

There is no need to establish another liability and compensation system now that the place of refuge is mainly a pollution problem. In the author's opinion, the urgent affairs are to urge the Bunker and HNS convention to be in force. Then the whole liability and compensation system has been established to remedy the pollution damage. There maybe a rise in case of providing places of refuge both on the limit of liability and extra compensation fund. Anyway, no damage can be totally compensated by

insurance. This is general characteristics of any insurance.

#### **5.4.4 Conventions need to be revised**

Following similar philosophy, the term of place of refuge and the State's liability should be stipulated in the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, United Nations Convention on the Law of the Sea 1982 and International Convention on Salvage 1989. Then the whole international legal system has been built to cope with the new or maybe the last legal gap at international level.

## **Chapter VI Conclusions and Recommendation**

### **6.1 The Legal Solution for Places of Refuge in International Level**

Obligation must be imposed on States to provide refuge for the protection of the marine environment. This philosophy is becoming more and more popular since the three notorious accident cases. Now that the places of refuge is primarily a further step in the context of contingency planning for preventing , reducing and controlling pollution from marine accidents, it is necessary to add a new amendment to the existing OPRC Convention together with the OPRC/HNS Protocol based on Article 199 of UNCLOS. The amendment should be attached by new guidelines in lieu of the existing IMO guidelines.

In the new consolidated OPRC/HNS, there should be an Article on “National Contingency Plan”. This Article should ideal confirm:

(1)Every Party shall establish a national contingency plan for emergency guide in case of oil or hazardous noxious substance pollution from ships.

(2)The plan shall include:

(a)Places of refuge for ship in distress.

The designation and providing of places of refuge shall be according to the guidelines developed by the Organization.

(b)Organizational relationship of the various bodies involved, whether public or private, taking into account guidelines developed by the Organization

In the guidelines it should be further stated:

When permission to access a place of refuge is requested, there is an obligation for the coastal State to consider whether or not to grant it. A State shall be liable for the damages caused by an unjust refusal to offer a place of refuge.

The corresponding liability and compensation problem can be further studied in the current legal frame work. Following the similar philosophy, the term of ‘place of refuge’ and the State’s liability should be stipulated in the relevant Conventions.

## **6.2 Recommendation on National Legislation**

National legislation is indispensable in finding solutions to the problem of places of refuge especially before the international legislation came into being. In fact, the Norway and UK have provided considerable ways in the field. In today’s international shipping market, the substandard ships try to avoid en route to Europe or North American for the stricter requirements both in safety and prevention pollution. These ships including tankers turn to Asia, Africa and South America market. Therefore the need of places of refuge for ship in distress and the risk of pollution in the third world countries are really higher than those in Europe.

As the ending of this dissertation, the author highly recommends that China, as well as other shipping nations outside EU, who depends much on exporting and importing oil and chemicals should take steps to deal with the problem of places of refuge and add it to the national contingency plan. As far as the situation of China is concerned, in Pearl River archipelagoes, Yangtze estuary, Taiwan Straits and Bohai internal water where

traffic lanes are especially busy, the places of refuge for ship in distress should be readily available at any time. And the decision making system are expected to be established as soon as possible. Then the contingency system can be regarded as a sound one. Nevertheless, this is impossible without a legislative base. Therefore, the term of “places of refuge” and how to deal with the ship in distress should be stipulated in the laws such as Law on Marine Environment Protection and Law on Maritime Safety.

## Bibliography

- Comité Maritime International [CMI] (2003). Places of refuge – Report of the CMI to the IMO. *In Yearbook 2002*(pp. 117-146). Antwerp: Author.
- Constantinides, X. (2002). The Castor case and its ramifications. In The Baltic International Maritime Council, *BIMCO Review 2002*(pp. 251-255).London: Author.
- European Commission [EC] (2002). *Erika: two Years on*. Retrieved February 1, 2006 from [http://europa.eu.int/comm/transport/maritime/safety/doc/erika/memo\\_en.pdf](http://europa.eu.int/comm/transport/maritime/safety/doc/erika/memo_en.pdf)
- Frank, V. (2004). Consequences of the prestige sinking for European and international law. *The International Journal of Marine and Coastal Law*, 20(1), 1-64.
- Gerard, P. (1994). ‘International Co-operation to Prevent Oil Spills at Sea: Not Quite the Success It Should Be’, in Helge Ole Bergesen and Georg Parmann (eds.), *Green Globe Yearbook of International Co-operation on Environment and Development 1994* (pp. 41–54). Oxford: Oxford University Press.
- Han, L.X. (2005). *A study on the legal system of compensation for pollution damage caused by ships*. Unpublished master’s thesis, Dalian Maritime University, Dalian, China.
- Hetherington, S. (2004a). “Prestige” – can the law assist? In Comité Maritime International (CMI) *Yearbook 2003*(pp. 361-374). Antwerp: Author.
- Hetherington, S. (2004b). Civil liability and monetary incentives for accepting ships in distress. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 457-467). Antwerp: Author.
- IMO (2001). *Designation by coastal States of places of refuge for vessels in distress where there is a risk*. Paper submitted at the MSC, 74th Session, 11 February 2001, by Spain. London: Author.
- IMO(2003a). *Guidelines on places of refuge for ships in need of assistance*. London: Author.
- IMO(2003b). *Places of refuge*. Paper submitted at the MSC, 77th Session, 24 March 2003, by BIMCO. London: Author.



- IMO (2003c). *Places of refuge*. Paper submitted at the MSC, 77th Session, 25 March 2003, by INTERTANKO. London: Author.
- IMO (2005a) . *Summary of status of conventions*. Retrieved February 15, 2006 from the World Wide Web: <http://www.imo.org/home.asp>
- IMO (2005b) . *Prevention of marine pollution conventions*. Retrieved February 15, 2006, from <http://www.imo.org/home.asp>
- IMO (2005c) . *Liability and compensation conventions* . Retrieved February 15, 2006 from the World Wide Web: <http://www.imo.org/home.asp>
- INTERTANKO (2002) *INTERTANKO Statement, Places Of Refuge*. Retrieved February 15, 2006 from the World Wide Web: [http://www.intertanko.com/pdf/weeklynews/INTERTANKOStatement\\_placesofrefuge.pdf](http://www.intertanko.com/pdf/weeklynews/INTERTANKOStatement_placesofrefuge.pdf)
- Julian, M. (2002). Current IMO position on places of refuge, salvage and wreck removal. Retrieved February 15, 2006 from the World Wide Web: <http://www.amsa.gov.au/amsa/haven/julian.pdf>
- Madern, D.& Knight, S.(2003). Refuge for ships in distress: International developments and the Australian position. *In MLAA NZ (Maritime Law Association of Australian and New Zealand) Journal*. 17, pp.101-117
- Mitropoulos, E.E. (2004). Places of refuge. *In The Baltic and International Maritime Council, BIMCO Review 2004(pp. 56-58)*. London: Author.
- Mukherjee, P.K. (2005a). *Refuge and salvage*. Unpublished lecture handout, World Maritime University, Dalian Branch, Dalian, China.
- Mukherjee, P.K. (2005b). Refuge and salvage. In A. Chircop & O. Linden (Eds.), *Places of Refuge for Ships Emerging Environmental Concerns of a Maritime Custom*. (pp.271-297). Leiden/Boston: Martinus Nijhoff Publishers.
- Mukherjee, P.K. (2005c). *An introduction to maritime law and admiralty jurisdiction*. Unpublished lecture handout, World Maritime University, Dalian Branch, Dalian, China.
- O'Neil, W.A. (2001). *Speech on Castor accident at Sub-Committee on Fire Protection (FP) - 45th session*. Retrieved February 1 ,2006 from the World Wide

Web: <http://www.imo.org/home.asp>

Polychronopoulou, H. (2002). Ports of refuge from an environmental protection point of view. Retrieved December 24 ,2005 from the World Wide Web:<http://www.euleandpartners.com>

Roman, R.M.D. (2006). Port perspective and environmental management considerations. In A. Chircop & O. Linden (Eds.), *Places of Refuge for Ships Emerging Environmental Concerns of a Maritime Custom*. (pp.119-143). Leiden/Boston: Martinus Nijhoff Publishers.

Schroeder, J.U. (2006). Review of decision-making by maritime administrations for ships in need of assistance-lessons for risk assessment. In A. Chircop & O. Linden (Eds.), *Places of Refuge for Ships Emerging Environmental Concerns of a Maritime Custom*. (pp.93-117). Leiden/Boston: Martinus Nijhoff Publishers.

Shaw, R. (2004a).Places of refuge: International law in the making. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 329-357). Antwerp: Author.

Shaw, R. (2004b).International sub-committee discussion paper. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 380-402). Antwerp: Author.

Shaw, R. (2004c).Designation of places of refuge and mechanism of decision making. In Comité Maritime International (CMI) *Yearbook 2003*(pp.446-456). Antwerp: Author.

Sterckx, D.(2004). Ports of refuge: Finding a workable system. In *The Baltic and International Maritime Council, BIMCO Review 2004*(pp. 59-61). London: Author.

Stone, T. (2004). Places of refuge in the United Kingdom. In *Lloyd's List Events, 2004*. London: Author.

Timagenis, G. (2004a). Places of refuge as a legislation problem. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 375-379).Antwerp: Author.

Timagenis, G. (2004b). Reception facilities for ships in distress. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 470-478). Antwerp: Author.

Timms, R. (2002).Current IMO position on safe havens, salvage and wreck removal. Retrieved December 20, 2005 from the World Wide Web:<http://www.amsa.gov.au/amsa/havn/Timms.htm>

UK MCA (2001). *A possible solution to the "port of refuge" problem*. Retrieved

December 20, 2005 from the World Wide Web: <http://www.mcga.gov.uk>

United Nations Atlas of the Oceans [UNAOA] (2005). *IMO work on places of refuge*. Retrieved February 1, 2006 from the World Wide Web: [http://www.oceansatlas.com/unatlas/issues/emergencies/transportation and telecomm/places\\_of\\_refuge.htm](http://www.oceansatlas.com/unatlas/issues/emergencies/transportation_and_telecom/places_of_refuge.htm)

Van Der Velde, W. (2004). The position of coastal States and casualty ships in international law. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 479-499). Antwerp: Author.

Van Hooydonk, E. (2004). The obligation to offer a place of refuge to a ship in distress. In Comité Maritime International (CMI) *Yearbook 2003*(pp. 403-445) Antwerp: Author.

Vormawah, B. Capt. (2002). Safe haven – Developments in IMO. In *Eule & Partners International Consulting - The International Conference and Exhibition “Ship/Port interface – Environment and Safety”*, Rotterdam, the Netherlands, 22-24 October 2002. Retrieved February 1, 2006 from the World Wide Web: <http://www.euleandpartners.com>

Wibel, C-S. (2002). Places of refuge: Solutions for a burning problem. In *Eule & Partners International Consulting - The International Conference and Exhibition “Ship/Port interface – Environment and Safety”*, Rotterdam, the Netherlands, 22-24 October 2002. Retrieved February 1, 2006 from the World Wide Web: <http://www.euleandpartners.com>

## **Appendix Applicable international convention**

At the international level, the following Conventions and Protocols are in force and constitute, *inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances:

1. United Nations Convention on the Law of the Sea, in particular Article 221 thereof;
2. International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended;
3. Protocol relating to Intervention on the High Seas in Cases of Pollution by substances other than Oil, 1973;
4. International Convention for the Safety of Life at Sea, 1974, as amended, in particular chapter V thereof;
5. International Convention on Salvage, 1989;
6. International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990;
7. International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978;
8. International Convention on Maritime Search and Rescue, 1979, as amended;
9. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;
10. Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971;

11. Convention on Limitation of Liability for Maritime Claims (LLMC), 1976;
12. International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969;
13. International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992;
14. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992.