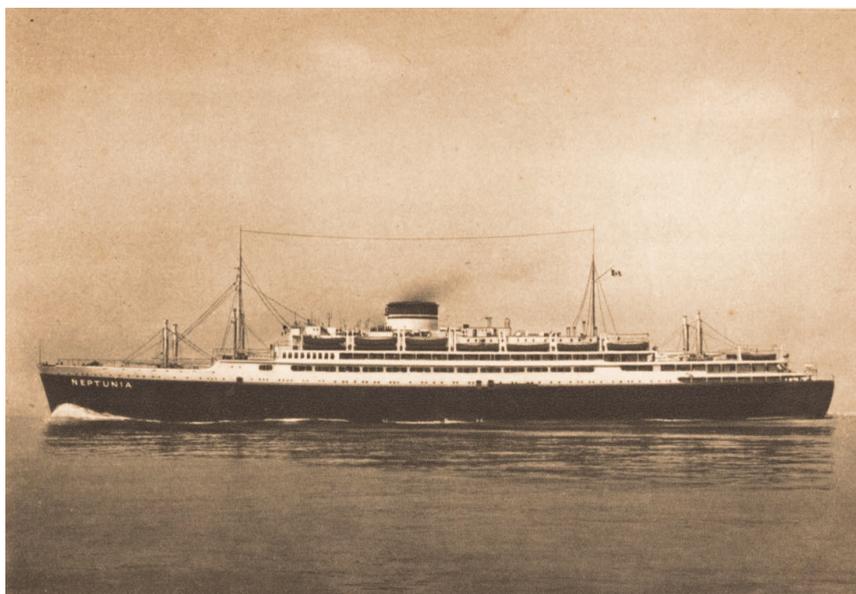


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PLACES OF REFUGE FOR SHIPS IN NEED OF ASSISTANCE: LOOKING FOR THE BEST RESPONSE¹

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I.- INTRODUCTION – II. SOME CONSIDERATIONS REGARDING THE EVOLUTION OF THE RIGHT TO ACCESS A PLACE OF REFUGE – III. AN EXAMINATION OF THE GUIDELINES OF THE INTERNATIONAL MARITIME ORGANIZATION – IV. PLACES OF REFUGE: A KEY ELEMENT IN THE MARITIME SAFETY POLICY OF THE EUROPEAN UNION; V. THE SPANISH RESPONSE – VI. PLACES OF REFUGE IN THE MEDITERRANEAN SEA – VII. FINAL REMARKS

ABSTRACT: The oil spills, as a result of accidents involving tankers combined with the ambiguities that affect this area of international law, have shed light on the need to take steps aimed at providing places of refuge for ships in need of assistance. In response to these disasters and to the consequences of the oil spills for the marine environment, the International Maritime Organization highlighted access to places of refuge as an issue for consideration. This article analyses the IMO Guidelines and the response of the European Union and the Mediterranean States to this issue.

KEYWORDS: places of refuge, oil spills, ships in need of assistance

LUGARES DE REFUGIO PARA BUQUES NECESITADOS DE ASISTENCIA: EN BUSCA DE LA MEJOR RESPUESTA

RESUMEN: Los vertidos de crudo como consecuencia de accidentes de petroleros junto con las ambigüedades que afectan a este ámbito de Derecho Internacional, han puesto de manifiesto la necesidad de adoptar medidas relativas al acceso a lugares de refugio a buques necesitados de asistencia. De hecho, en respuesta a este tipo de catástrofes y a sus consecuencias sobre medio ambiente marino, la Organización Marítima Internacional destacó el acceso a lugares de refugio como un ámbito prioritario de estudio. Este artículo analiza tanto las Directrices de la OMI como la respuesta de la Unión Europea y los países mediterráneos a esta problemática.

PALABRAS CLAVE: lugares de refugio, vertidos de crudo, buques necesitados de asistencia.

LIEUX DE REFUGE POUR LES NAVIRES AYANT BESOIN D'ASSISTANCE: A LA RECHERCHE DE LA MEILLEURE REPONSE

RESUME: Les déversements d'hydrocarbures résultant d'accidents de pétroliers ainsi que les ambiguïtés qui affectent ce domaine du droit international, ont mis en évidence la nécessité d'adopter des mesures en ce qui concerne l'accès aux lieux de refuge pour les navires ayant besoin d'assis-

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tance. En fait, en réponse à ces catastrophes et leurs conséquences sur le milieu marin, l'Organisation Maritime Internationale a mis en évidence l'accès aux lieux de refuge en tant que domaine prioritaire d'études. Cet article analyse autant les Directives de l'OMI comme la réponse de l'Union européenne et les pays Méditerranéens à ce problème.

MOTS CLÉS: lieux de refuge, déversements d'hydrocarbures, navires ayant besoin d'assistance

I. INTRODUCTION

Oil tankers transport some 2.900 million tonnes of crude oil and oil products every year around the world by sea³. Most of the time, this activity goes on without any problem. However, the oil spills, as a result of accidents involving the tankers *Erika* (1999)⁴, *Castor* (2000)⁵ and most recently *Prestige* (2002)⁶, combined with the ambiguities that affect this area of international law, have shed light on the need to take steps aimed at providing places of refuge for ships in need of assistance. In fact, the issue of place of refuge is not a theoretical or doctrinal debate but the solution to a practical problem: what to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ships be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?

In response to the disasters mentioned above and to the consequences of the oil spills for the marine environment, the International Maritime Orga-

³ See <<http://www.imo.org>>.

⁴ The *Erika*, a tanker carrying 30.000 tonnes of oil, was refused refuge by a French harbour master and subsequently broke in two and sank in heavy seas in the Bay of Biscay off the Coast of France.

⁵ The tanker *Castor*, with a load of 8.7 million gallons of unleaded gasoline, sustained heavy weather damage approximately 55 miles off the coast of Cartagena, Spain. Despite the risk of marine pollution and loss of life in deep sea transshipment were attempted, none of the affected coastal states offered the ship or the salvors a protected area closer to shore. The "Castor" was unable to find a sheltered place to effect cargo transfer and repairs for some 35 days. Finally, the vessel was towed to the coast of Tunisia where the cargo was safely unloaded.

⁶ The *Prestige*, a 26-year-old-single-hull tanker, sprang a leak off the coast of Galicia, Spain, on 13 November 2002. The Spanish government refused to offer the vessel or the salvors a sheltered location. The vessel was ordered to be held more than 60 miles offshore. Six days later the vessel sank, having been refused a port of refuge.

nization (IMO) highlighted access to places of refuge⁷ as an issue for consideration, with its Secretary General suggesting, in earlier 2001, that the time had come for the Organization to undertake, as a matter of priority, a global consideration of the problem of places of refuge for disabled vessels and adopt any measures required to ensure that, in the interest of safety of life at sea and environmental protection, coastal States reviewed their contingency arrangements so that such ships are provided with assistance and facilities as might be required in the circumstances⁸. This initiative led to its General Assembly to adopt the *Guidelines on Places of Refuge for Ships in Need of Assistance*⁹ in November 2003. The Guidelines defines place of refuge as a place –and not only a port– 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. Moreover, the IMO Guidelines are aimed at providing coastal states with a series of objective criteria that allow them to make decisions regarding the viability or convenience of providing refuge for ships in need of assistance. In fact, many authors have supported the idea that if these ships in particular had been provided access to a place of refuge, the effects of these catastrophes would have been “limited”¹⁰.

Although there are many issues related to the topic of providing access to places of refuge – such as existence of an obligation to provide safe haven for vessels in danger, authorities with the power to make such a decision and detailed protocols to be followed –, it is important to take into account

⁷ As ROSENNE pointed out “*the Titanic (1912), Torrey Canyon (1967), Amoco Cadiz (1978), Exxon Valdez (1987) are all not only maritime disasters. They are also starting-off points for rapid developments in the law to meet the problems brought out by the incident*”, ROSENNE, SH: “The International Maritime Organization interface with the Law of the Sea Convention”, in NORDQUIST, M.H; MOORE, J.N: *Current maritime issues and the International Maritime Organization*, Martinus Nijhoff, The Netherlands, 1999, p. 263.

⁸ See http://www.imo.org/safety/mainframe.asp?topic_id=746.

⁹ IMO Resolution A.949 (23), adopted on 5 December 2003.

¹⁰ “*when a vessel finds itself in distress at sea the potential hazard, not only for the vessel but also for the coastal state may increase if the vessel is not offered a place of refuge. A decision to grant or refuse a place of refuge, therefore, must take into account the advantages for the vessel and the environment, on the one hand, and balancing that against the risks for greater damage to the vessel and the environment, on the other. It is contended that the balance would, more often than not, turn out to favor a decision to grant a place of refuge*” DONNER, P: “Offering Refuge is better than refusing”, *WMU Journal of Maritime Affairs*, Vol. 7 (2008), No. 1, p. 299

the fact that the decision to authorise or refuse access to places of refuge by coastal states does not only have environmental implications¹¹, but also legal, political or socio-economic implications which generally hinder the decision-making process¹². Also, as we are referring to providing refuge for ships in need of assistance, we need to take into account that two opposing interests will come into play¹³: that of the ship in need of assistance, and that of the coastal state, which by granting access to the ship to enter waters under its sovereignty or jurisdiction, may result in serious damage being caused to the environment¹⁴, and subsequently to its economy¹⁵.

Based on these considerations, this study focuses on the issue of provi-

¹¹ “it is only in the final decades of the twentieth century that the importance of protecting the marine environment has been recognized”, SHAW, R: “Places of refuge. International Law in the making?”, *CMI Yearbook 2003*, p. 330.

¹² CHIRCOP, A: “Ships in distress, environmental threats to coastal states, and places of refuge: new directions for an Ancien Regime?”, *Ocean Development & International law*, n° 33, 2002.

¹³ The International Association of Ports and Harbors (IAPH) pointed out that “any proposal for reform (on places of refuge) must inevitably encounter two firmly entrenched and largely incompatible positions. On the one hand, shipowners and the various parties involved in the success of the marine adventure such as charterers, cargo owners, insurers, masters and crew and salvors have a strong interest in preserving the ship through timely intervention in a place of refuge. Allied to these interests are the interests of the flag State, the port States and the Classification Societies which play a role in ensuring the ship is kept in a seaworthy condition. On the other hand, coastal States through their port authorities and national governments have an equally strong interest in preserving their waters and territory from pollution damage and their populations and economic activities from danger from hazardous cargoes. In this, the demands of environmentalists, coastal communities, politicians and media play a major role” “Places of Refuge from a Ports’ Perspective”, available at: <<http://www.iaphworldports.org>>.

¹⁴ In these sense, YOUNG pointed out that “IMO has been devoting a great deal of effort to finding the right balance of interest to develop a framework to help those who must anticipate and handle complex place-of-refuge-situations in the future”, YOUNG, CH: “The international maritime organization and the development of an international legal framework for places of refuge”, *International Workshop: Places of refuge: responsibilities and rights of port authorities*, University of Antwerp-11 december 2003, available at: <http://www.esp.be/news/proceedings_11-12-2003.asp>.

¹⁵ “The fact that oil spills contaminate beaches and affect economic activities such as aquaculture, fishing and tourism has also served to focus attention on the socio-economic dimension”, CHIRCOP, A; LINDEN, O, NIELSEN, D: “Characterising the problem of places of refuge for ships” in CHIRCOP, A; LINDEN, O: *Places of Refuge for Ships. Emerging environmental concerns of a maritime custom*, Martinus Nijhoff, The Netherlands, 2006, p. 15.

ding access to places of refuge from a general perspective, by analysing IMO Guidelines, as well as from a regional perspective, reflected in the provisions implemented by the European Union in this area, paying special attention to how Spain and the Mediterranean Region has acted.

II. SOME CONSIDERATIONS REGARDING THE EVOLUTION OF THE RIGHT TO ACCESS A PLACE OF REFUGE

The right for a ship in need of assistance to access a place of refuge has evolved significantly as despite the fact that “traditionally and over a long period of time, the international maritime community strongly supported an unwritten norm concerning the provision of assistance to ships in distress” and “at least until the 1960s the right remained largely unquestioned”¹⁶. Nowadays, however “the various refusals since the 1970s may be evidence of an emerging state practice that appears to limit the extent and conditions of the right of refuge”, as indicated by CHIRCOP¹⁷. The reason for this evolution can be found in three essential aspects: 1) growing concerns for the protection of the environment, both in General International Law and in International Law of the Sea¹⁸ (reflected in a large number of agreements or conventions which have been signed, and which directly or indirectly refer to its protection¹⁹); 2) the increased volume of maritime traffic transporting hydrocarbons; 3) the consequences for coastal states and their marine envi-

¹⁶ CHIRCOP: “Characterising the problem...” *cit.*, p. 3.

¹⁷ CHIRCOP, A: “Living with ships in Distress- A New IMO Decision-Making framework for the requesting and granting of refuge”, *WMU Journal of Maritime Affairs*, 2004, Vol. 3, n° 1, p. 31.

¹⁸ “Places of refuges” is the latest and possibly the last act in a long process of creation of international rules for the protection of the marine environment”, TIMAGENIS, G.J: “Places of refuge as a legislative problem”, *CMI Yearbook 2003*, p. 375.

¹⁹ For example: The International Convention relating to Intervention on High Seas in cases of Oil Pollution Casualties (the Intervention Convention) 1969 as amended; The Protocol relating to intervention on High Seas in cases of Pollution by substances other than Oil, 1973; The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL); The International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPRC Convention); The Protocol on Preparedness, Response and Cooperation to Pollution incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol).

ronment of providing shelter for a ship in need of assistance. In fact, one of the fundamental reasons for regulating these places of refuge is precisely to protect the environment, to prevent any kind of contamination occurring, or at least to reduce its consequences to a minimum²⁰.

In these sense, the United Nations Convention on the Law of the Sea (UNCLOS) contains some rules that are relevant to places of refuge issues:

- i) Maritime Zones: IMO Guidelines define place of refuge as “a place where a ship in need of assistance can take action to stabilise its condition, reduce the hazard to navigation, protect human life and the environment”²¹. Frequently, such waters are likely to be a port, bay or other area in such geographical proximity to the coast as to receive shelter²². So, these places are understood as referring to maritime areas that are under the sovereignty of coastal States—internal waters and territorial sea²³. As it is known, internal waters are treated as land territory, so – according to UNCLOS- ships do not enjoy a right of entry into a port. This access depends on a decision of the coastal State. In the territorial sea “ships of all States, whether coastal or landlocked, enjoy the right of innocent passage”²⁴. While some authors have sought refuge in the right of innocent passage in internal waters

²⁰ In this sense, TIMAGENIS pointed out that “*experience has shown that vessels leaking or other persistent pollutants after an accident cause less pollution when they are in easily accessible areas exactly because the antipollution measures may be taken more easily and more effectively. On the contrary ships left on the high seas or to sink in very deep waters may continue leaking or a very long time without control and thus cause long term damage to the environment*”, TIMAGENIS: “Places of...”, *op. cit.*, p. 376. In this line, SHAW established that “*the legal issues arising out of both these casualties are on-going, but it is self-evident that if each of these ships had been allowed into a place of refuge where here 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 which must be acknowledged to be significant, but in both cases the impact would have been unlikely to prove as expensive as what eventually occurred*”, SHAW: “Places of refuge...”, *cit.*, pp. 333-334.

²¹ IMO Resolution A.949 (23), point 1.18.

²² “*use of the word ‘port’ might be too narrow and restrictive vis-à-vis the envisaged scope of the geographical area which might, in case of an emergency, be able to provide facilities and services (including putting in place contingency arrangements) to ships in distress, in particular laden tankers; hence the proposal by the IMO Secretariat to use the wider term “places of refuge”, available at: <http://www.imo.org/Safety/mainframe.asp?topic_id=746>*.”

²³ UNCLOS, art. 2.1.

²⁴ UNCLOS, art. 17.

as sufficient grounds to grant access to a place of refuge for a ship, it is actually difficult to reconcile the right of innocent passage²⁵ with the risk that may result from a ship in danger entering a place of refuge. Also, we cannot overlook the fact that this innocent passage may be revoked for safety reasons²⁶, which may include protection of the environment²⁷. Furthermore, other conventions such as the *International Convention for the Prevention of Pollution from Ships*, 1973 and 1978 (MARPOL 73/78); *Convention on Oil Pollution Preparedness and Response Cooperation*, 1990 (OPRC Convention)²⁸, or the *Convention relating to Intervention on the High Seas in cases of Oil Pollution casualties*, 1969²⁹ despite clearly referring to the prevention of marine pollution,

²⁵ UNCLOS, art. 18 establishes “Passage means navigation through the territorial sea for the purpose of: a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or b) proceeding to or from internal waters or a call at such roadstead or port facility. Passage must be continuous and expeditious”. In this sense, MORRISON point out that: “(...) *Clearly the objective of passage through the territorial sea is of a temporary nature as a medium for transit and not as a destination in itself*”, MORRISON, A: *Places of Refuge for ships in Distress. Problems and Methods of Resolution*, Martinus Nijhoff, The Netherlands, 2012, p. 101.

²⁶ See UNCLOS, art. 25.

²⁷ UNCLOS, Art. 19 establishes that: “*passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (...) (l) any other activity not having a direct bearing on passage*”. In this sense, MURRAY pointed out that “*the Erika and Castor incidents highlight an area of difficult tension and ambiguity in international law. What is the status of a distressed ship’s right of entry for reasons of force majeure or distress? On the one hand, under customary international law and UNCLOS, distressed ships have a right of entry into the territorial sea of coastal states. Conversely, there must be some limit to a distressed ship’s right of entry. Coastal states have an inherent right of self-defense and sovereign duties to protect their population and environmentally sensitive coastal areas*”, MURRAY, CH. F.: *Any port in a storm? The right of entry for reasons of force majeure or distress in the wake of the Erika and the Castor*, available at: <<http://moritzlaw.osu.edu/lawjournal/murray.htm>>. See also, VAN DER VELDE; W: “The position of coastal states and casualty ships in International Law, *CMI Yearbook 2003*, pp. 483-486; CHIRCOP: *op. cit.*, p. 217; VAN HOOYDONK, E: “The obligation to offer a place of refuge to a ship in distress”, *CMI Yearbook 2003*, p. 406.

²⁸ See articles 3, 4 and 5.

²⁹ CHIRCOP stressed that “*Intervention Convention could conceivably have contained reference to places of refuge for ships in maritime casualties. However, it did not. The Intervention Convention was designed to empower the coastal state with the necessary legal authority to intervene in relation to foreign ships involved in casualties on the high seas and that could harm its coastal interests*”, CHIRCOP: “The customary law of

do not have anything to say about this question in particular. That is, there is not specific obligation to offer refuge to a ship in distress. As MORRISON pointed out “*it remains discretionary on the part of the coastal State*”³⁰.

- ii) The protection of the marine environment: States have the obligation to protect and preserve the marine environment³¹. For this purpose, the States have the obligation: 1) to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source. These measures include those designed to minimize to the fullest possible extent of pollution of the marine environment such as pollution from vessels, in particular, measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea or preventing intentional and unintentional discharges³²; 2) Not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another³³; 3) In case of pollution danger, States in the area affected, in accordance with their capabilities, and the competent international organizations shall cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment³⁴. So, these disposals impose the duty to control or prevent pollution to the coastal States, but this does not mean an obligation to grant refuge to a ship in distress to prevent environmental damage³⁵.

Another question is the relation between the duty of coastal states to provide humanitarian assistance and the obligation of offering refuge. Several Conventions such as UNCLOS³⁶, *the International Convention for the Safety of refuge for ships in distress*”... *cit.*, p. 196.

³⁰ Morrison: *op. cit.*, p. 107.

³¹ UNCLOS, art. 192.

³² UNCLOS, art. 194.

³³ UNCLOS, art. 195.

³⁴ UNCLOS, art. 199.

³⁵ See also UNCLOS, art. 211.

³⁶ See article 98.

Life at Sea, 1974 (SOLAS Convention)³⁷ or the *International Convention on Maritime Search and Rescue*, 1979 (SAR Convention)³⁸ establish the duty of coastal states to provide humanitarian assistance. But even in these situations, it is necessary to distinguish between the obligation of providing humanitarian assistance and the obligation of offering refuge to a ship in distress. In fact, although article 11 of the SAR Convention establishes “*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 cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purposes of saving life or property in danger as well as preventing damage to the environment in general*”, this does not imply that a coastal State has the obligation to provide a place of refuge to a ship in distress, because as CHIRCOP pointed out “*this provision does not provide a clear legal obligation to provide a place of refuge, and indeed not even a duty to regulate port of refuge entry. Thus, the core duty of the refuge custom was not codified as it may have been understood in the 1980s. What the above provision now provides is simply a coastal state duty to take into account the cooperation needed among the actors concerned to enable successful salvage, when regulating or deciding on ports of refuge and other salvage matters*”³⁹.

³⁷ SOLAS Convention establishes the duty of other ships to come to the assistance of ships in distress and in addition requires coastal states to observe their rescue obligations towards crew on board ships.

³⁸ Article 2.1.1 requires states parties to “*ensure that assistance is rendered to any person in distress at sea*”.

³⁹ See, CHIRCOP “The customary law...” *cit.*, p. 195. In this sense, MUKHERJEE has underlined that this article is “*a classic example of the proverbial mix of apples and oranges. (...) The intention of the 1989 Convention was neither to confirm nor deny a right access to a port of refuge of a ship in distress. The drafters viewed it principally as a private law convention and therefore did not favor the articulation of public law rights and responsibilities of states in any far-reaching manner. The result is an uncertain mix of private and public law provisions within the Salvage Convention, and the public law provisions are, unfortunately, vague and equivocal. The plight of the salvor remains in limbo as was demonstrated graphically in the “Prestige” and other incidents*”; MUKHERJEE, P.K: “Refuge and Salvage” in CHIRCOP and LINDEN: *op. cit.*, p. 278. Along this line, MORRISON stated that “*this requirement to take the needs of salvors into account is, however, “an empty exhortation” that imposes no duty on a coastal State to actually grant Access to a ship in distress. All it does is to ensure that there is a cooperation with all interested parties when making decisions, including whether or not to grant access to a ship in distress, during the performance of the salvage operation (...), therefore, it can be concluded that the Salvage Convention does not create an obligation on coastal States to grant a place of refuge to ships in distress but merely requires that*

However, based on the Conventions mentioned above and on the recent international practice -when different ships in need of assistance such as the *Erika*, *Castor* or *Prestige* were denied access to places of refuge by the respective coastal State- and in UNCLOS we can deduce that International Law does not impose any obligation in this regard on the coastal states. Moreover, this is enshrined in IMO Guidelines as well as in the different provisions adopted by the European Union to safeguard its coasts against contamination by oil spills, as we will now see.

III. AN EXAMINATION OF THE GUIDELINES OF THE INTERNATIONAL MARITIME ORGANIZATION

As previously discussed, as a result of the most recent oil tanker disasters and their consequences on the marine environment, the social alarm produced and the “uncertainty” or “weaknesses” of current International Law of the Sea with regard to access to places of refuge⁴⁰, the IMO decided to study this matter. Although the Maritime Safety Committee had appointed a special group as a result of the accident suffered by the *Erika* and had already identified the need to analyse the places of refuge in December 1999, it was only after the accident involving the *Castor* that the Secretary General of the IMO requested at its 74th Session on 21st May 2001 a study on places of refuge as a priority matter. Finally, the IMO Assembly adopted *Guidelines on Places of Refuge for Ships in Need of Assistance* at its 23rd Session⁴¹. The purpose of the IMO Guidelines was “*to provide the parties concerned with a framework that enables them to generate an effective practical response to situations where ships are in need of assistance. They describe which concrete action may be expected from duly diligent shipmasters and salvors on the one hand and adequately organised coastal States on the other*”⁴².

States cooperate with salvors in relation to the salvage operation in which granting of a place of refuge could be a part”, MORRISON: *op. cit.*, pp. 105-106. See also, MARQUES ANTUNES, N: “Decision-making in the imminence of disaster: “Places of refuge” and the prevalence of national interests”, in CHANTAL RIBEIRO, M; MOLENAAR, E: *Maritime Safety and Environmental Protection in Europe. Multiple layers in regulation and compliance*, Edit. Ediliber, Coimbra, 2015, p. 96.

⁴⁰ VAN DER VELDE underlined that “*because existing legislation did not clarify the issue of places of refuge, the IMO adopted a set of guidelines in December 2002*”, VAN DER VELDE: *op. cit.*, p. 486.

⁴¹ IMO Resolution A.949 (23). During the same IMO Assembly was adopted the Resolution A.950 (23) on Maritime Assistance Services.

⁴² VAN HOOYDONK, E.V: *Places of Refuge. International Law and the CMI Draft Conven-*

Some authors have indicated their disagreement with the fact that we only have a series of guidelines which are not binding on the Member States of the International Maritime Organization. Although this is true, it is also true that other solutions, such as adopting a protocol that would be included with a Convention that is already in effect, such as MARPOL, or adopting an Agreement on this matter⁴³, would not guarantee any uniform application of these measures, as we should not forget that the member states are free to grant their consent to be bound, and therefore the provisions of any such Convention or Protocol would only be obligatory for the states that voluntarily decided them to be. In these sense, the Comité Maritime International (CMI)⁴⁴ studied the issues of places of refuge and made is proposal to the IMO in 2005 in order to introduce a binding instrument on this matter, but the IMO concluded that at this time there was no need to draft a Convention dedicated to Places of Refuge and that a more informed decision as to whether a Convention was necessary might best be taken in light of the experience acquired through their implementation⁴⁵.

IMO *Guidelines on Places of Refuge for Ships in need of Assistance*, which “can be viewed as a new international standard for the decision-making processes involved”⁴⁶, define access to places of refuge based on four pillars:

- i) The Guidelines focus on “ship in need of assistance”. This means “a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or

tion, Lloyd’s List, London, 2010, p. 8.

⁴³ In this sense, VAN HOOYDONK pointed out that “*the ideal solution would be an international convention on ports of refuge and ships in distress*” (...) “*...an international convention on places of refuge and ships in distress is both essential and attainable. A Convention in this sort would among other things set out principles regarding the right of access, decision-making methods, the civil and criminal liability of authorities, the compensation of losses accruing to ports, the allocation of salvage rewards and request for financial securities...Mere Guidelines and contingency plans are in the author’s view inadequate*”, VAN HOOYDONK: *op. cit.*, pp. 443-444.

⁴⁴ See, VAN HOOYDONK: *op. cit.*, pp. 179-315 and MORRISON: *op. cit.*, pp. 285-305 for a detailed analysis of the CMI Draft Convention

⁴⁵ See IMO, Report of the Legal Committee on the work of its ninetieth Session. LEG 90/15, 9 May 2005, points 384-394.

⁴⁶ CHIRCOP, A: “The IMO Guidelines on Places of Refuge for ships in need of assistance” in CHIRCOP and LINDEN: *op. cit.*, p, 37.

navigational hazard”⁴⁷. The use of this expression instead of “ships in distress” is very important because “the effect of this is to broaden the application to a wider range of ships that are not in a state of distress, but need assistance nonetheless”⁴⁸.

- ii) They enshrine the principle that there is no obligation on the part of the coastal state to offer refuge to ships in need of assistance⁴⁹;
- iii) Far from establishing a general obligation to provide refuge, the study is carried out on a “case-by-case” basis, because “granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast”⁵⁰.
- iv) The Guidelines are only applicable to situations in which there is no risk to human life, providing that “*where the safety of life is involved, the provisions of the SAR Convention should be followed. Where a ship is in need of assistance but safety of life is not involved, these guidelines should be followed*”⁵¹.

Based on these fundamental premises, and with the aim of safeguarding maritime safety and preventing and controlling contamination from vessels⁵²,

⁴⁷ IMO Guidelines, point. 1.18.

⁴⁸ CHIRCOP: “Living with ships...” *cit.*, p. 38.

⁴⁹ “*when permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible*”. See also YOUNG: *op. cit.*, p. 5.

⁵⁰ IMO Guidelines, point 1.7. In this sense, SHAW pointed out that “*in the world of the search for harmony of international law the words “case-by-case” are usually a sign of failure to achieve a common principle of universal application, but in the area of places of refuge it must, it is submitted, be recognized that each distress situation is different from all others, and that guidelines, rather than hard and fast rules, are the appropriate formula*”, SHAW: “Designation of...” *cit.*, p. 335

⁵¹ IMO Guidelines, point 1.

⁵² IMO Guidelines, point 1.12 “*the purpose of these Guidelines is to provide member governments, shipmasters, companies and salvors with a framework enabling them to respond effectively and in such a way that, in any given situation, the efforts of the shipmaster and shipping company concerned and the efforts of the government authorities involved are complementary. In particular, an attempt has been made to arrive at a common framework for assessing the situation of ships in need of assistance*”.

the IMO has implemented these Guidelines, which are configured according to two fundamental aspects: (1) the actions that must be carried out by the captain of the ship and (2) the actions that must be carried out by the coastal state.

(1) The captain of the vessel is responsible for identifying the reason why it needs assistance – fire, explosion, damage to the ship, collision, pollution, impaired vessel stability, grounding⁵³– as well as evaluating and providing information on the risks in the following cases: 1) if the ship remains in the same position, 2) if the ship continues on its voyage; 3) if the ship reaches a place of refuge and 4) if the ship is taken out to sea. The captain is responsible for indicating the type of assistance required from the coastal state to prevent damage occurring⁵⁴, as well as contacting the coastal state to inform it of all the specific aspects arising from the situation. These data must be transmitted to the coastal state using the Maritime Assistance Service (MAS)⁵⁵.

(2) In the case of the actions corresponding to the coastal States, the Guidelines basically require that they define which procedure has to be applied in situations when a ship in need of assistance requests permission to access waters under its jurisdiction. The aim is for the coastal states to draw up protocols indicating which authorities are responsible for taking the necessary decisions, and especially which criteria will be applied when granting or refusing access to a place of refuge. This said, these Guidelines obviously do not stipulate which authority the coastal state should make responsible for making these decisions; on the contrary, they do provide a series of objective criteria the coastal States should take into account when making the decision to grant or refuse access to a place of refuge⁵⁶.

Based on these Guidelines, the coastal States have to make an objective analysis of the pros and cons of granting access to a place of refuge, mainly based on environmental and social factors, such as the risks of contamination, the existence of protected species; weather and sea conditions (local

⁵³ IMO Guidelines, point 1.

⁵⁴ IMO Guidelines, point 3.

⁵⁵ IMO Resolution A.950(23). See also Information on Maritime Assistance Service (MAS) (MSC.5/Circ.13/Rev.3), 14 July 2016.

⁵⁶ SHAW has stated that “*the essential thrust of the IMO Guidelines, set out in paragraph 3.2, is that the assessment should be an objective one, weighing all the factors and risks in the balance, and that the coastal state should give shelter whenever reasonably possible*”, SHAW: “Designation of...”, *cit.*, p. 448.

meteorological statistics and number of days of inoperability or inaccessibility of the place of refuge); whether emergency plans are in place (the number of tugs available, etc.); and the foreseeable consequences in terms of personal safety and/or contamination⁵⁷.

Also, when providing or refusing access to a place of refuge, the coastal state has to take aspects such as the following into account: the type of cargo and its condition, stores, bunkers, in particular hazardous goods; the distance and estimated transit time to a place of refuge, and whether the master is still on board⁵⁸. The coastal state, which has to establish a Maritime Assistance Service, may also carry out an on-board inspection to evaluate the risks to the ship, the place of refuge and its environment, as well as to neighbouring States⁵⁹, as a result of one of the general principles behind these Guidelines, namely reconciling the different interests that are at stake⁶⁰.

Finally, having made an objective analysis taking all of the previous factors into account, coastal states have to decide on providing access for ships in need of assistance to a place of refuge under their jurisdiction. As Shaw indicated, *“it is to be hoped that these Guidelines will help in ensuring that decisions are taken by coastal states in a common-sense and consistent manner”*⁶¹.

It should be noted that in accordance with the provisions of paragraph 3.14, access to a place of refuge may be granted subject to providing a financial guarantee, through which the vessel will accept liability for any costs arising as a result of it entering a place of refuge.

IV. PLACES OF REFUGE: A KEY ELEMENT IN THE MARITIME SAFETY POLICY OF THE EUROPEAN UNION

Europe has a coastline that stretches 70,000 km along two oceans and four seas: the Atlantic and Arctic Oceans, the Baltic, the North Sea, the Mediterranean, and the Black Sea⁶², as a result of which its maritime safety po-

⁵⁷ IMO Guidelines, point 2.

⁵⁸ Ibidem, point 3.9

⁵⁹ Ibidem, point. 3.11

⁶⁰ *“the analysis should include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment”*

⁶¹ SHAW: “Designation of...”, *op. cit.*, p. 447.

⁶² See Communication from the Commission to the European Parliament, the Council, the

licy, within the framework of the Integral Maritime Policy of the European Union, occupies a very significant place on the EU's agenda.

In fact, the last two accidents that happened on the coasts of the Member States of the European Union brought to light the need to adopt different measures aimed at providing improved protection to the coastline against oil pollution. Although the disaster of the *Erika* led to a series of actions being adopted within this framework – the Erika I and Erika II packages⁶³ – the *Prestige* catastrophe revealed the need to promote the application of these measures⁶⁴ as well as to adopt a third maritime safety package, with the European Commission stating in 2009 that “with the adoption and subsequent implementation of the third Maritime Safety Package, the EU now has one of the world's most comprehensive and advanced regulatory frameworks for shipping”⁶⁵.

Out of all of the measures implemented, we will focus our attention on the actions of the EU in a specific area: places of refuge. Here it is necessary to highlight the adoption in 2002 of Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, intended to “(...) help to prevent accidents and pollution at sea and to minimise their impact on the marine and coastal environment, the economy and the health of local communities”⁶⁶. This Directive, based on a broad definition of “places of refuge” as “a port, the part of a port or another protective berth or anchorage, or any other sheltered area identified by a Member State for accommodating ships in distress”⁶⁷, established in its Article 20 that:

European Economic and Social Committee and the Committee of Regions: Conclusions from the consultation on a European Maritime Policy, COM (2007) 574 final. Brussels, 10.10.2007.

⁶³ Communication from the Commission to the European Parliament and to the Council on improving safety at sea in response to the Prestige accident, COM (2002)681final, Brussels, 3.12.2002. See also Sobrino HEREDIA, J.M: “La acción de la Unión Europea en materia de seguridad marítima”, *REDI*, vol. LV (2003) pp. 80-116

⁶⁴ COM (2002)681final, p. 5.

⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Strategic goals and recommendations for the EU's maritime transport policy until 2018”, COM (2009) 8final, Brussels, 21.1.2009, p. 7

⁶⁶ Directive 2002/59/EC, point 4.

⁶⁷ Directive 2002/59/EC, art. 3.m

Member states, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorization by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response. Plans accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph

In the light of this provision, it should be noted that: 1) it uses the expression “ships in distress”, while the IMO Guidelines, which were adopted subsequently to this Directive, use the expression “ships in need of assistance”; 2) the Member States are responsible for adopting plans to shelter ships in need of assistance in waters under their jurisdiction; 3) in our opinion, far from establishing an obligation on the part of the Member States to provide refuge, it leaves the final decision up to them as to the need or viability of offering or refusing refuge⁶⁸, and therefore the obligation only refers to adopting measures that define the procedure to be followed by the ships in need of assistance and the coastal State in the event of a catastrophe. In this line, CHIRCOP indicates that “it remains to be seen how Member States will implement the Directive, and in particular the extent to which the provision of refuge is characterised more as an obligatory than a discretionary requirement. The IMO Guidelines lean in the direction of discretion. Already in legislatively implementing the EU Directive, Spain appears to take the view that there is no obligation to provide refuge and has set financial security requirements at very high levels”⁶⁹.

Within the implementation framework of the Third Maritime Safety Package, Directive 2009/17/EC of the European Parliament and of the Council amending Directive 2002/59/EC was adopted, establishing a Community

⁶⁸ In this sense, MORRISON pointed out that “there is no compulsion for coastal States or ports to actually accommodate ships in distress since such an action is subject to “operational and environmental constraints” and it subject to authorization of the competent authority”; MORRISON, A: Shelter from the storm—the problem of places of refuge for ships in distress and proposals to remedy the problem. Doctor of Philosophy thesis, University of Wollongong, Faculty of Law, University of Wollongong, 2011, available at: <<http://ro.uow.edu.au/theses/3218>>.

⁶⁹ CHIRCOP: “The customary law ...” *cit.*, p. 214.

vessel traffic monitoring and information system⁷⁰. With regard to places of refuge, this modification was intended to respond to the deficiencies that were identified in the implementation by the Member States of Article 20, because, as indicated by the European Commission“(...) the experience gained with implementing the Directive has revealed differences of understanding and implementation by the Member States as regards the content of the plans and the responsibilities of the authorities concerned, which have to be remedied by making the existing provisions clearer and more focused”⁷¹. Subsequently, the aim of this reform is to “harmonise the implementation of the “places of refuge” plans to ensure they are applied uniformly in the different Member States, which will help in preventing serious pollution. There is a need, in particular, to clarify the rules for applying these principles”⁷². Actually, following the amendment of Article 20⁷³, we now have a much more detailed regulation, based on 7 main points:

- i) The Guidelines on Places of Refuge for Ships in need of Assistance annexed to Resolution A.949 (23) of the IMO are used as a reference, something that had not been possible in drafting the former Article 20, as Directive 2002/59/EC had been implemented prior to the IMO Guidelines.
- ii) The term “*ships in need of assistance*” is applied in place of “*ships in distress*” used in Directive 2002/59/EC, as this is applicable to a wider range of situations.
- iii) The plans for accommodating ships in a place of refuge are intended as a basic tool, and in fact Article 20a details the minimum information these plans should contain: a) the identity of the authority or authorities responsible for receiving and handling alerts; b) the identity of the competent authority for assessing the situation and taking a decision on acceptance or refusal of a ship in need of assistance in the place of refuge selected; c) information on the coastline of

⁷⁰ OJ L 131, 28.5.2009.

⁷¹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, COM (2005) 589final, p. 5.

⁷² COM (2005) 589final, p. 7.

⁷³ See Directive 2009/17/EC, articles 20a-20c.

- Member states and all elements facilitating a prior assessment and rapid decision regarding the place of refuge for a ship, including a description of environmental, economic and social factors and natural conditions; d) the assessment procedures for acceptance or refusal of a ship in need of assistance in a place of refuge; e) the resources and installations suitable for assistance, rescue and combating pollution; f) procedures for international coordination and decision-making; g) the financial guarantee and liability procedures in place for ships accommodated in a place of refuge.
- iv) The Member States must have a map indicating possible places of refuge “(...) so as to allow the competent authority, in the event of an accident or incident at sea, to identify clearly and quickly the most suitable areas for accommodating ships in need of assistance”⁷⁴.
 - v) The identification of the decision-making chain with regard to alerting and dealing with the situation in question. In this case, it is essential that the Member States clearly indicate who are the authorities responsible for receiving and handling alerts, as well as the authorities responsible for deciding whether to provide access to a place of refuge for a ship in need of assistance⁷⁵.
 - vi) Although the Member States are obliged to draw up the plans for accommodation, we do not believe that they are obliged to provide refuge for ships in need of assistance, as paragraph 16 establishes that “*when a ship is in need of assistance, a decision may have to be taken as regards the accommodation of that ship in a place of refuge*”⁷⁶. Also, Article 20b establishes that “*the authority or authorities [...] shall decide on the acceptance of a ship in a place of refuge following a prior assessment of the situation carried out on the plans [...]. The authority or authorities shall ensure that ships are admitted to a place of refuge if they consider such an accommodation the best course*

⁷⁴ See Directive 2009/17/EC, par. 19

⁷⁵ Article 20.1 “*member States shall designate one or more competent authorities which have the required expertise and the power, at the time of the operation, to take independent decisions on their own initiative concerning the accommodation of ships in need of assistance*” and art. 20a3 “*member states shall publish the name and contact address of the authority or authorities referred to in art. 20.1 and of the authorities appointed for receiving and handling alerts*”

⁷⁶ See Directive 2009/17/EC, par. 16.

of action for the purposes of the protection of human life or the environment". Therefore, the States must be prepared to offer the best and fastest response to a vessel in need of assistance, for which the plans for accommodation are essential, inasmuch as they define the "*course to be followed*" in order to evaluate the different interests in play (such as the state of the vessel, risk of pollution, etc.).

- vii) Financial security and compensation. We believe that this is one of thorniest issues proposed by the Directive, and something which could play a decisive role when it comes to authorising or rejecting access to a place of refuge, despite the fact that Article 20c.1 establishes that: "*the absence of an insurance certificate within the meaning of article 6 of Directive 2009/20/EC (...) on the insurance of shipowners for maritime claims shall not exonerate a Member State from the preliminary assessment and decision referred to in art. 20b-decision on the accommodation of ships-, and shall not in itself be considered sufficient reason for a Member State to refuse to accommodate a ship in a place of refuge*"⁷⁷.

Despite going beyond the scope of this paper, it is important to highlight the importance of the "SafeSeanet" Community Maritime Information Exchange System, developed by the Commission in agreement with the Member States, which makes it possible to locate at source and communicate to any authority accurate and up-to-date information on ships in European waters, their movements and their hazardous or polluting cargoes, as well as marine incidents.

It should also be noted that the issue of places of refuge is not a "*closed matter*"; as indicated by the fact that in 2013 the European Commission launched the "Cooperation Group on Places of Refuge", a forum for Member State authorities dealing with ships in need of assistance. The Cooperation Group will look into the implementation of current EU legislation and offer clarifications and guidance on existing provisions. If necessary, the group will also advise or make recommendations for a revision of the relevant EU directive regarding places of refuge⁷⁸. In this sense, the Group adopted on november 2015 the *EU Operational Guidelines on Places of Refuge* that "have been prepared in a spirit of enhanced co-operation and coordination among

⁷⁷ Articles 4 and 6, Directive 2009/17/EC

⁷⁸ Available at: <http://ec.europa.eu/transport>

all parties involved, including Member States' Authorities and concerned industry" and "provide a practical guidance for the competent authorities (CA) and the main parties involved in managing a request for a place of refuge from a ship in need of assistance, including where an incident occurs on the high seas or outside of the jurisdiction of any one member State"⁷⁹.

V. THE SPANISH RESPONSE

With more than seven thousand kilometres of coastline, along which more than 6,000 vessels travel each year loaded with hazardous merchandise, maritime safety is a particularly sensitive issue for Spain. Also, we should not forget that the *Prestige* disaster, which caused serious environmental damage, occurred in Spain, off the coast of Galicia. However, this was not the first accident of this kind in the region, as it joined a long list of tankers which had suffered some kind of "incident" off the Spanish coast: *Polycommander* (1970); *Erkowit* (1973); *Urquiola* (1976); *Andros Patria* (1979), *Casón* (1987) and the *Aegean Sea* (1992)⁸⁰.

As a result, it comes as no surprise that Spain was one of the first member States of the European Union to transpose to its own legal system Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, through Royal Decree 210/2004 of 6 February, establishing a monitoring and information system for maritime traffic⁸¹. Articles 20-24 of this Decree were dedicated to places of refuge, although the first steps in

⁷⁹ VTMISS. Places of Refuge. EU Operational Guidelines. Version 3-Final 13 November 2015, p. 3. See also European Commission. Commission Staff Working Document for the Council Shipping Working Party IMO-EU Information paper to be submitted to the 96th session of the Maritime Safety Committee of the IMO, London from 11-20 May 2016 (MSC 96) concerning information on the EU Operational Guidelines on places of refuge, SWD (2016) 43 final, Brussels, 22.2.2016

⁸⁰ See, among others, SOBRINO HEREDIA, J.M: "La acción de la Unión Europea en materia de seguridad marítima", *REDI*, Vol. LV (2003), p.79-117; JUSTE RUIZ, J: "El accidente del *Prestige* y el Derecho Internacional: de la prevención fallida a la reparación insuficiente", *REDI*, Vol. LV (2003), p. 15-42; CHIRCOP, A: Ships in distress, environmental threats., *cit.*, p. 215; PSARAFTIS, H.N: "Maritime Safety: to be or not to be proactive", *WMU Journal of Maritime Affairs*, 2002, n° 1, pp. 3-16

⁸¹ "although the Spanish Decree gives clarity about the applicable criteria, it is to be preferred to create international uniform criteria", VAN DER VELDE: *op. cit.*, p. 489.

transposing this Directive had already been taken through Law 62/2003 of 30 December on fiscal, administrative and social measures⁸². This Law regulated general aspects that were subsequently developed with the basic purpose of determining the rules and criteria defining how the maritime authorities should act when a vessel in need of assistance asks for refuge, to ensure that any damage caused as a result of providing refuge would be less than that caused by providing other alternative methods of assistance for the vessel⁸³. However, the implementation of Directive 2009/17/EC led to the publication of Royal Decree 1593/2010 of 26 November, modifying Royal Decree 210/2004⁸⁴. As a result, Royal Decree 1593/2010, together with Royal Legislative Decree 2/2011 of 5 September, approving the revised text of the Law on State Ports and the Merchant Navy⁸⁵, comprise the “*legislative package*” of reference for the matter in question.

It should be noted that as a result of this “legislative package”, the regulation of places of refuge is based on five main pillars: 1) the absence of the obligation to allow the entrance of a vessel to a place of refuge, as Article 299.2 of Royal Legislative Decree 2/2011 expressly indicates that any such invitation “may be refused or made subject to conditions” depending on a series of specific conditions; 2) the necessary reconciliation of interests between the vessel in need of assistance and the consequences that may affect the coastal state as a result of sheltering the vessel, granting authorisation in cases when it is considered that providing shelter is the best solution for protecting human life and the marine environment⁸⁶; 3) the design of a case-by-case study⁸⁷; 4) the Director General of the Merchant Navy, assisted by a technical committee, is appointed as the competent authority for making decisions regarding whether to accept or refuse a vessel in need of assistance, thereby complying with the obligation established in Article 20 of Directive 2009/17/EC; 5) the necessary drawing up of contingency plans, for which the maritime authorities are responsible. Here it should be noted that on 7

⁸² Official State Journal 313.

⁸³ Point 6, Royal Decree 210/2004.

⁸⁴ Official State Journal 289, 30 november 2010, p. 99368.

⁸⁵ Official State Journal 253, 20 octubre 2011, p. 109633.

⁸⁶ Article 299.2, Royal Decree 2/2011.

⁸⁷ Art. 24.3, Royal Decree 1593/2010.

February 2011, the Maritime Safety Information Programme (PRISMA) was presented, identifying 1,100 places of refuge along the whole of the Spanish coast, 80 of which are in Galicia⁸⁸.

Through these provisions and the subsequent implementation of plans for receiving vessels and identifying places of refuge under its sovereignty or jurisdiction, we believe that Spain has taken an important step towards ensuring that a catastrophe on the scale of the *Prestige* is never repeated. Even so, we should not forget that the decision on whether to accept a vessel will always be complex, due to the difficulty of reconciling the different interests involved.

VI. PLACES OF REFUGE IN THE MEDITERRANEAN SEA

Within the European Union there are agreements between various member States located in specific regions which address not only coordinated policies on the practical elements of pollution control but also coordinated policies on places of refuge⁸⁹. We will focus our attention on the Mediterranean Sea, because it has the largest traffic density of oil tankers of the globe. With 28% of the world's sea-borne oil traffic transiting in its waters, some 200,000 crossing per year, up to 2000 ships are in the sea at any one time⁹⁰.

In 1975, 16 the Mediterranean countries and the European Community (EC) adopted the Mediterranean Action Plan (MAP)⁹¹ as the institutional fra-

⁸⁸ “The PRISMA system is designed to assist in the decision to allow or reject requests from ships to enter places of refuge. The program, drawn up in a collaborative effort with CEDEX, is already in use by the Directorate-General and lists over 1,150 locations along the length of the Spanish coast including ports, harbours, estuaries and bays which, in specific circumstances, could offer a place of refuge to ships. The PRISMA database contains detailed information on each potential place of refuge”. See *Marina Civil* n° 99.

⁸⁹ North Sea (Agreement for Cooperation in dealing with Pollution of the North Sea by oil and other harmful substances) and Baltic States (Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 april 1992, into force on 17 January 2000) have also addressed places of refuge at regional level.

⁹⁰ See, <<http://www.unepmap.org>>.

⁹¹ The MAP's main objectives were to assist the Mediterranean Governments to assess and control marine pollution, to formulate their national environmental policies and to improve their capacities to identify better options for development and sound decision bases for the allocation of resources. The MAP also endorsed the preparation of a framework convention for the protection of the marine environment against pollution, as well as two related protocols that would provide a legal basis for cooperation in protecting the Mediterranean marine

mework for cooperation in addressing common challenges of environmental degradation. The main objective of the MAP was to assist the Mediterranean countries in assessing and controlling marine pollution and in formulating their national environment policies. In 1976, these Parties adopted the *Convention for the Protection of the Mediterranean Sea Against Pollution* (Barcelona Convention), which had been amended in 1995 and renamed as *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*⁹². The 1995 Barcelona Convention provides a substantially extended field of application and defines the obligations of the Contracting Parties in protecting the environment and contributing to the sustainable development of the Mediterranean Region. Moreover, the Barcelona Convention has seven Protocols⁹³ addressing specific areas of Mediterranean environmental conser-

environment. Although the MAP's initial focus was on marine pollution control, experience soon confirmed that socio-economic trends, combined with poor management and planning of development, are the root of most environmental problems, and that meaningful and lasting environmental protection is inseparably linked to social and economic development. The MAP's focus gradually widened from a sectoral approach to pollution control to integrated coastal zone planning and management as the key tool through which solutions are being sought. So, MAP's Phase II was designed, taking into account the achievements and shortcomings of the MAP in the context of developments of environmental protection policies at the international level. See <<http://www.unepmap.org>>.

⁹² The Convention entered into force in July 2004. The 22 contracting Parties to the Barcelona Convention are: Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia, Turkey, and the European Union. See, RAFTOPOULOS, E: "The Mediterranean Response to Global Challenges: environmental governance and the Barcelona Convention System" in VIDAS, D and SCHEI, P, J: *The World Ocean in Globalization. Climate Change, sustainable Fisheries, Biodiversity, shipping, regional issues*, Edit. Martinus Nijhoff, 2011, pp. 507-532.

⁹³ The Protocol for the Prevention of Pollution in the Mediterranean Sea by Dumping from ships and aircraft (adopted in 1976, amended in 1995); The Protocol for the Protection of the Mediterranean Sea against Pollution from land-based sources and activities (adopted in 1980, amended in 1996); The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted in 1995, replacing the related Protocol of 1982) and Annexes (adopted in 1996, amended in 2009, 2012 and 2013), The Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its subsoil (adopted in 1994); The Protocol on the Prevention of Pollution of the Mediterranean Sea by transboundary movements of hazardous wastes and their disposal (adopted in 1996) and The Protocol on the Integrated Coastal Zone Management in the Mediterranean (adopted in 2008).

vation. Among these Protocols, we will highlight the *2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*⁹⁴ (2002 Protocol).

In 1976 the “Regional Oil Combating Centre” (ROCC) was established by the decision of the Contracting Parties of the Barcelona Convention with the mandate to strengthen the capacities of coastal States in the Mediterranean Region and to facilitate co-operation among them in order to combat massive marine pollution by oil, particularly by developing national capacities to combat oil pollution and by establishing a regional information system with a view to dealing with marine pollution emergencies. In 1989, the name of the Centre was changed to the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC)⁹⁵. REMPEC assists to the Contracting Parties in meeting their obligations under the Barcelona Convention and the Prevention and Emergency Protocol⁹⁶.

We will focus our attention on places of refuge. In this sense, the *2002 Protocol* contains the following provision –art. 16– “*the Parties shall define national, subregional or regional strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment. They shall cooperate to this end and inform the Regional Centre of the measures they have adopted*”. To that end, REMPEC has prepared the *Guidelines on the Decision-making process for granting access to a Place of Refuge for Ships in need of assistance* in the framework of the *Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2005-2015)*⁹⁷. The Guidelines were adopted in 2008 for the Contracting parties⁹⁸

⁹⁴ The Prevention and Emergency Protocol was adopted by 25 January 2002, and entered into force 17 March 2004. The 15 contracting Parties are: Croatia, Cyprus, European Union, France, Greece, Israel, Italy, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Turkey.

⁹⁵ REMPEC is administered by the International Maritime Organization in cooperation with the UNEP/MAP.

⁹⁶ For REMPEC’s main field of action for the Prevention of pollution for the Marine Environment from Ships and the development of Preparedness for and Response to Accidental marine pollution and cooperation in case of emergency see the Centre’s Mandate adopted by the 16th Ordinary Meeting of the Contracting Parties (Marrakesh, Morocco, 3-5 november 2009).

⁹⁷ The Regional Strategy was adopted by COP 14 (Slovenia, 2005)

⁹⁸ See Annex V of the Report of the 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of

to the Barcelona Convention in order to assist the maritime administration in identifying places of refuge and in the appropriate decision making process to grant or refuse request for access to a place of refuge. At that time, the IMO adopted the Guidelines on Places of Refuge and the European Union the Directive 2002/59/EC as we saw below (the European Union and eight member States-Croatia, Cyprus, France, Greece, Italy, Malta, Slovenia and Spain- are contracting parties of the *2002Protocol*).

As the IMO Guidelines, the *Guidelines on the Decision making process* propose a case-by-case approach to analysis and decision making and intended to: 1) apply to any maritime incident which might give rise to circumstances where the National Maritime Administration may need to consider a request for granting access to a place of refuge in waters within its jurisdiction; 2) ensure that decisions on granting access to places of refuge are made in a consistent manner, within the boundaries of international and national maritime law. The Guidelines emphasise that it may be necessary to balance the interest of a ship in need of assistance and the National interest. As the EU Directive, these Guidelines establishes that States should enact national legislation which clearly mandates an existing or newly created body or official to have powers to decide upon a request to access to a place of refuge.

These Guidelines include the following procedure to be employed when deciding on a request for access to Place of Refuge:

1. As a first step, national administrations should prepare a detailed inventory of their coastline, compiling information (about natural and physical conditions, ecology and socio-economic factor⁹⁹) to be used on a case-by case basis to assess request for access to a place of refuge. In this sense, these Guidelines advocate the approach to decide on a suitable place of refuge on a case-by-case basis as opposed to pre-designated places of refuge. The presumption here is that a place

the Mediterranean and its Protocols, Almeria (Spain), 15-18 January 2008. Document UN-EP(DEPI)/MED IG.17/10,

⁹⁹ Natural and physical conditions (such as weather and sea conditions precluding or favouring the use of the area, i.e. during which weather is the area sheltered from wind, waves or currents; sea surface conditions at different weather conditions, seabed conditions...); Ecology (plankton, benthos, fish species, seabirds, waterfowl), Socio-economic factors (such as coastal conservation areas, fishing grounds, aquaculture, seabed cables, coastal recreation and tourism...) See Appendix 1 of the Guidelines.

of refuge is not a strictly defined fixed location but always depends on the type and characteristics of the ship in need of assistance, the type of incident that led to the distress situation, the prevailing wind and weather conditions and finally the potential consequences of admitting a particular ship to a particular place of refuge. A place of refuge that may be totally unsuitable in one incident may be the ideal place or refuge in another incident.

2. Secondly, the competent authority should explore the feasibility of dealing with the maritime emergency situation while the ship is at sea and compile basic information on the ship in need of assistance (name and flag of the vessel, cause of damage and the nature and extent of damage, nature and quantity of hazardous or harmful substances carried, actual pollution or potential for pollution¹⁰⁰...).
3. In third place, the competent authority should aim to compile, review and analyse all relevant available information and compare all options available and the hazards posed by the ship if it remains at sea or if it is admitted to a place of refuge on the coastline or in internal waters. In this way, the competent authority should consider additional information such as prevailing and forecast weather conditions for the time the vessel is expected to remain at sea, traffic density in the incident area¹⁰¹...
4. Finally, after requesting that qualified expert staff of the national administration carry-out on-scene inspection of the ship and an evaluation of the situation on board, the competent authority will take a decision on granting or denying refuge to a ship in distress. Moreover, the competent authority should also take into account the effect a denial of the request could have on the maritime coastal environment of other neighbouring coastal States¹⁰². So, these Guidelines, as IMO

¹⁰⁰ See Guidelines, Appendix 2: Initial Information to be supplied with a request for granting Access to a place of Refuge.

¹⁰¹ See Guidelines, Appendix 3: Issues to be considered in continuing to respond to a maritime casualty at Sea.

¹⁰² In the field of the sub-regional cooperation: The Agreement concerning the Sub-Regional Contingency Plan for Preparedness for and Response to accidental Marine Pollution in the South-Western Mediterranean signed in June 2005 by Algeria, Morocco and Tunisia entered into force on 19 May 2011, following its ratification by Morocco; the RAMOGE Agreement

Guidelines and the European Union Directive do not establish an obligation on the part of the Member States to provide refuge to a ship in need of assistance.

Some months ago, the Contracting Parties to the Barcelona Convention adopted a new *Regional Strategy for Prevention of and Response to marine Pollution from Ships*¹⁰³ (2016-2021) with the aim to respond to the challenges faced in the implementation of the Regional Strategy (2005-2015) and the possible areas of improvements. One of this areas is “to establish procedures for the designation of places of refuge in order to minimise the risks of widespread pollution” considering that “the designation of places of refuge associated with national plans to deal with ships in need of assistance are very valuable tools to protect the coastline against the devastating effects that a shipping accident occurring near the shore can have on the coastal environment of any State, it could be worthwhile for Mediterranean coastal States to consider in greater depth the modalities for establishing places of refuge within the Mediterranean region, including the preparation of, for example, guidelines on additional equipment, which would be required in places of refuge to facilitate cargo transfers in environmentally safe conditions”¹⁰⁴. In this sense, several specific goals have been identified, concerning to the Contracting Parties and the Secretariat. On the former, the expected results relating to the Contracting Parties under this Specific objective are: 1) identification, with high priority –which implies that the tasks in question should be completed by the end of 2018-, at the national level, of appropriate procedures as outlined in the relevant IMO Guidelines and relevant EU Guidelines supplemented by the associated Guidelines and Principles prepared by REMPEC, in order to

(Acord relatif à la Protection de l’environnement Marin et Côtier d’une zone la Mer Méditerranée) between Italy, Monaco and France, which was revised in 2012 and the LION Plan between France and Spain revised in 2016.

¹⁰³ The Regional Strategy has been adopted at the *19th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols* (Athens, Greece, 9-12 February 2016), UNEP (DEPI)/MED IG.22/28). See also Report on the meeting of National experts on the Revision of the Regional Strategy for Prevention of and Response to Marine Pollution from Ships (11th Meeting of the Focal Points of the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (Document REMPEC/WG.37/11/2, 27 May 2015)

¹⁰⁴ See point 4.14.3 of the Regional Strategy.

facilitate the decision making when designating a place of refuge for ships in need of assistance; 2) with medium priority –that implies that the task should be concluded as soon as possible, but no later than end of 2020- all Mediterranean coastal States have drawn up plan to deal with ships in distress, including appropriate equipment and means, as required, and have defined the modalities of the response according to its nature and to the risk incurred¹⁰⁵. On the second, relating to the REMPEC, continuous assistance provided to countries, which so request, to define procedures and draw plans as specified above.

So, once again, it should be noted that the issue of places of refuge is not a “closed matter” for the Mediterranean countries, as indicated by the adoption of the *Regional Strategy for Prevention of and Response to marine Pollution from Ships* (2016-2021) where places of Refuge have been identified as a specific objective.

VII. FINAL REMARKS

In order to prevent the environmental consequences of oil spills, the IMO Guidelines define access to places of refuge based on four pillars: 1) the existence of a ship in need of assistance; 2) no obligation on the part of the coastal states to offer refuge to ships in need of assistance; 3) granting access can only be taken on a case-by- case basis; 4) the Guidelines are only applicable to situations in which there is no risk to human life. At the European level, Directive 2009/17/EC amending Directive 2002/59/EC follows the IMO Guidelines and obliges EU member States to draw up plans to accommodate, if the situation so requires, ships in need of assistance in their ports or in any other protected place in the best possible conditions, in order to limit the consequences of accidents at sea in the waters under their jurisdiction. Although the Member States are obliged to draw up the plans for accommodation, we do not believe that they are obliged to provide refuge for ships in need of assistance. Finally, the Mediterranean countries adopted the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), the 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea and

¹⁰⁵ See Appendix 1 (Implementation Goals)

the Guidelines on the Decision-making process for granting access to a Place of Refuge for Ships in need of assistance in the framework of the Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2005-2015), that follows the IMO Guidelines. It should be noted that the issue of places of refuge is not a “*closed matter*” because the Cooperation Group on Places of Refuge of the European Union adopted on November 2015 the *EU Operational Guidelines on Places of Refuge*, and the Mediterranean countries adopted a new *Regional Strategy for Prevention of and Response to marine Pollution from Ships* (2016-2021), where places of Refuge have been identified as a specific objective.

The main goal of all these instruments is that coastal states can be in conditions to give the best response to a ship in need of assistance.

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EDITORIAL

Antonio REMIRO BROTONS
Sobre la libertad e independencia académicas

ÉTUDES

Adam SMITH
Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean

Rachid EL HOUDAÏGUI – Anass GOUYEZ BEN ALLAL
Rivalité et quête de leadership au Moyen-Orient à la lumière de l'accord sur le programme nucléaire iranien

Francina ESTEVE
The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders

Belén SÁNCHEZ RAMOS
Places of Refuge for Ships in Need of Assistance. Looking for the Best Response

Mamadou NIENTAO
La gestion intégrée des ressources en eau au Mali : le regard du Droit international

F. Saverio ANGIO
Islamic State's Qutbist Statehood: a Systemic Threat to the Concept of Sovereignty as a Primary Institution in the English School of International Relations

NOTES

María Dolores ALGORA WEBER
The Regional Integration as a Solution to Face the Mediterranean Security Challenges

Abdelhamid BAKKALI
OTAN et contre-asymétrie: Ambiguïté et difficulté d'adaptation

DOCUMENTATION

Déclaration Conjointe établissant un Partenariat de mobilité entre le Royaume du Maroc et l'Union Européenne et ses États membres

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TABLEAU D'ÉQUIVALENCE DES POSTES UNIVERSITAIRES

Tableau d'équivalence des postes Universitaires – Tabla de equivalencia de cargos académicos – Academic Ranks