DECISION-MAKING IN THE IMMINENCE OF DISASTER: 'PLACES OF REFUGE' AND THE PREVALENCE OF NATIONAL INTERESTS

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Introduction

Navigating the oceans has always presented humankind with rather specific challenges, including the assistance to people and ships at risk in general. Access to a safe haven by a ship in the event of a maritime accident has been from the outset a particular case high up in the scale of such challenges. Uniform practice throughout the world's oceans over many years led to custom. Ships in distress have historically been granted permission to enter sheltered coastal areas with a view to ensuring the safety of people on board as well as the salvage of ship and cargo.[1]

The last few decades brought about a reappraisal of the issue of access to sheltered areas by ships in distress. Environmental essentials, driven to the forefront of international affairs by a

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[1] From a theoretical standpoint an interesting debate could be had as to in whom any customary rights have been vested, which for reasons of brevity cannot be carried out in this paper.

dramatic change in the complexity of the oceanic context, have arguably turned the table on the aforesaid ancient custom. The proliferation of transportation of highly dangerous cargoes in supersized tankers gave rise to perils unanticipated by the international legal order. Accidents with tankers in recent years, causing hydrocarbon spills of dire proportions, have led to questioning the parameters of access to a 'place of refuge' by ships in distress. A reconsideration of all interests involved, in light of a growing awareness of the need to protect the marine environment as well as interests of states, became paramount.

This paper seeks to outline a particular aspect of the debate on places of refuge: the decision-making process within a coastal state facing an imminent disaster involving a tanker in distress. To paraphrase Shakespeare, to grant or not to grant access to a place of refuge to a tanker in distress is the question. Assuming there is no unqualified right of access, the issue to be addressed is on what basis the decision as to whether or not to grant access to shelter is to be made by a coastal state. The first section of this paper consists of a terse primer on 'places of refuge'. A brief description of the incident involving the tanker *Prestige* is the subject of the second section. Attention is drawn, in the third section, to the bewildering factual circumstances surrounding the *Prestige* incident. The legal regime enacted in Portugal (in a European setting) in the post-*Prestige* era is the subject of the fourth section. Delving into the process for deciding whether or not to grant access to a place of refuge, the final section attempts to offer a view on how national interests could become critical elements in such decision-making process.

For reasons of brevity, as well as for the significance of the outcome and ensuing consequences, focus is kept in this paper on decision-making in 'limit cases',[2] such as the *Prestige* incident.

[2] By 'limit cases' the author means hard cases in which the decision is all but obvious and stakes are high.

These cases could at this juncture be characterized by reference to the following elements. First, the protection of human life is assured.

No decision (by action or omission) would lead directly or indirectly to an increase of risk for the people involved, irrespective of the situation of ship and cargo. There is unquestionably a paramount legal principle of safety of life at sea.[3] Second, the maritime incident is of such gravity that errors and/or changes in the parameters on which the decision is predicated, however small, risk resulting in a catastrophic outcome of unfathomable proportions, so no clear 'right decision' exists. Ships may require assistance in different circumstances. This paper looks only into instances where the potential environmental impact is massive (likely a catastrophe) and the ship's survival is threatened. Finally, no comprehensive review of the legal regime on places of refuge generally speaking is to be undertaken herein. A wealth of bibliography on the subject is available. This analysis attempts to review in a focused manner the specific aspects of the decision-making process (including its underlying material parameters, insofar as reasonably possible) of coastal state authorities faced with an imminent disaster similar to the *Prestige* case[4].

[3] It is assumed that no aspects other than those relating to the maritime incident in question are relevant. A key assumption is that no decision may result in an unjustified, unnecessary and unreasonable increase of risk for human life. This is a centuries old tenet of maritime law.

[4] Even though there was an international aspect to the *Prestige* incident, and transboundary pollution issues between neighboring states could be raised, no analysis is conducted here on this point, either at the EU law level, or from a wider international law perspective. Nor is reference made to either regional aspects, including possible implications at the level of regional conventions, or matters relating to specific factors within the decision-making process (e.g. insurance matters, liability issues, economic implications, or types of threats to the environment).

'Place of Refuge': A Terse Primer

According to the International Maritime Organization (IMO) Guidelines, a place of refuge may be defined as "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".[5] Along similar lines, the Comité Maritime International (CMI) has defined it as "a place where action can be taken in order to stabilize the condition of a ship in need of assistance, to minimize the hazards to navigation, or to protect human life, ships, cargoes or the environment".[6] In spite of the similarities, the CMI definition seems to have a wider scope, in that: (i) the action can be taken by entities other than the ship itself; and (ii) ships and cargoes are included as elements to be protected alongside human life and the environment.

The differences between these two definitions could at first glance appear to be negligible. One would argue that perhaps it is not so. Consider notably the latter difference, i.e. the inclusion of ships and cargoes as protected elements apparently at the same level as human life and the environment. One would steer away from this suggestion on a number of grounds, which for reasons of brevity cannot be elaborated on here. Suffice it to say that, from an international law standpoint, one sees the protection of ships and cargoes as benefiting from a less intense protection than that awarded to human life and the environment.

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[5] IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, Doc. A.Res.949(23) of 5 December 2003 (IMO Guidelines), para. 1.19. An overview of the IMO work on this topic is available at < www.imo.org/OurWork/Safety/ Navigation/Pages/PlacesOfRefuge.aspx>.

[6] CMI, *Draft Instrument on Places of Refuge*, available at <www.comitemaritime.org/Places-of-Refuge/0,2733,13332,00.html> (CMI Instrument), art. 1(c). Prepared as an attempt to arrive at a legally binding conventional text on this issue, the CMI Instrument is yet to have a direct significant impact.

The practical reality is that, in the past, the best way to protect human life (and the environment) was to protect the ship itself (and thus the cargo). Only an indirect protection was thus in question. The point is that this distinction could nowadays become decisive in the decision-making process on the granting of access to a place of refuge, all depending upon the factual circumstances.

Account should also be taken, at the least within the European context, of the definition of 'place of refuge' included in the European Union's (EU) VTS Directive.[7] A place of refuge is defined therein 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".[8] There are at least three aspects in which this definition differs from the previous two. First, there is no explicit reference to the legal interests to be protected with the granting of access to a place of refuge. Second, it refers to a place identified (or to be identified) by the coastal state, meaning apparently that each coastal state has the right to select the location. Third, instead of "ships in need of assistance", it uses the terminology "ships in distress".[9]

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[7] Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system [2002] OJ L280/10, as amended by Directives 2009/17/EC [2009] OJ L 131/101 and 2011/15/EU [2011] OJ L 49/33. Unless otherwise stated, references to the VTS Directive in this paper shall mean the Directive incorporating the 2009 and 2011 amendments.

[8] VTS Directive, art. 3(m).

[9] This terminological difference stems perhaps from the fact that the original 2002 VTS Directive provisions on places of refuge were drafted in the aftermath of some maritime incidents, notably the *Erika* (1999) and the *Castor* (2000), in which the ships were in distress and required *immediate assistance*. The 2004 IMO Guidelines, which influenced the 2009 amendment of the VTS Directive, used the broader expression "ships in need of assistance", i.e. including ships which require assistance but are not in a distress situation. This broader expression was reflected in the amended version of art. 20 of the VTS Directive but not in the definition of 'place of refuge', which remained unaltered. While 'places of refuge' are not restricted to

Subject to the comments below characterizing the scope of this analysis, a 'place of refuge'[10] can for purposes hereof be understood on the basis of the following elements (loosely derived from a 'merger' of the three definitions above): (i) it is a sheltered area;[11] (ii) for accommodating a ship involved in a maritime incident and which suffered damage; (iii) in order to provide assistance thereto; and (iv) to attempt to remove or minimize potential threats to human life and the environment.[12]

Various authors contend that an international customary rule on places of refuge exists.[13] Such rule would arguably encompass

ships in distress, the focus of this paper are *Prestige*-like cases (as outlined below), in which ships are in distress.

10 There is a profusion of literature covering the issue of 'places of refuge'. Among the most recent, in-depth works on 'places of refuge' (which include a wealth of bibliographic references) one may refer to the following: A. Morrison, *Places of Refuge for Ships in Distress* (Brill/Martinus Nijhoff, Leiden: 2012); E. van Hooydonk *Places of Refuge: International Law and the CMI Draft Convention* (Lloyd's, London: 2010); and A. Chircop and O. Linden (eds) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (Brill/Martinus Nijhoff, Leiden: 2006).

11 Historically, the term 'port of refuge' seems to have been used. The reference to 'place' rather than 'port' is apparently meant to widen the geographical scope of areas that can be used as shelter.

12 The protection of ships and cargoes, historically viewed as being also relevant, has become of much lesser significance in terms of a decision on whether to grant access to a place of refuge to a distressed ship. Some authors argue that the protection of ship and cargo is still part of the customary rule: cf. e.g. A. Chircop "The Customary Law of Refuge for Ships in Distress" in Chircop and Linden (eds), note 10 at 224. One would argue that a qualification is required. The protection of ship and cargo is subject to human and environmental concerns, i.e. it must not constrain human and environmental protection and assessments relating thereto.

13 A table captioned "Summary of International Law Regimes of Ships in Need of Assistance" following from an analysis on various sources is proposed by van Hooydonk (cf. note 10 at 459). Distinguishing between 'classical customary law' and 'contemporary customary law', van Hooydonk suggests that that the former incorporated an 'absolute' right whereas the latter only a presumed right. One would side with other authors who conclude that

a right of a ship in need of assistance to be granted access to a sheltered area. Whilst one would perhaps not necessarily disagree entirely with the core assertion, it should certainly be added that the details of such rule could be the subject of an extensive debate. As far as shipping (any maritime uses of the ocean, more generally) is concerned, the oceanic context within which the (so-called) customary rule on places of refuge emerged was dramatically distinct from that of today's ocean. To begin with, protection of human life was at the heart thereof. Nowadays people can be rescued from ships in distress in ways that do not involve providing coastal shelter to the ship. Other aspects need be considered, from distinct activities to higher density of traffic, or from different technology to the dangerousness of cargoes for the environment. Nothing resembles the days in which such (argued) customary rule began to emerge.[14] All changed in a few decades. To state that said differences have no bearing on the validity and scope of the (ancient) customary rule on places of refuge would in the author's opinion render invalid any argument that the rule applies today. State practice contemporary to this novel ocean setting is decisive for any appraisal of the contents of a customary rule.

Today's distinct oceanic context bears fundamentally on a two-fold factual change. First, human lives can nowadays be protected without access to a place of refuge having to be granted to a ship in distress. Second, in the case of accidents, the damage (potentially) caused by a ship (particularly to the environment) is far greater given the dangerousness of certain cargoes and

outside the situations of protection of human life there is no customary rule imposing on coastal states the obligation to grant refuge to a ship in distress: cf. e.g. Morrison, note 10 at 75–126.

[14] The argument that this customary rule on places of refuge dates back millennia does not seem to add value to the debate. In effect, the more different the context in which the custom was formed is, the less acceptable becomes the extrapolation that the rule applies in today's context.

the quantities in which they are carried. Environmental interests, which are at the forefront of today's concerns on ocean management, would perhaps on their own determine a reappraisal of the whole discussion, notably as to their weighing-up against the interests of protection of ships and cargoes. The catastrophic repercussions for the environment of recent tanker accidents became entirely unacceptable for the international community at large, rendering all aspects other than human life and the environment virtually irrelevant in terms of interests to protect.[15]

Shortly put, in the discussion on places of refuge, given that the 'humanitarian rationale' has lost some of its previous significance as a factor in the decision-making process (because of technological advancements and the means available to guarantee the safety of human lives), the 'environmental protection rationale' became paramount, ships and cargoes being a somewhat negligible factor if their protection is not reconcilable with human and environmental protection goals.

Even if a customary rule indeed exists – which would require demonstrating the *opinio juris sive necessitatis* with respect to a *usus* of coastal states in assisting ships in distress in today's oceanic context (in our opinion, hitherto an elusive goal) – one would argue that, however frequent such assistance has been, the contours of the relevant norm need be reconsidered in light of recent practice of various coastal states in refusing to grant refuge in certain circumstances. A relevant body of state practice concerning specific incidents, and refusing access to a place of refuge in certain circumstances where disaster seemed imminent, has emerged in recent years. This state practice may not be

[15] For an outline of interests to be considered in the debate on places of refuge, cf. Morrison, note 10 at 38–50.

simply discarded without further consideration. Either there is a customary rule and the relevant states were (likely) in breach thereof, or the customary rule does not exist (or its contents are such that depart from what has been claimed) and such states have simply acted within their rights. The so-called '*not in my backyard*' approach, which has apparently underlain said recent state practice, arguably incorporates not only an aspect of *usus* by a number of interested coastal states (denying access to a place of refuge to a ship in distress), but also demonstrates *opinio juris* (as such states have taken the view that no obligation to grant access in such circumstances exists).[16]

[16] One argument that has been used to claim that these recent instances of state practice do not indicate the disappearance of the customary right of access is that "no opponent of the right of access has ever convincingly demonstrated that this right no longer exists" (van Hooydonk, note 10 at 112). The soundness of this approach can be questioned. First, in terms of customary law, said state practice shows that the states involved consider themselves not to be under any obligation to grant access to a place of refuge in the prevailing circumstances. Second, demonstration must be provided by the party claiming to enjoy an international law right of access to a place of refuge in those circumstances. However deeply rooted in a centuries-old state practice such claimed customary rule may be, the point that need be addressed is whether there is today a *usus* that is supported by an *opinio juris*; and, if so, the scope of such rule. Custom evolves over time. Assessing custom at any given point in time is a cumbersome and complex undertaking. For the ebbs and flows of custom-making are grounded on the very practice of the subjects to which the norm applies. At the very least, such body of recent state practice is evidence that several interested states consider the customary rule as not imposing an obligation to grant refuge in some cases. The argued customary rule has been 'challenged' thereby. One would in fact argue that the contents of the customary right of access (assuming for the sake of argument that it continues to exist) have been entirely reshaped over recent decades, and that in specific instances (which are referred to herein as *Prestige*-like cases), provided that danger to human life is not in question, there is no obligation for a coastal state to grant refuge to a distressed ship. This is perhaps why van Hooydonk eventually seems to go on to acknowledge that a 'right of refusal' does exist (van Hooydonk, note 10 at 162 *et seq*).

The LOS Convention,[17] hailed as a 'Constitution for the Oceans',[18] incorporates no rules sufficiently workable and detailed to deal in any adequate manner with the issue of places of refuge. Nor are such rules on places of refuge codified or incorporated in various others potentially relevant international instruments. It all boils down to a simple point: no obligation to grant access to a place of refuge to a ship in distress has ever been codified or provided for in an international instrument.[19]

In the LOS Convention, only certain high-level provisions can be relied on to attempt to ascertain the regime on places of refuge. Coastal states enjoy sovereignty over internal waters and (albeit with certain limitations) the territorial sea,[20] that is, the maritime zones in which places of refuge are typically located. Access to ports and anchorages (the usual places of refuge, as denoted in the VTS Directive definition) is not explicitly regulated. Coastal states are in effect entitled to take preventive measures in regard to compliance with conditions imposed on access to internal waters or ports.[21] More particularly, entry into said internal waters and ports may be subject to specific requirements for the prevention, reduction and control of pollution of the marine

[17] United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 3)..

[18] T.T.B. Koh 'A Constitution for the Oceans' (Third United Nations Conference on Law of the Sea, Montego Bay, 6–11 December 1982), available at <www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>.

[19] This view is supported by recent state practice. Cf. the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, of 22 November 2009 (available at <www.fao.org/Legal>), art. 10.

[20] LOS Convention, art. 2(1).

[21] Ibid., art. 25(2), which provides that "[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject".

environment (the environment being the key international legal interest to be protected).[22]

Contentions have been put forward by certain interested academics and stakeholders that Part XII of the LOS Convention, on "Protection and Preservation of the Marine Environment", offers a workable basis from which to derive an obligation for the coastal state to grant refuge to a ship in distress off its coasts.[23] The argument has been apparently built around the general obligation for states to protect and preserve the marine environment, culminating in the obligation to grant refuge to ships in distress as means to prevent environmental damage. Without entering into details, which are incompatible with the nature of this paper, one would nevertheless argue that said approach seems weak on two levels. First, for the argument to be entirely valid, a demonstration would have to be made that the granting of refuge would in all (or virtually all) instances be the best course of action to prevent or minimize environmental damage. No such general demonstration, notably in terms of causality link, has ever been provided. Nor could it be since, as will become apparent, the decision involves an 'incident-specific' assessment. Second, such an argument would clearly prioritize general prevention of environmental damage as an abstract notion ahead of concrete national interests of the coastal state in protecting their coastal environment. If only because the coastal state is the one which must live with the consequences of whatever decision it makes, and on whom the right (and duty) to protect the coastal environment is

22 Ibid., art. 211(3).

23 Ibid., art. 192 *et seq.* This general obligation has multiple facets reflected throughout Part XII (e.g. adoption of implementing measures; obligation to cooperate in various manners; duty not to transfer damage or hazards; monitoring and assessment). Part XII seems in fact to have established newer legal grounds for coastal states to exercise an increased jurisdiction over vessels within their jurisdictional waters, and has in no way imposed an obligation on coastal states to grant access to refuge for distressed ships.

vested under international law, one would undoubtedly challenge this underlying premise on both legal and policy grounds.

The Salvage Convention[24] offers perhaps the most significant and workable treaty law provision on places of refuge. Its article 11 establishes that, in regulating or deciding upon matters relating to salvage operations, such as admittance to ports of vessels in distress, states are to 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. Still, no obligation to grant access to a place of refuge to a ship in distress was provided for.

The conclusion has already been reached that remedies dealing with "the problem of places of refuge must seek an acceptable balance between the interests of coastal states and the shipping interests",[25] and more generally that the IMO Guidelines and the CMI Instrument are inadequate as solutions for the problem of places of refuge, a new approach being required.[26] What an "acceptable balance" could be in terms of general provisions incorporated in an international instrument remains to be seen. At this stage, all the international community seems to have been able to achieve is something entirely different and much less detailed. Further, national interests remain at the heart of decisions concerning the granting of a place of refuge to a distressed ship.

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[24] International Convention on Salvage of 28 April 1989 (1953 UNTS 194).

[25] Morrison, note 10 at 307. Morrison refers to the factors affecting any international response to the question of places of refuge, which include (i) improved industry performance, (ii) improved industry regulation, (iii) issues of liability, compensation and limitation, (iv) incentives for coastal states to use the IMO Guidelines, and (v) liability for cross-boundary environmental harm: ibid., at 308–350.

[26] Ibid., at 353.

THE *PRESTIGE* INCIDENT IN A NUTSHELL

At around 15.15 on 13 November 2002, the single-hull tanker *Prestige*, which had run into an Atlantic gale force 10/11 storm, suffered a structural accident some 27 nautical miles westwards of Cape Finisterre,[27] off the Iberian Peninsula. Within a few minutes, the fully laden vessel (with 77,000 tonnes of heavy-grade oil) was listing 25 degrees to starboard and leaking its cargo. In the morning of 14 November, with the engine damaged, the distressed *Prestige* had drifted (under the severe weather conditions) closer to the Spanish coast of Galicia (lying approximately 5 M[28] therefrom), moving on a northeastwards course towards the Bay of Biscay. No risk of grounding appeared to exist, apparently.

Spanish tug boats unsuccessfully attempted to tow the vessel, its emergency towing system having been found inoperative. The company SMIT Salvage BV eventually took over the situation as salvage operator, managing to take the *Prestige* in tow. With the vessel leaking heavy-grade oil,[29] in the imminence of a catastrophic environmental disaster, the Spanish authorities ordered the ship away from the coast, refusing to grant the *Prestige* a 'place of refuge'. The ship was towed out into the open sea

[27] The investigation into the *Prestige* incident seems not to have reached definitive conclusions as to what happened to the ship exactly as far as the structural damage is concerned. The crew apparently described it as having heard a loud noise and felt abnormal vibrations: cf. Galician High Court, 2013 Decision on Prestige case, ECLI Reference: ES:APC:2013:2641, available at <www.poderjudicial.es/search/indexAN.jsp>, at 31; *Report on Improving Safety at Sea in Response to the Prestige Accident* (European Parliament Doc. A5-0278/2003 of 15 July 2003), at 22.

[28] The symbol 'M' represents the unit 'nautical mile', which corresponds to 1,852 metres.

[29] By the afternoon of 14 November, with a fissure in one of its oil tanks, the *Prestige* had reportedly already spilled an estimated 3,000 tonnes of heavy-grade oil into the ocean.

by the team of SMIT Salvage BV, who apparently objected to the towing of the vessel (jointly with the Captain), arguing in favor of taking it into the harbor of La Coruña.

This decision of Spanish authorities to deny refuge to the *Prestige* has been subject to heavy scrutiny on multiple grounds by various stakeholders, including at the EU level. It was critical for the outcome, irrespective of how such outcome is assessed in hindsight. What could (or would) have happened had the decision been different (i.e. had an attempt been made to take the *Prestige* into a refuge area) can only be speculated; or at best be the subject of a somewhat limited educated guess. While a certain consensus appears to exist among some technical experts around the argument that refuge should have been granted to the *Prestige* in order to (attempt to) carry out repairs and avoid widespread pollution, the reality is that the decision taken by Spanish authorities appears to have been supported by many Spanish stakeholders and the vast majority of the people living in that coastal area (i.e. those who would be more directly affected by the decision).

The *Prestige* was ordered to start the engines and, with the assistance of tugs, was taken away from the Spanish coast, navigating in a northwesterly direction to the open Atlantic Ocean. On 15 November mid-afternoon, two tugs held the *Prestige* some 60 M from the Spanish coast. Spanish authorities issued new instructions for the vessel to be moved at least 120 M offshore. To avoid facing the rough seas, the tugs took the *Prestige* in a southwesterly direction on 16 November. This course attempted to avoid Portuguese jurisdictional waters since this country's authorities had already indicated that the vessel would not be allowed in. Additional structural damage, which caused an increased leakage of the cargo, led the vessel to be subsequently navigated southwards in search for calmer seas. On November 18, with the vessel rapidly approaching its Exclusive Economic Zone (EEZ) Portuguese authorities prohibited the salvage operator

from towing the *Prestige* into its jurisdictional waters. The south-westerly course was thus resumed.

At some time after 08.00 on 19 November, the *Prestige* broke in two amidships. The aft section sunk that day at around 12.00, the same happening to the bow section at around 16.15, approximately 130 M off the Iberian Peninsula. Estimates of the total spill of heavy-grade oil vary from 40,000 to 64,000 tonnes, the remainder being still inside the *Prestige* on the bottom of the Atlantic Ocean, at a depth of some 3,500 meters.

The coasts of Spain (Galicia), and to a much lesser degree of Portugal and France, were affected by this heavy-grade oil spill. Total damages reportedly have been estimated hitherto at over 4 billion Euros. The *Prestige* case is, by any account, one of the greatest disasters of this type humankind has ever witnessed,[30] even if the environmental impact is yet to be fully confirmed and the possible implications at the level of human health remain somewhat uncertain.

Two characterizing aspects are decisive for the review attempted in this paper, reason for which they should be briefly outlined at this early stage.

First, and perhaps the most critical point, reference ought to be made to the protection of the *Prestige* crew members. The vast majority of them (24 out of 27) were airlifted by helicopter on 14 November. Three of them remained onboard: the captain; the first mate; and the chief mechanic. Ultimately, the *Prestige* in-

30 Numerous accounts of the *Prestige* incident have been written, as short summaries or longer accounts, not only as academic studies but also as policy oriented reports or even politically driven arguments. For a specific academic review, including references to multiple sources, cf. e.g., V. Frank "Consequences of the *Prestige* Sinking for European and International Law" (2005) 20 *The International Journal of Marine and Coastal Law* 1-64. Reference can also be made, in the EU context, to the *Report on Improving Safety at Sea in Response to the Prestige Accident*, note 27. Both documents provide somewhat detailed descriptions of the *Prestige* case.

cident involved no loss of human lives. Nor were the lives of all involved (i.e. the *Prestige*'s crew members, as well as those who assisted the ship) at any relevant risk (i.e. a level of risk not inherent in a professional life at sea) throughout the events. This boils down to stating that, in the *Prestige* incident, the decisions made on granting refuge seem not to have been influenced by the 'humanitarian rationale'.

Second, as was unfortunately confirmed as events unfolded and the consequences became apparent, the dangerousness of the *Prestige*'s cargo emerged as an equally critical point of assessment. More than a matter of a potential spill of 77,000 tonnes of hydrocarbons (already a catastrophe), the dilemma stemmed from the fact that heavy-grade oil[31] was involved.[32] The immediate environmental impact of a heavy-grade oil spill of such magnitude could (can) only be described as a tragedy. In addition, one must not disregard the (not entirely known) potential longer-term effects for the environment as well as, much more importantly, at the level of health risks for humans from (potential) exposure thereto.[33]

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31 Reg. 21 of 1978 Annex I – Regulations for the Prevention of Pollution by Oil (2010 revised version), of 1978 Protocol relating to the International Convention for the Prevention of Pollution from Ships of 2 November 1973 (MARPOL 73/7), defines 'heavy grade oil' as including: (i) crude oils having a density at 15°C higher than 900 kg/m³; (ii) oils, other than crude oils, having either a density at 15°C higher than 900 kg/m³ or a kinematic viscosity at 50°C higher than 180 mm²/s; or (iii) bitumen, tar and their emulsions.

32 In 2003, following the *Prestige* accident, the IMO adopted resolutions implementing an accelerated phase-out for single-hull tankers (cf. MARPOL 73/78, Annex I, revised reg.13G), as well as a ban from 2005 on the carriage of heavy grade oil by single-hull tankers (cf. MARPOL 73/78, Annex I, reg.13H). It should be noted that the carriage in bulk as cargo or carriage and use as fuel of such heavy grade oils was subsequently generally prohibited in the Antarctic area (cf. MARPOL 73/78, Annex I, reg. 43).

33 One of the reasons why this paper focuses on *Prestige*-like cases is because the coastal areas involved are densely populated. If this factor would not be a part of the decision-making process, the outcome could be very different.

Decisions taken at the time of the *Prestige* incident might therefore have been clearly influenced by these two characterizing aspects. On the one hand, there was no relevant immediate risk for human life to be factored in. On the other hand, the impact of a massive heavy-grade oil spill at the level of human health and of the environment was a daunting threat for Spain, as well as the other coastal states involved (Portugal and France), if an accident occurred closer to the coast in a sheltered area.

Bewildering Circumstances

The details of the shipping setting within which the *Prestige* incident unfolded are somewhat bewildering. Difficulties concerned not only factual circumstances, but also legal parameters. Further, when such factual and legal aspects are examined, it is rather striking to conclude that (in spite of all the changes subsequently introduced) such circumstances could perhaps emerge in future incidents.

Let attention now be turned to the specific situation of the *Prestige* incident. The facts summarily outlined below are (to the best of our knowledge) accurate and reflect the bewildering setting of the last of the *Prestige*'s voyages with respect to the vessel and the cargo. The following aspects deserve consideration:

- The ship was a 26 years old single-hull tanker flying the Bahamian flag;

- It had been chartered by a Swiss-based trading business with ties to Russia;

The 'environmental protection rationale' would become virtually the deciding element.

- It carried a cargo of 77,000 tonnes of heavy-grade oil from Russia;
- The corporate vehicle through which the ship was owned was a Liberian company (which has apparently remained veiled throughout the events);
- The ship was apparently ultimately owned and managed by Greek interests;
- The *Prestige* was classed by an American society;
- Insurance had been taken out with a British entity;
- The latest class surveys had been conducted in China and the United Arab Emirates; and
- The crew comprised Greek, Filipino and Romanian nationals.

If an attempt were made to characterize these circumstances, the term 'transparency' would certainly not come to mind. The problem is that such a convoluted line of ownership, control and responsibility exists more often that it would perhaps seem desirable. Together with this lack of transparency exist a number of increased pitfalls (e.g. ineffective flag state control and substandard shipping; lack of control of dangerous cargoes), which acquire particular significance in tanker accidents. The implications, including as to enforceability, as well as determination of responsibility, are many-fold and cannot be reviewed (even if briefly) in this paper.

From the standpoint of the issue of places of refuge, all that needs to be emphasized is that it might become difficult for a decision-maker to rely on the information available (as to, for

example, the 'condition' and 'cargo details' of certain ships, and liability issues). If faced with a difficult decision on whether or not to grant refuge, decision-makers of the coastal state involved will almost inexorably tend to and probably should err on the side of caution in assessing the information provided. The reform of control mechanisms at various levels within the EU (including, particularly, of port state control), in the aftermath of the *Erika* and *Prestige* incidents, is a conspicuous token of how this lack of transparency has been at the forefront of recent concerns.

To turn a bad situation into a worse one, international law offered no adequate 'comfort' to those who were charged with making rather multi-faceted, problematic and burdensome decisions. First, there were no international or EU legal standards on which to rely materially in respect of granting access to a place of refuge. Second, no effective, pre-planned contingency plans or procedures seem to have been in place at the time. Third, the existing financial and compensation mechanisms seemed to be incompatible with the magnitude of the potential (environmental and other) repercussions. Therefore, legal conundrums existed at various levels.

There appears to be no doubt that Spanish authorities did consider the possibility of granting access to a place of refuge to the *Prestige*. Ultimately, the decision was made in the negative. Criticism has been fast in coming from multiple quarters, with many concluding that the environmental disaster could have been averted had the *Prestige* been brought to a place of refuge. But perhaps such criticism should be tempered with a measure of caution. An old saying comes to mind. *Beware of opinions from someone who does not have to live with the consequences of a decision*. It is especially so when such opinions are provided in hindsight.

In the *Prestige* case, the fact that local communities of Galicia (i.e. those whose lives and interests would be more directly affected by a decision) seem to have supported the decision of

Spanish authorities should not be taken lightly. For the democracy principle must be duly weighed-up in a decision-making process of this nature.

No theoretical demonstration can guarantee what the outcome of the incident would have been had Spanish authorities granted refuge to the *Prestige*. It is certainly the case as to the environmental and economic consequences. A more disconcerting feeling arises when attention is turned to human health aspects. Existing medical knowledge falls short of drawing definitive conclusions as to the long-term effects of certain substances in heavy-grade oils. The possibility of a carcinogenic impact from contact with such substances for humans seems not to be far-fetched. A question should therefore be asked when looking back at the *Prestige* incident. In the hypothetical scenario of access to a place of refuge not having averted the sinking of the *Prestige*, how should a decision-maker have factored the possibility of heavy-grade oils being spilled not in open sea but in an enclosed area, i.e. in higher density and closer proximity to human populations and the basis for their livelihood? For anyone who sailed close to shore and in enclosed waters, it is easy to think of a few reasons as to why under the meteo-oceanographic conditions prevailing at the time bringing the *Prestige* (a ship sailing with a structural fault) to refuge in an area such as the Finisterre could hypothetically result in an environmental catastrophe similar or worse to that which ultimately occurred. The additional downside of such a scenario would be that the risks of contact of humans with heavy-grade oil would probably increase.

Claims have been advanced that Spanish authorities have acted with negligence, allegedly as evidenced by a number of facts (e.g. unreasonable response times; unreliable decision-making; prioritization of political aspects over expert assessments). In spite of all evidence gathered, reviews conducted and reports prepared, such claims fail to provide sound proof on a crucial

point: that the granting of refuge would beyond any reasonable doubt have caused less damage than that caused by opting for sending the *Prestige* out to sea. Even if it would be hypothesized for the sake of argument that the environmental damage would have been less, there would always be the issue of heavy-grade oil spills closer to human populations. To factor risks concerning the environment above the risks concerning humans, where the two would be of a significant magnitude, would appear to be tantamount to turning international law upside down. However relevant environmental concerns may be as a matter of principle they do not trump human-related concerns (health and otherwise).

The 2013 decision of the *Tribunal Superior de Justicia de Galicia* (Galician High Court) on the *Prestige* case[34] can be seen as striking evidence of the complexity of a situation such as that of the *Prestige* incident as well as of the difficulties in dealing with a situation characterized by a lack of transparency. As the judgment noted, the evidence showed that the *Prestige*'s structure was not in a condition to withstand the demands of normal navigation let alone critical situations, and that the inspections were not effective. In spite of that, it was noted the *Prestige* was deemed seaworthy and cleared to sail. When referring to the emergency action that had been required, the Galician High Court stated that no one could have known for certain what the correct response to the accident should have been. With regards to the action taken by Spanish authorities, it concluded that the decision to order the vessel out to sea had in light of all facts known been seen as correct, if not the only possible decision.[35] This brief reference provides, on its own, food for thought as to what might happen if a similar accident would ever occur.

[34] Cf. note 27.

[35] Ibid., at 43–44, 51–52.

One of the points to be driven home, with regards to decision-making on whether or not to grant a place of refuge to a distressed ship, is that the complexity of a *Prestige*-like set of circumstances does not seem to lend itself to straightforward answers. No matter how hard the search for 'right answers', there always is room for disagreement and alternative approaches. In the current international legal setting, when deciding whether or not to grant refuge to a distressed ship in a *Prestige*-like case, any obligation would tentatively have to be conceived of as an *obligation of means* (i.e. as to the procedures to put in place for the purposes of and to the actual use thereof in decision-making), rather than an *obligation of result* (i.e. as to effectively grant refuge). Differently put, the demonstration that would have to be provided is that the decision that is eventually made can be put forward as an entirely valid option, all circumstances having been considered. The principal focus, as will be noted below, becomes the 'traceability' of the decision, not its content and outcome. To some extent, this seems to have been the core of the approach followed by the Galician High Court.

Whether or not the aforesaid *obligation of means* is already part of customary international law could be a matter for debate. Practice is yet scarce, although by accepting hard and soft international law instruments and by implementing national legislation to this effect states appear to be giving rise to an *usus*, arguably supported by *opinio juris*.

For Portugal, the situation was (fortunately) far less complex, not only because of the fact that it was not the coastal state directly involved (as the incident had not taken place in its jurisdictional waters), but also because the legal scenario for the decisions was somewhat different (for instance, an aspect of transboundary environmental harm had to be contemplated, in theoretical terms at least). When the possibility arose of the *Prestige* entering Portuguese jurisdictional waters, the authori-

ties refused to allow the ship to navigate southwards. Decisions in Portugal were being coordinated at ministerial level (with information from various sources), a Navy ship having been dispatched to the scene to follow-up the situation. Several scenarios were contemplated in the event the ship would indeed enter Portuguese waters. Ultimately, the *Prestige* remained outside Portugal's EEZ until it sank. With respect to Portugal, no other decision would seem appropriate when considering the national plane. In the absence of binding, effective international and regional legal mechanisms to deal with incidents such as these, national interests prevailed and determined the action taken.[36]

In terms of environmental damage, Portugal was much less affected than Spain. Two factors appear to have contributed to this outcome. First, the Portuguese authorities' decision not to allow the ship to enter its jurisdictional waters signified that the *Prestige* (as potential source of pollution) was kept as far as possible from Portuguese coastal areas. Second, the meteo-oceanographic (wind, in particular) conditions at the time were such that the pollution was driven away from Portuguese shores. At another time of the year, the situation could have developed in a different manner.

Portugal's Legal Regime in the Post-*Prestige* Era

The legal developments that took place (primarily) in the post-*Prestige* era (also the post-*Erika* era) highlighted the need for change that became all too apparent in the management of maritime disasters involving in particular tankers. There is little doubt that the developments notably within the IMO and the EU were aimed at 'responding' (at least partially) to the *Prestige* and *Erika* disasters and the decisions by coastal states not to grant refuge.

36 When assessing the circumstances of the *Prestige* case, the Galician High Court made specific reference to the Portuguese decision not to allow it to sail into its jurisdictional waters: ibid., at 33, 44.

The example of Portugal could be relevant in this debate for a few reasons. First, Portugal was one of the coastal states that, in the aftermath of the *Prestige*, adopted a concerted action with Spain and France to implement measures against single-hull tankers in its EEZ.[37] Second, in maritime terms, Portugal has a massive exposure to environmental risks and threats from shipping, given its extensive coastal areas and archipelagic features. Third, even though Spain's decisions affected Portugal directly, the Portuguese position during the *Prestige* events was to a certain extent of sympathy for the Spanish handling of the situation. Finally, although Portugal was not directly involved in a decision on places of refuge, it took action that effectively sent the *Prestige* out to open sea and away from the direction that had been selected to minimize the impact on the ship.

Taking a step back, let an additional comment be made on the 'ancient custom' to grant refuge to ships in distress. There seems to be little doubt that a customary rule compelling coastal states to allow entry into their internal waters (e.g. harbors, roadsteads,

[37] While authors have referred to it as 'unilateral action', it is somewhat odd to think that such 'unilaterality' refers in fact to action by a group of states. Moreover, while the three states mentioned were the more active paladins of such measures, other states supported their positions. The example of Italy is noteworthy, as its positions during the 2003 Informal Consultative Process (4th Meeting, 4 June 2003), months after the sinking of the *Prestige*, were to a significant extent aligned with those of Portugal, Spain and France. While not so openly vocal, other EU Member states expressed their sympathy. The United Kingdom, Ireland and Belgium joined-in with Portugal, Spain and France to apply for the setting-up, within the IMO, of the Western European Particular Sensitive Sea Area. Certain associated protective measures, which included a ban on carriage of heavy-grade oil by single-hull tankers, were involved. While such measures were eventually not approved, this evidence shows that a wider group of interested states had similar concerns. Whether or not the actions by Portugal, Spain and France were inconsistent with international law is a different matter, one which will for the time being remain undecided. Arguments can be made either way, this being perhaps a borderline situation.

bays) to a ship requiring assistance existed once. Such right undoubtedly exists when human life needs to be protected ('humanitarian rationale'). Environmental protection emerged in the last decades as a 'game-changer' and is currently also a critical aspect to be considered here ('environmental protection rationale'). Protection to ships and cargoes, apparently also warranted in the past, lost its significance at least to a certain extent, having nowadays become a 'distant third' in the list of 'justifying reasons' in favor of granting a place of refuge.[38] Customary international law, one would therefore contend, does not incorporate any rule imposing on coastal states an untrammeled duty to grant shelter to distressed tankers.

When one delves into the legal developments that occurred in the aftermath of the *Erika*, *Castor* and *Prestige* incidents, the most poignant and striking conclusion is precisely that no unqualified obligation to grant refuge to a ship in distress was identified. Had it been concluded that a customary rule to that effect existed, it would certainly have been spelt out in documents such as the VTS Directive and the IMO Guidelines. A similar conclusion is reached when reviewing international instruments that could potentially include provisions on the subject. As noted above, the Salvage Convention was the instrument that came closest to spelling out a workable rule,[39] but has fallen short of providing for an obligation to grant refuge. Its contribution could perhaps be found at another level, that is, in identifying (i) human life, (ii) property, and (iii) the environment as the interests to be protected.

[38] The VTS Directive refers to measures (consistent with international law) designed "to ensure the safety of shipping and of persons and to protect the marine and coastal environment" (cf. art. 19.1). Similarly, when dealing with contingency plans, reference is only made to threats to human life and the environment (cf. art. 20a.1). Threats to ships and cargoes seem thus placed at an entirely different level.

[39] Salvage Convention, art. 11.

In light of all reviews of international law undertaken hitherto, the conclusion does appear to be that in spite of all attempts no customary or conventional rule imposing on coastal states a duty to grant distressed ships access to places of refuge areas has been identified.

As a EU member state, and a party to the IMO, the legal panorama on the issue of places of refuge in Portugal is to a very large extent determined by international and EU instruments. Two such instruments, already mentioned, constitute the starting point of and the framework for any review of the relevant Portuguese legal regime: (i) the IMO Guidelines; and (ii) the VTS Directive (as amended). While other instruments could be made reference to[40], attention will be briefly drawn to the more significant aspects of these two instruments in terms of the specific issue treated here: the decision-making procedure on whether or not to grant access to a place of refuge by a ship requiring assistance.

The IMO Guidelines offer a framework on the basis of which states can act in respect of places of refuge. The following points attempt to summarize what can be deemed as the critical aspects of the IMO Guidelines on this problem, as regards both theory and practice:

- At the very outset, it is made clear that the Guidelines are not to be followed where safety of human life is in question. Nor are they to be viewed as addressing the issue of operations for the rescue of persons at sea.[41] This approach seems to confirm that the decision-making on places of refuge is a matter to be conceived of as not prejudicing the 'humanitarian rationale', which has been central to the 'ancient

40 Within the IMO context, consideration should be given to the Maritime Assistance Services (MAS) Resolution: cf. IMO Doc. A23/Res.950 of 26 February 2004.

41 IMO Guidelines, paras. 1.1 and 1.13.

customary rule'. However indirectly, it is acknowledged that the problem is to be viewed from a different angle;

- The decision-making process is canvassed not as a purely theoretical or doctrinal debate but as a matter of finding the solution to a practical (event-specific) problem. Its purpose is to provide states, shipmasters, companies and salvors with a common framework that enables them to respond effectively to a possible imminent disaster;[42]

- While noting that when a ship is damaged, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers and to repair the damage (an operation best carried out in a place of refuge), it recognizes unreservedly that the granting of a place of refuge could (a) involve political decisions and considerations which can only be addressed on a case-by-case basis, and (b) encounter local opposition;[43]

- Reference is made to the weighing-up process within which due consideration must be given on an objective basis and specifically in relation to the event in question to, on the one hand, the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and, on the other hand, the risk to the environment resulting from that ship being near the coast;[44]

- The latter of the foregoing factors, sometimes discarded without reasonable justification from the debate on places

[42] Ibid., paras. 1.2 and 1.12.

[43] Ibid., paras. 1.3, 1.7 and 1.10.

[44] Ibid., paras. 1.7 and 3.5.

of refuge, is of fundamental relevance: bringing a damaged ship closer to shore inevitably and indisputably results in an increase of the risk for the environment and the human populations of the coastal areas in question. This reference shows clearly that the specific area chosen as place of refuge may be more severely threatened and affected should a disaster occur;

- When setting down the elements concerning action by a coastal state, no doubts are left as to the right of coastal states to require ships to act in a certain manner with a view to handling the threat of danger;[45]

- It recommends the establishment by coastal states of procedures aimed at handling and acting on requests for the granting of a place of refuge and, where appropriate, authorizing access to such place of refuge.[46] The right of a coastal state not to authorize access to a place of refuge, if and when it deems it as not appropriate, is indubitably recognized;

- Contingency plans are to be drawn up by coastal states with a view to dealing with disaster situations involving damaged ships off their coasts. Such plans are to be implemented if and when an incident takes place. An information-sharing mechanism should be set up within the coastal state, linking all governmental and maritime authorities, in order to improve decision-making if the situation arises;[47]

- Factors to be weighed-up in the analysis of an incident through an event-specific assessment are listed. The ana-

[45] Ibid., para. 3.1.

[46] Ibid., paras 3.2 and 3.4.

[47] Ibid., para. 3.6, and Appendix 2, para. 2(3).

lysis, to be conducted in view of the prevailing circumstances and on an objective basis, must incorporate a comparative risk-assessment review by reference to the two options available: (a) the ship remaining at sea; and (b) the ship being brought into a place of refuge. The extensive list of factors includes, *inter alia*: (i) condition of the ship; (ii) nature of the cargo, in particular if hazardous cargoes are involved; (iii) threat to public safety; (iv) human and crew factors; (v) insurance, liability and financial aspects; (vi) environmental constraints, including existence of sensitive areas; (vii) economic impact; (viii) meteo-oceanographic conditions; (ix) navigational and piloting aspects; (x) contingency plans; and (xi) foreseeable consequences;[48]

- The comparative risk-assessment review must cover the safeguarding of human life at sea, the safety of persons at the place of refuge, as well as its industrial and urban environment, the pollution risks, the risks of disruption of economic activities, notably as to ports operations, the implications of the refusal of access to the place of refuge, including as regards the possible transboundary impact (*sic utere tuo* principle), and the possibility to preserve the hull, machinery and cargo of the distressed ship;[49]

- Most importantly, it is expressly stated that there is no obligation for the coastal state to grant access to a place of refuge, it being nevertheless bound to weigh-up all factors and risks and to give shelter whenever reasonably possible.[50]

[48] Ibid., para. 3.9, and Appendix 2, para. 2.

[49] Ibid., paras. 3.10 and 3.11.

[50] Ibid., para. 3.12.

Turning to the VTS Directive, the first point to be made is that it incorporates to a significant extent the IMO Guidelines, including explicit references thereto. The clearest example concerns the contingency plans to be drawn up by EU member states.[51] Focusing exclusively on the decision-making concerning the granting of access to a place of refuge, heed should be paid to the following aspects of the VTS Directive:

- The measures to be taken by member states in the event of incidents or accidents at sea are aimed at ensuring the safety of shipping and of persons and protecting the marine and coastal environment;[52]

- Amongst the non-exhaustive list of measures that national authorities are allowed to adopt are the possibility of directing the ship to follow a specific course and causing the ship to be piloted or towed;[53]

- EU member states must designate competent authorities which are to have the expertise and the power to take independent decisions concerning the accommodation of ships in need of assistance, by adopting any of the measures mentioned above;[54]

- Most notably, it is explicitly established that decisions are to be preceded by an assessment made by reference to applicable contingency plans. National authorities have to ensure

[51] VTS Directive, art. 20a.2.

[52] Ibid., art. 19.1.

[53] Ibid., Annex IV (to which art. 19.1 refers), paras. (a) and (d). If a ship is towed under a towage or salvage agreement, these measures may be addressed to the relevant assistance, salvage and towage companies.

[54] Ibid., arts. 20.1 and 20.2.

that distressed ships are admitted to a place of refuge only if they conclude that it is the best course of action for the purposes of protection of human life and the environment;[55];

- Contingency plans for accommodating ships in need of assistance are to be drawn up with a view to responding to potential threats to human life and the environment. Such plans to be based on the IMO Guidelines and have to incorporate the assessment procedures for acceptance or refusal of a ship in need of assistance in a place of refuge;[56]

- It is stipulated that the absence of an insurance certificate is not a sufficient reason for a refusal to grant refuge to a ship in distress.[57] When examined in light of the *Prestige* case, this aspect of the EU regime should perhaps invite cause for trepidation, since the 'bill' in the *Prestige* case was estimated by the Spanish government to be over 4 billion Euros;

- A specific obligation for masters and owners of ships carrying dangerous or polluting goods to cooperate with national authorities is imposed. This obligation is aimed at minimizing the consequences of incidents or accidents;[58] and

- It explicitly acknowledged that matters of recovery of, or compensation for, economic losses and damages relating to the accommodation of ships in distress need be looked into at the EU level.[59]

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55 Ibid., art. 20b.

56 Ibid., arts. 20a.1 and 20a.2.

57 Ibid., arts. 20c and 20d.

58 Ibid., art. 19.2 (which refers to art. 12).

59 Ibid., arts. 20d and 26.3. The Commission has submitted to the European Parliament and the Council the *Report on Liability and Compensation for*

The applicable Portuguese regime established by Decree-Law 52/2012 of 7 March 2012, which amended Decree-Law 180/2004 of 27 July 2004, reflects a wide list of international instruments.[60] The VTS Directive was transposed by the Portuguese statutory regime. Moreover, the IMO Guidelines have clearly also been taken into consideration. In a very loose sense, it could be said that the Portuguese regime is both EU and IMO compliant. While this is the case, there is little doubt that in its details this regime can depart somewhat from equivalent regimes within the EU zone and those of other states at large.

Financial Damages Sustained by Places of Refuge when Accommodating a Ship in Need of Assistance, Report COM (2012) 715 of 30 November 2012 (EU Liability Report). If additional evidence was necessary, the Report confirms how the liability and compensation aspects involved in the debate of places of refuge in effect confirm that questions remain unanswered. While there is no room in this paper to enter the debate on liability and compensation for financial damages stemming from the granting of refuge to a ship in distress, one illustrative point of the risks for coastal states should be highlighted. The report refers to the possibility of reception of a ship in a place of refuge to be legally deemed a "preventive measure" for purposes of the IMO liability-related instruments: see, EU Liability Report, paras. 2.2.1 and 5.1(3). No such confirmation exists, perhaps also because it could depend on each specific set of circumstances (i.e. it is not certain that all decisions to grant refuge qualify). The primary instrument on international liability aspects is the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (973 UNTS 3, as amended), which has been complemented by the Convention creating the International Oil Pollution Fund and the 2003 Protocol on a Supplementary Fund (jointly, "IOPC Funds"). An overview of the *Prestige* case in respect of the IOPC Funds and compensation issues is available at <www.iopcfunds.org/incidents/incident-map/#126-2002-210-November>.

[60] Regulations detailing aspects of the regime set down in Decree-Law 180/2004 are expected to be enacted in the future. Unless otherwise stated, references to Decree-Law 180/2004 in this paper shall mean the Decree incorporating the 2012 amendments.

The Portuguese authority designated as competent for deciding whether or not to grant refuge to a ship in need of assistance is the member of Cabinet charged with sea and maritime affairs.[61] The clear implication of this choice of competent authority seems to be that Portugal considers that political factors could become significantly relevant in a decision-making process, and has accordingly opted for integrating the decision at the level of the Cabinet. Compliance with the requirement for independent technical expert input was achieved through an obligatory but non-binding opinion from the Technical Commission for Accommodating Ships in Distress.[62] The measures which the competent authority may take are the exact same as those listed in the VTS Directive.[63]

With respect to the required contingency plans, the amended Decree-Law 180/2004 follows again the regime set forth in the VTS Directive, and provides for consideration to be given to the IMO Guidelines.[64] The decision on whether or not to grant refuge, as stipulated in the VTS Directive, is to be affirmatively taken where it is deemed the most appropriate decision for protection of human life and the environment.[65] The issue of financial security and compensation is dealt with again in the same exact terms as in the VTS Directive.[66]

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[61] Decree-Law 180/2004, art. 19.1.

[62] Ibid., art. 19.2. This commission is composed of members from a wide range of sectors (e.g. maritime and port authorities, vessel traffic authority, navy, environmental authority, and meteo office). Other members from interested sectors and stakeholders may be called upon to join the commission.

[63] Decree-Law 180/2004, art. 19.5 refers to Annex IV, which virtually transcribes the relevant annex of the VTS Directive.

[64] Decree-Law 180/2004, art. 19A.

[65] Ibid., art. 19B (reference is made to stabilizing the condition of the ship).

[66] Ibid., art. 19C.

Decision-Making: Prevalence of National Interests?

The scope of situations involving a decision-making process relating to places of refuge is likely to be virtually unlimited. For purposes of this paper, the author focused entirely on what was referred to as a *Prestige*-like case. In short, it is a maritime accident of the severest nature, near densely populated coastal areas,[67] involving a tanker carrying a highly polluting and dangerous hydrocarbon cargo,[68] in which from the outset the survival of the vessel comes into question, in which the responsibility for ship and cargo is not entirely clear, all signs auguring an imminent environmental and human catastrophe of unimaginable dimension and cost. This point is not without critical implications.

As reflected in the more recent international instruments, decision-making in respect of whether or not to grant a distressed ship access to a sheltered area is an 'incident-specific process'. On its own, this aspect would render invalid any simplifications and attempts at hard and fast rules on decisions concerning such granting of access to refuge. International law, indeed, contains no rule dealing with the outcome of the process. That is, there is no legal obligation to grant refuge (not even a 'qualified obliga-

[67] In the hypothetical scenario of a similar accident occurring in unpopulated (or even very sparsely populated) areas, the decision-making process relating to access to a place of refuge would probably factor circumstances in a different manner. Human health and other human-related concerns being absent, the decision would likely revolve around the dichotomy 'coastal environmental protection' *versus* 'oceanic environmental protection'. In such hypothetical case, protection of ship and cargo could perhaps be a more relevant factor than it would otherwise be the case.

[68] Parallels could be attempted between heavy-grade oils and other dangerous cargoes. For purposes of this paper, the option was made for restricting the analysis to a Prestige-like case. Reliance on the argument proposed here for purposes of a case involving a dangerous cargo of a different type would require the validation of the necessary legal analogies between both sets of circumstances.

tion', one would argue).[69] Conversely put, there is no *obligation of result*. What international law does appear to incorporate is an *obligation of means*, whereby states are mandated to carry out a decision-making process predicated on the specific circumstances of the incident. The outcome is entirely dependent on how such circumstances are weighed-up – through such decision-making process and in light of the critical interests to be protected. Only the said process may be subject to legal review, not the decision itself (or the outcome thereof) in isolation. Admittance of a ship to a place of refuge, according to the VTS Directive, is mandatory only if national authorities conclude that such decision is "the best course of action for the purposes of the protection of human life or the environment".[70] What the "best course of action" consists of is for each EU coastal member state to assess in each specific incident.[71]

Wedded as the decision-making process eventually is to the upshot thereof, the critical aspect has apparently become the *traceability* of the ultimate decision – that is, the possibility of ascertaining the stages of the process in reaching the decision of allowing (or disallowing) access to refuge. It should be immediately emphasized, however, that the relevant instruments have stopped short of a rigid process.[72] On the contrary, much room

[69] Correspondingly, there is no right for the ship to require a coastal state to grant it access to a place of refuge.

[70] VTS Directive, art. 20b. Portugal has added another aspect: the stabilization of the ship's condition: cf. Decree-Law 180/2004, art. 19B, n.° 2.

[71] An attempt is made by van Hooydonk to present the basis pursuant to which, under customary law, states may exercise a right of refusal of entry (van Hooydonk, note 10 at 170 et seq.). While not agreeing with the approach adopted, there are points of contact notably as to the elements of each decision (not necessarily the way in which such elements are weighed-up).

[72] While in and of itself the decision-making process established in the IMO Guidelines is not binding on IMO parties, the fact that such process is incorporated by states into their national legislation (as happened with Portugal) has undoubted law-making implications. By giving their imprimatur

for discretion continues to lie with coastal states because, for instance: (a) no comprehensive list of factors to be weighed-up was drawn up; (b) how each factor is to be concretized (or valued) remains a matter of judgment; and (c) the relative weight of each such factor in the decision-making process is not set in stone. Therefore, a wide margin of discretion for the coastal state persists. If a legal review on the process were attempted, unless the decision-making process had been conducted in a manifestly unreasonable manner, such legal review could stumble on very challenging aspects concerning the exercise of legal discretion by states. Said *traceability* appears to be thus critically linked to a notion of *reasonableness* in light of concrete circumstances.

A significant part of the discussion surrounding the *Prestige* disaster appears to have been centered on the decision itself. In light of subsequent developments by international instruments, a reappraisal might be well warranted. What should be enquired nowadays is perhaps whether the process leading to a decision – first, weighed-up all aspects that were relevant in the concrete circumstances and, second, factored each aspect in a not manifestly unreasonable manner. Zooming in on the process should be about reasonableness of the weighing-up process. No single correct weighing-up of the incident circumstances exists. How transparent the decision-making process is, from the standpoint of linking a set of circumstances to a specific decision, has in our view become the 'key to the vault'.

Sound technical assessments are a requirement for such decision-making processes, as they have or should have always been. The concrete circumstances of the affected vessel (i.e. seaworthiness, position, repairs required, survivability assessment), together with the availability of a sheltered area adequate to carry

to the decision-making process as described in the IMO Guidelines, states are arguably validating it for national and international law purposes.

out the necessary repairs in time to avert disaster, are indubitably amongst the critical features of the decision-making process. At the technical level, implementation should be perhaps viewed through the lenses of contingency plans. A decision-making process supported by a carefully designed contingency plan (e.g. pre-planned procedures, responses and precautionary actions together with robust means for pollution combat) is perhaps the most effective technical contribution. The decision-making process can never be made tantamount to a technical assessment. However, a clear technical input (in the form of a contingency plan) can become one of the pivotal elements thereof, by decluttering the process of unnecessary technical discussions at a critical time. Today, such contingency plans seem to have become a legal requirement, at the very least for EU member states.

Side-by-side with such technical assessments the coastal state's political 'value judgments' need be considered. They may not be simply brushed aside.[73] To do so would consist of a breach of international law as it now stands, as well as of the principle of democracy in several of its facets. The view taken by local stakeholders and the local population on the granting of refuge in a nearby area, for example, must particularly be given due weight. Access to a place of refuge located in a coastal area without human settlements, and limited or no economic activities, is an entirely different proposition. In the context of these political

[73] While being 'value judgments' that are by nature political, these aspects become legal factors for purposes of the decision-making process. Differently put, international law allows coastal states to undertake assessments that have a political element and to weigh-up such element within the legal decision-making process. The basis for these 'value judgments' is not the IMO Guidelines, which simply reflect international law. States are under international law entitled to weigh-up political factors to any extent not prohibited thereby. Insofar as no right of access to a place of refuge exists, in deciding whether to grant access to a distressed ship, states are fully in their right to undertake assessments as to the political implications of any decisions and scenarios.

'value judgments', two considerations arguably acquire outstanding significance in a *Prestige*-like incident.

First, there is the question of the full range of short and long-term impacts on human life primarily, but also the environment. Its relevance is too obvious to require explanation under international law. The long-term aspect is of paramount difficulty and should be separately considered. When in doubt as to which such long-term (irreversible) implications might be, a protective approach[74] taken by the coastal state appears to be fully justified (certainly when potentially serious implications for human life are involved). When such long-term impact comes together with a potentially significant financial burden, such a protective approach is all the more justified from a legal standpoint (which leads to the second consideration below). To be clear, one would argue there is no international law or EU obligation for a coastal state to avoid risks of widespread pollution as a result of refusing to grant shelter to a distressed ship when that goal would be attainable only by risking concentrated pollution with potential long term damage for humans and the coastal environment.

Second, there is the issue of financial liability for all damages caused by a disaster occurring after refuge is granted to a dis-

[74] Granting a place of refuge in a *Prestige*-like case entails the consideration of the scenario of massive volumes and high concentrations of heavy-grade oil being spilled over a confined coastal area. Because such coastal area is directly linked to human populations and their livelihoods ('human environment'), a manifest risk of serious damage for humans exists. Even if the consequences for humans are unknown from a purely scientific standpoint, making a decision that avoids such a spill by protecting the human environment seems clearly warranted. In a decision between 'two unknown evils' – the consequences of a massive spill of heavy-grade oil in a confined coastal area in close proximity with human populations or the consequences of a similar spill in an open oceanic area with no direct links with humans and where the heavy-grade oil would be in smaller concentrations – the choice to be made (assuming that the probability of each scenario materializing is not manifestly different) seems rather clear: protection is to be granted to the human environment instead of the environment in abstract terms.

tressed ship. As clearly demonstrated by the *Prestige* incident, a several billion Euro 'bill' might be left unpaid. Whether a coastal state is willing to bear such a financial burden (or even contemplate the possibility of having to face it), without clear guarantees of full compensation for all damages directly and indirectly resulting from the accident after refuge is granted, is a matter to be decided in discretionary terms. From a different angle, the issue of 'who' is affected by the disaster arises. If refuge was granted, and the disaster occurred, the damages would most likely be concentrated in internal waters, ports and/or the territorial sea of the coastal state. If, on the contrary, the disaster took place tens of miles offshore, it would likely not have the same intensity for the shores of such state. Of course, pollution of the high seas could become a problem to be addressed. However, pollution of the high seas does not seem to result per se in liability for a state.[75] It is even more so because a coastal state is not under a legal obligation to grant refuge. The debate on this point cannot be undertaken here. One would simply advance what seems to be critical. Even at the EU level, it is doubtful that a state may be 'forced' to face the risk of significant pollution damages (most notably if human populations are to be severely affected) without having the reciprocal right and guarantee to obtain full redress for any actual (direct and indirect) damages eventually suffered.[76]

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[75] The *res communis omnium* nature of the high seas often led to difficulties in similar situations. Unsurprisingly, the economics theory of the 'tragedy of the commons' has been named when referring to the situation of this maritime zone (cf. "The tragedy of the high seas" *The Economist*, 22 February 2014, available at <www.economist.com/news/leaders/21596942-new-management-needed-planets-most-important-common-resource-tragedy-high>). Strictly legally, a situation of pollution affecting the Area would likely have to be addressed from a different angle. From a practical perspective, however, it would be difficult to render a coastal State liable for pollution in the Area in a case of refusal to grant refuge.

[76] Cf. note 59, with very brief notes on this point.

A different issue concerns a possible risk of pollution of maritime zones subject to the jurisdiction of another state. This would be a much more complex point to deal with, reasons for which it was excluded at the outset from the scope of this paper. All that will be suggested here is that a mere risk of pollution of maritime zones subject to the jurisdiction of another state is per se not sufficient to constrain decisively the decision-making process of the state involved in the request for access to a place of refuge.

When comparing today's legal setting with that in place at the time of the *Prestige* incident, one almost feels as if little has changed for a coastal state faced with a similar threat of imminent disaster. The situation would still be an exceptional one as far as circumstances are concerned, and to be assessed and decided upon on its own merits. No certainty would exist as to the consequences of whichever decision would be made: allowing or not allowing access to a place of refuge. For the outcome of a potentially 'disastrous' situation can only be controlled to a certain (variable) extent. Given that certainty does not exist, a coastal state would always have to 'make a call' on the basis of its best assessment of all specific circumstances of the incident. Political considerations would continue to be present, and would be for the coastal state alone to deal with on its discretion. Most significantly, under international law there is still no obligation to grant shelter to the distressed ship.

Improvements have certainly occurred. The requirement that coastal states implement adequate decision-making procedures, contingency plans and organizational responding structures indubitably is a step towards better decision-making in *Prestige*-like incidents. Determining what the 'best course of action' is has been made somewhat clearer and easier by the legal instruments drawn up since the *Prestige* case (including national legislation, as in the case of Portugal).

Sieving through the interspersed gaps of international and EU law, the ultimate critical point to be touched upon concerns the

priority to be set on the interests to be protected by the coastal state's decision. Should international or European interests (in principle embodied by the need to avoid 'widespread pollution' by granting refuge to a distressed ship) prevail over those of the potentially affected coastal state (which is to grant access to a place of refuge)? In the present legal setting, one would argue that the answer should perhaps be given in the negative. All other things being equal, in light of the legal discretion enjoyed by coastal states in this respect, national interests will likely have a *prima facie* prevalence. Only the potentially affected coastal state may, in assessing the situation, waive the right to place prevalence on its national interests when deciding whether or not to grant refuge. Although possibly not what many would conclude, this seems to be the conclusion that best reflects the status quo of international and EU law.