

Places of Refuge – a Myth or a Reality?

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Abstract

Granting refuge to ships in distress has been an ancient custom, however, with a notable exemption; that of the Cyclops who not only refused to provide refuge and assistance to Ulysses but they were, indeed, very inhospitable (Homer, ca. 800 BC, The Odyssey). Polybios recounts the practice of granting refuge to ships in distress from the 3rd Punic War (149 – 146 BC). This practice was followed for many centuries and it was reconfirmed by the Barcelona Maritime Code (1258 AD), which contains a provision for assistance in case of storms to be given to ships in distress. The Rules of Oleron (ca. 1266 AD) stipulated a duty not only to assist mariners and merchants in case of distress but also to aid in saving the merchandise. In the 17th to 19th centuries, the age of bilateral treaties, the commitment to receive the distressed ship "with all kindness and humanity" and to provide "all friendly protection" was again reaffirmed. Does this "kindness and humanity" attitude towards a ship in distress survive in our days or is it that the shipping industry has taken a step back towards the Cyclopean approach?

Keywords

Places of Refuge; distress ship; Erika; Castor; Prestige; assistance.

Introduction

In the 20th and 21st centuries we witness a gradual deviation from the ancient custom; neither the Convention on the International Regime of Maritime Ports, 1923, the Convention on the Facilitation of Maritime Traffic, 1965, the International Convention on the Safety of Life at Sea, 1974, the International Convention on Maritime Search and Rescue, 1979, the OPRC

Convention, 1990, the London Dumping Convention, 1973, the MARPOL 73/78 Convention, nor the Salvage Convention, 1989, have any provision on where to take a vessel in need of assistance, or impose duty on State parties to provide place of refuge.

The current perception is very accurately reflected in the CMI (Comité Maritime International) report which quotes: "The right, according to customary law, for a vessel in distress to be granted a place of refuge no longer appears to be recognized by many States as an absolute right and has become clouded". In the last decade, the Cyclopean approach prevailed in a number of incidents, notably those of the "ERIKA", the "CASTOR" and the "PRESTIGE". Moreover, the U.S. and Canada legislation as well as the provisions of the EU's Ship Source Pollution Directive do not seem to have anything in common with the custom of receiving a distressed ship (especially its seafarers), "with all kindness and humanity" and to provide "all friendly protection".

The question arises whether the IMO Guidelines on Places of Refuge for Ships in Need of Assistance (Res. A.949 (23)), the IMO Maritime Assistance Service Res.A.950 (23), or even the EU Directive 2002/59/EC which requires Member States to draw up plans to accommodate ships in distress, may completely reverse the situation and align the policies of States with the ancient custom; to what extent is that possible, given the fact that the decision making process is in fact in the hands of politicians and not of the Maritime Administrations?

This paper aims to address the above crucial question and to also shed more light to certain realities; why has the Cyclopean approach been embraced in our times? what was missing in the old framework? Which are the possible future directions?

Granting refuge to ships in distress: an ancient custom

Granting refuge to ships in distress has been an ancient custom, which has been practised over the centuries. Nowadays, some States choose to recognise its existence and observe the custom while other States opt to refuse or ignore it.

Granting refuge is distinct from the right to receive assistance. It is not necessarily a right to enter port. It is clearly an exception to the general rule that innocent passage must be continuous and expeditious, as defined by the UNCLOS [art. 18(2) and 39(1) C.]

The basic humanitarian principle has survived over time and refuge was mostly granted to commercial vessels and to a lesser extent to fishing vessels or warships.

Early practices

A notable exception from the basic humanitarian principle has been the inhospitable action of the Cyclops after Ulysses requested refuge from them (**Homer, Ca, 800 BC, the Odyssey**).

Polyvios recounts the practice for granting refuge to distressed ships, from the 3rd Punic War (**149-146 BC**)^[1]. This practice was followed for many centuries and it was reconfirmed by the Barcelona Maritime Code (**1258 AD**)^[1]. The Code contains a provision for assistance in case of storms to be given to ships in distress. Also, the Rules of Oleron (**1160 AD**)^[1], which referred not only to merchant ships but also to fishing ships, stipulated a duty not only to assist mariners and merchants on board in case of distress but also to aid in saving the merchandise.

17th to 19th Century^[2]

This is the age of bilateral treaties, many of which stipulate rights of ships seeking refuge from, e.g. tempests, pursuit of pirates and enemies, or any other urgent necessity. The treaties reaffirmed the commitment to receive the distressed ship “**with all kindness and humanity**” and to provide “**all friendly protection**”. They also defined as potential places of refuge havens, roads or shores.

Custom (19th Century)^[2]

In the 19th century the right of refuge could be widely enjoyed by distressed ships and seafarers in a variety of places (port, harbour, haven, creek e.t.c.). Any kind of ship or boat enjoyed the right,

even warships which, however, had to notify local authorities and conditions could be imposed.

Distressed ships enjoyed the right to undertake repairs and maintenance at commercial rates, cargo could not be unloaded, except in case of general average or the need to raise funds for repairs. No customs duties were levied on the cargo and the ship could depart freely.

Ship wrecked vessels and persons on board would be given any possible assistance and property would be protected. The ship had a right to consular assistance and the burden of proof that the entry was not voluntary vested with the ship.

20th and 21st Century

In the 20th and 21st centuries we witness a gradual deviation from the ancient custom:

- The Convention on the International Regime of Maritime Ports, 1923, although it provides that State parties agreed to provide free, equal and mutual access to ports^[3], it does not make any specific mention of distress situation.
- The Convention on the Facilitation of International Maritime Traffic, 1965 (FAL), which focus on documentary facilitation of arrivals, stay and departure^[4], does not make any specific mention of distress situations, other than medical.
- Neither the International Convention on the Safety of Life at Sea, 1974 (SOLAS), nor the International Convention on Maritime Search and Rescue, 1979 (SAR), which both contain provisions on coastal State assistance in situations of distress at sea^{[5]&[6]}, make any reference to places of refuge.
- The International Convention on Oil Pollution preparedness, Response and Cooperation, 1990 (OPRC), which provides for and defines cooperation on contingency planning and response^[7], does not contain any provision on where to take a vessel in need of assistance.
- The London Dumping Convention, 1972 and the MARPOL 73/78 Convention, although both recognise the exceptional nature of a ship in distress and they provide appropriate legal exceptions from the application on key provisions in case the safety of human life or of a ship is threatened^{[8]&[9]}, they do not make any reference to places of refuge.

- The Salvage Convention, 1989 (Art. 11), stipulates that “*A State Party shall, whenever regulating or deciding upon matters relating to salvage operations, such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general*”.
- The Convention, however, does not contain any clear obligation to provide a place of refuge, or a duty to regulate the entry into a port of refuge.

Current Perception

The current perception is very accurately reflected in the CMI (*Comite ´ Maritime International*) report ^[10], which states that “*the right, according to customary international law, for a vessel in distress to be granted a place of refuge no longer appears to be recognised by many States as an absolute right and has become clouded*”.

What was missing in the old framework?

The custom was largely uncodified in the International Law of the sea and maritime law. Thus, there was room for conflicting interpretation. Moreover, there were no generally accepted (uniform) best practices, rationalized on the basis of risk-assessments.

Also, there was no insurance framework sufficiently wide in scope and depth of coverage (indemnity) to cover all possible risks or perils faced by the coastal State or port authorities providing refuge ^[11].

Ships in distress: the new framework of international standard

The current legislation concerning places of refuge consists of two IMO resolutions and an EU Directive, namely:

- IMO Resolution A.949(23) – *Guidelines on places of refuge for ships in need of assistance*
- IMO Resolution A.950(23) – *Maritime Assistance Services (MAS)*
- Directive 2002/59/EC – *Establishing a Community vessel traffic monitoring and information system*

Res. A.949(23)

The Assembly of the International Maritime Organisation, at its 23rd session, adopted the Res. A.949(23) on the 5th of December 2003. The fundamental points of this resolution are:

- Adopts the Guidelines on places of refuge for ships in need of assistance;
- Invites Governments to take these Guidelines into account when determining and responding to requests for places of refuge from ships in need of assistance;
- Requests the *Maritime Safety Committee*, the *Marine Environment Protection Committee* and the *Legal Committee* to keep the annexed Guidelines under review and amend them as appropriate;
- Requests the *Legal Committee* to consider, as a matter of priority, the said Guidelines from its own perspective, including the provision of financial security to cover coastal State expenses and/or compensation issues, and to take action as it may deem appropriate.

Res. A.950(23)

The Assembly of the IMO, at the same session as that of Res. A.949(23), adopted also the Res. A.950(23). The main points are:

- Recommends that coastal States can establish a maritime assistance service (MAS) for the purpose of:
 - receiving the reports, consultations and notifications required by the IMO instruments (referred to Annex 1 of the present resolution);

2. monitoring the ship's situation if a report, as referred to in paragraph (a) above, discloses an incident that may cause the ship to be in need of assistance;
 3. serving as the point of contact between the master and the coastal State concerned, if the ship's situation requires exchanges of information between the ship and the coastal State but is not a distress situation that could lead to a search and rescue operation;
 4. serving as the point of contact between those involved in a marine salvage operation undertaken by private facilities at the request of parties having a legitimate interest in the ship and the coastal State, if the coastal State concerned decides that it should monitor all phases of the operation;
- b. Urges Governments to issue national instructions advising their MAS of the authority or organisation:
1. To which it should transmit information obtained from a ship;
 2. From which it should receive instructions concerning its own actions and the particulars to be transmitted to the ship;
- c. Invites Governments of coastal States that have established a MAS to forward to the Organization the details of their MAS to enable the Organization to circulate such particulars, so that shipmasters and other persons or organizations concerned can contact it as necessary;
- d. Recommends that Governments of coastal States, when establishing a MAS, take into account the guidelines set out in Annex 2 of the resolution;
- e. Requests the *Maritime Safety Committee* and the *Marine Environment Protection Committee* to keep this resolution under review and amend it as appropriate;

Directive 2002/59/EC

Following *Erika* and *Prestige* disasters there was an *Introduction of provisions on places of refuge (Erika-II package - December 2000)*. These provisions have been adopted through *Directive 2002/59/E*, which entered into force on 5th of February 2004 (article 29). The main points of the directive are as follows:

Art. 20: Places of Refuge

- Obligation to draw plans to accommodate ships in distress in places of refuge;
- Plans shall contain arrangement and procedures and take account of operational/environmental constraints;
- Accommodation subject to prior authorization of Member States;
- Plans to be made available on demand;

Art. 23: Cooperation between Member States and the Commission

- Drawing up of concerted plans to accommodate ships in distress;

Art. 26.3: Evaluation

- Commission to examine need/feasibility of measures for recovery & compensation of costs and damages and to report to the European Parliament and to the Council by 5 February 2007;

THIRD MARITIME SAFETY PACKAGE

The Third Maritime Safety Package has been adopted by the Commission on the 23rd of November 2005 and transmitted to the Council and European Parliament under co-decision procedure. The Third Maritime Safety Package has two main

objectives: a) *improve accident and pollution prevention*, and b) *deal with the aftermath of an accident*. As far as *Places of Refuge* is concerned, this Safety Package brings a modification of the Directive 2002/59/EC on Traffic Monitoring, by developing the existing provisions on *Places of Refuge*. The most important proposals through the Third Maritime Safety Package concerning *Places of Refuge* are summarised below.

Art. 20: Decision Process (new provisions)

- Ships to be accommodated in Places of Refuge (POR) subject to the results of the assessment of the situation carried out on the basis of the POR plan;
- Decisions shall be taken by an independent competent authority designated by the Member State;
- Regular meetings between the independent competent authorities;

Art. 20a : Plans

- A clear and precise description of the responsible authorities and of procedures;
- The inventory of potential places of refuge;
- The means available for assistance and pollution combating;
- Reference to the international/regional arrangements applicable;
- Coordinates of contact points and competent authorities to be published;
- No publication of a list of POR but communication of the inventory to the Commission;
- In case of emergency, information of parties involved, in particular neighbouring Member States and assistance & towage companies;

Latest developments on the Modification of Directive 2002/59/EC

During the second quarter of 2007 the European Parliament introduced the important changes for the European Union's Vessel Traffic Monitoring Directive through the Third Safety Maritime Package, as mentioned above.

In June 2007, however, the Council of Transport Ministers in Luxembourg deleted a reference to 'independent' authorities charged with deciding to which ports ships in danger of breaking up and causing pollution should be sent. Moreover, the Council of Transport Ministers also deleted a plan for a system of financial guarantees covering liability for damage caused by such a ship as well as a European parliament amendment on compensation for ports which offer sanctuary.

At the time being, the draft text is back to the parliament for a second reading. There will be closed-door negotiations between the Council of Transport Ministers and Euro MPs in an effort to thrash out a deal before a new round of voting.

Cyclopean Approach

In the recent years, three high profile incidents, namely the *Erika*, the *Castor* and the *Prestige*, clearly showed that, in our modern times, the Cyclopean approach prevails as the normal practice whenever a distressed vessel requests a place of refuge. The consequences of these three incidents triggered the reaction of the EC with the introduction of Directive 2002/59/EC. As it pertains, however, the treatment of seafarers following an accident which results to pollution, the Directive 2005/35/EC, criminalises incidental pollution, a matter which has been widely condemned by the maritime industry. An analysis of the three incidents is essential for reaching firm conclusions.

M/V ERIKA

Sequence of events

- At approximately 1240, local time, 11 December 1999, a substantial starboard list developed on the Maltese registered RINA classed oil tanker *Erika*;
- At 1408 hrs, *Erika* sent a distress alert to MRCC ETEL. At 1411, MRCC ETEL acknowledged the distress alert, and requested the ship to confirm this or to indicate that she was safe;

- At 1606 hrs, the master called the company office in Ravenna via Monaco Radio, and confirmed that the distress alert had been changed to a safety message. The master told the managers that despite some noticeable cracks the situation seemed to be under control. Due to ship's condition, the managers advised the master that he should head for the safest port of refuge. It was agreed that this would be Donges;
- At 2227 hrs, the *Erika's* master sent a telex to MRCC ETEL, and copied to the ship's agents at Donges, giving details of the situation, and also making it clear that the ship had developed cracks on the main deck;
- At 0510 hrs, 12 December 1999, Master sounded the general alarm, and all crew mustered on the boat deck;
- At 0800 hrs, a French naval rescue helicopter arrived on the scene and the least experienced crew members were taken off first;
- At around 0808 hrs, when the *Erika* was in the Bay of Biscay, approximately 45 miles off the French coast, she suffered complete structural failure and broke in two, spilling a substantial part of her cargo;
- The ship managers did support the master's decision for the ship to proceed to a port of refuge. In fact, not only did they give their advice on this but once the decision for the ship to proceed to Donges was taken they immediately instructed their designated agents in France to appoint an agent at that port and to make the necessary arrangements with the harbour master;
- According to the agent, the harbour master of St. Nazaire had refused permission for the vessel to enter the port of Donges. It appears that the master was not aware of this and when the ship started to break in two she was still on course to that port. Therefore, it can be argued, that the refusal to enter Donges did not alter the course of events and was not relevant to the loss of *Erika*;

THE 'CASTOR'

The following information is based on Master's reports, vessel's official logbook and salvor's reports.

Sequence of Events

Expert's opinion on ERIKA disaster

- According to the official report, the concerns surrounding oil pollution, and the consequences that arise from having caused it, may have influenced the master in reaching his decision on what information to pass to the coastal authorities. The master did not advise the coastal authorities, about his initial observations of oil escaping into the sea;
- During the course of the casualty the master had to spend a disproportionate amount of his time sending and receiving telexes and making telephone calls to MRCC ETEL, the managers and the ship's agents;
- On 23rd December 2000, 0330 hrs UTC, vessel *Castor* departed from the port of Constanza, Romania, with 29,470 tonnes of unleaded gasoline;
- During the night at around 19:20 hours UTC, on 30th of December 2000, the officer of the watch reported a strong smell of gasoline. Position was noted as 36 55,25 North (Latitude) and 001 21,56 East (Longitude). The severe weather of the coast of Algeria prevented the crew from conducting a close up inspection of the deck. Daybreak, on 31st of December 2000, confirmed that the vessel had suffered structural damage to the deck plating just forward of midships in way of No. 4 Port, Starboard and Center tanks. Small plumes of cargo could be seen escaping from the tanks through the damaged plating. The vessel notified the damage (18:35 UTC) to MRCC CASABLANCA and was immediately

reduced speed and altered course to approach the nearest land;

- On 1st of January 2001, at 0400 hrs UTC, vessel arrived off the port of Nador, Morocco awaiting clearance to proceed to more shelter area. However, the Moroccan coast guard instructed the vessel to move 40 miles offshore;
- On 3rd of January 2001, the owners agreed and signed a Lloyd's Open Form salvage contract with Tsavlis Russ, which dispatched the salvage tug *Nikolay Chiker* to the scene. *Nikolay Chiker* arrived on the scene on 4th of January 2001. With the Moroccan authorities unwilling to place their ports or coastline at risk, the vessel continued under its own power with destination the Almeria Bay, Spain, where she arrived at around 1900 hours;
- At 0940 hrs UTC, on 5th of January 2001, Spanish Marine Authority inspectors boarded the vessel to carry out an inspection. They left from vessel at 1048 hours. With growing concern for the safety of the vessel, the Spanish authorities arranged for the evacuation of the crew. Nine (9) crewmembers were evacuated into a rescue boat. Spanish Maritime Authorities ordered the Master to abandon present position and stay at least 30 miles off Spanish coast. At 1700 hrs, master ordered the evacuation of the rest of the crew into an accompanying rescue boat;
- After having discharged all cargo from the damaged No. 4 tanks into the receiving vessel *Giovanna* on 21st of January, and despite the harsh weather conditions, *Nikolay Chiker* was ordered to steer away from the Spanish coast. *Castor* was towed eastwards towards *Algeria* in an effort to find a more suitable weather condition for the completion of the cargo transfer. On 24th of January, at 0930 hrs, the Algerian authorities have advised the salvors that the vessel should not be brought within 30 miles of their coastal waters;
- Between 24th to 31st of January 2001, *Nikolay Chiker* continued towing the casualty up and down the Tunisian east coast well outside territorial waters

maintaining a distance to the shore of about 35 miles. A request was sent to Maltese Authorities to allow the STS operation to take place in the lee of the islands. Malta responded at 19:40 UTC by telex instructing *Nikolay Chiker* and *Castor* to retain at any time a distance of at least 30 miles from the shores of Malta;

- At 07:15 hrs UTC, on 6th of February 2001, *Yapi* was moored alongside *Castor* at an approximate position 60 miles SW off Malta and eventually at 0940 hours UTC STS operation started;
- All remaining cargo was successfully discharged and at around 10:00 UTC, 8th of February 2001, STS operation completed and at that time cargo was redelivered to owners. The position of convoy was approximately 120 miles SW off Malta. Preparations commenced to make *Castor* ready for unmanned tow to Piraeus;
- *Castor* arrived to *Piraeus*, on 14th of February 2001, where she was redelivered by the salvors to her owners;

Lessons to be learned form the 'CASTOR' approach

The cargo of the *Castor* was unleaded gasoline. Gasoline does not pose a threat to the coast like fuel, diesel or crude oil. **REMPEC stated that “as regards the risk of pollution of the marine environment, spilled gasoline is expected to evaporate and dissipate naturally very soon after the release on the sea surface or immediately below it. It is recommended that no pollution response measures, except monitoring the concentration of HC in the air and if possible in the sea water column, would be taken, in particular, no attempts should be made to contain the spilled gasoline near the point of release. Given the approximate sea temperature of 13°-15°C and the winds of no less than 10-12 knots it is reasonable to expect that the gasoline would evaporate completely within 6 to 18 hours”.**

The response of all coastal States (Morocco, Gibraltar, Spain, Malta, Algeria, Tunisia and

others), requested to provide a place of refuge (not necessarily a port) for the ill fated vessel, to enable the transfer of cargo to other ships, was to order the ship to abandon or not to enter the sea area under their jurisdiction. Spain, in particular, after having evacuated the crew of the *Castor* ordered the Master to abandon Spanish waters and stay at least 30 miles off the Spanish coast.

To some extent such reactions can be understood. The argument was that the ship might suffer explosion or fire. This argument, however, is very weak given the fact that the accident happened in the middle of the winter where sea temperature is very low. Moreover, there is no justification at all for such refusals, following the complete discharge of the damaged no 4 tanks and their inersion, as well as the inersion of all other cargo tanks.

Thus, once the damaged No 4 tanks were discharged and the ship inerted, the vessel did not represent any higher risk than any other tanker.

None of the coastal States requested to provide a shelter area for the *Castor* were interested even to receive technical information, supplied by ABS and verified by the Cyprus Maritime Administration, which clearly demonstrated that extensive structural repairs gave the ship adequate residual strength to survive even adverse weather conditions in her damaged state. This reality was unquestionably verified as the vessel although it was towed over 1000 miles across the Mediterranean, in extreme force 12 gale with wave heights in excess of 8 meters, did not suffer any deterioration in its structural condition.

Worse, yet, none of the coastal States responded to a request made by the Government of the Republic of Cyprus to participate at an emergency meeting which was held at the premises of the Department of Merchant Shipping on 21 January, 2001, aimed to exchange views on the recommendable ways and actions for the possible rescue of the ship and her cargo and the protection of the marine environment .

This historical meeting concluded that every effort should be made to achieve the transfer of the cargo to shore facilities or other ships. In the worst case scenario, a controlled scantling of the vessel will be less damaging to the marine environment.

The above sequence of events leads us to the firm conclusion that, unfortunately, overhasty political intervention, in cases where a purely

technical analysis and assessment is primarily needed, results to unjustified and unreasonable decisions which, in many cases, can be devastating for the marine environment.

Not surprisingly, the adventure of the *Castor* created huge waves among the key players in the maritime industry and triggered catalytic reaction from the legislators, especially from the European Union.

It is worthwhile to mention that the then Secretary General of IMO Mr. William O' Neil, on January 8, 2001, called for an international debate on the issue of places of refuge.

M/V PRESTIGE

Sequence of events

- At approximately 1510, local time, 13 November 2002, a substantial starboard list developed on the Bahamian registered ABS classed oil tanker *Prestige*. The list occurred in the region of *Cape Finisterre*, between 25 to 30 nautical miles off the coast of *Galicia* in northwest Spain, on a voyage that originated at *St. Petersburg*, Russia to the probable discharge port of *Singapore*. At the time of the incident, the oil tanker, with 27 crewmembers on board, was underway in heavy seas and high winds. The list, reported to be about 24 degrees, caused the cargo of fuel oil to force open same main-deck cleaning openings, enabling fuel oil to spill into the sea. Moreover, as a result of the list, the vessel lost main propulsion and began to drift;
- Between 1600 and 1745, local time, a Spanish helicopter arrived to evacuate 24 members of the crew. The master, chief engineer, and chief mate stayed on board;
- On 14 November, two tugs, the *Rio De Vigo* and the *Sertosa 32* secured towlines to the *Prestige*. Spanish authorities refused to offer a Place of Refuge for *Prestige*. With the *Prestige* in a damaged condition, the tugs towed it out to sea into heavy weather. Over the next five days, the *Prestige* suffered additional structural damage while being towed in an undeclared location;

- Finally, on 19 November about 0800, the *Prestige* broke into two and subsequently sank about 133 nautical miles off the coast of Spain, six days after the initial listing incident;

Consequences

- According to unofficial reports, *Prestige* released 63,000 tons of oil, almost twice the size of the Exxon Valdez spill which ravaged Alaska's coast in 1989;
- Thousands of Galician fishermen were temporarily thrown out of work and their catches could be seriously reduced for many years, according to World Wildlife Fund;
- More than 300,000 sea birds died during the aftermath of the accident;
- Contamination by toxic pollutants. Contaminants on the sea bed enter the food chain through organisms that ingest sediments and eventually end up in sea bass, octopus, crabs and shrimps;
- Cleanup operations of more than 750 Spanish beaches are likely to have caused additional harm to the environment due to the extensive use of toxic oil dispersants;
- More than a year after the disaster, oil from the *Prestige* was washing up as far north as *Normandy*;

Expert's opinion on PRESTIGE disaster ^[12]

- The vessel complied with the hull girder strength requirement of the 1973 and 2003 ABS rules;
- The vessels' hull structure had adequate strength against the static and dynamic loads at the time of the casualty;
- The vessel would not have broken into two in the absence of further exposure to severe wave loading over a sustained period;

Places of refuge: Differences within the EU

The Cyprus approach

Cyprus is one of the very few countries which, having realised that the interests of the coastal State and the vessel need to be balanced against each other and that that balance in the majority of the situations should result in granting a place of refuge, has a crystal clear policy which honours the ancient custom.

Moreover, it has demonstrated by deeds, not by words, over the last few years that it has in place an effective legal and administrative system which can promptly respond in emergency situations.

The Merchant Shipping Law of 2004 (Law 131(I)/2004), which transposed Directive 2002/59/EC on Vessel Traffic Monitoring and Information System, contains, among many others, the following important points:

- ***“The plan for the accommodation of ships in distress shall be prepared taking into account the relevant IMO guidelines...”***
- ***Advisory Committee on Places of Refuge (ACPoR): Chairman, the Director of the Department of Merchant Shipping (DMS), one DMS Officer, plus one representative from: Cyprus Ports Authority, Fisheries Department, Department of Environment, District Administrations. The ACPoR team can take decisions even if only 3 members are present.***
- ***In case of emergency, the selection of a suitable PoR should be done after consultation with experts in various fields. Operational support from expert groups could be asked, if there is such a need.***
- ***The ACPoR submits its proposals to the Minister who takes the final decision and issues relevant instructions.***

The first case where Cyprus provided a place of refuge was the case of the *Castor*. It should be recalled that all States requested to provide a shelter area for the ship refused to do so. Although the initial response of the Cyprus Maritime Administration to the request of the salvors was

positive, the issue was brought to the Council of Ministers of the Republic for receiving an official seal.

On 7th of February 2001, the Council of Ministers decided to provide a Place of Refuge to the ship and authorised the Minister of Communications and Works to “*appoint a technical committee, which would take care of the problem and it would deal with the terms and conditions under which the permission would be granted and advise the Government accordingly*” (see Appendix).

Eventually, there was no need for the *Castor* to be towed to Cyprus waters, as the transfer operation of its remaining cargo to the *Yapi* was completed on 8th of February 2001.

On 4th of February 2005, the Crude Oil Suezmax Tanker *Genmar Kestrel* (79553 GT, built 1989), collided with Crude Oil Suezmax Tanker *Trijata* (77387 GT, built 1991) off the Egyptian coast. As a result *Genmar Kestrel* reported a heavy list and engine break down at lat 31 45N, long 31 57.6E. It is estimated that approximately 6000 and 3000 barrels of light crude oil had been released to the sea from *Genmar Kestrel* and *Trijata* respectively.

The salvors opted to tow the *Genmar Kestrel* close to Cyprus, in order to carry out transshipment operations to the Maltese *Searacer*. On 11th of February 2005, the Cyprus Advisory Committee on Shelters-Safety convened a meeting with the owners, salvors, the vessel’s P&I Club and other interested parties, in order to examine the situation.

Following this meeting, the Committee concluded that any transshipment operations within Cyprus waters (territorial waters, EEZ) should be carried out under controlled conditions and recommended to the Minister that a suitable place of refuge should be granted under such controlled conditions.

The Minister, on 15th of February 2005, decided to accept the proposal of the Committee and instructed that a place of refuge should be granted under certain proactive conditions aimed to protect the marine environment.

The instructions stipulated that in case the recipients reject the proposal of effecting the transshipment operation under the conditions set, “ they are prohibited from effecting any transshipment operation within the waters under the jurisdiction of the Republic of Cyprus” (see Appendix).

In the afternoon of 28th of September 2006, the Cyprus Maritime Administration received information that the Marshall Islands’ registered *Front Vanguard*, loaded with 160,000 tonnes of crude oil, grounded in the Mediterranean near the Suez Canal.

Next morning, on 29th of September 2006, the Cyprus Advisory Committee on Shelters-Safety convened a meeting for examining the situation, in the light of information that the salvors’ intention was to escort-tow the vessel close to Cyprus and proceed with the transshipment of the cargo to another vessel. The Committee concluded that such operation should be carried out under controlled conditions and recommended to the Minister that a place of refuge, if requested, should be granted under such conditions.

Within a few hours, at around noon of the 29th September 2006, the Minister issued its decision-instruction, similar to the decision-instruction in the case of *Genmar Kestrel*.

UK approach

- Creation of a new post: the Secretary of States Representative (SOSREP). Officially the role of SOSREP is ‘**On behalf of the Secretary of State he is able to oversee, control and if necessary, to intervene and exercise “ultimate command and control” acting in the overriding interest of the UK in salvage operations with in the UK waters involving vessels or fixed platforms where there is significant risk of pollution**’;
- Under the *Marine Safety Act 2003*, SOSREP or the MCA directs vessels to places of refuge when he judges it appropriate;
- Anywhere around the UK’s coasts could be a place of refuge;
- There is no pre-conceived list or ranking of places of refuge. According to UK approach, this is because each incident has its own unique, transient and varied nature;
- When a ship in need of assistance requires a place of refuge, SOSREP inevitably takes account of all the factors which relate to the specific incident, such as the weather, the geographical whereabouts of the incident and the type of threat posed

by the vessel and its cargo, with a view to determining the most appropriate place of refuge, minimising adverse consequences;

French approach

- In the French system, the maritime prefect decides alone for a place of refuge. Only port directors can oppose the choice (place of refuge) of the maritime prefect and that, in such case, the final decision lay with the director of ports at the ministry of transport or with the minister;
- France's premier maritime representative body, the *Institut Francais de la Mer (IFM)*, disagrees with setting up a network of SOSREP-style decision-makers for dealing with emergencies at sea in the European Union;
- According to an IFM statement, the European Commission should try to ensure that decision-making in an emergency at sea is rapid and efficient rather than *independent* at any price. It said that, in any case, the belief that a place of refuge for a ship in difficulty could be designated completely independently was a myth;

The Spanish approach

- In February 2004, the Spanish government has published a Royal Decree setting out new rules on places of refuge. According to the new rules, companies seeking refuge for a vessel in distress could also be asked to waive any right to limit their financial liabilities under international conventions. Furthermore, a shipowner has to pay for a shelter and the amount depends on the type of vessel, its cargo and its gross tonnage;
- As an example, the owner of a loaded 145,000 GT VLCC could be asked to deposit 1.4bn Euros into a Spanish bank before being granted access into a place of refuge;
- The Secretary General of the International Chamber of Shipping, Chris Horrocks,

argued that “*notwithstanding the suffering caused by Prestige, this is a pretty cynical initiative that makes the conditions so unrealistic that no one is going to take refuge*”. Moreover, the director of the Spanish Shipowner Association, Manuel Carlier, expressed his concern that not only there are no explicit guidelines under what circumstances the financial guarantees would be required but these financial guarantees bear no relation to the value of a ship or its cargo as well.

- Soon after the *Prestige* disaster, Spain and France signed a bilateral agreement that included, among other things, the decision to expel single-hull vessels laden with heavy oils beyond the 200-mile exclusive economic zones controlled by the two countries^[14]. As a result of this agreement, 87 ships have come under scrutiny between December 2002 and July 2003, a good part of which were asked to sail away from shore under naval escort. Prominent representatives of the tanker sector have slammed these actions as breaches of the UN convention on the Law of the Sea. Norway even filed a formal diplomatic reproach against Spain after a Norwegian-owned vessel was expelled;
- According to Adolfo Menendez, undersecretary at the Spanish Ministry of Public Works “*Today, there is no longer a right of innocent passage; the right of passage must be a responsible right of passage*”. Spanish officials have also reportedly commented that “*Spain will not permit its extensive coastline to turn into a ‘rubbish dump’ for an irresponsible minority of rogue shipowners*”. It is estimated that anywhere between 200 and 300 ships are given shelter in Spanish ports every year. In 2002, the northwest major ports of Spain alone took in a total of 153 vessels with problems;

Implementation of DIRECTIVE 2002/59/EU from EU Member States

It is very interesting to see how the EU Member States have reacted to the DIRECTIVE 2002/59/EC since that has come into force.

At the moment, more than half the European Union's coastal states have identified their entire coastline as potential places of refuge for ships in distress, according to the European Commission. Another third have singled out precise places or ports of refuge, while very few have decided to make the list of possible POR public.

Belgium opted to identify precise places of refuge. Britain has produced a database, with possible POR, which is publicly available. Denmark has produced an 'exhaustive' list and made it public. Finally, according to the transport Commissioner Jacques Barrot, 'Portugal does not wish to move towards publication of a POR list'.

CONCLUDING REMARKS

Transferring the problem from one area to another

Article 195 of UNCLOS prohibits the direct or indirect transfer of pollution damage or hazards from one area to another when the state takes measures to prevent reduce or control pollution. This implies that a state owes a duty to other states not to refuse refuge to a vessel if it only leads to damage being moved to the territory of another state.

It is argued, however, that allowing a vessel into sheltered waters does not guarantee the successful salvage of the vessel, and that, sometimes, considerable costs and environmental damage can result from such a decision.

The *Castor* case clearly demonstrates that the decision of coastal states to refuse a place of refuge for the ship, unquestionably, was far from being wise. Politicians opted to put aside any technical expertise and simply ignored the fact that there were no clear grounds in assuming that their coasts would have suffered damages from the cargo of the vessel; instead, they followed the pattern to "transfer" the problem to another area.

Obviously, Spanish authorities did not learn any lessons from the *Castor* case, since they followed exactly the same course of action as that in the case of the *Prestige*. Had the *Prestige* been allowed to approach at more sheltered waters, it could probably have been saved and, most likely, in the worst case scenario, that of an oil escaping incident, the resulting pollution would have been much less severe than that we have all experienced in November 2002.

Have Places of Refuge become a reality?

It may be thought that in Europe, at least, due to the mandate of the much acclaimed EU Directive 2002/59/EC, granting a place of refuge to a distressed ship is now a reality. I express my disagreement with such conclusion; my firm belief is that the cornerstone for places of refuge to become a reality is, simply, the sound and well balanced conditions that accompany a decision to grant shelter to a distressed ship. Having said that, the financial guarantees imposed by the Spanish authorities to ship owners in order to grant access to a place of refuge, is a good example for all of us to understand that a place of refuge all over Europe is not a reality yet. It is more than obvious, that these financial guarantees cannot be met by the industry and they simply force the ship owners/managers in doing anything other than asking for a place of refuge.

Pre-designated Places of Refuge

As I have already mentioned previously, Article 20 of the EU Directive obliges coastal member states to draw up plans for places of refuge. The Directive also requires member states to inform the Commission of the steps they have taken in this respect. Some, but only a few, member states have designated specific places or areas for this purpose, and made them public. Most member states have limited themselves to taking an inventory of possible places of refuge saying that a specific place of refuge will be identified if and when a situation requiring a safe haven occurs.

In my view, the pre-designation and publication of all possible places of refuge is not important at all. What is important is the granting of a suitable place of refuge when this is required.

Who should be responsible for taking the decision?

The only way to heal this inherent problem is to transfer the responsibility in the decision making chain, or a substantial stake of it, from politicians to experts, technocrats and public administrators / institutions. This can be done in two ways: Either to assign the decision making task to a completely independent person/authority with overriding powers, or to involve in the process an institutional technical body which makes its assessment, takes all measures and steps necessary and simply submits its recommendations to the Government for final approval.

The first approach, which has been embraced by the U.K, in the first instance, can be seen that it has all advantages in its favour: The question, however, which merely has to be answered is, how much "independent" an appointed person or Authority, although embraced with all powers, can be? Could we exclude the scenario that the appointed person or Authority would simply adhere to the wills of politicians and subsequently completely exonerates them from any responsibility? Moreover, what would be the consequences that may arise from arbitrary and unjustified decisions of the appointed person or Authority?

In my view the second approach is more balanced, as it delegates responsibilities where they belong; after all, politicians are elected to govern and rule and they are not supposed to stay at a safe distance in emergencies and situations where critical decisions have to be swiftly taken; this is a fundamental principle of democracy. Moreover, it is quite clear to understand that it would have been much easier for political personnel and public servants to take the right decisions, based on the recommendations of institutional expert body (ies), whose technical expertise cannot be questioned.

It has been argued that the second approach can be time consuming because the direct involvement of politicians in the decision making process may not allow the prompt implementation of the appropriate measures and steps. This, again, is a non-existent or very weak argument, as Cyprus has demonstrated in the case of the M/V "Front Vanguard", a final decision/ruling of the Minister was issued in less than 24 hours from the time the island's Maritime Administration became aware of the potential problem.

Possible Future Directions

Answering the question which possible future directions may allow a return to the old custom, the following recommendations are cited as 'food for thought':

- **Amendment of the International Salvage Convention 1989.** Although such a development will provide certain clarity to the rules of the game, however, it is doubtful whether the required consensus on this matter will be achieved in the foreseeable future
- **A new IMO International Convention?** This possibility looks to be remote as IMO member States are currently not inclined towards this.
- **Expanding the membership of existing conventions?** European countries have ratified all relevant conventions, because this has been mandated by EU Directives and Regulations. Thus, the effort should be concentrated to convince non EU states to proceed with ratifications
- **Improvement of the civil Liability Regime to enable coastal states to recover damages:** Liability for pollution damage is regulated through a number of international Conventions, e.g. the 1992 CLC Convention, the 1992 Fund Convention, the 2003 Fund Protocol, the 1996 HNS Convention and the 2001 CLC Bunker Oil Pollution Damage Convention. The HNS and the CLC Bunker Conventions have not, yet, entered into force internationally; once they enter into force, they will certainly have a positive effect on coastal states interests and will ease further granting of areas of refuge. The liability regime set up in the above conventions imposes strict liability on the registered owner of the vessel. Making the owner of the ship liable regardless of fault enables claimants to claim and receive compensation quickly, without being forced to go through a lengthy litigation process in order to establish negligence on the part of the shipowner. Furthermore, the conventions require the vessel to have compulsory insurance or other financial security to cover the liability it may incur, up to the respective limits of liability defined in the various

conventions. Most importantly, they provide for direct action against the insurer.

- **The IMO Draft Convention on Wreck Removal:** The Convention, when adopted and in force, will improve the situation further by making it compulsory for a vessel to have insurance covering the wreck removal liability and will also allow claimants to take action directly against the insurer.
- **Guidelines covering the responsibilities of Parties concerned:** MSC 81 (May 2006), considered a proposal to develop guidelines covering the responsibilities of all parties concerned in a maritime emergency. The intention is not to create a chain of command, but to clarify what the chain is. The COSMAR and NAV sub-committees will conclude on this topic within 2007.

Final conclusion

It would not be true if someone reached the conclusion that I am pessimistic regarding the issue of granting places of refuge, in the coming years. On the contrary, I am optimistic, that sooner or later, we will return to the ancient custom. Needless to mention that, tremendous progress to this direction has been achieved over the last few years. My agony, simply, is whether we will have to pay additional tolls, in other words, whether another disaster will be the driving force for Governments and legislators to give final solutions to the pending uncertainties and problems regarding places of refuge.

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- [3] Convention on the International regime of Maritime Ports (1923), Article 2.
- [4] Convention on the Facilitation of International Maritime Traffic (1965), The 2005 Amendments, Section H (*Special measures of facilitation for ships calling at ports in order to put ashore sick or injured crew members, passengers, persons*

rescued at sea or other persons for emergency medical treatment).

[5] International Convention on the Safety of Life at Sea (1974), Chapter V (Safety of Navigation), Regulation 15 (Search and Rescue).

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Appendix

**EXTRACT FROM THE RECORD OF THE DECISIONS OF THE MEETING OF
THE COUNCIL OF MINISTERS ON 7/2/2001**

**Permission to the Cypriot M/T "CASTOR" to enter the
Republic's territorial waters for the purpose of carrying out
transshipment operations.**

Decision No
53.156

48. The Council decided:
- a) To allow the Cypriot M/T "CASTOR" to enter the territorial waters of the Republic for carrying out transshipment operations, under certain conditions which will be agreed.
 - b) To authorise the Minister of Communications and Works to appoint a technical committee, the composition of which is exhibited in the ANNEX of the proposal, which will take care of the problem and it will deal with the terms and conditions under which the permission will be granted and which will advise the Government accordingly.
 - c) To invite in Cyprus Mr Darko Domovic of the Regional Marine Emergency Response Center for the Mediterranean Sea, (REMPEC), an organization which operates under the auspices of the International Maritime Organization, who will be advising the technical committee on matters related to his area of competence.

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To the Permanent Secretary
Ministry of Communications and Works

The above decision is herewith forwarded to you for your information and actions as necessary.

[Signature]

.....
(Chrysostomos Sofianos)
Secretary
of the Council of Ministers

27.2.2001

CC: Permanent Secretary, Ministry of Finance
: Permanent Secretary, Ministry of Agriculture
Natural Resources and the Environment
: Permanent Secretary, The Planning Bureau.

Instruction (Decision) of the Minister of Communications and Works issued under sections 19 and 28 regarding the oil-tanker "GENMAR KESTREL " to proceed to a transhipment of its cargo into the oil-tanker "SEARACER " in waters under the jurisdiction of the Republic

The Minister of Communications and Works in exercise of the powers conferred on him under sections 19 and 28 of the *Merchant Shipping (Community Vessel Traffic Monitoring and Information System) Law of 2004 (Law 131(I)/2004)* issues the present Instruction (Decision), which is addressed :

a) to the master , the operator , or the agent- representative of the operator situated in the Republic of Cyprus of the ship under the flag of Marshall Islands "GENMAR KESTREL " (Call Sign V7CQ5 , IMO no. 8703103),

b) to the master , the operator , or the agent- representative of the operator situated in the Republic of Cyprus of the ship under the flag of Malta "SEARACER " (Call Sign 9HDX7 , IMO no. 9227443),

c) to the master , the operator , or the agent- representative of the operator situated in the Republic of Cyprus of the tug boat under the Cyprus flag " EAS " (Call Sign P3ZM4 , IMO no. 7403146).

1. TAKING INTO CONSIDERATION the situation that was created in the maritime zone (sea area) under the jurisdiction of the Republic of Cyprus following the collision of the oil-tankers " GENMAR KESTREL" and "TRIJATA" north of Egypt and concretely the fact that by private salvage contract the M/T "GENMAR KESTREL" was towed in waters under the jurisdiction of the Republic of Cyprus (territorial waters, Exclusive Economic Zone), waters in which the said vessel continues to be .

2. FURTHER TAKING INTO CONSIDERATION the fact that the presence of the M/T "GENMAR KESTREL" in waters under the jurisdiction of the Republic of Cyprus and her situation resulting from the above mentioned collision, may constitute a serious and imminent threat for the coastline and the marine environment, provided its presence and activities are not placed under the control and the monitoring of the competent Authorities of the Republic of Cyprus .

3. FURTHER TAKING INTO CONSIDERATION the fact that under the circumstances the intention of the operators of both the "GENMAR KESTREL" and of the tug "EAS" is to proceed as soon as possible within the waters under the jurisdiction of the Republic (territorial waters, Exclusive Economic Zone) to the transhipment of the entirety of the cargo of about 133.000 metric tones of crude oil of the distressed M/T "GENMAR KESTREL" into the M/T "SEARACER " , that such intention was already communicated to the competent Authorities of the Republic and that the transhipment operation of the oil will last roughly three days.

4. EXAMINING the particular recommendations that were submitted to me for the extraordinary confrontation of the above situation by the *Advisory Committee on Shelters - Safety*, which was constituted and convened on Friday 11 February 2005 by virtue of section 22 (2) of Law 131(I)/2004, I was led to the conclusion that by virtue of the provisions of section 17 (1) (a) (i) of the same Law, the M/T "GENMAR KESTREL" as well as the programmed transhipment of the entirety of its cargo to the M/T "SEARACER " within the waters under the jurisdiction of the Republic (territorial waters, Exclusive Economic Zone), without the whole transhipment operation being placed under the control and the monitoring of the competent authorities of the Republic of Cyprus, constitute a serious and imminent threat for the coastline and the marine environment of the sea area under the jurisdiction of the Republic of Cyprus and that for the above reasons the immediate adoption of appropriate measures to avert , lessen or remove the above threat is necessary.

5. CONSEQUENTLY for all the above reasons, by virtue of sections 19 and 28 and the Fourth Schedule of Law 131(I)/2004, I HEREBY ISSUE the following instructions , which are binding on all the recipients of this Decision:

(i) *All the recipients of the present Decision are instructed to immediately take the necessary steps in close cooperation with the competent authorities of the Republic so that the towed vessel "GENMAR KESTREL" and the M/T "SEARACER " anchor in a sea area to be determined by the Authorities of the Republic (approximately at a distance of 3 nautical milers from the Vasiliko area) and effect the whole transhipment*

operation of the entirety of its cargo of about 133000 metric tones of crude oil of the distressed M/T " GENMAR KESTREL " under monitored (controlled) conditions and under the supervision of the authorities of the Republic .

The above vessels shall be allowed to anchor at the Vasiliko area on the following pre- conditions:

a) A technical study from the vessel's classification society for all the phases of unloading and ballasting of the vessel is submitted before and approved by the Department of Merchant Shipping of the Republic of Cyprus (DMS). The classification society of the vessel submits a Report on the functional situation of her engines and of all equipment to be used during the transshipment operation (inert gas system , crude oil washing , etc).

b) the vessel is furnished with a full insurance coverage .

c) A comprehensive Plan for the Prevention and Combating of any eventual pollution is submitted before and approved by the Competent Authority. The interested parties shall provide the necessary equipment and manpower as described in the Plan .

d) During its entire anchorage the vessel shall be supervised by the competent authorities of the Republic and shall fully comply with relevant instructions (eg. necessary measures for the discharge of the oil from tank No. 5 right , or restore the water- tightness of the crack).

e) An essential condition is that the vessel must responsibly declare /submit before its entry in the territorial waters of the Republic a detailed program of the work that it will execute within the territorial waters of Cyprus.

f) the vessel in which the cargo of oil is to be transhipped is a double- hull as required by the International Convention MARPOL.

(ii) In case where the recipients of the present Instruction (Decision) reject the proposal of effecting the transshipment operation in the Vasiliko area under the pre-conditions already mentioned (cf (i) above), by virtue of this Decision the vessels "GENMAR KESTREL " and "SEARACER" are prohibited from effecting any transshipment operation of the said cargo of oil within the waters under the jurisdiction of the Republic of Cyprus (territorial waters and EEZ) and the M/T " GENMAR KESTREL " is hereby ordered to immediately leave the territorial waters and the Exclusive Economic Zone of Republic of Cyprus, and sail to a sea area outside the Cypriot jurisdiction.

Non compliance with my above instructions constitutes a criminal offence punishable with a sentence of imprisonment not exceeding 12 months or with a fine not exceeding 5 000 Cyprus Pounds or with both such sentences .

Finally, by virtue of the present Decision I bring to the knowledge of all its recipients that under the provisions of Law 131(I)/2004 (sections 28 and 31) they have the right to file an objection before me against my present decision within a time-limit of 7 days from the dispatch of the present (the objection does not stay the execution of the present Instruction), and following that , a recourse before me against any dismissing decision on an objection (within a time - limit of 30 days from the communication of the decision on which the recourse is based) ; or a judicial recourse before the Supreme Court of the Republic as provided in Article 146 of the Constitution.

Done on 15 February 2005

Harris THRASSOU

Minister of Communications and Works of the
Republic of Cyprus