PLACES OF REFUGE

INTERNATIONAL LAW AND THE CMI DRAFT CONVENTION

ERIC VAN HOOYDONK

Lloyd's List

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Foreword

KARL-JOHAN GOMBRII AND STUART HETHERINGTON

Places of refuge for distressed vessels has been on the CMI agenda as a topic since 2001. It has been the subject of discussion at various colloquia and conferences held at Bordeaux in 2003 (Colloquium), Vancouver in 2004 (Conference), Cape Town in 2006 (Colloquium) and Athens in 2008 (Conference). It has also been the subject of meetings of a CMI International Sub-Committee and a Working Group, both chaired by Stuart Hetherington, which prepared a draft Instrument.

CMI's work was initiated by the IMO Legal Committee following upon the incidents involving the *Castor* and the *Prestige*. In accordance with its usual practice, CMI sent a questionnaire to National Maritime Law Associations. Their responses and summaries were all forwarded to the IMO Legal Committee as was later on the draft Instrument, which was submitted to and considered by the Legal Committee at its meeting in March–April 2009. The Committee duly took note of the CMI draft. Many delegations spoke highly of the good work done by the CMI on this subject with its "many thorny and difficult issues", as the Chairman put it.

However, the delegates of IMO member states generally indicated that they were unwilling to adopt an instrument containing mandatory provisions governing the admission of ships in distress to their waters.

This view reflects the inherent conflict between the interest of ports and coastal states, which are reluctant to be forced to admit ships which are in trouble because of the risk of pollution in the port or to the coastline and, on the other hand, the interests of the vessel and the wider community which face potentially increased risk of further damage to the vessel and more widespread pollution of the environment if the vessel is sent back out to sea. The size of many modern vessels and the quantities of their potentially lethal cargoes or bunkers on board have made the decision of port or other coastal state authorities so much more difficult than it was for earlier generations.

The CMI draft Instrument represents an attempt to balance these conflicting interests. In the unfortunate event of a new marine casualty like the *Prestige*, if the IMO decides to reopen the subject, they will have in the CMI draft a useful starting point for their work. In any event, (as Professor Hooydonk points out in this timely and magnificent work) the work done by CMI can be viewed as an informal codification of existing customary international law and has an important role to play.

Whilst the topic "Places of Refuge" was a new topic for the CMI to start working on in 2001, it is a subject which, as the author demonstrates, has been discussed in legal commentaries, international treaties, case law and domestic law for a great many years.

It is unusual in a legal text to find a reference in the opening pages to Pliny the Younger. That not only demonstrates the depth of research and analysis which has gone into this work but also the long history of its subject matter, namely the role ports play in providing safe havens to ships travelling around a coastline.

The author has previously displayed his knowledge and love of ports in his earlier work *The Ports Portable – A cultural travel guide to the port cities of Antwerp, Hamburg and Rotterdam*. In that work he displayed his knowledge of the aesthetics of port cities. In this work he displays his knowledge of the many sources of law which impact on the difficult topic of "Places of Refuge".

Professor Hooydonk has crafted a detailed analysis of the CMI draft Instrument ("Convention" as he prefers to call it). He has combined that with a comparison and analysis of developments within the IMO and European States and a review of current international law, both conventions and bilateral treaties, as well as a useful summary of the leading papers and commentaries written on the topic over the last 20 years. The extensive tables of international instruments, EU legislation and legislation generally, as well as the table of cases and bibliography at the commencement of this work, are testament to the extent of the scholarship which has gone into it.

In his identification of the major provisions of the convention which CMI has drafted, in his discussion of the areas that it does not cover and in his comparison with the European regime on places of refuge, Professor Hooydonk has provided an objective assessment of the worth of this draft convention. In doing so he has highlighted the ambivalent role which port authorities (particularly those which are State owned) have played in recent years in the debate as to whether or not such an international convention was needed. It was in recognition of the concerns of the IAPH that the delegates at the CMI conference incorporated optional provisions in the draft convention so that if and when the IMO determines that such a convention is necessary, State delegates can determine whether they can justify adopting the extreme position put forward by the IAPH or one of the more modified positions contained in the options within the draft convention.

In the course of the many meetings which the CMI conducted to discuss this topic, Professor Hooydonk was the heart and soul of the International Working Group of the CMI and in many respects its scholarly backbone. This was no more exemplified than when he presented a paper at the Vancouver Conference in 2004 entitled "The obligation to offer a place of refuge to a ship in distress. – A plea for granting a salvage reward to ports and an international convention on ports of refuge". The paper provided the legal underpinning for the work which CMI continued to do.

The fact that he has now taken it upon himself to write a fully fledged academic monograph on the topic is something for which the entire maritime legal community should be very grateful. His very impressive work will provide an invaluable source of information and knowledge not only about the CMI draft Instrument but about the enormous international legal source material that exists, but which has so far been very difficult to access.

We commend Professor Hooydonk on his work. It is as readable as it will prove to be useful to both legal practitioners and those who own and operate ships (and work on them), to those who have to make decisions about the use to which their ports or coasts are put and to those who might be engaged to assist those ships in salvage operations.

Karl-Johan Gombrii
President of the Comité Maritime International

Stuart Hetherington
Chairman of the CMI International Working Group on Places of Refuge

Foreword

DIRK STERCKX

It is easier to take difficult decisions under pressure. The public outcry after the *Erika* disaster in the winter of 1999 was a decisive factor in the making of EU rules on maritime safety, among them the Directive on the Monitoring of Shipping in EU waters. In the months after the disaster, the late Loyola de Palacio tabled the first two "Maritime Packages", a series of proposals to improve the quality of shipping.

The Monitoring proposal contained little on places of refuge. I remember that the hottest debate in Parliament was about the "bad weather ban", which would give port authorities the power to allow or forbid ships to leave port in certain cases. The authorities did not want that power and the responsibility that came with it; shipowners and captains would not accept it because they wanted to remain master on board. The problem did not show up in the discussions we had in the following years. The debate on places of refuge was initiated by Parliament; we insisted that member states should be better prepared in case of serious accidents. The Council accepted under pressure of popular anger over the terrible pollution of the coast of Brittany.

We thought we had set up rules that would increase the efficiency of disaster management, but clearly we had failed: even before member states were required to implement the Directive, the discussion on places of refuge was thrown back at us in a very brutal manner with the breaking up and sinking of the *Prestige*, only six months after the Directive had been signed under the Spanish Presidency. The handling of this accident by the Spanish authorities forced us to reconsider the whole regulatory framework and strengthen it.

This proved to be a difficult process. After long preparations with Resolutions by Parliament, the Commission proposed to change the Monitoring Directive and to make EU rules on places of refuge stricter. The new rules require from member states that they have not only plans, but also the human resources and the equipment to implement them.

The final negotiations on the "Third Maritime Package" took place in 2009, years after the shocking disasters that prompted the legislative process. The pressure of public opinion no longer played the role it had in the making of the first two packages. The negotiations were difficult, but thanks to the commitment of the French presidency we managed to reach an agreement. During the whole process, I asked those member states who have a strong structure for managing maritime disasters to involve themselves in the debate. They were initially prepared to accept a watered-down proposal but eventually agreed to put pressure on member states who were opposed to the stricter framework. These negotiations gave me a closer look at the chemistry in the Council.

This book looks at the legal detail of the work we did as regulators. I am proud that I have had the opportunity to participate in a process that took us ten years to complete; a process that has given the EU the most efficient legal framework for improving maritime safety. We have been able to achieve this through discussions and exchanges with many people. The author of this book is one of them.

Dirk Sterckx
European Parliament Rapporteur on Places of Refuge

Preface and Acknowledgements

The present study is a modest contribution to the ongoing policy debate and legal research on the regime of places of refuge for ships in need of assistance.

First of all, it is an attempt at systematising the enormous, seemingly shapeless, mass of international legal source material on this subject that has accumulated through the centuries. My objective was to offer a fresh perspective on the interpretation of the relevant rules of customary law and treaties – which show a remarkable line of development – and on their interrelation with the *IMO Guidelines on places of refuge for ships in need of assistance* that were adopted in 2003. My main conclusion is that current international law clearly converges on the recognition of a qualified, presumed or *prima facie* right of entry for ships in distress. In continuation of Aldo Chircop's initial exploration, I have also ventured to delve a bit deeper into the historical origins of the place-of-refuge custom. Whilst I hope to have dug up some relevant but hitherto neglected materials, I cannot avoid the impression that a lot more remains to be discovered, and therefore express the hope that a full-blown historico-legal research project be undertaken soon.

Secondly, this book contains a commentary on the important *Draft Instrument on Places of Refuge,* which was adopted by the Comité Maritime International in 2008. This organisation – which is, practically speaking, the World Maritime Law Association (an English name which would suit it much better, by the way) – continues to play an essential role in the development of maritime law at a global level. My hometown of Antwerp was the birthplace of the CMI and it still hosts its headquarters. All Antwerp and Belgian lawyers continue, for that matter, to take pride in the presence and the work of the institution. This attachment to the CMI also inspired the present book. It grew out of my conviction that the criticism with which the CMI's work on places of refuge was met from the outset was largely unjustified. The often-heard claim that, as an instrument devised essentially to curtail the sovereignty of coastal States, the Draft Instrument is unrealistic and, for that matter, a non-starter, rests on a misrepresentation. In reality, the main thrust of the Draft Instrument – or rather Draft Convention – is to summarise and codify *existing* customary international law and, in doing so, to offer legal certainty to all interested parties. In other words, regardless of the rash if not complacent attitude taken by IMO's Member States in the Legal Committee who preferred to shelve the text upon receipt, the Draft can immediately play a role as a source of current international law. Even if it never sees the light of day as an international treaty, the Draft Convention is set to play a central role in preventing future maritime and environmental disasters of the *Erika* and *Prestige* type and in assessing the liabilities of parties ignoring international standards of good administration.

I wish to express my sincere gratitude to Patrick Griggs, the former President of the CMI, who invited me in 2001 to participate in the activities of the CMI International Working Group on Places of Refuge. Special thanks to Stuart

Hetherington, the Chairman of the International Working Group, who supervised these activities in a highly competent and inspirational way and who, moreover, authored the CMI Draft Convention, for the pleasant collaboration. I also extend my thanks to Rapporteur Richard Shaw, Giorgio Berlingieri and Gregory Timagenis. Gratitude is further due to the fellow practitioners, colleagues and policymakers who commented on specific passages and/or provided me with sometimes hard-to-obtain source materials. In this context, I mention Mark Assaf, Augustin Blanco-Bazán, Paul David, Leo Delwaide, Gwendoline Gonsaeles, Måns Jacobsson, John Hare, Petria McDonnell, Isabelle Ryckbost, Monika Stankiewicz, Dirk Sterckx, Cédric Van Assche, Jean-Pierre Vanhooff and Chris Young. Thanks also to my invariably helpful office staff (especially Björn and Joris). And finally, as always upon concluding a book, I blow a kiss to darling Mia.

On the practical side, it should be pointed out that a deliberate choice was made to include in the footnotes a number of explanatory quotations from Dutch, French, German, Italian, Latin, Norwegian, Portuguese and Spanish sources in the original language. I dare say that the practitioner of maritime law will not experience too great a difficulty in understanding these foreign sources. The websites cited were last consulted on 15 February 2010.

Eric Van Hooydonk

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