UiT The Arctic University of Norway

Faculty of Law

Coastal State Jurisdiction over Ships in Peril and Shipwrecks

Iva Parlov

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Abbreviations and Acronyms

ASR	Articles on Responsibility of States for Internationally Wrongful Acts
BIMCO	Baltic and International Maritime Council
BUNKER	2001 International Convention on Civil Liability for Bunker Oil Pollution Damage
CDEM	construction, design, equipment and manning (standards)
CEDRE	Centre of Documentation, Research and Experimentation on Accidental Water Pollution
CLC	1992 International Convention on Civil Liability for Oil Pollution Damages
CMI	Comité Maritime International
COLREGs	1972 Convention on the International Regulations for Preventing Collisions at Sea
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Agency
et al.	and others
EU	European Union
EUR	euro
fn	footnote
FUND	1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
GESAMP	Group of Experts on Scientific Aspects of Marine Environmental Protection
HNS	1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, as amended by the 2010 Protocol
IAPH	International Association of Ports and Harbors

ICJ	International Court of Justice
ICS	International Chamber of Shipping
IG P&I Clubs	International Group of Protection and Indemnity Clubs
ILA	International Law Association
ILC	International Law Commission
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
INTERTANKO	International Association of Independent Tanker Owners
IOPC Fund	International Oil Pollution Compensation Fund
ISU	International Salvage Union
ITLOS	International Tribunal for the Law of the Sea
ITOPF	International Tanker Owners Pollution Federation
IUMI	International Union of Marine Insurance
LEG	IMO Legal Committee
LLMC	1976 Convention on Limitation of Liability for Maritime Claims, as amended by the 1996 Protocol
MAIB	The UK's Marine Accident Investigation Branch
MARPOL (73/78)	1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol
MEPC	IMO Marine Environment Protection Committee
MSC	IMO Maritime Safety Committee
n	note/footnote
nm	nautical mile
NAV	IMO (former) Sub-Committee on Safety of Navigation
no	number
NSCR	IMO Sub-Committee on Navigation, Communications and Search and Rescue

OPRC	1990 Convention on Oil Pollution Preparedness, Response and Co-operation
para(s)	paragraph(s)
PCIJ	Permanent Court of International Justice
P&I Clubs	Protection and Indemnity Clubs
RINA	The Royal Institution of Naval Architects
SOLAS	1974 International Convention for the Safety of Life at Sea
UK	United Kingdom
UMCC	United Maritime Consultative Council
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USD	United States dollar
USSR	Union of Soviet Socialist Republics
VCLT	1969 Vienna Convention on the Law of Treaties
VTMIS	Vessel Traffic Monitoring and Information System
WRC	2007 Nairobi International Convention on the Removal of Wrecks
WWF	World Wildlife Fund

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1948 Convention on the International Maritime Organization (the IMO Convention), 289 UNTS 3, as amended

1958 Convention on the Territorial Sea and the Contiguous Zone (the TSC), 516 UNTS 205

1958 Convention on the High Seas (the HSC), 450 UNTS 11

1958 Convention on the Continental Shelf (the CSC), 499 UNTS 311

1969 Vienna Convention on the Law of Treaties (the VCLT), 1155 UNTS 1980.

1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention) 970 UNTS 211

1973 Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil (the Intervention Protocol) 1313 UNTS 4

1974 International Convention for the Safety of Life at Sea (the SOLAS), 1184 UNTS 2

1982 United Nations Convention on the Law of the Sea (the LOSC) 1833 UNTS 3

1989 International Convention on Salvage (the Salvage Convention) 1953 UNTS 165

1990 Convention on Oil Pollution Preparedness, Response and Co-operation (the OPRC) 1891 UNTS 51

1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (the CLC), 1956 UNTS 255

1992 Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the FUND Convention), 1953 UNTS 330

1996 The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention), as amended by the **2010** Protocol (not yet in force)

2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunker Convention), 973 UNTS 3

2002 Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002

2003 IMO Guidelines on Places of Refuge for Ships in Need of Assistance (the IMO Guidelines on Places of Refuge) adopted by the IMO Assembly Resolution A.949 (23) of 5 December 2003

2007 Nairobi International Convention on the Removal of Wrecks, IMO doc, LEG/CONF.16/19 of 23 May 2007

2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (FAO PSM Agreement)

2009 Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC

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The Corfu Channel Case (The United Kingdom v. Albania), Judgment of 9 April 1949, ICJ Reports 1949

Fisheries Case (The United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports 1951

Nottebohm Case (Liechtenstein v. Guatemala; second phase), Judgment of 6 April 1055, ICJ Reports 1955

North Sea Continental Shelf Cases (Federal Republic of Germany v. the Netherlands), Judgement of 20 February 1969, ICJ Reports 1969

Fisheries Jurisdiction Case (The United Kingdom v. Iceland), Judgement of 25 July 1974, ICJ Reports 1974

The Barcelona Traction, Light and Power Company, Limited Case (Belgium v. Spain; second phase), Judgment of 5 February 1970, ICJ Reports 1970

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. the United States of America), Judgment of 12 October 1984, ICJ Reports 1984

The Continental Shelf Case (Libyan Arab Jamahiriya v. Malta), Judgment of 21 March 1984, ICJ Reports 1984

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgement of 27 June 1986, ICJ Reports 1986

Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports 1991

The Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, ICJ Reports 1994

The Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997

Kasikili/Sedudu Island Case (Botswana v. Namibia), Judgment of 13 December 1999, ICJ Reports 1999

International Tribunal for the Law of the Sea (ITLOS)

The M/V SAIGA (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), ITLOS Judgement of 1 July 1999

The Mox Plant Case (Ireland v. the United Kingdom), Provisional Measures, ITLOS Order of 3 December 2001

The Arctic Sunrise Case (the Netherlands v. Russia), Provisional Measure, ITLOS Order of 22 November 2013

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Advisory Opinion of 2 April 2015

Arbitral Awards

The Island of Palmas Case (the United States of America v. the Netherlands), Award of 4 April 1928, United Nations Report of International Arbitral Awards Volume 2

Aramco Arbitration (Saudi Arabia v. Aramco), Award of 23 August 1958, 27 International Law Report 117

The Rainbow Warrior Case (Case Concerning the Difference between New Zealand and France Concerning the Interpretation of Application of Two Agreements Concluded on 9 July 1986 between Two States and Which Related to the Problems from the Rainbow Warrior Affair), Decision of 30 April 1990, Reports of International Arbitral Awards, Volume XX, United Nations 2006

The Continental Casualty v Argentine Republic, ICSID Case no ARB/03/09, Arbitration Award of 5 September 2008

The Indus Waters Kinshenganga Arbitration (Pakistan v. India), Permanent Court of Arbitration, Partial Award of 18 February 2013

The Chagos Arbitration (The Republic of Mauritius v. the United Kingdom), Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award of 18 March 2015

The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016

The Court of Justice of the European Union

Bosphorus Queen Shipping Ltd Corp. v. Rajavartiolaitos Case (C-15/17), the Court of Justice of the European Union, Judgement of 11 July 2018

PART I
INTRODUCTION

1 Introduction

1.1 Topic

In 2018, the *Thorco Lineage* drifted aground on the Raroia Atoll (of the Tuamotus chain in French Polynesia) after developing engine problems while en route from the USA to Australia.[1] This general cargo ship was built in 2014 and was therefore relatively young at the time of the incident. In the same year of 2018, the container ship *Maersk Honam* caught fire in the Arabian Sea. It was only one year old at that time.[2]

To ensure maritime safety, and consequently environmental protection, the international community has been working for decades on improving shipping standards for prevention of incidents at sea.[3] Nonetheless, no ship is immune to a risk of running into perils at sea, and possibly of sinking or getting stranded and thus shipwrecked. While newly built ships are in principle much safer than older ships, incidents do and will continue to occur,[4] if for no other

[1] Gcaptain, available at <https://gcaptain.com/thorco-lineage-refloated-but-remains-adrift-in-french-polynesia/> and news available at <https://www.rnz.co.nz/international/pacific-news/361477/ship-that-ran-aground-on-french-polynesia-reef-towed-to-papeete> all accessed 31 October 2019.

[2] GCaptain, available at <http://gcaptain.com/major-fire-on-ultra-large-containership-maersk-honam-arabian-sea/> accessed 31 October 2019.

[3] International shipping, and standards associated therewith, are within the mandate of the International Maritime Organization (IMO). As far as safety of ships is concerned, of key relevance are standards contained in the following instruments: the 1974 International Convention for the Safety of Life at Sea (the SOLAS), 1184 UNTS 2, as amended; the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (the IBC Code), IMO doc, MSC.4 (48) of 17 June 1983, as amended; the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (the IGC Code), IMO doc, MSC.5 (48) of 17 June 1983, as amended; the International Code on Intact Stability (the IS Code), IMO doc, MSC.267 (85) of 4 December 2008; and the International Safety Management Code (ISM Code), IMO doc, A.741 (18) of 4 November 1993, as amended. Incidents at sea occur not only because of failures concerning safety standards, but also because of poor ship maintenance. In the aftermath of the *Prestige* (2002) accident, the European Parliament suggested that 'far more attention ought to be devoted to the maintenance and condition of ships, as a poorly maintained double-hulled tanker represents a greater potential hazard than a well maintained single-hulled tanker'. See European Parliament, 'Resolution on Improving Safety at Sea P5_TA (2004)0350 dated 21 April 2004' (2004) C 104 E/730, *Official Journal of the European Union*, para 2, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P5-TA-2004-0350&language=EN> accessed 31 October 2019.

[4] While the occurrence of incidents remains challenging, insurance market recorded a significant decline in the number of shipping losses. See Allianz Global Corporate & Specialty, 'Safety and Shipping Review 2019, An Annual Review of Trends and Developments in Shipping Losses and Safety', 4. This report is based on the Lloyd's List Intelligence Casualty Statistics (data as of 1 April 2019). Moreover, the ITOPF statistics for 2019 show that oil spills marked a significant downward trend. See ITOPF, '2019 Oil Tanker Spill Statistics', available at <http://www.itopf.org/news-events/news/article/2019-oil-tanker-spill-statistics-published/> accessed 11 March 2020. See also a report prepared by the Southampton Solent University, '15 Years of Shipping Accidents: A

reason than because problems like bad weather and human error persist.[5] The question then arises as to what the nearby coastal State may, must or must not do to combat the risks posed by these ships.

Traditionally, ships in peril and shipwrecks were in the focus of maritime law, in particular salvage law whose main concern was to address mutual rights and obligations of shipowners and salvors. In essence, traditional law of salvage was characterized by the freedom of the shipowner to enter into a contract with the salvor of its own choice and on terms and conditions of its own preference. No salvor had the right to claim salvage reward if the shipowner expressly prohibited undertaking of salvage.[6]

From the law of the sea perspective, seas and oceans were traditionally divided into two maritime zones – a narrow area of the territorial sea within which coastal States enjoyed absolute territorial sovereignty, and high seas within which ships were subject to the regime characterized by the freedom of navigation and exclusive flag State jurisdiction. Coastal States were thus prohibited from any intrusion into the freedom of navigation of foreign ships beyond the limits of their territories. At the same time, there was a long established maritime practice according to which ships in peril were allowed to take assistance in a place of refuge (e.g. a port or a safe anchor close to the shore) to stabilize their condition so they would be able to continue with their voyage as safely and expeditiously as possible. No permission would have been asked from the coastal State in this respect. A mere notification was enough.[7] Once in a place of

Review for WWF', available at <http://awsassets.panda.org/downloads/15_years_of_shipping_accidents_a_review_for_wwf_.pdf> accessed 31 October 2019.

[5] As far as bad weather and rough sea conditions are concerned, it has been reported that this particular factor directly contributed to at least 21 total losses in 2017 and that this figure could increase in the future. See Allianz Global Corporate & Specialty, 'Shipping Review 2018, An Annual Review of Trends and Developments in Shipping Losses and Safety', 6 and 9. According to the US Coast Guard research, as referred to by John Witte, former President of the International Salvage Union (ISU), the root cause of more than 75% of casualties is human error. See John Witte, 'The Shared Responsibility of Shipowners, Salvors and Insurers to Work Together in Marine Casualty Response', available at <http://www.marine-salvage.com/media-information/maritime-risk-international/> accessed 31 October 2019. A ship that loses stability due to wrong ballasting may be an example of human error. Ro-ro carrier ships are prone to this issue more than other types of ships. See TradeWinds News, available at <https://www.tradewindsnews.com/insurance/sixth-car-carrier-accident-of-2019-prompts-urgent-safety-questions/2-1-669866> accessed 31 October 2019. According to EMSA, human erroneous action is the main contributing factor in maritime incidents. See EMSA, 'Annual Overview of Maritime Casualties and Incidents 2018', 33, available at <http://www.emsa.europa.eu/emsa-documents/latest/item/3406-annual-overview-of-marine-casualties-and-incidents-2018.html> accessed 31 October 2019.

[6] Article 3 of the 1910 Brussels Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, UKTS (1913) Cd 6677. This treaty is not in force as it was superseded by the 1989 International Convention on Salvage (London, adopted on 28 April 1989, entered into force on 14 July 1996) 1953 UNTS 165.

[7] Edgar Gold, Foreword to Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) xii. Maritime custom associated with refuge tradition has also been in the focus of extensive studies conducted by Hooydonk and Morrison. See Erik van Hooydonk, *Places of Refuge* (Lloyd's List 2010); Anthony Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers 2012).

refuge, foreign ships were exempted from coastal (port) State jurisdiction, in particular from local custom and immigration laws.[8]

Since the 1960s, the aforementioned tradition underwent fundamental challenges and changes in international law. A series of maritime accidents brought to light the relevance of public law, aspects of which used to be perceived as pure maritime law. These accidents demonstrated different kinds of socio-economic and environmental risks posed by ships in peril and shipwrecks to the nearby coastal States, their people, economies, and to the marine environment.[9] The legitimacy of the exclusiveness of flag Sate jurisdiction on the high seas started to be seriously questioned as it became apparent that coastal States need to overtake certain powers from flag States to successfully combat those risks. The catastrophe of the *Torrey Canyon* casualty (1967) marked the critical point in this maritime/public and flag/coastal State transition by witnessing in the most dramatic way the vulnerability of coastal States to oil pollution caused by a single ship.

By spilling into the sea approximately 120 000 tons of heavy crude oil, the *Torrey Canyon* accident beyond any doubt produced the catastrophe. It resulted in pollution of hundreds of miles of the British and French coastlines, and caused particularly severe damage to local economies (primarily tourism and fishing industry) and marine life.[10] The consequences of this casualty were tremendous, regardless of the fact that the ship was located relatively far from the shore, i.e. some 16 nm from the coastline.

The *Torrey Canyon* disaster caused the International Maritime Organization (IMO) to convene a general diplomatic conference to adopt a treaty that would address the right of coastal States to intervene on the high seas to combat the risk of oil pollution. The conference adopted the

[8] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edition, Manchester University Press 1999) 68. See also Aldo Chircop, 'Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 146.

[9] It is commonly acknowledged that maritime accidents serve as a catalyst for international law-making. See Iliana Christodoulou-Varotsi, 'Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC's Penal Approach' (2006) 33 *Transport Law Journal* 371, 374. See also Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 350.

[10] M'Gonigle and Zacher (n 9) 36; Suzane Hawkes and Michael M'Gonigle, 'A Black (and Rising?) Tide: Controlling Maritime Oil Pollution in Canada' (1992) 30 (1) *Osgoode Hall Law Journal* 165, 180; Edgar Gold, *Gard Handbook on Protection of the Marine Environment* (3rd edition, GARD 2006) 118; Patrick Griggs, '"Torrey Canyon", 45 Years On: Have We Solved All the Problems?' in Baris Soyer and Andrew Tettenborn (eds), *Pollution at Sea: Law and Liability* (Informa 2012); Steven Rares, 'Ships that Changed the Law – the *Torrey Canyon* Disaster', 1-5. This paper was presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017, available at <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171005> accessed 31 October 2019.

1969 International Convention,[11] which was complemented by the 1973 Protocol to cover substances other than oil too.[12] The right of intervention on the high seas was given to coastal States only as an exception. Issues of general jurisdiction were kept for the deliberations at the upcoming Third United Nations Conference on the Law of the Sea (UNCLOS III), which was convened between 1973 and 1982.

UNCLOS III produced the 1982 Law of the Sea Convention (LOSC),[13] commonly known as the 'constitution for the oceans'.[14] Coastal States successfully expanded their jurisdiction at sea, both substantively and spatially. The expansion, however, came as a package deal that was intended to strike a fair balance between different interests pursued by States, including between the interest of flag States in preserving navigational freedom to the maximum extent possible on the one hand and the interests of coastal States in expansion of their powers on the other hand. The LOSC is also notable for its Part XII, which dedicates considerable attention to the protection and preservation of the marine environment, and which in this respect imposes certain obligations (mostly of a general kind) on all States, regardless of whether they act in their capacity as coastal States.

Being of a constitutional character, however, the LOSC remained silent on many specific issues, including on matters concerning State jurisdiction over ships in peril and shipwrecks, save for Article 221, which confirmed the right of intervention, but created ambiguities as to its content. While distributing jurisdiction among States on the basis of the idea that such a distribution will facilitate the strengthening of relations among all nations on the grounds of the principle of justice and fairness,[15] the LOSC was never intended to be a treaty set in stone. To further clarify and develop its jurisdictional framework, the LOSC reserved a certain role for international institutions.[16] As far as shipping is concerned, the institution in point is the IMO,[17] whose

[11] The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, adopted on 29 November 1969, entered into force on 6 May 1975) 970 UNTS 211.
[12] The 1973 Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil (London, adopted on 2 November 1973, entered into force on 30 March 1983) 1313 UNTS 4, as amended. For ease of reference, the 1969 Intervention Convention and the 1973 Intervention Protocol are together referred to as the 'Intervention Convention'.
[13] The 1982 United Nations Convention on the Law of the Sea (Montego Bay, adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3.
[14] Remarks by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at <https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses1-6.-Tommy-T.B.-Koh-of-Singapore-President-of-the-Third-United-Nations-Conference-on-the-Law-of-the-Sea-_A-Constitution-for-the-Oceans_.pdf> accessed 31 October 2019.
[15] The Preamble to the LOSC.
[16] Henrik Ringbom, 'Introduction' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 9.
[17] Aldo Chircop, 'The IMO, its Role under UNCLOS and its Polar Shipping Regulation' in Robert Beckman et al (eds), *Governance of Arctic Shipping* (Brill Nijhoff 2017) 138-139.

mandate is commonly expressed as a mission to ensure 'safe, secure and efficient shipping on clean oceans'.[18] As mentioned earlier, the 1963 Intervention Convention and the 1973 Intervention Protocol were both adopted under the auspices of the IMO.

With the emergence of new incidents and the associated practical challenges and legal controversies, the IMO continued in the post-LOSC era to play a pivotal role in developing international law on matters concerning risks posed by ships in peril and shipwrecks. In 1989, the Salvage Convention[19] was adopted to bring the traditional salvage law up-to-date with the developments in international environmental law, including Part XII of the LOSC. This Convention was adopted primarily because of the experience with the *Amoco Cadiz* accident (1978) and the insufficiency of the traditional 'no cure-no pay' principle in the context of environmental protection. In the aftermath of the incidents of the *Erika* (1999), the *Castor* (2000) and the *Prestige* (2002), the work of the IMO was predominantly focused on issues of places of refuge and the so-called 'not-in-my-backyard'[20] approach that certain coastal States took in response to a number of incidents in which ships were in need of a shelter, but were denied refuge. This work culminated in the adoption of the 2003 IMO Guidelines on Places of Refuge.[21]

Incidents continued to emerge and new risks, such as navigational obstructions posed by sunken and stranded ships beyond the limits of the territorial sea, continued to call for further developments in the field. Contrary to general perception, navigational obstructions by sunken and stranded ships do occur even far from the shore (where one would not expect any shallow waters). The incidents of the *Tricolor* (2002) and the *Baltic Ace* (2012) illustrate the point.[22] To

[18] For example, see the IMO Newsletter, available at: <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Documents/COP%2018/IMO%20side%20event.pdf > and IMO, 'Third IMO GHG Study 2014: Executive Summary and Final Report' (International Maritime Organization 2015), available at <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Documents/Third%20Greenhouse%20Gas%20Study/GHG3%20Executive%20Summary%20and%20Report.pdf> all accessed 31 October 2019. See also EU briefing, available at <https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)577964> accessed 31 October 2019.

[19] The 1989 International Convention on Salvage (London, adopted on 28 April 1989, entered into force on 14 July 1996) 1953 UNTS 165.

[20] For the 'not-in-my-backyard' approach, see the observation made by the International Salvage Union, available at <http://www.marine-salvage.com/media-information/press-releases/isu-urges-governments-to-adopt-imo-places-of-refuge-guidelines/> accessed 31 October 2019.

[21] The 2003 IMO Guidelines on Places of Refuge for Ships in Need of Assistance (the IMO Guidelines on Places of Refuge) were adopted by the IMO Assembly Resolution A.949 (23) of 5 December 2003.

[22] The *Baltic Ace* sank approximately 27 nm off the Dutch coast, with only 6 m free space left below the water surface. A similar problem occurred with the *Tricolor*, which sank in the French exclusive economic zone (EEZ) so that its breadth was almost the same as the depth of the water. For more on these incidents see chapter 2 of the thesis (2.2.3.).

address these and similar risks, a new treaty was adopted at the IMO conference – the 2007 Nairobi International Convention on the Removal of Wrecks (WRC).[23]

The current legal regime on coastal State jurisdiction over foreign ships in peril and shipwrecks is thus determined by a combination of a number of instruments that have been emerging over the last fifty years. Each of these instrument is tailored for specific legal issues (intervention, general distribution of jurisdiction, salvage, places of refuge, wreck removal). Nonetheless, they all attempt to be part of one and the same legal regime that provides coastal States with decision-making powers to respond to various risks posed by ships in peril and shipwrecks. While the regime in point provides coastal States with considerable rights, these are subject to restrictions and obligations given the interests of others, i.e. flag States, neighboring States, private actors and the international community as a whole. A drifting ship that calls for intervention measures may at the same time request a place of refuge and salvage assistance. Moreover, a sunken or stranded ship may be treated by the coastal State as a shipwreck, while neither sinking nor stranding of a ship takes away the interest of the shipowner in bringing the ship back to service (navigation) upon successful completion of salvage. In these and similar scenarios, the content of the rights and obligations of the coastal State is not immediately apparent because much of the language used in the relevant instruments is vague and subject to interpretations. In other words, considerable ambiguity characterizes not only each of the key instruments in place, but also their mutual relationship and the way the legal regime actually works.

1.2 **Research Question(s) and Research Themes**

Against the aforementioned backdrop, this thesis seeks to explore and explain the following research question:

> What are the rights and obligations of coastal States over foreign ships in peril and shipwrecks under current international law, and how have these evolved since the *Torrey Canyon* (1967) accident?

This thesis, therefore, studies both the current state of international law and its evolving component. In particular, it investigates the *what*, *where*, *when* and *how* of coastal State jurisdiction. In so doing, the thesis examines, *inter alia*, if and how coastal States are prevented

[23] This treaty was adopted in Nairobi on 18 May 2007 and entered into force on 14 April 2015. For the text of the treaty see IMO doc, LEG/CONF.16/19 of 23 May 2007. For information on the date of adoption and entry into force see IMO, 'Status of IMO Treaties', 527, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020.pdf> accessed 31 October 2019.

from unnecessarily or arbitrarily undermining the navigational rights and freedom in the exercise of their rights, and if and how the rights of coastal States are constrained due to the rights and interests associated with the protection and preservation of the marine environment. In its analysis, the thesis observes each of the relevant instrument (the LOSC and IMO instruments) separately, as well as their relationship. Concerning the latter, the thesis asks if, where and how these instruments overlap, read together and complement each other, and what added value each of the subsequent instrument has compared to the previous one.

As part of its analysis of the current state of international law, the thesis is concerned not only with the question as to what is the applicable law (the content of law), but also who is bound by such law. In this respect, the thesis investigates the contribution of the key IMO instruments to general international law in order to identify whether coastal States may in a given situation apply certain rules in relation to all ships, irrespective of their flag. In this respect, the thesis raises the question of opposability. The legal discussion on this question boils down to the last treaty adopted in the field – the WRC.

In many instances, international courts and tribunals have found that a certain rule of customary international law finds its origin or evidence in a treaty.[24] If not authoritatively confirmed, however, customary international law is hard to prove. Since the status of the WRC has not been addressed by any international court or tribunal so far, this thesis will not attempt to take any authoritative role in this respect. Rather, the ambition is to reflect upon whether the WRC has the potential to be incorporated into the LOSC through the so-called 'rules of reference'.[25]

The reason why the key instruments other than the WRC do not warrant any investigation on their contribution to general international law is because either the rules contained therein are already authoritatively confirmed to have their place in customary international law (e.g. the right of intervention and most of the provisions contained in the LOSC) or they lack the norm-creating character. The latter concerns the IMO Guidelines on Places of Refuge, which are merely of a recommendatory nature. This, however, does not prevent the discussion on how these guidelines may nevertheless contribute to our understanding of certain rules and principles

[24] See Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45 *Ocean Development and International Law* 239, 239-259.

[25] The so-called 'rules of reference' are addressed in more detail in chapters 3, 4 and 8 of the thesis. For more in general see Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 140-183; Erik Franckx (ed), *Vessel-source Pollution and Coastal State Jurisdiction* (Kluwer Law International 2001) 11-32.

already present in general international law and the LOSC, and the discussion on where and how the issue of places of refuge finds its place in current international law.

The public (international) law concerns discussed in this thesis are to some extent informed by the private (maritime) law considerations and are moreover dependent on the strengths and weaknesses associated with the current liability and compensation regime. The thesis seeks to explore these public/private interplays. The ambition here is not to produce a comprehensive analysis of maritime law. The intention is rather to reflect upon maritime law considerations to the extent these appear necessary for the better understanding of the public law issues. For example, the thesis investigates how the ability/inability of the coastal State to rely upon the IMO's liability and compensation regime may explain the willingness/unwillingness of that State to exercise its rights in relation to foreign ships in peril in the scenarios in which these ships request a place of refuge, and how such ability/inability may inform the reasonableness of the coastal State's demands in this respect.

Ultimately, this thesis is about the evolving component of current international law, i.e. how has international law been developing since 1967? In this regard, the thesis explores the gradual increase of coastal States powers brought with each of the later instruments and asks whether and how the post-LOSC developments affect our understanding of the LOSC jurisdictional balance, as well as what potential the post-LOSC instruments have for developing general international law. This question appears particularly relevant in the context of wreck removal given the silence of the LOSC on this particular matter.

As far as the issue of places of refuge is concerned, while its relevance in the context of environmental protection is undisputable, the prospect for a development of a stand-alone treaty seems rather unrealistic. Nevertheless, it appears necessary to observe the issue of places of refuge within the 'bigger picture' and to reflect upon the question as to which way the tide is flowing, to shed some light on the prospect for potential future developments of international law in this particular area. To some extent, the thesis will thus reflect upon the legislation of the European Union (EU) concerning places of refuge given the recent EU proposal for amendments of the IMO Guidelines on Places of Refuge on the basis of some of the EU solutions.[26]

[26] IMO doc, MSC 100/17/1 of 3 August 2018, MSC 100/17/1/Corr.1 of 21 August 2018 and NCSR 7/13 of 15 October 2019.

1.3 **Aim**

The aim of this thesis is to produce a more profound understanding of the legal regime concerning coastal State jurisdiction over ships in peril and shipwrecks. While the regime in point builds on different instruments, it is important that a systemic view be taken to clarify how such a regime actually works and whether its fragmentation appears problematic at all. Moreover, incidents at sea are normally of a very dynamic nature. It is hoped that this thesis, by providing comprehensive knowledge on the regime in point, may save time in situations in which delays may prove critical but nevertheless happen for the reason of legal ambiguities.

The developments of international law in this particular field have been taking place at different stages to respond to pressing challenges and needs over the last fifty years. The ambition of the thesis is to identify how far international law has moved from 1967 and to identify possible patterns that could help one to predict and understand the direction of the developments that may potentially occur in the future. In this respect, the thesis seeks to offer some theoretical observations and clarifications.

1.4 **Terminology and Scope**

This study is about ships in peril and shipwrecks that create different kinds of socio-economic and environmental risks to coastal States. There is no universally accepted legal definition of the terms ‘ships in peril’ and ‘shipwrecks’. Rather, these terms are allocated specific meaning depending on the legal context in question. The thesis gives a practical meaning to these terms and perceives a ‘ship in peril’ as a ship that finds itself in a situation of some sort of calamity at sea (accidentally, rather than intentionally), which calls for assistance to be provided to that particular ship, while the ship is still afloat. To describe each and every single calamity that may occur at sea is rather difficult. Nonetheless, a few examples may be given such as difficulties in maneuvering due to exceptionally bad weather and deteriorating sea conditions, defects in the hull, malfunctions in the machinery or equipment, fire on board and collision. As far as a ‘shipwreck’ is concerned, the thesis perceives this term so as to mean a ship that is sunken or stranded. The difference between a ‘ship in peril’ and a ‘shipwreck’ is built on the physical state of a ship. A ship in peril is still afloat, in contrast to a shipwreck, which has touched the seabed. Ultimately, the aim of this thesis is to identify what actually distinguishes a ship from a shipwreck in terms of general concepts.

As far as 'ships in peril' are concerned, the thesis looks at these from the legal perspective when no human life is at risk given that issues concerned with safety of life are governed by a specific set of legal rules that belongs to the domain of humanitarian law. Nonetheless, when it comes to the issue of places of refuge, the humanitarian aspect will be brought into the discussion to the extent necessary to provide better understanding of its maritime counterpart. With regard to shipwrecks, the focus is placed on hazardous shipwrecks, rather than shipwrecks that have archeological or historical value.[27]

While the main research question posed in this study uses the term 'rights and obligations', the thesis prefers the title 'jurisdiction' as a more generic term that captures a legal competence (authority) of a State over a certain event involving a foreign ship, the content and limits of which competence is then explained through such rights and obligations. The focus is placed on *coastal State* jurisdiction and in this respect, a clarification needs to be made of the three different capacities in which States may possibly act. A simple, yet succinct definition is given by Churchill and Lowe, who explain as follows:

> A *flag State* is the State whose nationality a particular vessel has. A *coastal State* is the State in one of whose maritime zones a particular vessel lies. A *port State* is the State in one of whose ports a particular vessel lies.[28]

The concept of 'flag State' is rather straightforward – it relates to a State whose flag the ship is flying. When it comes to the concept of 'port State' and 'coastal State', while these concepts differ, in a specific scenario the coastal State may at the same time be the port State (e.g. a foreign ship is located in the EEZ of the coastal State X and requests a port of refuge in the same State). For the sake of ease and pragmatic reasons, this thesis will use the term coastal

[27] Some scholars define a shipwreck as a thing of no commercial value. See Richard Shaw and Michael Tsimplis, 'The Liabilities of the Vessel' in *Southampton on Shipping Law* (Institute of Maritime Law 2008) 190; Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 2 *Lloyd's Maritime and Commercial Law Quarterly* 92, 92. For insurance purposes, a shipwreck is treated as a ship that becomes an actual total loss or constructive total loss so that the costs of repair exceed the value of the ship. See for example GARD, 'Salvage and Wreck Removal from a P&I Club Perspective', available at <http://www.gard.no/web/updates/content/51949/salvage-and-wreck-removal-from-a-pi-club-perspective> accessed 31 October 2019.

[28] Churchill and Lowe (n 8) 344. The concept of 'port State jurisdiction' is to be distinguished from the concept of 'port State control'. The latter is normally used in the context of correcting inadequate performance of internationally agreed rules and standards by flag and port States. For the so-called 'flag of convenience' and 'port of convenience' see Erik J Molenaar, 'Port and Coastal States' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 280. As Molenaar observes, it is usually made explicit in the regional agreements on 'port State control' that the port State is at any time allowed to exercise its 'residual' jurisdiction on the basis of its territorial sovereignty, which empowers the State to regulate and enforce more stringent standards than internationally agreed ones.

State in a broader sense so as to include both coastal and port States, and will observe rights and obligations of the coastal State in relation to a foreign ship in peril and a foreign shipwreck.

1.5 **Methodology**

1.5.1 Doctrinal Study

Borrowing from Hutchinson, '[i]f doctrinal legal research has ever been dead, it has until today always succeeded in rising from the grave'.[29] Given the previously addressed research questions, this thesis undertakes a doctrinal study and thus focuses on the relevant current legal framework – in particular, the interpretation, interrelation, systematization and justification of the relevant rules contained in the LOSC and the key IMO instruments, and to some extent the authoritatively confirmed rules of customary international law. The thesis predominantly examines legal literature and analyzes sources of international law. To some extent, real case scenarios are used as a source of inspiration.

In its analysis of sources of international law, the thesis investigates both the content of the existing law and the potential of the WRC for developing general international law. Against this backdrop, it appears necessary to give a brief overview of the traditional sources of international law and their ability to create general norms.

1.5.2 Sources of International Law

It is commonly recognized that the most influential list of traditional sources of international law is the one contained in Article 38 (1) of the Statute of the International Court of Justice (ICJ Statute), which reads as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;

[29] Terry Hutchinson, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 17.

> d. subject to the provisions of Article 59, judicial decisions and the teachings[30] of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although drafted for the purpose of organizing the composition and functioning of a particular Court – the International Court of Justice (ICJ), the list contained in Article 38 (1) is nevertheless generally regarded to be an 'authoritative statement' of the sources of international law.[31] After all, it refers judges to particular sources in order to decide a dispute 'in accordance with international law'. Of controversy is, however, whether Article 38 (1) provides an exhaustive or rather open list of the sources. In this respect, Lowe, for example, explains that 'tribunals' have a tendency to be more flexible than this [catalogue of sources contained in article 38 (1) of the ICJ Statute] might suggest'.[32]

If one goes back to 1920s, when the Advisory Committee of Jurists started drafting the ICJ Statute, it would perhaps be right to say that the list contained in Article 38 (1) was intended to be exhaustive. However, there is a growing body of instruments adopted by international organizations and in this respect Thirlway notes that:

> presumably the International Court, whose powers are circumscribed by its Statute, would not be able to rely on these *eo nomine*; but it should not be overlooked that while decisions of international organizations (for example) are not listed in Article 38, this does not mean that the Court cannot apply such decisions in its reasoning.[33]

Nonetheless, in his study on the process of making the law of the sea, Harrison argues that 'international institutions of various kinds have played a central role in the law-making process' and continues by cautiously observing that:

> [t]he growth in international institutions has not, however, led to new sources of international law. Few of these organizations have formal legislative powers that allow them to override the consent of individual states. Rather, the significance of international institutions in this context lies in their ability to bring states together in a

[30] For more on how the teachings are used by international courts and tribunals see Sondre Torp Helmersen, 'How the Application of Teachings Can Affect the Legitimacy of the International Court of Justice' in Avidant Kent et al (eds), *The Future of International Courts* (Routledge 2019) 181-198; Sondre Torp Helmersen, 'The Application of Teachings by the International Tribunal for the Law of the Sea' (2020) 11 (1) *Journal of International Dispute Settlement* 20.
[31] Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 6. See also James Crawford, *Brownlies's Principles of Public International Law* (8th edition, Oxford University Press 2012) 22.
[32] Vaughan Lowe, *International Law* (Oxford University Press 2007) 35.
[33] Thirlway (n 31) 20.

> single forum and to facilitate the creation of the traditional sources of international law, namely treaties and customary international law.[34]

The following few sub-sections will now address each of the sources of international law as listed in Article 38 (1) of the ICJ Statute, following the same order as provided in Article 38 (1), without indicating any hierarchy in this respect.

1.5.2.1 Treaties

Treaties rank first in the list of the sources of international law as provided in Article 38 (1) of the ICJ Statute. This does not necessarily imply their predominance over other sources, albeit given their specificity in creating rights and obligations for States parties, treaties may in a given situation enjoy priority based on the *lex specialis* principle.[35] Given that treaties establish 'rules expressly recognized by the contesting states',[36] treaties surely are the first place one would have a look at in case of a dispute between States.[37]

One of the main legal principles governing treaties is the *pacta tertiis* principle *(*or *pacta tertiis nec nocent nec prosunt*), according to which treaties create no rights and impose no obligations on third States, i.e. non-parties. This principle is spelled out in Article 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which reads as follows:

> A treaty does not create either obligations or rights for a third State without its consent.[38]

The importance of the consent comes from the fact that each State is a sovereign entity and there is no international legislator that has supra-national powers to impose legislation on the sovereign. Pauwelyn in this respect observes that there are 'essentially as many law-makers as there are states'.[39] The principle of consent was confirmed in the *SS Lotus* Case (1927) in which the Permanent Court of International Justice (PCIJ) held:

> [i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will […].[40]

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[34] James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 3.
[35] *Lex specialis derogat legi generali* (special law repeals general laws). See Crawford (n 31) 22.
[36] Article 38 (1) (a) of the ICJ Statute.
[37] Lowe (n 32) 64.
[38] The 1969 Vienna Convention on the Law of Treaties (Vienna, adopted on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 1980.
[39] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 13.
[40] The *SS Lotus* Case (France v. Turkey), Judgment of 7 September 1927, PCIJ Reports 1927, para 44.

However, a rule contained in a treaty may simultaneously exist in other sources of international law, in particular customary international law and general principles of law. In concrete terms, this means that a certain rule contained in a treaty may produce legal effects even in relation to States that are not parties to a given treaty.[41]

One of the main advantages of having a treaty as a source of law is a written form which enables a treaty to be easily found. Yet, while often easy to be found, treaties may not necessarily be easy to interpret. Treaties examined in this thesis are no exception in this regard. In its analysis, therefore, the thesis employs generally accepted rules for the interpretation of treaties, reflected as such in the VCLT. The main rule is spelled out in Article 31 of the VCLT, which reads as follows:

> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[41] There are exceptions to the rule of *pacta tertiis* spelled out in Articles 35 and 36 of the VCLT. According to Article 35 of the VCLT, a provision of a treaty creates an obligation for a third State, if 'the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'. Pursuant to Article 36 of the VCLT, a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto'. As opposed to Article 35, Article 36 of the VCLT does not require consent of a third State to be given in writing. Rather, such consent is 'presumed so long as the contrary is not indicated, unless the treaty otherwise provides'.

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

In short, a treaty is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. In some instances, the thesis also employs the rule contained in Article 32 of the VCLT, which refers to the supplementary means for treaty interpretation such as, *inter alia*, the 'preparatory work' of the treaty, i.e. *travaux préparatoires*, and the 'circumstances of its conclusion.'

While the VCLT lacks the official support of all States, international courts and tribunals have on many occasions confirmed the customary law nature of the provisions of Articles 31 and 32.[42] The VCLT therefore provides a generally accepted tool for treaty interpretation, which explains the reason why it is in fact employed in this thesis.

In interpreting treaties, the thesis also takes account of the developments outside a given treaty having in mind the *Indus Waters Kinshenganga* Arbitration, in which the Court held:

> [i]t is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law.[43]

Furthermore, the thesis takes account of the modern trends that show a tendency of one treaty influencing the interpretation of another. In the *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* Case,[44] the Court of Justice of the European Union, for example, utilized the interpretation of the Intervention Convention in order to interpret Article 220 (6) of the LOSC and consequently Article 7 (2) of the EU Directive 2005/35, which resembles the content of Article 220 (6) of the LOSC.

While one treaty may indeed inform the content of another, reference to another treaty may only be made as a useful, rather than binding, guidance, unless one treaty is explicitly brought

[42] Regarding Article 31 of the VCLT see for example the *Territorial Dispute* Case (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, ICJ Reports 1994, para 41; the *Kasikili/Sedudu Island* Case (Botswana v. Namibia), Judgment of 13 December 1999, ICJ Reports 1999, para 18. Regarding Article 32 of the VCLT see for example *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports 1991, para 48.

[43] The *Indus Waters Kinshenganga* Arbitration (Pakistan v. India), Permanent Court of Arbitration (PCA), Partial Award of 18 February 2013, para 452.

[44] The *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* Case (C-15/17), the Court of Justice of the European Union, Judgement of 11 July 2018.

under the scope of another treaty, as is the case with many IMO treaties incorporated into the LOSC through the so-called 'rules of reference'.[45]

1.5.2.2 Customary International Law

According to Article 38 (1) (b) of the ICJ Statute, customary international law is 'evidence of a general practice accepted as law'. Hence, customary international law is composed of two constituent elements. The first element relates to state practice, while the second concerns the *opinio juris* – a belief of a State participating in such practice that its action or inaction is in accordance with international law.[46] While the former is usually described as a 'material element' of custom (relevant for the purpose of collecting evidence), the latter normally stands as a 'psychological element' (relevant for the purpose of characterizing certain practice as the rule of law).[47]

Regarding state practice, it must be the one 'generally accepted'. Yet, not all States have to participate therein, but only those particularly affected. In the *North Sea Continental Shelf* Cases, the ICJ held that:

> [w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.[48]

In terms of the consistency, it is substantial, rather than complete consistency required. [49] In the *North Sea Continental Shelf* Cases, the Court held that a practice, in order to qualify for customary international law, must be 'extensive and virtually uniform'.[50] In terms of the duration of practice, the Court found that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law'.[51] Thus, the time is of no relevance, although it might be difficult to prove the extensive and

[45] Molenaar (n 25) 183; Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 31; Irini Papanicolopulu, 'Jurisdiction of States over Persons ate Sea: Principles, Issues, Consequences' in Jürgen Basedow et al (eds), *The Hamburg Lectures on Maritime Affairs 2011-2013* (Springer-Verlag Berlin Heidelberg 2015) 152.
[46] The *opinio juris* is sometimes referred to as the *opinio juris sive necessitates*. The meaning is the same.
[47] Crawford (n 31) 36-40. See also Lowe (n 32) 38, 59.
[48] The *North Sea Continental Shelf* Cases (Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para 73.
[49] Crawford (n 31) 24.
[50] The *North Sea Continental Shelf* Cases (n 48) para 74.
[51] Ibid. See also Crawford (n 32) 24.

virtually uniform practice that is exercised only within a short period of time. However, such difficulty may be overcome through the role of international organizations in providing a forum for discussion and exchange of views among States. On this point, Harrison argues that 'customary international law can develop more rapidly through international institutions'.[52]

For a State to be bound by a rule of customary international law, no active participation in practice is required. As observed by the International Law Association (ILA)'s Committee on Formation of Customary (General) International Law:

> for a specific State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it.[53]

Save for the persistent objectors, the ILA Committee further observes that:

> no international court or tribunal has ever refused to hold that a State was bound by a rule of alleged general customary international [law] merely because it had not itself actively participated in the practice in question or deliberately acquiesced in it.[54]

Therefore, if there is an opportunity for a State to protest, and instead of doing so it remains silent, one could argue that such a State indeed participated in practice and that its silence thus amounts to 'acquiescence'.[55]

Apart from practice, customary international law also requires the *opinio juris* element, which in fact distinguishes a mere courtesy (although generally accepted practice) from the law. A State does not need to express *opinio juris* in an explicit way. Explicit statements are in fact rare.

Once there is a state practice with accumulated *opinio juris*, such practice binds all States (or, in case of a regional or a bilateral practice, some States), save for the persistent objectors. The persistent objector rule means that customary international law binds all States, except those States that have made it clear from the very beginning that they do not give their consent to be bound by the rule of customary international law, i.e. States that object to that rule and do so persistently. In order to benefit from a persistent objection rule, a State must raise the objection

[52] Harrison (n 34) 19.
[53] ILA, Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law', Report of the 69th Conference of the International Law Association 2000, 23.
[54] ILA (n 53) 24.
[55] Lowe (n 32) 45.

before the practice becomes a rule of law. The doctrine of the persistent objector therefore reflects the key principle on which international law is based – the principle of consent. Once the consent is given, there is no way for a State to unilaterally 'opt-out', unless otherwise provided by the rule itself. [56]

While customary international law is indeed the primary source for the creation of general international law, it has a significant disadvantage compared to a treaty rule as it is very difficult to prove its existence. It is against this background that Harrison argues that 'international institutions present new opportunities for creating customary international law by offering a single forum in which states can exchange views on emerging norms'.[57] In fact, as the Court pointed out in the *North Sea Continental Shelf* Cases, the formation of customary international law may be influenced by the negotiations and adoption of a treaty in three different ways.[58] A treaty may first stand as a codification of an already existing rule of customary international law. Additionally, a treaty may influence subsequent state practice and *opinio juris*, and transform to a rule of customary international law. This way of influencing customary international law may, however, accumulate difficulties in addressing the *opinio juris* element because the question then arises as to whether the State believes that, by exercising certain practice, it acts in accordance with the treaty, or in accordance with customary international law.[59] Finally, a treaty may crystallize customary international law in such a way that a certain rule becomes customary international law during the negotiation process.[60]

1.5.2.3 General Principles

Article 38 (1) (c) of the ICJ Statute refers to 'general principles of law recognized by civilized nations' as an independent source of law.[61] In other words, it gives the power to the Court to employ this source of law in order to decide a dispute between States with no reference to any other source (treaty or customary international law).

The reason why general principles were included in Article 38 (1), in addition to treaties and customary international law, was to avoid a *non liquet* situation, where the court can do nothing

[56] Lowe (n 32) 55.
[57] Harrison (n 34) 16.
[58] The *North Sea Continental Shelf* Cases (n 48) para 60.
[59] Lowe (n 32) 85.
[60] For more on this issue see Lowe (n 32) 83-85; Harrison (n 34) 17-19.
[61] The term 'civilized' is nowadays outdated. It has been included in the text of the ICJ Statute for the purpose of making distinction between those nations that were sufficiently developed to provide standards worthy of comparison and those that were not. See Thirlway (n 31) 93-95.

but declare that a claim can neither be upheld nor rejected due to the lack of the applicable rule of law.[62] Yet, although standing as an independent source of international law, general principles are sparingly used as a sole legal basis for the court judgements.[63] Rather, as Boyle and Chinkin argue, the importance of general principles 'derives principally from the influence they may exert on the interpretation, application and development of other rules of law'.[64] Indeed, general principles are commonly used by courts and tribunals in combination with a treaty rule or customary international law, so as to give a greater weight to a certain reasoning. There is a number of general principles observed in this thesis, such as principles that explain the basis for State jurisdiction, as well as the principles of reasonableness, good faith and the prohibition of abuse of rights. Borrowing from D'Amato, that these are indeed general principles 'is evident from the fact that the Court simply takes judicial notice of them, with no attempt to offer independent proof'.[65]

1.5.2.4 Jurisprudence

In international law, a decision made by an international court or tribunal has no precedential weight.[66] This rule is, *inter alia*, reflected in Article 59 of the ICJ Statute, which stipulates that:

> the decision of the Court has no binding force except between the parties and in respect of that particular case.[67]

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[62] Stephen Hall, 'Researching International Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 195.

[63] Lowe (n 32) 88; Crawford (n 31) 36. While it is hard to identify the exact reason for which the courts are reluctant to make reference in their judgments solely to general principles as a source of international law, some scholars nevertheless make certain observations that are worthwhile noting. Friedmann, for example, argues that the traditional law is 'essentially concerned with the formal regulations of diplomatic relations between states' and, as he continues, international courts and tribunals depend on the consent of States in terms of the existence of their jurisdiction. Friedmann therefore concludes that courts have to exercise 'great caution in the application of general principles of law, lest they be accused of unauthorized exercise of international legislation'. See Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *American Journal of International Law* 279, 280.

[64] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 223. See also Lowe (n 32) 87-88. The editors of *Oppenheim's International Law* see the general principles as a source of international law that (i) 'enables rules of law which can fill gaps or weakness in the law which might otherwise be left by the operation of custom or treaty', and (ii) 'provides a background of legal principles in the light of which custom and treaties have to be applied and as such it may act to modify their application'. See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edition, Oxford University Press 1992) 40. See also Hall (n 62) 192-196.

[65] See Anthony D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 (2) *The American Journal of International Law* 211, 220. While D'Amato was here referring to 'statements of general customary rules', rather than general principles themselves, his reasoning is nevertheless relevant and used by analogy.

[66] Boyle and Chinkin (n 64) 293.

[67] Subject to Article 59 of the ICJ Statute, Article 38 (1) of the same Statute provides that 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Yet, the fact that no doctrine of precedents exists in international law, does not mean that the decisions of international courts or tribunals have no significance in practice. As Boyle and Chinkin point out:

> international courts and tribunals do more than apply the law. […] they are also part of the process for making it. In some cases, this involves affirming the law-making effect of multilateral agreements, UN resolutions, ILC codification or other products of the international law-making process […] in other cases, judges have drawn upon a rather broader legal basis for their decisions, and articulated rules and principles of law that can only be described as novel and are not necessarily supported by evidence of general state practice or *opinio juris*.[68]

Yet, for as long as States do not decide otherwise, jurisprudence still lacks a precedential value in international law. Against this backdrop, this thesis uses jurisprudence merely as a support of the argumentation in its legal analysis.[69]

1.6 **Outline**

This thesis is divided into four parts. Part I serves as an introduction to the thesis and is comprised of only one (this) chapter (Chapter 1 – Introduction).

Part II sets the scene for the main discussion and contains three chapters (Chapters 2, 3 and 4). Chapter 2 offers a factual background to the legal regime discussed at the later stage. In particular, this chapter identifies and explains the different risks associated with ships in peril and shipwrecks, and the different interests thereby affected, including the interests of coastal States. Chapter 3 then outlines the basic features of State jurisdiction, including coastal State jurisdiction, under general international law and under the LOSC, which serves as an underlying constitutional framework to the legal regime discussed in the main part of the thesis. Chapter 4 concludes the setting the scene part by providing an overview of the mandate of the IMO, including in the context of the so-called 'rules of reference' as used in the LOSC. The chapter concludes with the IMO's institutional structure and decision-making process.

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[68] Boyle and Chinkin (n 64) 310. See also D'Amato (n 65) 215.

[69] D'Amato uses the court's reasoning in its own legal analysis. In his words, 'a specific decision is the agency which gives life and shape to methods of legal analysis'. See Anthony D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law' (1970) *Northwestern University School of Law Scholarly Commons, Faculty Working Papers,* Paper 128, 1, available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/128> accessed 2 May 2019.

Part III is dedicated to the discussion on the research questions posed in the thesis. In exploring these questions, the thesis in essence takes a scenario-based approach built on the two main factors: first, the physical state of a ship (ships in peril that are still afloat in contrast to shipwrecks, i.e. ships that have touched the seabed by either sinking or getting stranded) and second, the location of a measure taken by the coastal State in relation to ships in peril and shipwrecks. When it comes to the second factor, the thesis distinguishes between maritime zones beyond territorial sovereignty on the one hand (high seas, exclusive economic zone, continental shelf) and the area under territorial sovereignty on the other hand (territorial sea, ports, internal waters, archipelagic waters). It is these two factors that essentially explain the key legal challenges and controversies associated with the current legal regime observed in the thesis and the way such a regime has been developing since the *Torrey Canyon* accident.

Against this backdrop, chapters 6 and 7 discuss coastal State jurisdiction over ships in peril. The former is concerned with maritime zones beyond territorial sovereignty, while the latter focuses on the area under territorial sovereignty. Chapter 8 discusses coastal State jurisdiction over shipwrecks. In contrast to the scenarios of ships in peril, the scenarios of shipwrecks in the area under territorial sovereignty do not call for legal discussion, the extent of which would merit a separate chapter. Accordingly, chapter 8 discusses coastal State jurisdiction over shipwrecks in both areas beyond and under territorial sovereignty, distinguishing between these by way of different sections (rather than chapters).

While chapters 6-8 are focused on both the current state of international law and its evolving component, these chapters are relatively long. To make the thesis more readable, part of the discussion on the way international law has been evolving since the *Torrey Canyon* is contained in a separate chapter – chapter 5, which in this respect offers preliminary observations to chapters 6-8. It explores and explains the transition from the secondary to primary norms of international law (from the plea of necessity to the right of intervention) and already at this stage indicates the legal controversies associated with the presence or absence of territorial sovereignty in different maritime zones.

Part IV concludes the thesis with chapter 9 – Conclusions.

PART II

SETTING THE SCENE

2 Risks Posed and Interests Affected by Ships in Peril and Shipwrecks

2.1 Introduction

This thesis is about the legal regime governing coastal State jurisdiction over foreign ships in peril and shipwrecks. As indicated in the previous chapter, the regime relevant to this topic is comprised of the LOSC and a number of different IMO instruments, the content of which will be discussed in the subsequent chapters of the thesis. In order to provide a better understanding of why there is a need for a legal regime in the first place, this chapter will identify and clarify the different risks associated with foreign ships in peril and shipwrecks, as well as various competing issues that might arise from such events, which explain the tensions that characterize the underlying dynamic of the current legal regime. This tension may in fact point at the potential for international disputes in instances where the regime does not provide more than vague and ambiguous solutions. Against this backdrop, the aim of this chapter is to provide a factual background to guide a legal discussion at the later stage.

2.2 Risks Posed by Ships in Peril and Shipwrecks

2.2.1 Oil Pollution

The vulnerability of coastal States to oil spills is a well-known risk associated with ships in peril and shipwrecks. A considerable number of accidents that have occurred in the past and the disastrous consequences thereby caused have ensured that oil pollution risks are today perceived as 'unprofessional and unacceptable'.[70] The accident of the *Torrey Canyon* is commonly used to illustrate the starting point of this perception. That vessel was a super tanker carrying 120 000 tons of heavy crude oil en route from Kuwait to Wales. On 18 March 1967, the ship ran aground while located some 16 nm off the southwest coast of England. The ship

[70] The expression is borrowed from Gold. See Edgar Gold, *Gard Handbook on Protection of the Marine Environment* (3rd edition, GARD 2006) 115.

broke its hull and immediately spilled into the sea around 30 000 tons of oil, thereby creating an 8 miles long oil slick, which turned into a 20 miles long slick in only a couple of hours.[71]

At the time of the *Torrey Canyon* accident, States did not have any experience with pollution of this magnitude. As a result, it was not known how to best respond to the problem. Around 14 000 tons of oil initially came ashore and the UK Government spread onto it some 10 000 tons of what was at the time called 'detergents'. However, these were highly toxic chemicals and their use soon proved to be both ineffective and devastating as they increased the damage.[72] The ship eventually broke in two and its entire cargo of 120 000 tons of crude oil spilled into the sea. In an attempt to burn off oil and prevent the further spreading of pollution, the UK bombed the ship. However, this was not very successful either and ultimately, more than 200 km of the British and the French coast was polluted.[73]

The *Torrey Canyon* is still considered to be 'the UK's worst environmental accident'.[74] Even 50 years later, images of beaches covered with oil released from this accident often appear in media.[75] These kind of images were brought into sharp focus by a number of other subsequent oil spills too, such as the accidents of the *Amoco Cadiz* and the *Prestige*.

The *Amoco Cadiz* was a tanker carrying 223 000 tons of crude oil en route from the Persian Gulf to Rotterdam, the Netherlands. On 16 March 1978, the ship ran into a heavy storm and developed a steering gear failure, as a consequence of which it drifted towards the Breton coast off France. Despite the various attempts to assist the ship, it eventually ran aground on Portsall Rocks, close to the port of Portsall, France, releasing into the sea its entire cargo and around

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[71] Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 36; Suzane Hawkes and Michael M'Gonigle, 'A Black (and Rising?) Tide: Controlling Maritime Oil Pollution in Canada' (1992) 30 (1) *Osgoode Hall Law Journal* 165, 180; Gold (n 70) 118; Steven Rares, 'Ships that Changed the Law – the *Torrey Canyon* Disaster', 1-5. This paper was presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017, available at <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171005> accessed 31 October 2019.

[72] Stephen Hawkins et al, 'From the *Torrey Canyon* to Today: a 50 Year Retrospect of Recovery from the Oil Spill and Interaction with Climate-Driven Fluctuations on Cornish Rocky Shores', 6. This abstract was presented at the 2017 International Oil Spill Conference and is available at the official web site of the ITOPF, <https://www.itopf.org/fileadmin/data/Documents/Papers/IOSC17_Hawkins.pdf> accessed 31 October 2019.

[73] For more on the *Torrey Canyon* accident, and the UK's reaction to this, see Patrick Griggs, '"Torrey Canyon", 45 Years On: Have We Solved All the Problems?' in Baris Soyer and Andrew Tettenborn (eds), *Pollution at Sea: Law and Liability* (Informa 2012) 3-5.

[74] Colin de la Rue, 'Shipping and the Environment – An Overview', available at <http://www.colindelarue.com/overview/> accessed 31 October 2019.

[74] Aage Thor Falkanger, *Maritime Casualties and Intervention* (Fagbokforlaget 2011) 20.

[75] In 2017, the BBC remembered 'the day the sea turned black' with a number of images from the *Torrey Canyon* disaster. See BBC News, 'Torrey Canyon Oil Spill: The Day the Sea Turned Black', available at <https://www.bbc.com/news/uk-england-39223308> accessed 31 October 2019.

4 000 tons of bunker-fuel. The accident caused pollution of approximately 360 km of the French coastline.[76]

A similar disaster happened with the *Prestige*, a tanker that was carrying 77 000 tons of heavy fuel oil en route from St. Petersburg, Russia to Singapore via Gibraltar. On 13 November 2002, while in the area of the Cape Finisterre, off the coast of Galicia, Spain, it ran into heavy seas and strong winds and developed a 30 degree starboard list.[77] The engine failure, coupled with bad weather conditions, caused the ship's drifting and after some time, while located some 130 nm off the Spanish coast, the ship broke in two. Around 63 000 tons of oil spilled into the sea, polluting around 2 900 km of the Spanish, French and Portuguese coastline.[78] If compared to the *Amoco Cadiz* accident, the quantity of oil released into the sea was considerably lower (63 000 tons compared to 227 000 tons). Yet, the length of the coastline polluted was significantly higher (2 900 km compared to 360 km), which clearly indicates that the amount of pollutant released into the sea is not in itself the only relevant factor to predict or assess the seriousness of potential or actual damage. Other key factors include the vicinity to the coast, the vulnerability of the area concerned, mitigating efforts, weather, currents, and tides.

The accident of the *Exxon Valdez* (1989), for example, happened in the vicinity of some of the USA's most pristine coastline. This tanker was carrying 180 000 tons of crude oil when it ran aground on Bligh Reef in Prince William Strait, Alaska, spilling around 40 000 tons of oil into the sea and thereby causing pollution of approximately 2 000 km of the coastline.[79] The *Hebei Spirit* (2007) released some 11 000 tons of heavy crude oil, after being hit by a drifting barge in front of the Port of Incheon, South Korea. The released oil contaminated around 375 km of the nearby shore.[80]

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[76] CEDRE, *Amoco Cadiz*, available at <https://wwz.cedre.fr/en/Resources/Spills/Spills/Amoco-Cadiz> accessed 31 October 2019; ITOPF, *Amoco Cadiz*, available at <http://www.itopf.com/in-action/case-studies/case-study/amoco-cadiz-france-1978/> accessed 31 October 2019. See also Chao Wu, *Pollution from the Carriage of Oil by Sea: Liability and Compensation Issues* (Springer 1996) 133; Archie Bishop, 'Law of Salvage' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume II Shipping Law* (Oxford University Press 2016) 488-489.

[77] CEDRE, *Prestige*, available at <https://wwz.cedre.fr/en/Resources/Spills/Spills/Prestige> accessed 31 October 2019.

[78] Ibid. See also Veronica Frank, 'Consequences of the Prestige Sinking for European and International Law' (2005) 20 *The International Journal of Marine and Coastal Law* 1; European Parliament, 'Resolution on Improving Safety at Sea P5_TA (2004)0350 dated 21 April 2004' (2004) C 104 E/730, *Official Journal of the European Union*, para 2, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P5-TA-2004-0350&language=EN> accessed 15 January 2020.

[79] Gold (n 70) 97-98; CEDRE, *Exxon Valdez*, available at <https://wwz.cedre.fr/en/Resources/Spills/Spills/Exxon-Valdez> accessed 31 October 2019.

[80] Hu James Zhengliang 'Legal Issues from the Hebei Spirit Oil Spill' in Michael Faure et al (eds), *Maritime Pollution Liability and Policy. China, Europe and the U.S.* (Wolters Kluwer 2010) 400; CEDRE, *Hebei Spirit*, available at <http://wwz.cedre.fr/cedre_en/Resources/Spills/Spills/Hebei-Spirit> accessed 31 October 2019.

Although images of beaches covered with oil may commonly first capture one's attention, the heaviest (financial) claims usually derive from industry – particularly fisheries and coastal amenities.[81] These claims relate to, *inter alia*, physical damages, seafood contamination and disruption of business activities. Oil, for instance, may create direct damage to fishing boats and fishing equipment such as buoys, lift nets, cast nets and fixed traps.[82] Oil may also contaminate seafood – either physically or through tainting (which gives the food an oil-derived taste or smell).[83] These damages may further impact the economy. For example, certain products may be withdrawn from the market or be subject to a significant price reduction. Loss of marketability in general could also be the case as consumers may become reluctant to buy seafood from the affected area or the nearby area, even though such food may not in fact be contaminated. Damages and losses associated with fishing activities may appear particularly upsetting for communities that heavily rely on these activities for their income.

The fishing industry was greatly affected in the UK and France after the *Torrey Canyon* disaster.[84] The same was the case with the oil spill from the *Amoco Cadiz*. Oyster cultivation was so damaged following the *Amoco Cadiz* that approximately 9 000 tons had to be immediately destroyed.[85] As a consequence of the *Prestige* accident, fishing in Galicia was banned along approximately 90% of that coastline, for almost a year.[86] In the case of the *Hebei Spirit*, around 128 000 individuals (mainly those working in the fishing sector) submitted claims for economic losses, and seaweed cultivation was claimed to be damaged across thousands of hectares.[87]

Oil spills may have a considerable impact on marine biodiversity. They may cause mortality of animals and plants, or influence their behavior, feeding, growth, respiration, movement and

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Referring to the *Hebei Spirit*, one observer explains: 'at the coast you normally see a mass of blue-green broken up by white […] what struck us was there was only black as far as the eye could see'. SKULD news, available at <https://www.skuld.com/topics/casualties/hebei-spirit/Fighting-Spirit---Handling-the-Hebei-Spirit-incident/> accessed 31 October 2019. See also ITOPF, *Hebei Spirit*, available at <http://www.itopf.com/in-action/case-studies/case-study/hebei-spirit-republic-of-korea-2007/> accessed 31 October 2019.

[81] ITOPF, 'Effects of Oil Pollution on Fisheries and Mariculture', 7, available at <https://www.itopf.org/fileadmin/data/Documents/TIPS%20TAPS/TIP_11_Effects_of_Oil_Pollution_on_Fisheries_and_Mariculture.pdf> accessed 31 October 2019.

[82] This was for instance the case with the accident of the *Hebei Spirit*. See Jose Maura, 'Current IOPC FUND Issues', 2, available at <http://www.interspill.org/previous-events/2012/13-March/pdfs/Current%20IOPC%20Fund%20Issues.pdf> accessed 31 October 2019.

[83] ITOPF (n 81) 4.

[84] M'Gonigle and Zacher (n 71) 36.

[85] ITOPF, *Amoco Cadiz*, available at <http://www.itopf.com/in-action/case-studies/case-study/amoco-cadiz-france-1978/> accessed 31 October 2019.

[86] ITOPF, *Prestige*, available at <http://www.itopf.com/in-action/case-studies/case-study/prestige-spainfrance-2002/> accessed 31 October 2019.

[87] Maura (n 82) 2-3.

reproductive functions.[88] Species that live at the surface, such as seabirds and turtles, are particularly vulnerable to coating, while seaweeds and shellfish are extremely sensitive to smothering and toxicity.[89] As a result of the *Amoco Cadiz* accident, marine life was reported to be significantly affected, with millions of dead specimens. According to some records, one of France's most highly prized sea bird sanctuaries was eradicated following that accident, just at the time when its sea bird population had started to recover from the *Torrey Canyon* oil spill.[90]

Oil spills may also produce significant damage to corals and coral reefs, which may be vulnerable to coating at low tide (when they are exposed to air).[91] Coral reefs may also be damaged by the toxic components of oil. Risks of damage to corals and coral reefs may be particularly problematic in the West Pacific Ocean, which is known for its Coral Triangle, a marine area located between Indonesia, Malaysia, the Philippines, Papua New Guinea, Timor Leste and Solomon Islands famous for nearly 600 different species of reef-building corals.[92] The Coral Triangle is home to a very rich marine ecosystem, including six of the world's seven marine turtle species and more than 2 000 species of reef fish. It is also known for large populations of commercially significant tuna.[93] More than 120 million people rely on the coral reefs of the Coral Triangle in many ways, such as for food and income.[94]

A recent oil spill caused by the accident of the bulk carrier *Solomon Trader* (2019) may illustrate the problem.[95] The *Solomon Trader* ran aground while loading bauxite ore in Kangaya Bay, Rennell Island, Solomon Islands.[96] While the official investigation into the accident is still ongoing, it is reported by the media that the area affected is very vulnerable in terms of its

[88] ITOPF (n 81) 2. See also Gold (n 70) 95.
[89] ITOPF (n 81) 2.
[90] M'Gonigle and Zacher (n 71) 34. A harmful impact that oil pollution may have on seabirds is associated with the fact that a significant number of these species are threatened with extinction. See GESAMP, 'Reports and Studies No. 6, Impact of Oil on the Marine Environment', available at <http://www.gesamp.org/data/gesamp/files/media/Publications/Reports_and_studies_06/gallery_1222/object_1223_large.pdf> accessed 31 October 2019. As far as the *Torrey Canyon* accident is concerned, the population of a specific species – the hermit crab (*Clibanarius eruthropus*) – was reported to be severely impacted. See Hawkins et al (n 72) 12.
[91] Gold (n 70) 101.
[92] WWF, available at <https://www.worldwildlife.org/places/coral-triangle> accessed 31 October 2019.
[93] Ibid. See also Michael Barrett and Patrick Halpin, 'Potentially Polluting Shipwrecks, Spatial Tools and Analysis of WWII Shipwrecks' (Masters project submitted in partial fulfillment of the Master of Environmental Management degree, Nicholas School of the Environment, Duke University 2011) 6.
[94] WWF, available at <https://www.worldwildlife.org/places/coral-triangle> accessed 31 October 2019.
[95] News available at <https://www.afp.com/en/news/826/stricken-ship-refloated-after-solomons-oil-spill-doc-1gd0l71> accessed 31 October 2019. See also gCaptain, available at <https://gcaptain.com/australia-sends-more-help-for-solomon-islands-oil-spill/> accessed 31 October 2019; Safety4Sea, available at <https://safety4sea.com/solomon-trader-oil-spill-worse-than-first-thought/> accessed 31 October 2019.
[96] News available at <https://www.afp.com/en/news/826/stricken-ship-refloated-after-solomons-oil-spill-doc-1gd0l71> accessed 31 October 2019.

ecological composition, and that the local population relies heavily on subsistence fishing in this area.[97]

Finally, an important impact of oil spills relates to human health. Certain types of oil have been reported to have carcinogenic effects. This is the case with heavy fuel oils as they contain a considerable proportion of polycyclic aromatic hydrocarbons (PAHs). The proportion of PAHs is lower, and hence less carcinogenic, in light crude oils. Nonetheless, light crude oils are still reported to be problematic due to their acute toxicity or tainting effect.[98]

2.2.2 Harmful Substances Other than Oil

While risks posed by ships in peril and shipwrecks are predominantly associated with oil pollution, it is to be noted that substances other than oil (carried by ships) may also produce harm to coastlines and the marine environment. The list of these substances is kept with a UN advisory body (the Group of Experts on Scientific Aspects of Marine Environmental Protection, i.e. GESAMP), which provides profiles for different kinds of hazardous chemicals (the GESAMP Hazard Profiles).[99] These profiles are then used by the IMO to establish adequate requirements for the safe transport of dangerous goods in accordance with the relevant provisions of the SOLAS[100] and the MARPOL.[101] There are more than 2 000 harmful substances other than oil, many of which may be found listed in the various IMO codes.[102]

Compared to oil spills, accidents that involve harmful substances other than oil are rare. Yet, once they occur,[103] the consequences may be fatal due to the inherent properties such as toxicity, infection, explosivity, radioactivity, corrosivity, reactivity. Spills or releases of these substances

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[97] UNESCO, 'Concern for Oil Spill Near East Rennell, Solomon Islands, in Central Pacific' of 4 March 2019, available at <https://whc.unesco.org/en/news/1938> accessed 31 October 2019. It is to be noted that the East Rennell is inscribed on the World Heritage List and is the largest raised world's coral atoll.

[98] ITOPF (n 81) 5.

[99] See the most recent 'GESAMP Composite List 2019', available at <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/ChemicalPollution/Documents/GESAMP%20Composite%20List%20of%20hazard%20profiles-2019.pdf> accessed 11 March 2020.

[100] See Chapter VII (Carriage of Dangerous Goods) of the SOLAS.

[101] The 1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol, as amended (the MARPOL). See Annex II (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form).

[102] Of relevance are, for example, the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, as amended; the International Maritime Dangerous Goods Code, as amended; the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, as amended; the International Maritime Solid Bulk Cargoes Code, as amended.

[103] It has been reported that accidents involving packed HNS are usually the result of misdeclared goods, poor packing and labeling, incorrect stowing. See ITOPF, 'Are HNS Spills More Dangerous Than Oil Spills?', 21. This paper was prepared by Dr. Karen Purnell for the Interspill Conference & the 4th IMO R&D Forum, Marseille, May 2009.

into the sea or into the atmosphere may thus be more dangerous than oil spills.[104] The accident of the *Cason* (1987) illustrates the point.[105] It was a cargo ship loaded with 1 100 tons of packed hazardous substances, composed of products of flammable properties (xylene, butanol, butyl acrylate, cyclohexanone, sodium), toxic properties (anilin oil, diphenyl-methan, o-cresol, dibutyl phtalate) and corrosive properties (phosphoric acid, phthalic anhydride). The ship caught fire after containers with sodium came into contact with seawater. 23 out of 31 crew members died. As a result of subsequent explosions, the ship was completely destroyed and around 15 000 people within a 5 mile radius of Cape Finisterre (Galicia, Spain) were evacuated.

Another example is a more recent accident involving the *Maersk Honam* (2018), an ultra-large container ship that caught fire on 6 March 2018 in the Arabian Sea while en route to the Mediterranean Sea via the Suez Canal. The ship was carrying 7 860 containers partly comprised of dangerous goods.[106] After the fire was extinguished, the ship was brought to the port of Jebel Ali, Dubai, United Arab Emirates, where the offloading of containers was safely completed.[107] By then, five crew members had already lost their lives in the fire.[108]

2.2.3 Ship's Hull, rather than Substances Carried on Board

A ship itself may prove hazardous, irrespective of any hazardous effects of substances carried on board. Corals and coral reefs, for instance, may be damaged by virtue of a physical contact with a ship, which may occur if a ship is sunken or stranded.[109] Once damaged, coral reefs are prone to erosion if the living coral is damaged.[110] Apart from environmental concerns, a sunken or a stranded ship may have an impact on the economic interests of the coastal State. For instance, it may pose a hazard to fishing activities,[111] by damaging fishing nets or snagging them to the extent that it causes fishing boats to sink.[112] Moreover, a sunken or a stranded ship

[104] ITOPF (n 81) 21.
[105] CEDRE, *Cason*, available at <http://wwz.cedre.fr/en/Resources/Spills/Spills/Cason> accessed 31 October 2019. See also ITOPF, available at <https://www.itopf.org/fileadmin/data/Documents/Papers/interspill09_hnsappendix.pdf> accessed 31 October 2019.
[106] GCaptain, available at <https://gcaptain.com/fire-damaged-maersk-honam-headed-jebel-ali/> accessed 31 October 2019.
[107] GCaptain, available at <https://gcaptain.com/fire-stricken-maersk-honam-to-be-rebuilt-in-south-korea/> accessed 31 October 2019.
[108] Maersk Press Release of 26 September 2018, available at <https://www.maersk.com/news/2018/09/26/maersk-implements-new-guidelines-on-dangerous-goods-stowage> accessed 31 October 2019.
[109] Gold (n 70) 102.
[110] Gold (n 70) 101.
[111] Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 2 *Lloyd's Maritime and Commercial Law Quarterly* 110.
[112] The UK's Marine Accident Investigation Branch (MAIB) reported in 2010 it was aware of 36 accidents that involved fishing boats having capsized or sunk after snagging their fishing gear on different kinds of materials,

may affect the offshore interests and obstruct drilling activities; create obstructions in the laying of pipelines and communication cables;[113] and, depending on its location, spoil the aesthetics of the surrounding environment and thus further affect tourism or simply pose a disturbance to the local population.[114]

As far as a ship in peril is concerned, it may obstruct navigation and pose a hazard to ships passing by, albeit this kind of obstruction is usually of a temporary character. Once the ship touches the bottom of the seabed, the obstruction may become permanent. An example is the accident of the *Tricolor* (2002) – a car carrier that collided with another ship while en route from Zeebrugge, Belgium to Southampton, the UK.[115] The casualty took place in a very busy shipping area in the English Channel, within the French exclusive economic zone (EEZ). Following the collision, the *Tricolor* sank. Given that the *Tricolor* was a car carrier, there was no major risk of oil pollution, save for the bunker oil which was soon removed from the tanks. The problem, however, was the location of the sinking because the breadth of the ship was almost the same as the depth of the water.

The *Tricolor* sank in a very busy area and thus posed a serious navigational risk. In fact, two vessels subsequently collided with the wreck and there were several further near-collisions.[116] This happened despite the fact that the French authorities issued navigational warnings and marked the wreck accordingly. A similar situation occurred with the *Assi Eurolink* (2003) and the *Baltic Ace* (2012), both car carriers. The *Assi Eurolink*, for instance, sank in a position that left only 25 m between the wreck and the sea surface. This was 4 m shorter than the 29 m

including sunken and stranded ships, on the seabed. See MAIB Report No 5/1010 of April 2010. At the same time, one needs to appreciate that a sunken or stranded ship may also present an opportunity for rich fishing. See Dromgoole and Forrest (n 111) 110.

[113] For example, a wreck of an 18th century merchant ship obstructed the laying of a pipeline in the gas field off the coast of Norway and the wreck was consequently excavated. See Fredrik Søreide and Marek E Jasinski, 'Ormen Lange: Investigation and Excavation of a Shipwreck in 170m Depth', available at <https://www.academia.edu/2056561/Ormen_Lange_Investigation_and_excavation_of_a_shipwreck_in_170m_depth> accessed 17 January 2020.

[114] In the case of the *Server* (2007), a ship that ran aground in the vicinity of the Norwegian west coast, the Norwegian Coastal Authorities issued a wreck removal order arguing that the shipwreck posed a risk to the marine environment. Following upon the appeal submitted by the owners, the Norwegian Ministry of Fisheries and Coastal Affairs upheld the wreck removal order but changed the legal basis reasoning that the shipwreck of the *Server* was unsightly. The point to be made here is that the coastal State may wish to do something about a shipwreck for a mere aesthetic reason. See GARD news, available at <http://www.gard.no/web/updates/content/23043357/the-saga-of-the-server> accessed 31 May 2019.

[115] Marine Insight, available at <http://www.marineinsight.com/maritime-history/worst-maritime-accidents-the-tricolor-cargo-ship-accident/> accessed 31 October 2019.

[116] GARD news, available at <http://www.gard.no/web/updates/content/51625/tricolor-the-collision-sinking-and-wreck-removal> accessed 31 October 2019.

guaranteed depth for safety navigation in that area.[117] The *Baltic Ace* (2012)[118] sank some 27 nm off the Dutch coast, in a position which left only 6 m between the wreck and the sea surface.[119] These examples all concern ships that sank beyond the limits of the territorial sea, where the coastal State lacks territorial sovereignty.[120] However, navigational obstructions mostly occur within the territorial sea as it is these waters that are typically shallow, as opposed to normally deep waters beyond the limits of the territorial sea.[121]

Ultimately, it is to be noted that a ship which poses a navigational obstruction may at the same time create a risk to the marine environment, and to the coastline and related interests of the nearby coastal States. Even if a ship itself is free of any oil or other harmful substances, another ship (perhaps carrying oil or other harmful substances, but in all cases, carrying bunker-fuel) may collide with it. Furthermore, a ship may create a navigational hazard and at the same time obstruct entry to a port and thus cause disruption of economic activities.

2.3 **Interests of the Coastal State and Conceivable Measures of Protection**

Ships in peril and shipwrecks may pose a number of socio-economic and environmental risks to the nearby coastal State and may accordingly be seen as a problem in relation to which the coastal State may wish to claim its jurisdictional powers by taking certain measures of protection. There is a variety of measures that the coastal State could possibly want to take in this respect and there are various ways to categorize those measures. One way is to make a distinction on the basis of whether the coastal State decides to tow a ship further out to open

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[117] See 'Hydro International, Multiple Survey and Positioning Techniques for MV ASSI EUROLINK, Wreck Monitoring in Dredging Operations', available at <https://www.hydro-international.com/content/article/wreck-monitoring-in-dredging-operations?output=pdf> accessed 31 October 2019. For more on legal issues associated with the incident of the *Assi Eurolink* see Vivian van der Kuil, 'Limitation of Liability for Maritime Claims and Politics' in Cedric Ryngaert et al (eds), *What's Wrong with International Law?* (Brill Nijhoff 2015) 89-90.

[118] Lloyds, 'The Challenges and Implications of Removing Shipwrecks in the 21st Century', 13, <https://www.lloyds.com/~/media/lloyds/reports/emerging%20risk%20reports/wreck%20report%20final%20version%20aw.pdf> accessed 31 October 2019.

[119] GCaptain, available at <https://gcaptain.com/baltic-ace-salvage-suffers-major-setback/> accessed 31 October 2019.

[120] The legal regime of maritime zones, including the EEZ, are addressed in chapter 3 of the thesis.

[121] A few shipwrecks may be given as examples. For instance, the *MSC Chitra* (2010) was a container ship that ran aground off the port of Mumbai (India). See LOS Marine & Engineering Consultants, 'Report on the Comparisons between Rena and Other Wreck Removal Operations in recent Years', available at <http://www.crownlaw.govt.nz/assets/Uploads/Reports/wreck-removal-report-3.pdf> accessed 31 October 2019. Another example is the *Alfa I* (2012), a tanker that hit the submerged wreck of the *City of Mykonos* (even though the wreck was marked) and became a shipwreck itself. This happened in the Elefsis Bay, close to Piraeus (Greece). The *Alfa 1* suffered hull damage and consequently sank, with the stern lying on the seabed, and bow being above the water. See IOPC FUND Report, 'Incidents 2013', available at <http://www.iopcfunds.org/uploads/tx_iopcpublications/incidents2013_e.pdf> accessed 31 October 2019.

sea or closer to its shore. This will mostly be of relevance when it comes to ships in peril, rather than shipwrecks.

To give an example, in the case of the casualty of the *Christos Bitas* (1978),[122] the ship was ordered to be towed further out to open sea to be sunk some 300 nm off the Irish coast. A similar situation happened with the *Prestige* accident. The Spanish authorities, afraid of pollution in their 'backyard', requested the ship to be towed out to open sea. It is worthwhile mentioning already at this stage that the decision of the Spanish authorities was received by the shipowner and the salvor with great disagreement as they were of the opinion that the ship needed to be brought to a place of refuge in order to prevent a catastrophe.[123]

The coastal State may indeed take a different approach and instead of pushing the ship far from its coast, it may rather bring it closer. The accidents of the *Modern Express* (2016) and *Sea Empress* (1996) may be used as examples to illustrate this.[124] The *Modern Express*, for example, was brought to the Spanish port of Bilbao to stabilize its conditions after developing a severe list. The *Sea Empress*,[125] on the other hand ran aground outside the port of Milford Haven, Wales, UK. Around 2 500 tons of oil was immediately spilled into the sea and the Port Authority was in doubt whether to order the ship to be towed further to open sea or not. While the initial plan was to take the ship out to sea, the plan soon changed as the ship lost further 69 300 tons of oil. It was finally decided that the ship was to be refloated and brought to Milford Haven for a discharge of the remaining cargo.[126]

While bringing the ship closer to shore may indeed be a conceivable measure that the coastal State could possibly take as a way of protection against the risk posed by a given ship, it needs to be emphasized at the same time that bringing a ship closer to shore by no means gives a guarantee that a catastrophe, or less severe damage, will in fact be prevented. In the case of the *Tribulus* (1990), Ireland offered a place of refuge, although the ship subsequently caused

[122] Richard Shaw, 'Places of Refuge – International Law in the Making?' in *CMI Yearbook 2003* (Comite Maritime International 2003) 329; Aage Thor Falkanger, *Maritime Casualties and Intervention* (Fagbokforlaget 2011) 18.
[123] Hans van Rooij, 'Defending the Salvor's Freedom of Action'. This paper was prepared for the International Marine Claims Conference held in Dublin, 26-28 October 2005. Van Rooji delivered this paper in his capacity as President of the International Salvage Union.
[124] EU – EEA Member States, Table Top Exercise on the EU Operational Guidelines – Places of Refuge, NCA CHEM, Horten, Norway, Exercise Report, October 2017, 22.
[125] Colin de la Rue and Charles B. Anderson, *Shipping and the Environment* (2nd edition, Informa 2009) 914-915; ITOPF, available at <http://www.itopf.com/in-action/case-studies/case-study/sea-empress-milford-haven-wales-uk-1996/ > accessed 31 October 2019.
[126] De la Rue and Anderson (n 125) 914-915.

pollution in Bantry Bay. As a consequence of this, a few weeks later Ireland refused to grant a place of refuge to the *Toledo*, not to repeat the *Tribulus* scenario.[127]

Further categorization of measures can also be made on the basis of whether those measures result in further damage being caused to a ship. A speed reduction may be an example of a measure that does not cause any further damage, while bombing a ship, as was the case with the *Torrey Canyon*, is the opposite. Another example often used to illustrate the point is the accident of the *Wafra* (1971)[128] – a tanker that ran aground on a reef some 6 miles off the coast of South Africa. After being refloated, the ship was towed some 200 nautical miles to open sea and was finally bombed by the South African Forces, whereupon it sank. While destroying the ship would in principle go against the ship's interests, the shipowner of the *Wafra* did not oppose the measures taken by the African authorities. This is probably due to the fact that the commercial value of the ship was insufficient for the shipowner to have such interest.[129] The same could explain the absence of opposition on the side of the *Torrey Canyon*. At the same time, one must appreciate that such radical measures as bombing ships are no longer resorted to in present days.

A ship may also be deliberately beached. This was the measure that the UK decided to take with the *MSC Napoli* (2007),[130] a container ship that suffered a structural failure and developed a severe list during its voyage in the English Channel. In order to mitigate damage, taking into account the relevant environmental and navigational factors, the ship was beached after being brought into the sheltered waters of Lyme Bay and thereafter it was dismantled. As observed by Hugh Shaw, the former Secretary of State's Representative (SOSREP) in the UK:

> The strategy was unusual in that we deliberately grounded the ship in Lyme Bay to mitigate against a potentially far more serious situation. Once the vessel was in the shallow, sheltered waters of Lyme Bay, the salvage operation was infinitely more manageable. […] Failure to take action would have led to a significant risk of the vessel

[127] Aldo Chircop, 'Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 159. See also Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 215, fn 240.
[128] Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review* 514, 518.
[129] Palmer Cundick, 'Oil Pollution, Negotiation – An Alternative to Intervention?' (1972) 6 (1) *The International Lawyer* 34, 34. See also Cundick (n 128) 543; Falkanger (n 122) 21.
[130] UK's Report on the *MSC Napoli*, available at <https://www.gov.uk/government/news/tenth-anniversary-of-the-msc-napoli-shipwreck-disaster> accessed 31 October 2019.

sinking in the open seas of the English Channel which could have led to long term environmental consequences as well as navigational safety issues.[131]

In cases of sunken or stranded ships, conceivable measures may further be categorized based on whether ships are to be physically removed from or lowered further down into the seabed. An example of lowering the shipwreck further down into the seabed is the case with the *Assi Eurolink* which, as pointed out earlier in this chapter, decreased the guaranteed navigable depth by approximately 4 m.[132] The lowering of the shipwreck was done by dredging seabed sand from around the wreck so that the wreck could sink deeper.

As far as physical removal is concerned, there are different ways to remove a ship from the seabed such as for instance refloating a ship (and perhaps further towing it to a place of safety). This was the case with the sunken *Angeln* (2010),[133] a container ship that capsized and sank in the Caribbean Sea, some 3 nm off Saint Lucia. There are various ways to remove a ship from the seabed and one is a parbuckling method, which requires the use of leverage to get a ship in an upright position, so that a ship may be towed further. This was the case with the *Costa Concordia* (2012).[134] This is an expensive method, compared for instance to cutting up a ship *in situ*. However, the latter may assumingly have a greater impact on marine life as the noise may scare some species away. While technical aspects of methods employed for the purpose of dealing with sunken and stranded ships are outside the scope of this thesis, these examples nevertheless illustrate the existence of alternatives.

A ship may be removed from the seabed only partially, as was the case with a shipwreck of the *California*,[135] a bulk carrier that sank on 24 March 2006, following a collision in a busy traffic separation scheme of the Malacca Strait, some 11 nm off the Malaysian coast. Upon the removal of oil and other pollutants from the ship, the wreck was cut up and partially removed for the

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[131] UK Government, 'Tenth Anniversary of the MSC Napoli Shipwreck Disaster', press release of 18 January 2017, available at <https://www.gov.uk/government/news/tenth-anniversary-of-the-msc-napoli-shipwreck-disaster> accessed 31 October 2019.

[132] Van der Kuil (n 117) 89; Report on the *Assi Eurolink*, available at <http://www.maritimejournal.com/news101/industry-news/dredge_monitoring_gives_shipwreck_the_deep_six> accessed 31 October 2019. See also information available at <http://www.nautinst.org/en/forums/mars/search-all-mars-reports.cfm/assieuro> and <http://www.ecomare.nl/en/encyclopedia/man-and-the-environment/safety-at-sea/accidents-at-sea/tricolorassi-euro-link/> accessed 31 October 2019.

[133] RINA, 'Container ship *Angeln* Casualty', available at <https://www.rina.org.uk/Angeln_Accident.html> accessed 19 February 2020.

[134] GCaptain, available at <http://gcaptain.com/the-costa-concordia-parbuckling-in-pictures/> accessed 31 October 2019.

[135] Report on the removal of the wreck *California*, available at <http://www.crownlaw.govt.nz/assets/Uploads/Reports/wreck-removal-techniques.pdf> accessed 31 October 2019.

purpose of ensuring safety of navigation (leaving more space between the wreck and the sea surface).[136] Another example is the partial removal of the wreck of the *Riverdance* (2008) and the *TK Bremen* (2011).[137]

The risk posed by ships in peril and shipwrecks may also be dealt with by tackling the hazardous cargo and bunkers, rather than undertaking any measures directly with the ship itself. For example, oil can be pumped out from the ship. In practice, however, it would probably be hard to clean the ship in a way that guarantees no oil on board. Cargo may also be discharged in port facilities or through ship-to-ship transfer.

Lastly, measures of protection that the coastal State may possibly want to take can be distinguished on the basis of whether the coastal State wants to take certain measures on its own or give instructions to the ship.[138] For instance, the coastal State may give to the ship an order to navigate through a specific lane with a pilot on board or to remove a shipwreck from the seabed. At the same time, the coastal State may wish to take these measures on its own (through its contractors or public authorities).

2.4 **Interests of Actors Other than the Coastal State**

2.4.1 State Actors

As previous section demonstrated, there are a number of measures that the coastal State may wish to order or take – these are varied and context-specific. A ship in peril or a shipwreck may pose a risk to more than one coastal State. In this respect, measures taken by a particular coastal State to combat risks may be of interest to its neighbors. Depending on the circumstances of a given case, exercising coastal State jurisdiction in this respect may be in line with, or go against, the interest of the neighboring States.

As far as flag States are concerned, ensuring safety of navigation and the protection and preservation of the marine environment is in the interests of all States, including flag States. The latter, however, may lack the capacity to respond to accidents that require prompt reaction

[136] Ibid.

[137] Lloyds (n 118). See also report prepared by the UK's Marine Accident Investigation Branch (MAIB) on the *Riverdance*, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385635/RiverdanceSafetyFlyer.pdf> accessed 31 October 2019; The Atlantic, 'Salvaging the TK Bremen', available at <https://www.theatlantic.com/photo/2012/01/salvaging-the-tk-bremen/100231/> accessed 31 October 2019. See also ITOPF, available at <http://www.itopf.com/in-action/case-studies/case-study/tk-bremen-france-2011/> accessed 31 October 2019.

[138] Cundick (n 128) 553; Falkanger (122) 18-19.

if, for example, the accident is not located in the vicinity of the flag State.[139] Against this backdrop, the flag State could primarily have an interest to support the coastal State in taking certain measures of protection as identified and explained in the previous section, rather than taking these measures on its own.[140] At times, there may not be a sufficient incentive for the flag State to combat the risks posed by ships in peril or shipwrecks. This may be particularly relevant in the context of 'flags of convenience', which merits some further explanation.

Traditionally, flag States would have required a shipowner, master and a crew to be of the flag nationality in order for a ship to be entitled to fly that flag.[141] However, the traditional ship registry system has undergone considerable changes, given the emergence of 'open registries', also known as 'flags of convenience'.[142] These registries are usually not concerned about the nationality of the shipowner, master and crew. Rather, they operate on the 'convenience' basis, which is typically reflected in tax and manning advantages, and generally less stringent rules that make shipping more profitable and less burdensome.[143] As observed by Birnie and others, flag States of convenience 'have little or no connection with the shipping industry apart from offering the facility of an open register'.[144] Against this backdrop, the actual interest of the flag State in a given situation may be questioned.[145]

The interest of the flag State may also be reflected through the private interests of the shipowner, cargo owner and the ship's operator. They all aim for smooth operation, which implies no or limited interference from the coastal State, normally captured under the notion of freedom of navigation, which explains the main tension between flag and coastal States over matters discussed in this thesis. In practical and legal terms, the interest of the flag State in this respect

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[139] As Birnie et al explain, 'it is unrealistic to expect flag States themselves to maintain the capacity to respond to accidents including their vessels wherever they occur'. See Patricia Birnie et al (eds), *International Law and the Environment* (3rd edition, Oxford University Press 2009) 115.

[140] This, however, provided that both States have the same appraisal of the situation at stake. For more on the example of places of refuge, see Aldo Chircop et al, 'Characterising the Problem of Places of Refuge for Ships' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 23; Falkanger (n 122) 25.

[141] Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edition, Informa 2009) 277-278.

[142] Ibid. See also Alan Tan, *Vessel-Source Pollution* (Cambridge University Press 2006) 63-64.

[143] Mandaraka-Sheppard (n 141) 277-278; Birnie et al (n 139) 398.

[144] Birnie et al (n 139) 398. Falkanger explains that these States may at times be nothing more than a simple 'mailbox'. See Falkanger (n 122) 96.

[145] This does not go to say that the lack of an actual interest denies the existence of the flag State's legal interest that would stem from Article 91 (1) of the LOSC (ship is a national of a State whose flag it is flying). The emphasis here is on facts rather than law. However, the legal effect of Article 91 (1) could perhaps be questioned in the context of the 'genuine link' requirement. For more on the controversies regarding Article 91 (1) of the LOSC and the meaning of the 'genuine link' see Robin Churchill and Christopher Hedley, 'The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships' (2000) *International Transport Workers' Federation*, available at <http://orca.cf.ac.uk/45062/> accessed 31 October 2019.

mostly comes to light in the course of negotiations of regulations on shipping, or in the course or international disputes when the flag State brings the coastal State before an international court or tribunal for violation of the freedom of navigation.[146] These private interests thus merit some further clarification.

2.4.2 Shipowners, Cargo Owners and Charterers

Ships are made to navigate seas and oceans. If a ship runs into peril at sea, its ability to navigate is compromised. A shipowner may therefore have an interest in organizing or receiving assistance (e.g. salvage) to stabilize the conditions of the ship and continue with the voyage as initially planned. Even a sunken or stranded ship may be refloated and repaired, and thus brought back to service.[147]

The interest of a shipowner in getting assistance is both proprietary and commercial in nature. In terms of the former, a shipowner may obviously be concerned about preserving the property by preventing or minimizing damage to the ship's hull, machinery and equipment. In other words, the shipowner's interest may certainly go against the interest of the coastal State in taking measures of protection that create damage to the ship (e.g. bombing the ship). However, if the ship itself is already so damaged that no prospect of bringing the ship back to service exists,[148] the shipowner may probably wish to abandon the ship.[149] Sunken and stranded ships are seemingly more prone to abandonment than ships in peril, because of the sophisticated technology required to bring these ships back to surface and high expenses thereby incurred.[150]

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[146] The legal aspect of it will be explained throughout the thesis.

[147] See chapter 8 of the thesis (8.2.2.1.). A damaged part of the ship's hull may well be rebuilt and replaced with a new part. In the case of the *Maersk Honam*, the ship was cut into two parts and the section from midship to stern was rebuilt with a new forward section. See gCaptain, available at <https://gcaptain.com/fire-stricken-maersk-honam-to-be-rebuilt-in-south-korea/> accessed 31 October 2019. The ship has changed the name and now operates as *Maersk Halifax*. However, the ship retained the same flag (Singapore). See Vessel Finder, available at <https://www.vesselfinder.com/vessels/MAERSK-HALIFAX-IMO-9784271-MMSI-563030500> accessed 19 February 2020.

[148] In the law of marine insurance, as well as in practice, this situation is regularly referred to as an 'actual total loss' – a term that describes a ship which is completely destroyed or so damaged that it ceases to serve its purpose. See Marko Pavliha and Adriana Vincenca Padovan, 'The law of Marine Insurance' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume II Shipping Law* (Oxford University Press 2016) 629-631. See also Trine-Lise Wilhelmsen and Hans Jacob Bull, 'Handbook in Hull Insurance', Preliminary Edition for the New Course in Marine Insurance (Oslo 2007).

[149] An abandonment would probably not be the case if a shipowner is for some reason personally attached to the ship.

[150] The costs of the removal of the wreck of the *Costa Concordia* are estimated in the region of 1.3 billion US dollars and for the *Rena* wreck in the region of 450 million US dollars. See the official web site of the International Salvage Union (ISU), available at <http://www.marine-salvage.com/overview/wreck-removal/> accessed 31 October 2019.

The amount of expenses required for the purpose of assisting the ship are of importance in considering whether or not the shipowner actually wants to preserve the ship. If these expenses exceed the ship's value, even though the ship itself is not particularly damaged, the shipowner would probably show no interest in preservation of the ship.[151] The coastal State may well have an influence in this respect by imposing requirements that increase the expenses initially anticipated by the shipowner.

A shipowner is primarily interested in earning profit from the commercial exploitation of the ship. As a result, any interference which puts this prospect in danger goes against the shipowner's interest. If the nearby coastal State requires a ship to follow certain instructions such as navigating through a specific lane or at a lower speed, this could cause delays in delivery of goods and prevent the shipowner from fulfilling contractual obligations with third parties. Perhaps it could even prevent the earning of profit, or at least in the amount agreed upon. The same would be the case if the coastal State requires the shipowner to accept assistance on the basis of specific instructions that are both time-consuming and costly (e.g. requiring expensive technology or methods).

The commercial interests of a shipowner in having no interference from the coastal State also largely depend on the terms and conditions of a contract under which the ship operates. If it is a voyage charterparty,[152] the shipowner would normally earn profit upon the successful completion of the voyage.[153] This means that, if the ship runs into calamity at sea and depending on the circumstances of a given situation, the shipowner could have a strong interest in undertaking salvage assistance that would successfully enable the ship to stabilize its conditions as quickly as possible to fulfill its contractual obligation and to employ the ship for the next voyage. The shipowner would thus want to have no interventions from the coastal State, which would put the commercial interests of the ship at risk, other than perhaps allowing the ship to proceed to a place of refuge.

[151] In the law of marine insurance, as well as in practice, this situation is regularly referred to as a 'constructive total loss'. See Pavliha and Vincenca Padovan (n 148) 629-631.

[152] A voyage charterparty means that a person in charge of the ship undertakes to carry certain cargo on a particular voyage (normally identified in the contract by way of specification of the loading port/terminal and the discharging port/terminal), or a certain number of voyages. See BIMCO sample, LNGVOY, boxes 7-10. See also The Institute of Chartered Shipbrokers, *Dry Cargo Chartering* (Witherby&Co Ltd 2006) 73-79. For the insurance perspective see Susan Hodges, *Law of Marine Insurance* (Cavendish Publishing Limited 1996) 51.

[153] Paul Todd, *Contracts for Carriage of Goods by Sea* (BSP Professional Books 1988) 67. See also Anthony Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers 2012) 47. However, it is to be noted that, given the freedom of contracts, parties to a contract may agree on different terms and conditions.

If the ship is in time charter,[154] with an 'off-hire' clause, the shipowner would normally be prevented from earning the profit ('hire') for the 'time lost', which time is usually defined in the contract by reference to a specific course of events, such as an accident on board a ship (e.g. engine failure) that requires a ship to stop and take certain assistance.[155] This means that a shipowner would have a strong interest in salvage operations taking place as quickly as possible, to minimize 'time lost', and in that respect to have no interference from the coastal State that would cause delays.

While the shipowner may indeed want to have no interference from the coastal State whatsoever, it may also be, depending on the circumstances of a given case, that the shipowner wants to cooperate with the coastal State for the purpose of bringing the ship to a safe port or anchor (place of refuge), as previously mentioned. This way the ship may stabilize its conditions and undertake salvage assistance in a sheltered environment, rather than in rough and open seas, where the conditions of the ship may cause further damage to the vessel, nearby coastal States, industry and the environment. In this respect, the shipowner may have an interest to cooperate with the coastal State on account of being subject to rules of strict liability (i.e. liability that does not depend on fault) for pollution damages under the IMO liability and compensation conventions,[156] and because of its obligation to keep the ship seaworthy,[157] which has further implications on keeping a good reputation and attracting more business.

All the aforementioned interests of a shipowner can also apply to a demise charterer as a beneficial owner (sometimes referred to as an owner *ad hoc*),[158] and cargo owner.

2.4.3 Insurers

The interest of insurers depends on the type and scope of the insurance cover. There are essentially three types of insurance that are normally at play in shipping industry: (i) hull and

[154] Time charter means that a ship is employed for a certain period of time and a shipowner is entitled to earn hire irrespective of whether the ship is actually in service or not. See William Tetley, *International Maritime and Admiralty Law* (Les Editions Yvon Blais Inc 2002) 150-151. See also The Institute of Chartered Shipbrokers, *Dry Cargo Chartering* (Witherby&Co Ltd 2006) 80-84; BIMCO sample, BIMCHEMTIME 2005. For the insurance perspective see Susan Hodges, *Law of Marine Insurance* (Cavendish Publishing Limited 1996) 41.

[155] Tetley (n 154) 151. See for example BIMCO standard form NYPE 2015 Time Charter, Clause 17 which provides that: '[i]n the event of loss of time from deficiency and/or default and/or strike of officers or ratings, or deficiency of stores, fire, breakdown or, or damage to hull, machinery or equipment, grounding, detention by the arrest of the Vessel […] the payment of hire and overtime, if any, shall cease for the time thereby lost'.

[156] See chapter 3 of the thesis. For more on the incentive of the shipowner to cooperate with the coastal States authorities see Colin de la Rue, 'Liability of Charterers and Cargo Owners for Pollution from Ships' (2001-2002) 26 *Tulane Maritime Law Journal* 115-123. See also Morrison (n 153) 40.

[157] For more see Chircop (n 140) 20; Morrison (n 153) 40.

[158] Tetley (n 154) 125; Martin Davies and Anthony Dickey, *Shipping Law* (3rd edition, Law Book Company 2004) 73.

machinery (H&M) insurance, (ii) protection and indemnity (P&I) insurance and (iii) cargo insurance.[159] The actual scope of each of these depends on the terms and conditions agreed between the parties to the relevant insurance contract. Some general observations may nonetheless be mentioned here.

H&M insurance is in principle an insurance of property.[160] It covers loss of, or damage to, a ship itself. This means that if a ship runs into peril at sea, or is sunken or stranded, the H&M insurer would have an interest in preventing or mitigating any (further) damage to the ship.[161] The same applies to cargo insurance. H&M insurance may cover the shipowner's liability, such as liability for collision claims or claims in cases of contact with fixed or floating objects.[162] Yet, the liability of a shipowner towards third parties is normally covered under P&I insurance.[163]

P&I insurance covers a shipowner's liability, which is 'incidental to the ownership and operation of ships'.[164] This type of insurance is normally provided by P&I Clubs, which are mutual (not-for-profit) insurance associations.[165] If a ship runs into peril at sea, or it is sunken or stranded, the P&I Club would thus have an interest in preventing or minimizing the shipowner's liability for damages (e.g. oil pollution) or expenses (e.g. wreck removal expenses).

2.4.4 Salvors

Salvors are normally the first on the spot to respond to incidents at sea. They perform different services in relation to the preservation of maritime property (ship and cargo) and the protection of the marine environment. Salvors work on a commercial basis,[166] which means that their

[159] Pavliha and Vincenca Padovan (n 148) 576-636.
[160] See more in Howard Bennett, *The Law of Marine Insurance* (Clarendon Press Oxford 1996) 362-382; Wilhelmsen and Bull (n 148) 45; Jonathan Gilman et al (eds), *Arnould's Law of Marine Insurance and Average* (Sweet & Maxwell 2008); Pavliha and Vincenca Padovan (n 148) 1326.
[161] See more in Wilhelmsen and Bull (n 148) 263.
[162] Bennett (n 160) 237; Wilhelmsen and Bull (n 148) 45.
[163] Bennett (n 160) 236-245.
[164] Bennett (n 160) 238.
[165] See Colin de la Rue, 'Shipping and the Environment – An Overview', available at <http://www.colindelarue.com/overview/> accessed 31 October 2019.
[166] Salvage service is nowadays usually performed on a contractual basis and in this respect the most commonly used contract form is the standard Lloyd's Open Form (LOF), a sample of which is available at <https://www.lloyds.com/the-market/tools-and-resources/lloyds-agency-department/salvage-arbitration-branch/lloyds-open-form-lof> accessed 31 October 2019. In the words of Busch, 'Lloyd's Open Form is still the most widely used salvage contract after over a century of constant use'. See Todd Busch, 'Co-operation in a Crisis Between Ship Interests and Salvors: the Salvor's Perspective', available at <http://www.marine-salvage.com/media-information/conference-papers/co-operation-in-a-crisis-between-ship-interests-and-salvors-the-salvors-perspective/> accessed 31 October 2019.

interest is primarily to earn profit[167] by successfully completing their service. Salvors are normally expected to bring the ship and/or its cargo in a 'place of safety'.[168] The interest of the salvor could therefore be linked to a place of refuge being granted by the coastal State.

Given their special skills and knowledge, salvors are also interested in their work not being questioned or interrupted.[169] The salvors' interest in non-interference with their work may also be related to the fact that a delay or any additional burden in terms of receiving specific instructions/directions in performing their service may reduce the prospect of success, which may have further implications on earning the profit.[170] At the same time, salvors may have an interest in cooperating with authorities from the coastal State if that enables them to complete the job more effectively.

2.5 **Conclusions**

Ships in peril and shipwrecks may pose different socio-economic and environmental risks to the nearby coastal States, their people, environment, economy and the marine environment in general. While these risks are commonly associated with pollution caused by harmful substances (oil and other), they may also come from the ship's hull. Navigational obstructions and unsightly wrecks illustrate the point. Given the socio-economic and environmental risks posed by ships in peril and shipwrecks, the coastal State may find itself in a position where it wants to take certain measures of protection. These may find support from, or may go against, the interests of the shipowner and/or flag State, as well as the interests of the neighboring States and the international community as a whole. The need for balancing different and juxtaposed interests explains the need for an adequate legal regime to be in place, and puts into perspective the controversies raised during the negotiations of the LOSC and the key IMO instruments to be discussed in this thesis. These controversies will be briefly mentioned in the forthcoming chapters and will be further elaborated in the main part of the thesis.

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[167] This is obviously in addition to compensation for the costs and expenses for fuel, equipment, personnel etc.

[168] This is usually stipulated in the contract. See for example LOF 2011, where it is stipulated in clause A that the parties to the contract 'agree to use their best endeavours to salve the property […] and to take the property to the place stated in Box 3 [place of safety] or to such other place as may hereinafter be agreed. If no place is inserted in Box 3 and in the absence of any subsequent agreement as to the place where the property is to be taken the Contractors shall take the property to a place of safety'.

[169] As Falkanger observes while referring to the Donaldson Report, 'even interventions limited to "requiring certain general courses of action to be adopted or avoided" may be disliked. According to the report, salvage companies "have expressed deeply felt anxieties that the [Secretary of State's] representative might "take over" their respective roles and do so without the necessary specialist skills'. See Falkanger (n 122) 28-29.

[170] Ibid.

3 Coastal State Jurisdiction under General International Law and the LOSC

3.1 Introduction

Jurisdictional powers of coastal States in relation to foreign ships are governed by rules of general international law, which are predominantly reflected in the LOSC – a treaty that was adopted almost forty years ago, but nevertheless has remained to be commonly perceived as the 'constitution for the oceans'.[171] Indeed, the United Nations General Assembly notes that the LOSC is the 'legal framework within which all activities in the oceans and the seas must be carried out'.[172] To provide background information necessary for discussion in the main part of the thesis, this chapter: outlines the basic features of State jurisdiction under general international law and as provided for under the jurisdictional framework of the LOSC, and explains the relationship of the LOSC to other international agreements as in fact, when it comes to ships in peril and shipwrecks, the LOSC has significantly evolved on account of various IMO instruments. How these assist the application, interpretation and development of the LOSC will be discussed in the main part of the thesis. The LOSC compulsory dispute settlement concludes the chapter.

3.2 Basic Features of State Jurisdiction under General International Law

3.2.1 The Concept and Types of State Jurisdiction

The concept of 'State jurisdiction' may have different meanings in international law, although the most common meaning indicates a legal competence of a State over a certain event or a conduct of a person within or outside that State's territory.[173] Some scholars distinguish between three types of jurisdiction on the basis of the 'tripartite system' approach.[174] For

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[171] See Remarks by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at <https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses1-6.-Tommy-T.B.-Koh-of-Singapore-President-of-the-Third-United-Nations-Conference-on-the-Law-of-the-Sea-_A-Constitution-for-the-Oceans_.pdf> accessed 31 October 2019. See also Shirley V. Scott, 'The LOS Convention as a Constitutional Regime for the Oceans' in Alex G. Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publications 2006) 9-38; Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 44-45.

[172] See for example the Preamble to UNGA Resolution 70/235 of 23 December 2015.

[173] Frederick Alexander Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years* (Brill 1984) 19-20, 34; Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 75-85.

[174] The 'tripartite system' approach is commonly ascribed to a French philosopher Baron Montesquieu.

instance, Brownlie and Crawford define jurisdiction as 'an aspect of sovereignty', which gives a competence to a State to regulate the conduct of natural and juridical persons within 'all branches of government: legislative, executive and judicial'. They accordingly distinguish between prescriptive, enforcement and adjudicative jurisdiction.[175] Some scholars treat adjudicative jurisdiction as part of enforcement jurisdiction.[176] This study refers to jurisdiction as a competence of a State to adopt, take and enforce certain measures against foreign ships in peril and foreign shipwrecks in order to combat different socio-economic and environmental risks identified in the previous chapter.

3.2.2 Principles that Explain the Basis for State Jurisdiction

For the coastal State to enjoy jurisdiction over foreign ships, there must be a particular principle that explains the basis for such jurisdiction, which is normally related to the concept of sovereignty.[177] In this respect, sovereignty represents the basis (legal justification) for State jurisdiction. At the same time, given that no State is more sovereign than other States, sovereignty serves the purpose of creating a limit to State jurisdiction.[178] To put it differently, sovereignty and the equality of States imply both rights and obligations. While each State has the *right* to exercise certain jurisdiction, it may do so only within the limits of its own sovereignty,[179] as it has the corresponding *obligation* not to encroach upon the sovereignty of another State.[180]

3.2.2.1 Territorial Jurisdiction

The concept of sovereignty is commonly linked to the territory of a given State, which apart from the land consists of a certain area of the sea, in particular internal waters, archipelagic waters and the territorial sea. Based on territorial sovereignty, every State enjoys jurisdiction

[175] Emphases added. See James Crawford, *Brownlies's Principles of Public International Law* (8th edition, Oxford University Press 2012) 456. The same approach is used by Oxman. See Bernard Oxman, *Jurisdiction of States* (Oxford University Press 2015) paras 3-6. See also Irini Papanicolopulu, 'Jurisdiction of States over Persons at Sea: Principles, Issues, Consequences' in Jürgen Basedow et al (eds), *The Hamburg Lectures on Maritime Affairs 2011-2013* (Springer 2015) 149.
[176] Mann (n 173) 19-20, 34; Molenaar (n 173) 75-76.
[177] Crawford (n 175) 456.
[178] See Mann (n 173) 20. While referring to the principle of consent as a manifestation of the State's sovereignty, Lowe and Staker explain that '[e]ven if the characterization of international law as fundamentally consensual is accepted, it does not follow that a sovereign State is free to do what it wishes. The sovereign equality of States is an equally fundamental principle of international law'. See Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D. Evans (ed), *International Law* (3rd edition, Oxford University Press 2010) 319.
[179] Emphases added.
[180] Emphases added. See Mann (n 173) 20. The obligation not to encroach upon the sovereignty of another State is what some authors call an 'obligation of non-intervention'. See Crawford (n 175) 447.

within the geographically defined limits of its territory.[181] It is generally accepted that such a competence is presumed and unqualified, unless there is a rule to the contrary, such as the right of a foreign ship to exercise innocent, transit and archipelagic sea lanes passage, as will be explained below.[182] Moreover, jurisdiction which is based on the territorial principle is *prima facie* exclusive.[183]

3.2.2.2 Extra-Territorial Jurisdiction

At times, a State may have an interest to exercise jurisdiction outside its territory. States are at all times free to agree between themselves on the basis of such jurisdiction.[184] However, in the absence of an agreement, for a State to successfully claim extra-territorial jurisdiction, public international law requires there to exist a sufficient nexus (link) between the State and the object of its jurisdiction (person, object, fact, event, activity etc). There are several principles that may explain jurisdictional nexus, albeit not all of them find a firm place in general international law.[185]

One of the most commonly used principles that explains extra-territorial State jurisdiction is the principle of nationality (also known as the active personality principle). It gives a State a competence over a person that possesses its nationality, regardless of the fact that such person is located outside the territory of that State. The nationality principle was for example recognized in the *Nottebohm* Case, in relation to the nationality of a natural person.[186] The principle is now recognized to be relevant not only in relation to natural persons but also in relation to juridical persons, as well as to aircrafts and ships.[187] In respect of the latter, the LOSC explicitly stipulates that a ship is considered to be a national of the State whose flag it is flying.[188] Moreover, the LOSC makes it clear that there must exist a 'genuine link' between the

[181] Lowe and Staker (n 178) 325; Crawford (n 175) 478; Oxman (n 175) para 13; Mann (n 173) 20.
[182] Institute of International Law, 'The Extraterritorial Jurisdiction of States', Deliberations of the Institute during Plenary Meetings, Session of Milan 1993, Yearbook Volume 65 Part II, 134; See also Molenaar (n 173) 78.
[183] There is an exception to this rule in relation to the matters that are seen as essentially 'internal' to ships present in the port. See Marten Bevan, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 28-29.
[184] Lowe and Staker (n 178) 326.
[185] Mann (n 173) 28; Oxman (n 175) para 10. See also Erik J Molenaar, 'Port and Coastal States' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 287.
[186] In the *Nottebohm* Case, the ICJ articulated the nationality principle through the notion of a 'genuine link' by ruling that 'a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States'. See the *Nottebohm* Case (second phase), Judgment of 6 April 1055, ICJ Reports 1955, 4, 23.
[187] Lowe and Staker (n 178) 323-324.
[188] Article 91 (1) of the LOSC.

State and the ship. The meaning of a 'genuine link' and the effect of its absence is, however, subject to debate.[189]

The territorial principle and the principle of nationality are the so-called basic principles of State jurisdiction as they are grounded in general international law.[190] However, there are other bases that may at times explain the relevant *nexus* between the State and the object of its jurisdiction, even though it is not always clear whether those principles belong to general international law or they may otherwise be invoked only on the basis of a specific agreement between States. One such principle is the protective principle, which determines State jurisdiction in an instance where the State's vital interests are harmed or threatened to be harmed.[191] Clearly, a mere harmful effect does not suffice as the interest of the State needs to be 'vital'.

While there is no straightforward answer as to what makes a certain interest 'vital', it has been suggested that interpretation should be rather restrictive.[192] As will be seen in chapter 6 of the thesis, the right of intervention, which finds its origin in the plea of necessity, is based on the protective principle and may indeed be exercised only in exceptional (restricted) circumstances of very serious pollution. The right of intervention and the plea of necessity are both based on the protective principle and they both find their place in customary international law, albeit in different types of norms, as chapter 5 and 6 will demonstrate.[193]

Another principle that may at times be invoked as a basis for State jurisdiction is the effect or impact doctrine.[194] It justifies State jurisdiction on the grounds of the location of the injurious

[189] For more on the controversies regarding the meaning of 'genuine link' see Robin Churchill and Christopher Hedley, 'The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships' (2000) *International Transport Workers' Federation*, available at <http://orca.cf.ac.uk/45062/> accessed 10 May 2019.
[190] Oxman (n 175) paras 13-21.
[191] Molenaar (n 173) 84; Lowe and Staker (n 178) 325.
[192] Lowe and Staker (n 178) 326, where Lowe argues that: 'while the category [vital interests] is not closed, the potential for its expansion is limited'. Arguing on a sufficiently close connection between a given set of facts on the one hand and a certain State on the other hand, Mann refers to the concept of 'a reasonable relation' and observes that 'a State has legislative jurisdiction if its contact with a given set of facts is so close, so substantial, so direct, so weighty that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a sufficient connection'. See Mann (n 173) 28. See also Kari Hakapää, *Marine Pollution in International Law* (Suomalainen Tiedeakatemia 1981) 152.
[193] The right of intervention finds its place in the primary norms of international law, while the plea of necessity finds its place in the secondary norms of international law. For more on the distinction, see chapter 5 of the thesis.
[194] The effect or impact doctrine was first articulated in the *Alcoa* Case, before the Supreme Court of the USA. The Court in this case held that: 'It is settled law […] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders, that has consequences within its borders which the State reprehends […]'. See 148 F. 2d 416 (2d Cir. 1945), at p. 443, as cited in Molenaar (n 173) 82.

effect, rather than the location of an act or omission that has caused such effect.[195] This doctrine is subject to significant controversies, albeit it has been noted that it is not disagreeable in all cases.[196] While the doctrine of effect explains extra-territorial jurisdiction on the basis of injurious effect, it is to be noted that it nonetheless implies an obligation to balance the interests of a given State with the interests of other States.[197]

A further principle to explain extra-territorial jurisdiction is the passive personality principle. In contrast to the principle of active personality, which brings to focus the nationality of a person who engages in certain conduct (an act or omission), the principle of passive personality centers around the nationality of a victim.[198]

In some instances, State jurisdiction is considered to be universal, i.e. based on the principle of universality. This means that any State has the right to exercise jurisdiction in a given situation. One example is jurisdiction over certain crimes such as genocide or piracy on the high seas.[199] This principle, however, bears no particular relevance for the present study.

State jurisdiction does not necessarily have to be based on a single principle. If combined, principles of State jurisdiction may at times 'better define [the] scope' of State jurisdiction.[200] One example in this respect concerns coastal State jurisdiction over vessel-source pollution as it combines the principle of protection and the doctrine of effect/impact.

In cases where more than one State is entitled to exercise jurisdiction over a certain matter (commonly referred to as a 'conflict of jurisdiction'), general international law dictates no hard and fast rule as to how these conflicts are to be solved. Sometimes, specific rules to this end are provided in specific treaties on the matter that falls under the scope of that particular treaty (the so-called 'conflict' or 'relationship' provisions, which are in fact contained in the treaties

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[195] Oxman (n 175) para 23.

[196] Crawford (n 175) 463. Crawford also argues that the effect or impact doctrine is largely practiced by the USA and the EU.

[197] Molenaar (n 173) 82. The obligation to balance the interests of States has also been confirmed by the courts of the USA, where the doctrine first appeared. Referring to the position of the USA in relation to the doctrine of effect/impact, Schachter uses the concept of reasonableness and summarizes the USA position in a way that: '[w]here there is no clear purpose to affect the United States market, but the extraterritorial conduct has a substantial effect, the United States has prescriptive jurisdiction *provided other factors do not render the exercise of such jurisdiction unreasonable*. If there is no evidence that the main intent is to affect the United States commerce, a *greater effect* is required than where such intent is shown. Directness of effect, gravity of the offence, foreseeability are among the factors that would support a finding of greater effect'. [Emphases added] See Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 262-263.

[198] Oxman (n 175) para 34-36. Crawford (n 175) 461. One of the criticisms to this principle relates to the fact that it exposes individuals to a considerable number of jurisdictions, without enabling them to anticipate laws and regulations they will eventually be subject to, which considerably endangers legal certainty and predictability. See Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 93.

[199] Crawford (n 175) 467; Oxman (n 175) para 37-45.

[200] Papanicolopulu (n 175) 155-156.

observed in this study, as will be addressed throughout the thesis). In these cases, as well as in cases in which it is hard to assess whether there exists a sufficient jurisdictional nexus or not, the principle of reasonableness may play a critical role.[201]

3.2.2.3 The Significance of the Burden of Proof

At times when the existence of a jurisdictional nexus is not so clear, the burden of proof could play an important role. There are essentially two approaches in this respect. One approach argues that a State is allowed to exercise jurisdiction as it pleases, unless there is a prohibitive rule to the contrary. In practice, this approach is naturally used by a State that in a given situation claims its jurisdiction.[202] Another approach advocates that a State is prohibited from exercising jurisdiction as it pleases, unless there is a permissive rule to the contrary. This approach is normally used by a State that opposes assertions of another State as to that State's jurisdiction.[203] It is not clear which one of the two approaches finds its place in general international law.[204] The LOSC, as will be addressed in more detail below, seems to take the latter approach. Its 'package deal' character implies that a State party to the LOSC cannot exercise jurisdiction, unless there is an explicit basis to this end or unless it can be demonstrated that such a basis has subsequently emerged as a new norm of customary international law.

3.2.3 General Limits Imposed on State Jurisdiction

While the aforementioned principles may inform the basis of State jurisdiction in a given case, they do not explain the content nor the limits of such jurisdiction, nor is there any hard and fast rule that speaks to that determination,[205] save for the general principle of sovereign equality and reasonableness.[206] The latter was explained by Judge Fitzmaurice in the *Barcelona Traction* Case as follows:

> It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are

[201] Molenaar (n 173) 77.
[202] Ryngaert (n 198) 21.
[203] Ibid.
[204] Oxman, for instance, speaks of the lack of clarity, while Ryngaert takes the view that it is the prohibitive principle approach that reflects general international law (customary international law), although he speaks of its broader version, which allows permissiveness (exception to the rule) to be interpreted quite extensively. See Oxman (n 175) para 10; Ryngaert (n 198) 21. Molenaar proceeds on the approach that 'extra-territorial jurisdiction cannot be presumed but must operate under a principle recognized by international law'. See Molenaar (n 173) 81.
[205] On the question of the extent and the limits of State jurisdiction see Mann (n 173) 26.
[206] Mann refers to the principle of reasonableness in the context of the principle of prohibition of abuse of rights and arbitrariness. See Mann (n 173) 26-30.

> of course others – for instance in the fields of shipping, "anti-trust" legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.[207]

The principle of reasonableness does therefore not have any specific defined meaning, but nevertheless can be determined to include a general limit imposed on States in the exercise of their jurisdictional powers, breach of which is at any time subject to the scrutiny of the court. More specific observations in relation to the content and the extent of coastal State jurisdiction over foreign ships in peril and shipwrecks, and the relevance of the principle of reasonableness in this respect, will be addressed in the main part of the thesis.

3.2.4 Special Rules Concerning Enforcement Jurisdiction

Apart from the main features concerning State jurisdiction in general, there are a few further observations to be specifically made in relation to enforcement jurisdiction. First, no State is authorized to take enforcement jurisdiction outside its territory without its own legislation authorizing it to so do.[208] Second, the existence of legislative jurisdiction does not suffice for a State to claim enforcement jurisdiction in another's State's territory, nor does the existence of enforcement jurisdiction explain the existence of legislative jurisdiction.[209] Third, a State may take enforcement action in another State's territory only if provided with that State's consent, which may be obtained on the basis of bilateral or multilateral treaties, or on the basis of acquiescence.[210]

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[207] The *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, 3, Separate opinion of Sir Fitzmaurice, para 70. In the *Nationality Decrees in Tunis and Morocco* Case, the PCIJ considered that 'jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law'. See the *Nationality Decrees in Tunis and Morocco* Case, Advisory Opinion of 8 November 1921, PCIJ Reports 1923, Ser B No 4, 24.
[208] Molenaar (n 185) 290.
[209] Mann (n 173) 36-37.
[210] Molenaar (n 173) 86.

3.3 **The LOSC Jurisdictional Framework**

As previously explained, State jurisdiction may be grounded in either a particular treaty (where States may agree on jurisdiction as they determine) or general international law. This section will now explain State jurisdiction on the basis of a particular treaty – the LOSC, which in fact reflects general international law to a large extent.[211] In some respects, however, the LOSC offers rather *sui generis* solutions. In order to aid this discussion, it is first necessary to say a few words about the historical background to the negotiations of the LOSC, as well as the LOSC's object and purpose.

3.3.1 Historical Background, Object and Purpose

3.3.1.1 Prior to the Third United Nations Conference on the Law of the Sea (UNCLOS III)

Seas and oceans were historically divided into two areas. One was a relatively narrow area adjacent to the States' shores, in which coastal States enjoyed territorial sovereignty, subject to the right of foreign ships to exercise innocent passage. The other area was the high seas, which was available for use to all States and ships flying a State flag.[212] Against this backdrop, the history of the law of the sea is often characterized as a victory of the concept of 'open seas', i.e. *mare liberum* (ascribed to Hugo Grotius) over the concept of 'closed seas', i.e. *mare clausum* (ascribed to John Selden).[213] On the high seas, flag States had exclusive jurisdiction over their ships, while coastal States had no jurisdictional powers, save for the functional right of hot pursuit (applicable everywhere on the high seas) and the enforcement powers in relation to breaches of custom laws (applicable only in a very narrow area adjacent to the waters where coastal States enjoyed sovereignty).[214]

This was the state of the law of the sea until the beginning of the 20th century. It was predominantly governed by unwritten rules of customary international law and it was clearly favoring flag States given the considerable proportion of the seas that were subject to high seas

[211] Some States and commentators are of the opinion that the LOSC reflects customary international law in its entirety, save for Part XI. However, as observed by Churchill, this seems to be an 'oversimplification'. See Churchill (n 171) 37-38. For a recent status of the LOSC provisions in customary international law see Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45 *Ocean Development and International Law* 239-259.

[212] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 7; See also Helmut Tuerk, *Reflection on the Contemporary Law of the Sea* (Brill Nijhoff 2012) 5.

[213] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edition, Bloomsbury 2016) 61.

[214] Treves (n 212) 7.

freedoms.[215] For a long time, the traditional division of jurisdictional powers was uncontroversial. The situation, however, changed in the early 20th century when coastal States developed a significant interest in the resources found in the waters adjacent to the waters subject to their territorial sovereignty. The era of the early 20th century marked a starting point in the process of transition: from a 'law of movement' to a 'law of territory and appropriation'.[216] This process of transition is often explained as 'creeping coastal State jurisdiction'.[217] Given that the interests of flag States were becoming considerably confined, it became evident that the time had come for the law of the sea to be revisited and unwritten rules to be codified.

The first attempt in the progressive development and codification of the law of the sea[218] took place during the 1930 Hague Conference on the Codification of International Law, convened by the League of Nations.[219] The most controversial issue on the agenda was the question of the breadth of the territorial sea and the coastal States' powers over the resources beyond that territorial sea. Despite the efforts of delegates, the conference failed in producing an agreement among States. After the Second World War, coastal States became even more assertive of their expansion at sea, both spatially and substantively. In the process of 'creeping jurisdiction', they started to claim a much larger area to be subject to their territorial sovereignty and at the same time they claimed exclusive resource-oriented rights in the adjacent area. Some coastal States also pursued jurisdictional claims in relation to the protection and preservation of the marine environment.[220]

A new attempt at the codification and progressive development of the law of the sea occurred in 1949, when the International Law Commission (ILC) started to work on this issue.[221] The work of the ILC resulted in the adoption of the 1956 'Final Draft Articles on the Law of the Sea, With Commentaries',[222] which served as a basis for the negotiations that took place during

[215] Henrik Ringbom, 'The Changing Role of Flag, Port and Coastal States under International Law' in Johan Schelin (ed), *General Trends in Maritime and Transport Law 1209-2009* (Axel Axelsons Institute of Maritime and Transport Law, University of Stockholm 2009) 1.
[216] Tuerk (n 212) 9.
[217] Churchill (n 171) 4.
[218] Within this context, codification means simple restatement of the existing rules, while progressive development means adaptation of the existing rules to the contemporary needs/changing environment/circumstances. See James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 29-37; Treves (n 212) 7.
[219] For more on this conference see Hunter Miller, 'The Hague Codification Conference' (1930) 24 (4) *The American Journal of International Law* 674-693.
[220] Molenaar (n 185) 294.
[221] The ILC was established for this purpose by the United Nations General Assembly in accordance with Article 13 of the UN Charter. See UNGA Resolution 174 (II) of 21 November 1947.
[222] ILC, 'Final Draft Articles on the Law of the Sea, With Commentaries', Yearbook of the International Law Commission, 1956, Volume II, 265.

the then upcoming conference on the law of the sea – convened by the United Nations in 1958 in Geneva (UNCLOS I).[223] UNCLOS I produced four separate conventions on the law of the sea: (i) the Convention on the Territorial Sea and the Contiguous Zone,[224] the Convention on the High Seas,[225] the Convention on Fishing and Conservation of the Living Resources of the High Seas,[226] and the Convention on the Continental Shelf.[227] In addition, the conference produced a protocol on the settlement of disputes. UNCLOS I was, however, seen as a failure and this was for several reasons. First, it produced a protocol on the settlement of disputes, which was of an optional, rather than mandatory character. Second, by producing four different conventions, rather than embracing them all in a single treaty, UNCLOS I enabled States to pursue a 'pick and choose' tactic.[228] Finally, and probably most importantly, the major issue of controversy – the breadth of the territorial sea – remained unsolved.[229] The controversy was hoped to be rectified by the conference being convened two years later (UNCLOS II) but the result was not forthcoming – no consensus on this matter was reached. The turning point in the codification and progressive development of the law of the sea came with the Third United Nations Conference on the Law of the Sea (UNCLOS III), convened between 1973 and 1982, resulting in the adoption of the LOSC.

3.3.1.2 UNCLOS III and the Adoption of the LOSC

UNCLOS III was convened with an ambition to review all law of the sea issues due to the fact that the political and economic reality was now different than it was when UNCLOS I and UNCLOS II were convened.[230] For example, many developing States gained their independence in this intervening period and did not feel obliged to abide by the existing legal regime in whose formation they did not participate. Moreover, with developments of science and technology, coastal States started to claim aspirations to exploit the economic potential of

[223] Although many of these draft articles were finally renegotiated at the conference. See Harrison (n 218) 34.
[224] The 1958 Convention on the Territorial Sea and the Contiguous Zone (the TSC), 516 UNTS 205.
[225] The 1958 Convention on the High Seas (the HSC), 450 UNTS 11. The HSC was largely incorporated in Part VII of the LOSC as unchanged. See Bernard Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 (4) *American Journal of International Law* 830, 832.
[226] The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (the CFCLR), 559 UNTS 285.
[227] The 1958 Convention on the Continental Shelf (the CSC), 499 UNTS 311.
[228] Tuerk (n 212) 11.
[229] Oxman argues that the 'inability of the [1958 Geneva] Conventions to identify precisely where that regime [the regime of the high seas] applies is a symptom of the reemergence of the territorial temptation at sea. See Oxman (n 225) 833. Nevertheless, one could still appreciate the fact that the UNCLOS I succeeded in codifying customary international law on the very regime of the high seas and the right of innocent passage.
[230] Treves (n 212) 16.

a vast portion of the seas.[231] While UNCLOS I and UNCLOS II were prepared by the ILC, the situation with UNCLOS III was different. As observed by one commentator:

> States were simply unwilling to leave the promotion of their vital interests to the International Law Commission because they reasoned that only governmental representatives could effectively formulate solutions.[232]

States therefore saw UNCLOS III primarily as a conference of political (territorial) concerns and economic aspirations. The conference was based on the exchange of the governmental proposals and counterproposals, and an active consensus-based negotiation technique, which gave the responsibility to the chair of the negotiations to prepare a consensus text that best reflects a formula that would be satisfactory to all participants.[233] The ambition was to adopt one single treaty, which would not repeat the 'mistake' of UNCLOS I, i.e. the 'pick and choose' optionality.[234]

In deciding on the mandate of the conference, the UN General Assembly specifically called for a convention dealing with all matters relating to the law of the sea 'bearing in mind that the problems of the ocean space are closely interrelated and need to be considered as a whole'.[235] The conference was entrusted with a task to deal with the establishment of an equitable international regime for the Area and the resources beyond the limits of national jurisdiction and a broad range of related issues including those concerning the regimes of different maritime zones,[236] the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and marine scientific research.[237] Some of these issues were to some extent already regulated under the 1958 Geneva Conventions[238] and customary international law.[239] However,

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[231] As outlined in UNGA Resolution 2750 C (XXV) of 17 December 1970.

[232] Tommy Koh and Shunmugam Jayakumar, 'An Overview of the Negotiating Process of UNCLOS III' in Myron Nordquist et al (eds), *United Nations Convention on the Law of the sea 1982, A Commentary, Volume 1* (Martinus Nijhoff Publishers 1985) 50.

[233] Harrison (n 218) 41. For more on active consensus approach see Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75 (2) *American Journal of International Law* 324.

[234] Tuerk (n 212) 11.

[235] UNGA Resolution 3067 (XXVIII) of 16 November 1973. The same has been emphasized in the decision of UN General Assembly of 1970. See Preamble to UNGA Resolution 2750 C (XXV) of 17 December 1970.

[236] Such as the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States).

[237] UNGA Resolution 2750 C (XXV) of 17 December 1970.

[238] This for instance relates to the regime of the territorial sea and continental shelf.

[239] In fact, some of the provisions of the 1958 Geneva Conventions were incorporated in the LOSC almost verbatim, as a codification of customary international law. This primarily relates to some of the provisions of the 1958 Convention on the High Seas and the 1958 Convention on the Territorial Sea and the Contiguous Zone (e.g. the regime of the high seas was to a large extent already subject to the rules of customary international law).

they still needed to be taken under review given the political and economic developments that had emerged in the meantime.

Negotiating and renegotiating different kinds of issues within the same treaty required a careful balance to be struck between the opposing interests of States. Depending on the particular issue under discussion, States gathered in different groups to strengthen their positions in the negotiations. On matters of a general character, the LOSC negotiations were largely characterized by the opposition between developed States on the one hand and developing States on the other hand.[240] The protection and preservation of the marine environment was one such matter. On matters of navigation, including environmental issues affecting these, States were divided between coastal States on the one hand and flag States on the other hand. While coastal States pursued their interests to expand jurisdictional powers at sea, flag States wanted to make sure that the navigational rights and freedoms were preserved to the maximum extent possible.[241]

Striking the balance between the opposing interests of different group of States often resulted in vague and ambiguous terms in the text of the Convention. As one commentator explains, those vague and ambiguous terms '[have] most certainly not to be attributed to poor draftsmanship'.[242] Rather, they are to be seen as the lowest common denominator, i.e. 'an agreement between participants to further disagree'.[243]

3.3.1.3 The Impact of the LOSC on Customary International Law

The LOSC is largely considered to be a reflection of customary international law.[244] The main factors that seem to explain the impact of the LOSC on customary international law concern the participation of States and the consensus-based approach in the LOSC negotiations.[245] For this reason, it appears appropriate to say a few words about these.

As far as the participation factor is concerned, it is to be appreciated that more than 160 States took part at various stages of UNCLOS III,[246] which is indeed a remarkable number. The desirability of achieving 'universality of participation in the Conference' was already apparent

[240] Molenaar (n 173) 29.
[241] Thomas Mensah, 'Foreword' to Donald Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and The New Law of the Sea* (Martinus Nijhoff Publishers 2000) vii-ix.
[242] Erik Franckx (ed), *Vessel-source Pollution and Coastal State Jurisdiction* (Kluwer Law International 2001) 11.
[243] Ibid.
[244] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edition, Manchester University Press 1999) 24; Roach (n 211) 239-259.
[245] For more on the LOSC's impact on customary international law see Harrison (n 218).
[246] To draw the parallel, only 86 states participated at UNCLOS I. See Harrison (n 218) 39.

in Resolution 3067 (XXVIII) of 16 November 1973, by which the UN General Assembly expressed the view that the universal participation is a 'vital factor' for codification and progressive development of the law of the sea.[247]

As for the consensus-based approach in decision-making, this was an innovation of UNCLOS III. It emerged from the so-called 'gentlemen's agreement', by which delegates agreed that:

> [t]he Conference should make every effort to reach an agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.[248]

This approach provided in the 'gentlemen's agreement' was indeed followed during the whole LOSC negotiation process. However, at the very end, when the time came to adopt the final text of the convention, a vote was taken. This was primarily because the USA was dissatisfied with Part XI of the LOSC concerning the legal regime of the Area. The LOSC was eventually adopted by 130 votes in favor, with 4 votes against and 17 abstentions.[249]

The aforementioned factors characterizing the negotiations of the LOSC are important to bear in mind as they explain the impact of the LOSC on general international law and may as such be used in arguing on the potential for the Nairobi Wreck Removal Convention (WRC) to have implications for general international law too. While some commentators argue on the lack of the ability of the LOSC to influence customary international law given its 'package deal' character,[250] Harrison explains that such an argument does not seem to be convincing as 'this view does not explain how one identifies the customary international law of the sea if one cannot rely on the state practice and *opinio juris* that coincides with the Convention.'[251] Support for the latter may be found in the *Gulf of Maine* Case, in which a Chamber of the ICJ noted that despite the fact that the LOSC was not in force,[252] and that a number of States did not appear inclined to ratify it, this however:

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[247] Ibid.

[248] 'Declaration incorporating the "Gentleman's Agreement" made by the President and endorsed by the Conference at its 19th meeting on 27 June 1974', appended to the Rules of Procedure for the negotiations on the LOSC. See UN doc, A/CONF.62/30/Rev.3. The concept of consensus here must be distinguished from the concept of unanimity. As Harrison explains, unanimity requires 'the affirmative vote of all negotiating states', while consensus 'simply requires that there is "a very considerable convergence of opinions and the absence of any delegations in strong disagreement"'. See Harrison (n 218) 43.

[249] Churchill and Lowe (n 244) 18.

[250] Hugo Caminos and Michael Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 (4) *American Journal of International Law* 871, 886-887.

[251] Harrison (n 218) 52.

[252] At the time of the judgement (1984), the LOSC was not yet in force.

> in no way detracts from the *consensus* reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention […] were adopted without any objections.[253]

The observation of the Chamber in the case, therefore, clearly speaks of the ability of the LOSC to influence customary international law, irrespective of its entry into force and although the 'package deal' character is not specifically mentioned here, it is nevertheless implied in the conclusion.

The view that the LOSC reflects customary international law, however, has to be approached with some care. Not all of its provisions are capable of having the effect of representing customary international law as not all of its provisions are drafted in general normative language aimed at binding all States. For example, this is the case with Part XV (settlement of disputes) and Part XI (Area), to the extent it address institutional issues.[254] Moreover, a treaty provision, even though not institutional in nature, may still lack what the Court in the *North Sea Continental Shelf* Cases calls the 'fundamentally norm-creating character',[255] based on the manifest intent, reflected in the (i) form in which the rule is cast and (ii) structural relation of that rule to the rest of the treaty.[256] Finally, some LOSC provisions do not have a legally binding effect on some States which are considered persistent objectors.[257]

3.3.1.4 The Object and Purpose of the LOSC

As apparent from its Preamble, the LOSC was adopted with the goal to establish:

> a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient

[253] Emphasis added. See the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. USA), Judgment of 12 October 1984, ICJ Reports 1984, 246, para 94. In the case of *Libya/Malta,* the Court for instance held, while considering Article 76 of the LOSC, as follows: 'It is in the Court's view incontestable that […] the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law'. See the *Continental Shelf* Case (Libyan Arab Jamahiriya v. Malta), Judgment of 21 March 1984, ICJ Reports 1984, 3, para 34.

[254] Churchill (n 171) 37-38.

[255] The *North Sea Continental Shelf* Cases (Federal Republic of Germany v. Denmark), Judgment of 20 February 1969, ICJ Reports 1969, 3, paras 71-72; The *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. USA), Judgment of 12 October 1984, ICJ Reports 1984, 246, paras 80-82.

[256] Anthony D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law' (1970), Northwestern University School of Law Scholarly Commons, *Faculty Working Papers*, Paper 128, available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/128> accessed 31 October 2019.

[257] For instance, Israel voted against the adoption of the LOSC as it did not agree on the provisions of the LOSC relating to international straits (Part III of the LOSC). See Harrison (n 218) 59.

> utilization of their sources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

With this ambition in mind, the LOSC is intended to contribute to the realization of a 'just and equitable international economic order', as well as to:

> the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and […] the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.[258]

3.3.2 The Zonal Approach to Coastal State Jurisdiction

In pursuance of its object and purpose, the LOSC distributes State jurisdiction at sea by predominantly taking a zonal approach. As far as ports are concerned, however, the LOSC makes only a few references.[259] The reason why ports are not comprehensively addressed in the LOSC is explained on the basis of the fact that ports are generally assimilated to the land and as such are exclusively subject to that State's territorial sovereignty. In the *Nicaragua* Case, the Court explained that 'it is by virtue of its sovereignty that the coastal State may regulate access to its ports'.[260] In this respect, the LOSC merely recognizes in its Preamble that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.

While it should be beyond any doubt that general international law makes certain restrictions on a State's territorial sovereignty in ports (e.g. an obligation to exercise jurisdiction over foreign ships on the basis of what is reasonable), what remains somewhat ambiguous is whether general international law contains a specific obligation imposed on States concerning places of refuge requests. This question will be specifically discussed in chapter 7 of the thesis. At this stage, it suffices to mention that a place of refuge may be, but is not necessarily, a port; it may also be a safe anchorage in internal waters or in the territorial sea.

[258] The LOSC Preamble.
[259] See for example Articles 25 (2) and 211 (3) of the LOSC.
[260] The *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Judgement of 27 June 1986, ICJ Reports 1986, 14, para 213.

3.3.2.1 Internal Waters, Archipelagic Waters and the Territorial Sea

Internal waters, archipelagic waters and the territorial sea form part of the coastal State's territory. Internal waters are positioned landward of the baselines from which the breadth of the territorial sea is measured.[261] These waters are subject to the coastal State's territorial sovereignty and its exclusive jurisdiction, which means that the coastal State is in principle allowed to prescribe and enforce its laws and regulations as it pleases. However, there is one specific exception to this rule – the right of foreign ships to exercise innocent passage if the use of straight baselines 'has the effect of enclosing as internal waters areas which had not previously been considered as such'.[262]

Archipelagic waters may be claimed only by specific 'archipelagic' States. The LOSC defines an 'archipelagic State' as 'a State constituted wholly by one or more archipelagos and may include other islands'.[263] The LOSC entitles archipelagic States to establish archipelagic by drawing archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago.[264] The legal regime of archipelagic waters greatly resembles the regime applicable to internal waters in that jurisdiction of the coastal (archipelagic) State is in principle exclusive, subject to two limitations: (i) the right of innocent passage[265] and (ii) the right of archipelagic sea lanes passage.[266] The latter applies in designated archipelagic sea lanes and, where these have not been designated, in routes normally used for international navigation.[267]

Adjacent to the internal waters, or the archipelagic waters (if applicable), is the territorial sea. The LOSC defines the maximum breadth of the territorial sea to be 12 nm measured from the baselines.[268] In this respect, as pointed out earlier, the LOSC succeeded where its predecessors had failed. Jurisdiction of the coastal State in the territorial sea is in principle exclusive, save

[261] Article 8 (1) of the LOSC. The LOSC recognizes two ways in which the baselines may be drawn. One is to draw the baselines on the basis of the low-water line along the coast ('normal baselines') (see Article 5 of the LOSC) and the other way, which is allowed only under specific conditions, is to draw the so-called 'straight baselines' (see Article 7 of the LOSC). It is to be noted, however, that 'historic bays' or 'historic waters' are considered to be part of internal waters on the basis of longstanding and effective control of the coastal State in a given case, which is recognized as such by the international community. This means that 'historic bays' or 'historic waters' do not require specific conditions that are usually required for a coastal State to draw the straight baselines. See Churchill and Lowe (n 244) 24, 43-45.
[262] Article 8 (2) of the LOSC.
[263] Article 46 (a) of the LOSC. Article 46 (b) of the LOSC further defines an 'archipelago' as 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'.
[264] Article 47 (1) of the LOSC.
[265] Article 52 of the LOSC.
[266] Article 53 of the LOSC.
[267] Article 53 (4) of the LOSC.
[268] Article 3 of the LOSC.

for two exceptions: (i) the right of innocent passage,[269] and (ii) the right of transit passage in straits used for international navigation.[270] The question one may ask is whether a ship in peril, or a sunken or stranded ship, falls outside the scope of these two exceptions. The answer to this question depends on the meaning of the substantive provisions concerning the right of innocent/transit passage, which will be addressed in the main part of the thesis.

At this stage, it suffices to mention that the authority of the coastal State to regulate transit passage is more limited than in the case of innocent passage. For example, transit passage cannot be suspended, while innocent passage can, albeit subject to few exceptions[271] and only temporarily. The difference also exists in that transit passage applies to aircraft. Moreover, submarines may navigate submerged as this is their 'normal mode' of navigation.[272] None of this is the case with innocent passage.

The LOSC's legal regime applicable to internal waters, archipelagic waters and the territorial sea apply to both the seabed and water column.[273] While the right of innocent passage existed prior to the LOSC,[274] the rights of transit passage and archipelagic sea lanes passage are novelties that emerged from UNCLOS III – the main *quid pro quo* in relation to the extension of the limits of the territorial sea of coastal States to 12 nm and the emergence of the phenomenon of archipelagic States.[275] The right of innocent passage undoubtedly finds its place in customary international law.[276] Whether this holds true for the regime of the archipelagic waters and the right of transit passage is subject to some ambiguity. Churchill and Lowe suggest that both are part of customary international law.[277] Tanaka on the other hand argues that there is not sufficient evidence to support this argument.[278]

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[269] Article 17 of the LOSC.
[270] Article 38 of the LOSC. In addition, in some straits coastal State jurisdiction is limited by navigational rights and freedoms existing on the basis of long-standing international treaties. This is for instance the case with the 1936 Montreaux Convention regarding the strait of the Dardanelles, the Sea of Marmara and the Bosporus.
[271] This is for instance the case in the specific types of straits used for international navigation which connect the high seas or EEZ and the territorial sea of another State. See Article 45 (1) (b) of the LOSC.
[272] Article 39 (1) (c) of the LOSC.
[273] It also applies to the airspace above, albeit this is of no relevance for this thesis.
[274] As Tuerk observes, even John Selden recognized the right of innocent passage. The LOSC in this respect did not really change the law of the sea. See Tuerk (n 212) 16. See also Budislav Vukas, *The Law of the Sea* (Martinus Nijhoff Publishers 2004) 148.
[275] Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and The New Law of the Sea* (Martinus Nijhoff Publishers 2000) xi.
[276] See *Maritime Delimitation and Territorial Questions Between Quatar and Bahrain* (Quatar v. Bahrain), Judgment of 16 March 2001, ICJ Reports 2001, 40, para 223. For the most recent study on the status of customary international law see Roach (n 211) 239-259.
[277] Churchill and Lowe (n 244) 113 and 130.
[278] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 107 and 109.

Adjacent to the territorial sea are the contiguous zone, the exclusive economic zone (when established) and the continental shelf. These zones have the same inner limit (the outer limit of the territorial sea). However, their outer limits differ.[279] In these zones, the coastal State does not enjoy territorial sovereignty but certain sovereign rights and jurisdiction. Given the absence of territorial sovereignty, coastal State jurisdiction in these zones is limited to specific purposes (functions), as will be explained next.

3.3.2.2 The Contiguous Zone

The contiguous zone is a maritime zone adjacent to the territorial sea, the breadth of which cannot exceed 24 nm, measured from the baselines.[280] The contiguous zone does not exist *ipso facto* but needs to be proclaimed.[281] In the contiguous zone, which comprises both the seabed and the water column above, the coastal State is given enforcement jurisdiction for the purpose of preventing and/or punishing infringement of its laws and regulation concerning customs, fiscal, immigration or sanitary issues.[282] This competence is of no relevance for this thesis and will not be considered any further.

In addition, the coastal State is allowed to prescribe and enforce laws and regulations in relation to the removal of archeological and historical objects.[283] While these objects may include sunken and stranded ships, it is to be noted that archeological and historical objects are subject to a legal regime different from that examined in this thesis, as these objects warrant the protection from the outside risks (in contrast to objects observed in this thesis, which themselves cause the risk to outside interests and call for the protection of the latter rather than the former).[284] The regime in point is the Convention on the Protection of the Underwater Cultural Heritage, adopted under the auspices of the United Nations Organization for Education, Science and Culture (the UNESCO).[285]

[279] See Articles 33, 55, 76 of the LOSC.
[280] Article 33 (2) of the LOSC.
[281] Churchill and Lowe (n 244) 135-136.
[282] Article 33 (1) of the LOSC.
[283] Article 303 (2) of the LOSC.
[284] While the scope of this thesis is rather limited to what is feasible within a PhD project, it would be interesting to study the relationship between these two legal regimes. Is there any and if yes, how do these two regimes intersect?
[285] The 2001 Convention on the Protection of the Underwater Cultural Heritage (Paris, adopted on 1 November 2001, entered into force 2 January 2009), 2562 UNTS 3 (the UNESCO Convention).

3.3.2.3 The Exclusive Economic Zone

The exclusive economic zone (EEZ) is a maritime zone adjacent to the territorial sea, which extends to a maximum of 200 nm, measured from the baselines.[286] The EEZ does not exist *ipso facto*.[287] Rather, it needs to be proclaimed by the coastal State and the limit of 200 nm in this respect represents the maximum to which the coastal State may go in its proclamation. Within the EEZ, the coastal State is provided with 'sovereign rights' for the specific purpose of:

> exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[288]

Given that ships in peril and shipwrecks are not 'natural resources', but rather man-made objects, sovereign rights that the coastal State is allowed to exercise in its EEZ appear to be of no relevance for this thesis. However, while ships in peril and shipwrecks do not stand as natural resources themselves, they may nevertheless have an impact on the natural resources. It is in this context that the question needs to be asked whether regulating activities such as salvage, intervention and wreck removal could be seen as regulating activities that fall under the scope of the coastal State's sovereign rights in the EEZ. This question will be discussed in the main part of the thesis.

In addition to sovereign rights, the coastal State has in the EEZ 'jurisdiction provided for in the relevant provisions of [the LOSC]' in relation to:

(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research and
(iii) the protection and preservation of the marine environment.[289]

Given the environmental risks posed by ships in peril and shipwrecks, as explained in chapter 2, of relevance for this thesis is the purpose of 'the protection and preservation of the marine environment'. What first needs to be emphasized is that the expression 'jurisdiction provided for in the relevant provisions of [the LOSC]' means that Article 56 (1) (b) (iii) of the LOSC

[286] Tuerk explain the creation of the EEZ as 'certainly one of the most revolutionary features of UNCLOS, recognizing the right of coastal States to jurisdiction over the resources of some 38 million square nautical miles of ocean space – a generous endowment indeed and a major inroad on the freedom of the seas'. See Tuerk (n 212) 26-27.
[287] Article 57 of the LOSC.
[288] Article 56 (1) (a) of the LOSC.
[289] Article 56 (2) (b) of the LOSC.

needs to be read together with Part XII of the LOSC, which addresses the protection and preservation of the marine environment in more detail, as well as with other provisions of Part V, such as Article 56 (2) of the LOSC reflecting the due regard principle. Before explaining the main features of Part XII of the LOSC, it is necessary to reflect upon the due regard principle and the *sui generis* character of the EEZ regime.

Reaching an agreement on the legal regime of the EEZ involved a compromise between coastal and flag States. Once coastal States had abandoned the idea of having a wider territorial sea, flag States were willing to accept the extended jurisdiction of coastal States adjacent to their territories, albeit for specific purposes only. Boyle explains that:

> the central feature of the resulting EEZ regime is that it preserves for all states the high seas freedom of navigation within the zone, rather than the more restrictive territorial sea right of innocent passage, in contrast to earlier 200-mile claims made by a number of Latin American states.[290]

In exercising their rights and performing their obligations in the EEZ, States are obliged to have 'due regard' to the rights and obligations of other States.[291] This equally applies to both coastal and flag States (mutual due regard). While coastal States are provided with certain sovereign rights and jurisdiction for the protection and preservation of the marine environment, flag States are given the assurance that the high seas freedom of navigation continues to apply. In this regard, Article 58 (1) of the LOSC stipulates that all States enjoy the freedom of navigation in the EEZ 'subject to the relevant provisions' of the LOSC.

Preserving the freedom of navigation to the maximum extent possible was one of the flag States' foremost priorities during UNCLOS III. Yet, while the freedom of navigation indeed continues in the EEZ by virtue of Article 58 (1), and is less restricted than the navigational right of innocent passage, it is still not of the same right as the one applicable on the high seas.[292] This becomes obvious in relation to the matter of the protection and preservation of the marine environment, as will be addressed in the main part of the thesis.[293] The 'due regard' requirement has not been attached to a specific meaning and this is what Boyle and Chinkin explain to be a

[290] Alan Boyle, 'EU Unilateralism and the Law of the Sea' (2006) 21 (1) *The International Journal of Marine and Coastal Law* 15, 17-18.
[291] Articles 56 (2) and 58 (3) of the LOSC.
[292] See Vukas (n 274) 148.
[293] See Vukas (n 274) 149.

treaty provision which, although normative, is 'soft' in character – it is a principle rather than a rule.[294] As such, it is difficult to breach that on its own.

In cases where neither the coastal State nor the flag State is assigned with rights or jurisdiction in the EEZ, the LOSC offers a special formula for the resolution of conflicts (the so-called 'Casteñeda formula'). This formula is provided in Article 59 of the LOSC, which stipulates that:

> In case where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interest of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

The Casteñeda formula is thus vague. It speaks of the principle of 'equity', the importance of the interests as they apply to the coastal and other States as well as the international community as a whole, without really saying how should one interpret and apply such a provision in a given case. As Anderson points out, the formula provided in Article 59 of the LOSC contains 'imprecise, elusive concepts, not easy to apply, even by judges'.[295] The Casteñeda formula is probably the best evidence of the *sui generis* regime of the EEZ as no presumption can solve the problem of *lacunae*, which is in contrast with the regime of the territorial sea and the high seas, where it would either be the coastal State or the flag State that would have *prima facie* jurisdictional competence.[296]

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[294] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 221.

[295] He further explains that '[i]t was thought by some observers that this Article would be applied widely, but this has not proved to be true in practice. Nonetheless, the Article solved a problem at the Conference and it may still prove its value in some future dispute'. See David Anderson, 'Coastal State Jurisdiction and High Seas Freedoms in the EEZ in the Light of the *Saiga* Case' in Clive R. Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers 2011) 108. While referring to Article 59 of the LOSC, Proelss speaks of a 'backup clause' and Tuerk of a 'wise, but rather imprecise' provision. See Alexander Proelss on Article 59 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 460; Tuerk (n 212) 28.

[296] Molenaar (n 173) 87. While the presumption would be the easiest and probably the most precise way of handling the *lacunae*, it is well explained by Tuerk why this is not in fact the case. In his words: '[t]he fundamental problem with the EEZ regime lies in the need to maintain an appropriate balance between the rights and duties of the coastal State and those of other States. Attempts to swing this balance in favor of the States having declared such zones, if successful, would lead to a gradual assimilation of the EEZ with the territorial sea and would over time lead to a further substantial diminution of the freedoms of the seas'. See Tuerk (n 212) 28.

3.3.2.4 The Continental Shelf

As opposed to the contiguous zone and the EEZ, the continental shelf comprises only the seabed and its subsoil. In this sense, the regime of the continental shelf would appear relevant only for sunken and stranded ships that are lying on the bottom of the sea (as opposed to ships in peril that do not in fact touch the seabed but stay on the sea surface).[297] In principle, the continental shelf extends to 200 nm, measured from the baselines. Up to this limit the continental shelf does not have to be proclaimed by the coastal State.[298] In other words, it exists *ipso facto*. However, under certain circumstances, the LOSC allows the coastal State to establish the outer limits of its continental shelf beyond the limit of 200 nm up to 350 nm, or up to 100 nm beyond the 2 500 m isolbath.[299] This is the so-called 'outer continental shelf'.[300] Article 76 (8) of the LOSC obliges coastal States to submit information on the limits of their outer continental shelf to the Commission on the Limits of the Continental Shelf, which is then tasked with making recommendations to coastal States in this respect. The limits of the continental shelf which are established on the basis of the Commission's recommendations are 'final and binding'.

Similarly to the EEZ, the legal regime of the continental shelf is tied to a specific purpose. It gives the coastal State the sovereign right to explore and exploit its natural resources.[301] Sunken and stranded ships are therefore clearly outside the scope of the regime,[302] albeit the question may again be posed as to whether regulating salvage, intervention, wreck removal or other similar activity could in a given situation appear 'necessary for and connected with' exploration and exploitation of the continental shelf resources. This question will be discussed in the main part of the thesis.

3.3.2.5 High Seas and the Area

The high seas (water column) and the Area (seabed) are beyond the national jurisdiction of coastal States. The high seas are characterized by the freedom enjoyed by all States, which

[297] Although, it needs to be highlighted that the LOSC, while addressing the regime of the continental shelf, makes it explicit that such a regime does not affect the legal status of the superjacent waters. See Article 78 (1) of the LOSC. This also applies to the airspace above those waters, which is of no relevance for this thesis.
[298] Article 76 (1) and (2) of the LOSC.
[299] Article 76 (1) and Article 76 (5) of the LOSC.
[300] See Ted McDorman, 'The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime' (1995) 10 *International Journal of Marine and Coastal Law* 195.
[301] Article 77 (1) of the LOSC.
[302] Churchill and Lowe (n 244) 152.

freedom finds its origin in the doctrine of *mare liberum* ascribed to Hugo Grotius.[303] Within the regime of the high seas, flag States enjoy various freedoms, including the freedom of navigation.[304] The coastal State in principle enjoys no jurisdictional competence on the high seas as jurisdiction here belongs exclusively to the flag State. Among the generally accepted exceptions to the primacy of flag States on the high seas are the right of hot pursuit[305] (which is not relevant to the topic of this thesis) and the right of intervention,[306] which will be elaborated in detail in chapter 6.

The Area comprises the seabed and ocean floor and subsoil thereof. It is subject to the legal regime characterized by the principle of the 'common heritage of mankind' (meaning, among other things, that the Area cannot be subject to national appropriation).[307] The origin of the principle of the 'common heritage of mankind' is often ascribed to Arvid Pardo.[308] The regime of the Area is a resource-oriented regime, which speaks of its irrelevance for this thesis.[309] As such, it will not be considered any further. Rather, the thesis will focus on the regime of the high seas, the EEZ, the territorial sea, internal and archipelagic waters. In addition, Part XII of the LOSC will be observed to the extent it explains general obligations and limitations on coastal State jurisdiction concerning the protection and preservation of the marine environment. This chapter will now outline the main features of Part XII, while the substantive discussion will follow in chapters 6-8 of the thesis.

3.3.3 Part XII: Protection and Preservation of the Marine Environment

3.3.3.1 General Observations

The LOSC dedicates considerable attention to the protection and preservation of the marine environment. The entirety of Part XII is devoted to this topic, with a considerable spectrum of rights conferred, and obligations imposed, on all States. Part XII of the LOSC starts with Article 192 imposing a general obligation on all States 'to protect and preserve the marine environment'. This provision is rather vague and ambiguous, while more specific obligations

[303] Article 87 (1) of the LOSC. See David Joseph Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard et al (eds), *The IMLI Manual on International Law, Volume I The Law of the Sea* (Oxford University Press 2014) 239.
[304] Article 87 (1) (a) of the LOSC.
[305] Article 111 of the LOSC.
[306] Article 221 of the LOSC. While there are no controversies as to the existence of the right of intervention, some controversies exist in relation to its content, as will be seen in chapter 6 of the thesis.
[307] Helmut Tuerk, 'The International Seabed Area' in David Joseph Attard et al (eds), *The IMLI Manual on International Law, Volume I The Law of the Sea* (Oxford University Press 2014) 280;
[308] Rothwell and Stephens (n 275) 11.
[309] Articles 1 (1) and 136 of the LOSC.

are to be found in other provisions. These are, however, not free from their own vagueness and ambiguity, but nevertheless provide rules that are more specific than Article 192.

In the *South China Sea* Arbitration, by referring to the 'corpus' of international environmental law, the Tribunal found that Article 192 of the LOSC is not only to be read with other provisions of the LOSC, but also with instruments other than the LOSC.[310] This means that the key IMO instruments discussed in this thesis indeed have the potential to be observed in the context of the LOSC as a corpus of international law concerning risks associated with ships in peril and shipwrecks.

Rights and obligations outlined in Part XII of the LOSC at times concern all States, irrespective of their capacity as flag, port or coastal States. For instance, in taking measures to prevent, reduce and control pollution of the marine environment, all States are obliged 'not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another'.[311] Moreover, all States have an obligation to take, individually or jointly, measures that are necessary to prevent, reduce and control pollution of the marine environment from any source.[312] While this obligation does not distinguish between flag, port and coastal States, it seems to differentiate between developed and developing States, as it makes further clarification that States are obliged to take these measures 'using for this purpose the best practicable means *at their disposal* and in accordance with *their capabilities'*.[313]

This is a so-called 'double standard' which reflects the fear expressed by developing States during UNCLOS III that an unqualified obligation would impose an unfair burden on them that would impede their prospect for economic development given the high costs associated with environmental protection.[314] The double standard was, however, not as much pursued by developing States in relation to vessel-source pollution as in relation to the environment in general, as these States were primarily concerned with the prospect for economic growth in relation to industrial and agricultural activities, rather than shipping.

[310] The Tribunal's finding of the LOSC violations was deduced (not entirely, but partly) from the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. See the *South China Sea Arbitration*, PCA Case No 2013-19, Award of 12 July 2016, para 956. See also Stephen Fietta et al, 'The South China Sea Award: A Milestone for International Environmental Law, the Duty of Due Diligence and the Litigation of the Maritime Environmental Disputes' (2017) 29 (4) *Georgetown Environmental Law Review* 711.
[311] Article 195 of the LOSC.
[312] Article 194 (1) of the LOSC.
[313] Article 194 (1) of the LOSC. Emphases added.
[314] Molenaar (n 173) 29 and 52.

3.3.3.2 Vessel-Source Pollution

Part XII of the LOSC also addresses different types of rights and obligations of States depending on whether they act in their capacity as flag or coastal States. This is evident in relation to vessel-source pollution, where certain obligations are imposed on flag States and coastal States offered certain rights. Both flag and coastal States are in this respect normally referred to global standards and the engagement of the IMO, through the so-called 'rules of reference', such as the expression 'generally accepted international rules and standards' (GAIRAS). For example, for the purpose of prevention, reduction and control of vessel-source pollution, Article 211 (2) of the LOSC requires that flag States adopt laws and regulations that at least have the same effect as GAIRAS. When it comes to coastal States, reference to GAIRAS is for example made in Article 211 (5), which deals with the legal regime of the EEZ and allows coastal States to adopt laws and regulations to combat vessel-source pollution and at the same time impose a restriction in this respect in that coastal States are not allowed to go beyond GAIRAS.

The implications of the rules of reference on coastal and flag States will be explained in the next chapter. For now, it is important to note the underlying idea behind this mechanism, which goes back to the early 1960s, when it was realized that flag State jurisdiction was not sufficient to combat pollution coming from ships and to protect coastal States accordingly.[315] There was no doubt coastal States should have the right to protect their coastal and related interests and should consequently be given legislative and enforcement jurisdiction for this purpose. The question was, however, how to balance these rights and jurisdiction with the rights and jurisdiction of flag States, primarily relating to the freedom of navigation.

As one commentator observes, 'ways and means were sought' to limit the competence of coastal States 'in order to strike a reasonable balance' between the interests of coastal States on the one hand and the interests of flag States on the other hand.[316] Ultimately, coastal States were given the right to prescribe and enforce on matters concerning vessel-source pollution. However, they were imposed certain restrictions in this respect through the operation of the so-called rules of reference, save for intervention powers addressed in Article 221 of the LOSC, which does not make use of GAIRAS. Rather, it refers to the right of intervention 'pursuant to

[315] Franckx (n 242) 13.
[316] Ibid.

international law, both customary and conventional'. The content and limits of the right of intervention will be discussed in the main part of the thesis.

3.3.3.3 Rules on Responsibility and Liability and the Relevance of the IMO Liability and Compensation Conventions

According to Article 235 (1) of the LOSC, States bear responsibility for the fulfillment of their international obligations concerning the protection and preservation of the marine environment and they are in this respect liable in accordance with international law.[317] In essence, Article 235 (1) of the LOSC is nothing more than a restatement of general international law on State responsibility, as reflected in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (the ASR).[318] Article 235 (1) therefore speaks of the rule that applies in general, whenever there is a breach of an international obligation (not necessarily an obligation concerning the protection and preservation of the marine environment).

An important point to be made with reference to Article 235 (1) is that this provision does not require damage to occur.[319] Hence, the general rule contained in Article 235 (1) requires no material damage for a State to be held responsible and liable in accordance with international law for failing to fulfill its international obligations concerning the protection and preservation of the marine environment. However, for Article 235 (1) to be triggered, there must occur a breach of a specific obligation concerning the protection and preservation of the marine environment, which obligation is often one of conduct (due diligence obligation), rather than the one of result (involving strict liability).[320] In effect, this would mean that State responsibility and liability may at times be hard or even impossible to claim, as will be seen later on in chapter 7 concerning places of refuge issues. Moreover, it is to be noted that Article 235 (1) of the LOSC may also be invoked in relation to GAIRAS, as will be explained in the next chapter.

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[317] While referring to Article 235 (1) in its advisory opinion in the case of the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, the Seabed Disputes Chamber of the ITLOS made a distinction between the terms 'responsibility' and 'liability' as follows: 'In the view of the Chamber, in the provisions cited in the previous paragraph [Article 235 (1) of the LOSC and others], the term 'responsibility' refers to the primary obligation whereas the term 'liability' refers to the secondary obligation, namely, the consequences of a breach of the primary obligation'. See *Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Seabed Dispute Chamber, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para 10.

[318] The ASR are to be found in the UNGA Resolution 56/83 of 12 December 2001.

[319] This is in clear contrast with Article 139 (2) of the LOSC (addressing the liability in relation to activities in the Area).

[320] Tim Stephens on Article 235 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017).

As opposed to paragraph 1 of Article 235 of the LOSC, which does not require damage to occur for State responsibility and liability to be triggered, paragraph 2 speaks of 'damage caused by pollution' and in this respect spells out the general rule concerning the system of compensation for victims. To be more precise, it stipulates that:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

The purpose of this provision is twofold. It serves as a corrective function (for victims to be compensated) and it provides an incentive for commercial industry (e.g. shipowners and operators) to indeed take measures to prevent pollution in the first place.[321] The problem often encountered in practice with the system of compensation for victims is that the system is largely offered through civil proceedings before national courts, which are complex, time-consuming and costly.[322] In that sense, they may neither provide prompt nor adequate compensation for victims. At times, compensation may be lacking entirely or may be significantly reduced on account of a variety of reasons such as problems associated with establishing jurisdiction and applicable law (where and whom to sue), the principle of liability (issues such as: is it a strict or fault-based liability; is it subject to any monetary limits and if yes to what extent). Perhaps the most common struggle is the inability of a victim to prove fault of a responsible person (shipowner or other) and/or to find an adequate property from which the compensation may be inferred (in cases the enforceable court decision is in fact obtained).

To overcome these problems, the LOSC requires States to ensure that victims are given the possibility to invoke legal remedies under national legislation to be compensated 'promptly' and 'adequately'. To this end, a suite of liability and compensation conventions were adopted by the IMO. The LOSC makes reference to these in Article 235 (3) through the obligation of States to cooperate (i) in the implementation of existing conventions and (ii) in the further development of international law in this respect. This provision reads as follows:

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[321] Rothwell and Stephens (n 275) 393.

[322] For more on the problems associated with liability and compensation issues encountered in practice see Rothwell and Stephens (n 275) 393-399; Steven Rares, 'Ships that Changed the Law – the *Torrey Canyon* Disaster', 2. This is a paper presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017, available at <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171005> accessed 9 April 2019.

> With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Indeed, there are a number of liability and compensation conventions developed at the IMO to address the issue of liability and compensation for damage caused by pollution of the marine environment. These conventions are: the LLMC,[323] the CLC,[324] complemented by the FUND Convention and the Supplementary FUND Convention;[325] the Bunker Convention,[326] the HNS Convention.[327]

These conventions are all premised on the same four principles. First, a shipowner's liability is strict.[328] This adequately explains the previous statement that the industry has an incentive to take certain measures to prevent pollution in the first place. Second, while the shipowner's liability is strict, it is at the same time subject to certain limitations, which explains the *quid pro quo* for the strict liability regime.[329] Third, compensation is guaranteed through compulsory

[323] The Convention on Limitation of Liability for Maritime Claims was originally adopted in 1976 (the 1976 LLMC) and was amended by the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims (the 1996 LLMC).

[324] The International Convention on Civil Liability for Oil Pollution Damage was originally adopted in 1969 (the 1969 CLC). However, it was superseded by the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (the CLC), 1956 UNTS 255.

[325] The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage was originally adopted in 1971 (the 1971 FUND Convention). However, it was superseded by the 1992 Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the FUND Convention), 1953 UNTS 330. At times, the IOPC FUND established under the 1992 Fund Convention may appear inadequate as it has its own limits, for which reason a new convention was adopted in 2003 to supplement the 1992 FUND Convention. The convention in point is the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund (the Supplementary FUND Convention).

[326] The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunker Convention), 973 UNTS 3.

[327] The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention) was originally adopted in 1996 (the 1996 HNS Convention) and was amended by the 2010 Protocol (the 2010 HNS Convention). The consolidated version of the Convention is normally referred to as the HNS Convention. However, it did not enter into force yet.

[328] Strict liability means that no fault is required. See Article III (1) of the CLC, Article 3 (1) of the Bunker Convention, Article 7 (1) of the HNS Convention, Article 10 (1) of the WRC. Exoneration from liability is nevertheless possible, although under limited and strict conditions. See Article III (2)-(3) of the CLC, Article 3 (3)-(4) of the Bunker Convention, Article 7 (2)-(3) of the HNS Convention and Article 10 (1) of the WRC. At times, shipowner is defined as a registered owner, while at times ship operator is included as well. For more on this see chapter 7 of the thesis.

[329] See Article V of the CLC, Article 6 of the Bunker Convention, Article 9 of the HNS Convention and Article 10 (2) of the WRC. While the CLC and the HNS Convention operate within a two tier system in which the IOPC

insurance or other financial security that is required to be obtained in advance.[330] Fourth, the victim is authorized to take direct action against the insurer or other entity who provided financial security.[331] The figures that nevertheless vary, depending on the convention at stake, concern the type of ships and damage covered, as well as the amount of compensation available (depending on monetary limitations and availability of complementary funds). These will be discussed in chapter 7 of the thesis.

While the IMO liability and compensation conventions indeed follow Article 235 (2) of the LOSC in that they are centered around damage having in fact occurred ('damage caused by pollution of the marine environment'), they also go a step further by providing compensation for preventive measures, albeit only in exceptional cases subject to specific conditions, as will be explained in chapter 7 of the thesis. The WRC is the final convention in the suite of the liability and compensation conventions. However, as already mentioned earlier in this thesis, the WRC is not a pure 'liability and compensation' convention. It also addresses jurisdictional issues, as will be discussed in chapters 6-8 of the thesis. Moreover, as will be explained there also, it is not a damage-oriented (i.e. victim-oriented), but a cost-oriented convention.

3.4 **The Relationship of the LOSC to Other International Agreements**

The LOSC is neither a completed nor a fixed regulatory instrument.[332] Indeed, there exist a significant number of treaties and other legal instruments that overlap with, or relate to, the subject matter of the LOSC, including the IMO instruments discussed in this thesis. As far as treaties are concerned, their mutual relationship is in general governed under the provisions of the VCLT, which largely reflects customary international law.[333] In addition, the LOSC itself contains specific provisions explaining its relationship to other instruments (Articles 237 and 311) and other instruments also explicitly outline their relationship to the LOSC.

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and HNS funds provide the top-up compensation, the Bunker Convention and the WRC operate within one tier system and are linked to the LLMC fund, the amount of which normally depends on the tonnage of the ship. For more on this see chapter 7 of the thesis.

[330] See Article VII (1) of the CLC, Article 7 (1) of the Bunker Convention, Article 12 (1) of the HNS Convention and Article 12 (1) of the WRC.

[331] See Article VII (8) of the CLC, Article 7 (10) of the Bunker Convention, Article 12 (8) of the HNS Convention and Article 12 (10) of the WRC.

[332] See Henrik Ringbom, 'Introduction' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 1.

[333] Of particular relevance are Section 4 of Part III of the VCLT (treaties and third States), Part IV of the VCLT (amendment and modification of treaties) and Part V of the VCLT (invalidity, termination and suspension of the operation of treaties).

The general purpose of the relationship provisions is to provide a technique to prevent, or provide a solution to, (potential) conflicts in international law.[334] The same purpose is served by maxims known to most legal systems, such as the principles of *lex specialis* or *lex posterior*.[335] While the relationship provisions and maxims do provide a 'direction in interpretation' of substantive provisions,[336] they do not define in every instance whether there is in fact a potential for a conflict or not. To answer this question, one must refer to substantive provisions that perform this role, and this thesis will consider such provisions in its main part. In relation to the 'direction in interpretation', however, some general observations may be made here.

When it comes to the relationship provisions in the LOSC, Articles 237 and 311 denote a certain degree of superiority of the LOSC over any other treaty, regardless of whether such a treaty already exists or is to be concluded in the future.[337] In this respect, Article 311 (2) stipulates that the LOSC:

> shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

The first part of this provision would suggest that preference is given to treaties other than the LOSC, as the LOSC 'shall not alter the rights and obligations of States Parties which arise from' those treaties. However, the last part of the provision makes it clear that this is so only to the

[334] While there is no universal definition of a 'conflict', there are some attempts to make the term more meaningful. Wolfrum and Matz-Lück, for instance, take the rather narrow perspective arguing that a conflict arises between treaties if 'one obligation cannot be fulfilled without necessarily violating the other'. See Rüdiger Wolfrum and Nele Matz-Lück, *Conflicts in International Environmental Law* (Springer 2003) 6. Others take a broader perspective arguing that 'States are not only concerned when a State cannot abide by two treaties but also where one treaty frustrates the goals of another treaty'. See Christopher Borgen, 'Treaty Conflicts and Normative Fragmentation' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 455. For more on the ambiguity as to what is a 'conflict' see ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group, Finalized by Martti Koskenniemi', UN Doc A/CN.4/L/682 of 13 April 2006, available at <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 6 May 2019.

[335] See ILC (n 334) 142.

[336] Ted McDorman, 'A Note on the Potential Conflicting Treaty Rights and Obligations between the IMO's Polar Code and Article 234 of the Law of the Sea Convention' (2015) *Law and Politics of the Arctic Ocean* 141-159, 157.

[337] The only exception to this rule is the supremacy of the UN Charter over the LOSC, albeit, as Churchill observes, this is of no practical significance as in practice there seems to be no conflict between the LOSC and the UN Charter. For more on the superiority of the LOSC over any other treaty see Churchill (n 171); Detlef Czybulka on Article 237 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017); Nele Matz-Lück on Article 311 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017).

extent that the other treaty is 'compatible' with the LOSC and 'do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention'. These conditions clearly speak of the LOSC's preeminence.[338]

Furthermore, Article 311 (3) speaks of treaties 'modifying or suspending the operation of provisions of' the LOSC. While these treaties are indeed permitted, they apply only between parties to those treaties. In other words, no modification or suspension of the LOSC may have a legal effect on the LOSC States parties that are not parties to the modifying or suspending agreements. This indeed preserves the principle central to the law of treaties – the *pacta tertiis* principle, as applicable under Article 34 of the VCLT and customary international law.[339]

In case States Parties to the LOSC intend to modify or suspend the operation of the LOSC by an *inter se* agreement, they are required to notify the other States Parties of their intention and the notification shall be made through the UN Secretary General.[340] Article 319 (2) (c) of the LOSC then explicitly requires the UN Secretary General to notify States Parties of such agreements. In practice, there has not been any such notification to date.[341] While there are some indications that the WRC indeed modifies the LOSC to some extent, no notification through the UN Secretary General has so far been registered to this effect. This still does not allow the conclusion that the WRC is not in effect the modification of the LOSC and this question will be discussed in chapter 8 of the thesis.

Finally, there are certain treaties 'expressly permitted or preserved by' other articles of the LOSC. In this respect, Article 311 (5) of the LOSC prescribes that Article 311 (read in its entirety):

> does not affect international agreements expressly permitted or preserved by other articles of this Convention.

Hence, Article 311 (5) points to *lex specialis.*[342] Agreements that fall under the 'rules of reference', as will be explained in the next chapter, may be one such example. Another example may be Article 237, which addresses the relationship of the LOSC with 'other conventions on the protection and preservation of the marine environment'. In other words, Article 237 deals

[338] See ILC (n 334) 142.
[339] See chapter 1 of the thesis (1.5.2.1.).
[340] Article 311 (4) of the LOSC.
[341] Churchill (n 171) 37. For more on modifying and suspending treaties see David Freestone and Alex Oude Elferink, 'Flexibility and Innovation in the Law of the Sea: Will the LOSC Convention Amendment Procedures ever be used?' in Alex Oude Elferink (ed), *Stability and Change in the Law of the Sea. The Role of the LOS Convention* (Martinus Nijhoff 2005).
[342] Czybulka (n 337).

with the relationship of the LOSC to environmental treaties as *lex specialis*. According to paragraph 1 of Article 237 of the LOSC, the provisions of Part XII of the LOSC:

> are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

Paragraph 2 further spells out:

> [s]pecific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

It is to be noted that the provision of Article 237 of the LOSC is phrased in hortatory language, rather than mandatory language as it uses the term 'should', rather than 'shall'. The effect of Article 237, however, is the same as that of Article 311 of the LOSC in that both allude to the preeminence of the LOSC over any other agreement.[343] In addition to Article 237 and 311, of relevance are Articles 312 and 313, which both are devoted to possible amendments to the LOSC. However, the procedure envisaged thereunder is rather cumbersome and has consequently never been applied in practice.[344]

3.5 **Compulsory Settlement of LOSC Disputes**

3.5.1 Advance Consent to the Compulsory Regime for the Settlement of Disputes

International law knows no supranational entity that could impose on States an obligation to settle their disputes before international courts or tribunals. Consequently, States cannot be brought before an international court or tribunal, nor they can be legally bound by any judgment or award rendered by such court or tribunal, without their express consent.[345] The problem often encountered in practice is that States are in fact not willing to give their consent in this respect. UNCLOS I is a good example of this as it produced a protocol on the settlement of disputes which was an opt-in mechanism. UNCLOS III, however, brought a significant amendment to

[343] McDorman (n 336) 150.
[344] Churchill (n 171) 42-43; See also Irina Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 47.
[345] Bernard Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 395.

this approach, as Part XV of the LOSC now provides a compulsory regime for the settlement of disputes, entailing binding decisions to which States gave their explicit consent in advance by becoming a party to the LOSC.

If States cannot agree on any peaceful means or no settlement of dispute has been reached on the basis of a peaceful means chosen by the parties, any party to a dispute may 'request' its settlement before the international court or tribunal under Section 2 of Part XV. Here lies the main significance of Part XV of the LOSC as the LOSC States parties give their advance consent to other States parties to 'request' the settlement of a given LOSC dispute by an international court or tribunal and to be legally bound by a judgment or award rendered by that court or tribunal in accordance with Section 2 of Part XV of the LOSC.[346] This applies irrespective of whether or not a State in fact participated in the proceedings or in the constitution of the court or tribunal.[347] As Boyle notes, when it comes to the settlement of international disputes, the LOSC is probably the most important development in international law since the adoption of the UN Charter and the ICJ Statute.[348]

Rather than providing a single forum for compulsory settlement of disputes, the LOSC provides a range of four fora that a State can choose from. In particular, by means of a written declaration, a State party to the LOSC is free to choose between the following forums: (i) the International Tribunal for the Law of the Sea (the ITLOS), (ii) the International Court of Justice (the ICJ), (iii) arbitration under the rules outlined in Annex VII of the LOSC and (iv) special arbitration under the rules outlined in Annex VIII of the LOSC.[349] Unless the parties to a specific dispute agree otherwise (either in advance or on an *ad hoc* basis), arbitration under Annex VII will be compulsory.[350]

3.5.2 Disputes Concerning the Interpretation or Application of the LOSC

Article 286 of the LOSC stipulates that Section 2 of Part XV of the LOSC applies only to a 'dispute concerning the interpretation or application of the LOSC'. The same wording can be

[346] Article 296 of the LOSC explicitly stipulates that any decision rendered by a court or tribunal having jurisdiction under this section 'shall be final and shall be complied with by all the parties to the dispute'. Moreover, such a decision 'shall have no binding force except between the parties and in respect of that particular dispute'. See also Article 33 of Annex VI of the LOSC, Article 11 of Annex VII of the LOSC and Article 4 of the Annex VIII of the LOSC.
[347] The *Arctic Sunrise* Case, (Netherlands v Russia), ITLOS, Provisional Measure, Order of 22 November 2013, paras 46-57.
[348] Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 (1) *International and Comparative Law Quarterly* 37-54, 37.
[349] Boyle calls this approach to the settlement of disputes the 'cafeteria' approach. See Boyle (n 348) 40.
[350] Boyle (n 348) 37-54, 40; Oxman (n 345) 399.

found in Article 288 (1) which speaks of jurisdiction of a court or tribunal established in accordance with the LOSC over a 'dispute concerning the interpretation or application of this Convention […]'.

In principle, no reservation to Part XV of the LOSC is allowed, which clearly confirms the package deal character of the LOSC.[351] However, some exceptions concerning certain types of disputes do exist. A State may for instance make a reservation in relation to a dispute concerning the interpretation or application of Articles 15, 74 and 83 (maritime boundary/delimitation dispute) or a dispute concerning historic bays or titles or military activities.[352] As observed by Molenaar, these exceptions were probably unavoidable if one is to think of the political reality in which the LOSC was negotiated.[353] However, issues concerning navigational rights and freedoms, as well as issues related to the interpretation and application of international rules and standards for the protection and preservation of the marine environment (e.g. Article 211 (5) of the LOSC concerning GAIRAS), which are issues of particular relevance for this thesis, undoubtedly fall under the scope of the compulsory settlement of disputes regime.[354]

3.5.3 Applicable Law

Part XV of the LOSC contains a specific provision concerning the applicable law, namely Article 293 which prescribes that, in deciding a dispute between States parties to the LOSC, a court or a tribunal having jurisdiction under Section 2 of the LOSC 'shall apply this Convention and *other rules* of international law not incompatible with this Convention'.[355]

The phrase 'other rules of international law' gives the courts and tribunals a possibility to rely on the 'corpus' of international law related to a specific matter of the LOSC, such as for instance the protection and preservation of the marine environment, as in fact the Tribunal relied on in the *South China Sea* Arbitration.[356] Against this backdrop, there seems to be no reason why the same should not apply to matters of risks posed by ships in peril and shipwrecks. In the words of Oxman, the provision of Article 293 reflects the fact that the LOSC does not exist in isolation

[351] Article 309 of the LOSC.
[352] Article 298 (1) (a) and (b) of the LOSC.
[353] Molenaar (n 173) 498.
[354] Article 297 (1) (a) - (c) of the LOSC.
[355] Emphases added.
[356] As mentioned earlier, in the *South China Sea* Arbitration the Tribunal referred to the corpus of international environmental law in the context of Article 192 of the LOSC. See the *South China Sea* Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, paras 941 and 956.

but rather 'forms part of the corpus of international law,' and as such, it may 'help explain the provenance, wording, or function' of the text of the LOSC.[357]

The inclusion of the phrase 'other rules of international law' in Article 293 of the LOSC is probably best explained with reference to a statement by the ILC that 'none of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded'.[358] While this would certainly mean that customary international law and general principles of international law may fall under the scope of 'other rules of international law', what remains ambiguous is whether treaties that do not reflect general international law are included. Ferrara suggests that these are included.[359] However, this interpretation should be taken with caution because of the *pacta tertiis* principle. It is at any time important to bear in mind that a State is bound by obligations imposed under international law only in so far it gave its consent.[360] Nonetheless, the significance of the key IMO instruments discussed in the thesis may at any rate be observed through the potential to assist judges in the interpretation of the LOSC and to find their fit in this respect in the reasoning of the judgement, rather than in the dictum.

Given that courts and tribunals have only jurisdiction concerning the interpretation or application of the LOSC, it should be clear that 'other rules of international law' may be applicable only to the extent they may indeed assist the interpretation or application of the LOSC.[361] In other words, no other rules but those contained in the LOSC may form the basis for the claim if a dispute is to be brought before the LOSC court or tribunal. Hence, if a State party to the LOSC wants to bring another State party to the LOSC before the international court or tribunal on the basis of any of the key IMO instruments discussed in this thesis, it first has to make sure that its claim is based on the LOSC.

3.6 **Conclusions**

Coastal State jurisdiction in relation to foreign ships is governed by rules of general international law, which are by and large reflected in the LOSC. The latter, however, is neither a complete nor a finished piece of work. Rather, its constitutional character generally demands

[357] Oxman (n 345) 413-414.
[358] ILC (n 334) para 172. See also Oxman (n 345) 413-414.
[359] Pablo Ferrara on Article 293 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 1894-1895.
[360] Crawford (n 175) 447.
[361] Ferrara (n 359) 1894-1895. See also Oxman (n 345) 413-414.

that specific rules are developed elsewhere. Nonetheless, it does provide directions as to where and how these rules are to be developed and used. In principle, the LOSC addresses coastal State jurisdiction on the basis of a zonal approach and the presence/absence of territorial sovereignty. In addition, Part XII applies to all maritime zones and imposes on all States an obligation to take, individually or jointly, measures that are necessary to combat pollution from any source.[362] While silent on many issues, including issues concerning ships in peril and shipwrecks, the LOSC has proven to be flexible enough to correspond to modern trends and challenges in practice.[363]

There exist a significant number of treaties and other legal instruments that overlap with, or relate to, the subject matter of the LOSC, including the IMO instruments to be discussed in the main part of the thesis. In this respect, the LOSC contains provisions that speak of the relationship of the LOSC to other agreements. Of particular relevance are the provisions of Articles 237 and 311 of the LOSC, both of which spell out the primacy of the LOSC over any other agreement. In cases of disputes concerning the interpretation and application of the LOSC, Part XV provides a compulsory settlement of disputes regime, which ultimately also enables a State party to the LOSC to test before international courts and tribunals the relationship between the LOSC and the key IMO instruments discussed in this thesis.

[362] Article 194 (1) of the LOSC.

[363] Probably best explained in the words of Mensah, the LOSC is 'not a finished work of art: it is a living document [...]'. See Thomas A. Mensah in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Brill Nijhoff 2000), ix-x. According to Gavouneli, the LOSC 'has proven to be solid yet flexible, constant yet adjustable, massive yet subtle – old and yet so new […]'. See Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007) 178.

4 The IMO as a 'Competent International Organization' in Developing the LOSC

4.1 Introduction

As chapter 3 demonstrated, the LOSC is neither a complete nor a finished piece of work. Rather, it is an instrument of a constitutional and living character, whose provisions are clarified and developed through other agreements. As far as shipping is concerned, the agreements in point are adopted at the IMO, as in fact the key instruments observed in this thesis. Against this backdrop, this chapter explains the mandate of the IMO, both under the IMO Convention and its gradual expansion in practice. Next, it explains the way the LOSC refers to the IMO's mandate by using the so-called 'rules of reference'. Reflection upon IMO's institutional structure (membership and organs) and decision-making process concludes the chapter.

4.2 Establishment and Mandate of the IMO

The initial idea of forming an intergovernmental organization with competence in shipping first emerged in 1889, during the International Maritime Conference convened by the USA in Washington, D.C. Yet, it was only after the Second World War that the idea proved to be viable.[364] In particular, in 1946, the United Maritime Consultative Council (the UMCC), which was established for the purpose of exchanging information and discussing matters relevant for shipping, recommended the establishment of a permanent shipping organization within the system of the United Nations.[365] Based on the UMCC's recommendation, the United Nations Economic and Social Council convened a conference in Geneva in 1948.[366] The conference led to the adoption of the Convention on the Inter-Governmental Maritime Consultative Organization, today known as the Convention on the International Maritime Organization (the IMO Convention).[367]

[364] Aldo Chircop, 'The International Maritime Organization' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 417.
[365] Gaetano Librando, 'The International Maritime Organization and the Law of the Sea' in David Joseph Attard et al (eds), *The IMLI Manual on International Law, Volume I The Law of the Sea* (Oxford University Press 2014) 577.
[366] Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 39-44.
[367] The 1948 Convention on the International Maritime Organization (the IMO Convention), 289 UNTS 3, as amended.

In order to enter into force, the IMO Convention required participation of 21 States, of which 7 with no less than 1 000 000 gross tonnage each.[368] It took 10 years before this could be accomplished,[369] partly because many States felt that the Organization was given a competence that could potentially affect their economic interests.[370] Eventually, a number of States ratified the IMO Convention but subject to a certain declaration or reservation with the ambition to restrict the Organization's competence to those technical aspects of shipping.[371]

The IMO Convention has been amended on several occasions.[372] The most significant amendments, which largely occurred as a response to the *Torrey Canyon* and similar accidents,[373] concern the change of the name of the Organization,[374] the institutional structure and the Organization's mandate. The general mandate and functions of the IMO are addressed under the IMO Convention. At the same time, reference is to some extent made to the specific mandate and functions of the IMO in the LOSC.[375] Moreover, the mandate of the IMO has evolved in practice, without this being reflected in the LOSC or in the IMO Convention.

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[368] Article 74 of the IMO Convention.

[369] The IMO Convention entered into force on 17 March 1958. See UN Treaty Collection, information available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&clang=_en> accessed 9 May 2019.

[370] Scandinavian States were the most active ones in this respect. For more see Librando (n 365) 577.

[371] Norway, for instance, made the following statement: 'The Norwegian Government supports the work programme proposed by the Preparatory Committee of the Organization in document IMCO/A.I/11. The Norwegian Government holds the view that it is in the field of technical and nautical matters that the Organization can make its contribution towards the development of shipping and seaborne trade throughout the world. If the Organization were to extend its activities to matters of a purely commercial or economic nature, a situation might arise where the Norwegian Government would have to consider resorting to the provisions regarding withdrawal contained in article 59 of the Convention'. The same statement was made by Denmark, Finland and Sweden. Others expressed their view in different wording, although the substance was essentially the same. For the status of the IMO Convention see UN Treaty Collection, information available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&lang=en> accessed 30 October 2017.

[372] For the consolidated version of the IMO Convention see the IMO, Basic Documents, Volume I, 2018 Edition.

[373] See Aldo Chircop, 'The IMO, its Role under UNCLOS and its Polar Shipping Regulation' in Robert C. Beckman et al (eds), *Governance of Arctic Shipping* (Koninklijke Brill 2017) 110.

[374] The initial name of the 'International Maritime Consultative Organization' changed into the 'International Maritime Organization' on the basis of the amendments to the IMCO Convention adopted by the IMCO Assembly by its Resolution A.385 (IX) of 14 November 1975, as rectified by Resolution A.371 (X) of 9 November 1977. The amendments to the IMCO (now IMO) Convention entered into force on 22 May 1982. Given the omission of the phrase 'consultative' in the name of the Organization, it is clear that the IMO nowadays offers a forum where Governments cooperate for the purpose of making not merely recommendations but also legally binding regulations.

[375] Some specific IMO conventions also assign the IMO with certain functions not mentioned in the IMO Convention itself and these relate to the *tacit acceptance* procedure envisaged, for example, in the MARPOL (Article 16) and the SOLAS (Article 8). In the words of M'Gonigle and Zacher, this is a so-called 'quasi-legislative' capacity of the IMO, or in words of Wolfrum, 'quasi-prescriptive'. See M'Gonigle and Zacher (n 366) 48; Rudiger Wolfrum, 'IMO Interface with the Law of the Sea Convention' in Nordquist Myron and Norton Moore John, *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 225. Given that the *tacit acceptance* amendment procedure does not concern any of the key IMO instruments observed in this thesis, the IMO capacity in this respect shall not be elaborated any further.

4.2.1 Mandate under the IMO Convention and its Expansion in Practice

The IMO was initially established with an ambition to facilitate international trade by providing a forum that would enable cooperation among Governments in adopting the highest practicable standards to ensure maritime safety and efficiency of navigation. As prescribed in Article 1 (a) of the original text of the IMO Convention, the IMO was established to:

> provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation.[376]

In other words, the IMO initially had no authority in matters of environmental protection, but merely in matters of technical aspects of navigation. The situation changed with the 1975 amendments to the IMO Convention, when the purpose of the IMO expanded so as:

> to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and *prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article*.[377]

This provision clearly speaks of the mandate of the IMO being concerned with not only maritime safety and efficiency of navigation, but also with matters related to the marine environment. Yet, not all matters concerning the marine environment are expressly included, but only those related to vessel-source pollution. To date, this provision remained unchanged.

While the mandate of the IMO as stipulated in the IMO Convention was subject to no further amendments, it has gradually expanded in practice so as to include a wide range of issues not necessarily related to vessel-source pollution in its narrowest sense. These issues were all seen to be of a particular importance for the purpose of preventing harm to the environment in general.[378] The issues in point, as summarized by Molenaar, embrace:

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[376] Article 1 (a) of the IMO Convention.
[377] IMCO Assembly Resolution A.385 (IX) of 14 November 1975, as rectified by the IMO Resolution A.371 (X) of 9 November 1977. Emphases added.
[378] Chircop (n 373) 110.

> impacts of merchant shipping on the marine environment and its biodiversity, such as emissions, anchoring, ballast water and sediments, anti-fouling systems, ship recycling, ship strikes of cetaceans and noise.[379]

As will be seen throughout the main part of the thesis, matters concerning hazardous wrecks could be added to the list of issues that fall under the mandate of the IMO in terms of impacts of merchant shipping on the marine environment and its biodiversity.[380]

The mandate of the IMO, as expanded in practice, is reflected in the IMO Strategic Plan for 2018-2023,[381] which provides as follows:

> The mission of the International Maritime Organization (IMO), as a United Nations specialized agency, is to promote safe, secure, *environmentally sound, efficient and sustainable shipping* through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO instruments, with a view to their universal and uniform application.[382]

If compared to the IMO Convention, it is clear that the IMO Strategic Plan speaks of the expanded mandate of the organization. At the same time, it is important to bear in mind that the IMO Strategic Plan was adopted by the IMO Assembly and hence, by the States themselves. Moreover, it was adopted by consensus, which means that the expansion of the IMO mandate indeed enjoys the support of the global community.[383]

In order to achieve the purposes for which it is established, the IMO is assigned with specific functions. It is given the task: (i) to consider and make recommendations upon matters referred to it;[384] (ii) to provide machinery for consultation among its Members and the exchange of

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[379] Erik J Molenaar, 'Shipping: Vessel-source Pollution' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 187.
[380] Emphasis added. See chapter 8 of the thesis. Even though irrelevant for this thesis, for the sake of completeness it is worth mentioning briefly that the mandate of the IMO has also expanded to maritime security issues, which expansion is explained by challenges that have emerged with the terrorist acts such as the hijacking of the *Achille Lauro* in 1985 and the 9/11 attack. For more see Chircop (n 373) 110. The security challenges triggered, *inter alia*, the adoption of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Convention).
[381] IMO Assembly Resolution A.1110 (30) of 6 December 2017.
[382] The mandate of the IMO is often referred to in shorthand as 'safe, secure and efficient shipping on clean oceans'. See chapter 1 of the thesis (1.1.).
[383] Strategic Plan for 2018-2023 was adopted by resolution of the IMO's Assembly. See IMO doc, A 30/Res.1110 of 8 December 2017.
[384] Article 2 (a) of the IMO Convention.

information among Governments; and (iii) to facilitate technical cooperation, particularly in regard to developing States.[385] In addition, the IMO is specifically assigned with the mandate to:

> provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary.[386]

While this provision could point at the legislative function of the IMO, it is to be noted that the IMO has no authority to act as a global legislator[387] in that it is still exclusively States that make international law, while the IMO in this respect provides a forum within which States gather to exchange their views, express their positions and eventually make such law.[388]

4.2.2 Reference to the IMO in the LOSC

The LOSC makes special reference to the IMO on two instances: (i) in the context of the settlement of the LOSC disputes (explicit reference)[389] and (ii) in the context of the regulatory framework for vessel-source pollution and maritime safety (implicit reference). In relation to the former, the function of the IMO is linked to drawing up and maintaining the list of experts in the field of, *inter alia*, safety of navigation and protection and preservation of the marine environment, including vessel-source pollution. This list may be used for the purpose of settling a dispute before a special arbitral tribunal, established in accordance with Annex VIII of the LOSC.[390] In addition, the experts from such a list may be appointed to assist the court or tribunal in deciding a dispute under Part XV of the LOSC.[391]

However, the most commonly known IMO function, to which the LOSC makes an implicit reference, relates to the development of international rules, standards, regulations, procedures and practices concerning maritime safety and vessel-source pollution. The role of the IMO is in this respect addressed in the LOSC either through a reference to a 'competent international organization' or through a reference to a number of different terms, such as 'generally accepted

[385] Article 2 (c) – (e) of the IMO Convention.
[386] Article 2 (b) of the IMO Convention.
[387] As explained by Kirgis, '[f]ew knowledgeable observers contend that the international community is yet ready for a true world legislature'. See Frederick Kirgis, 'Specialized Law-Making Process' in Oscar Schacter and Christopher Joyner (eds), *United Nations Legal Order, Volume 1* (Cambridge University Press 1995) 161.
[388] James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 3.
[389] For more on the LOSC settlement of disputes see chapter 3 of the thesis (3.5.).
[390] Article 2 (2) of the Annex VIII of the LOSC.
[391] Article 289 of the LOSC.

international rules and standards' (GAIRAS) or 'applicable international rules and standards'. These concepts are commonly known as the 'rules of reference'.[392]

4.2.2.1 The IMO as a 'Competent International Organization'

As previous chapter explained, the LOSC is a treaty that is comprehensive enough to address almost all ocean activities.[393] However, being of a constitutional character, most of the time it provides only a framework, and it therefore requires more detailed (operational) rules to be developed elsewhere. In this respect, the LOSC often refers to work of the competent international 'organization' or 'organizations'.[394] When the LOSC uses the term 'competent international organization' (the term used in singular, rather than in plural), it is generally acknowledged that the reference is thereby made to the IMO.[395] One such example where the LOSC uses the term 'competent international organization' is Article 211 (1) of the LOSC, which addresses prescriptive jurisdiction over vessel-source pollution stipulating that:

> States, acting through the *competent international organization* or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the

[392] Erik Franckx (ed), *Vessel-source Pollution and Coastal State Jurisdiction* (Kluwer Law International 2001) 11-13; Bernard Oxman, 'Tools for Change: The Amendment Procedure' in Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea, New York 9 and 10 December 2002 (United Nations 2003) 195; Budislav Vukas, *The Law of the Sea* (Martinus Nijhoff Publishers 2004) 26-31; Irina Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction' in Donald Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 66.

[393] Shipping activity is no exception in this respect. See Chircop (n 364) 427. See also Harrison (n 388) 27.

[394] See for instance Articles 22 (3) (a), 41 (4) and (5), 53 (9), 60 (3) and (5), 61 (2), 61 (5), 97 (2), 119 (2), 197, 198, 211 (1), (2), (3), (5), (6), 257, 262 etc. It is also to be noted that the LOSC, on some occasions, uses different terminology such as for instance 'appropriate international organizations' in Article 270 dealing with 'ways and means of international cooperation'. According to Treves, there is a distinction between 'competent' and 'appropriate' in that 'competent' requires a judgement in terms of law, while 'appropriate' requires a judgement in terms of opportunity. See Tullio Treves, 'The Role of Universal International Organizations in Implementing the 1982 UN Law of the Sea Convention' in Alfred HA Soons (ed), *Implementation of the Law of the Sea Convention Through International Institutions* (Noordwijk aan Zee, the Netherlands: Law of the Sea Institute 1991) 17.

[395] See DOALOS, Bulletin No. 31 of 1996, 80-95. The list prepared by the DOALOS is claimed to be 'not authoritative'. Nevertheless, it bears a significant value given its drafter (the DOALOS) is an authority specifically entrusted by the UN General Assembly with the task of a secretary responsible for the LOSC. See UNGA Resolution 49/28 of 6 December 1994. See also Erik Røsæg, 'The Role of the International Maritime Organization in Defining and Altering the Jurisdiction of Flag, Coastal and Port States' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 365. To say that the term 'competent international organization' relates exclusively to the IMO is not to say that the competence of the IMO is exclusive. See Chircop (n 364) 429. The competence of the IMO in the field of vessel-source pollution is almost exclusive, with the exception being the competence of the International Atomic Energy Agency (the IAEA) for nuclear propelled ships and ships carrying nuclear fuel or waste.

> threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.[396]

This provision spells out a general rule according to which States are expected to follow one of the two alternatives when it comes to regulation of vessel-source pollution. They must act either through the IMO (the LOSC in this respect uses the term 'competent international organization' in singular) or through the 'general diplomatic conference', which in fact may be convened under the auspices of the IMO.[397] The term 'conference' is clear enough, pointing at 'a meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes'.[398] The meaning of the terms 'general' and 'diplomatic' call for some explanation.

Regarding the term 'general', which is omitted in many of the LOSC provisions dealing with conferences, Article 211 (1) of the LOSC makes it clear that vessel-source pollution is truly global in its ambit. As explained by Bartenstein, the purpose of using the word 'general' is therefore to make reference to 'conferences open to "universal participation", as opposed to geographically or otherwise limited participation'.[399] As for the term 'diplomatic', the purpose is to distinguish between diplomats, i.e. 'plenipotentiaries' or 'delegates invested with full authority to represent their State' on the one hand and 'representatives of intergovernmental organizations or independent experts' on the other hand.[400] While the term 'general diplomatic conference' does not explicitly refer to the IMO, a conference convened under the auspices of the IMO would surely be one such conference given the IMO membership in essence covers all States with an interest in shipping, as will be commented on below.

The alternatives through which States are expected to act in regulating vessel-source pollution thus clearly speak of multilateralism and the importance of the engagement of the global community.[401] Vessel-source pollution is not the only context in which the LOSC makes a

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[396] Emphases added.
[397] Article 2 (b) of the IMO Convention.
[398] Black's Law Dictionary.
[399] See Kristin Bartenstein on Article 211 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea, A Commentary* (C.H.Beck, Hart, Nomos 2017) 1428.
[400] Ibid.
[401] However, there are certain exceptions such as the provision of Article 234, which addresses ice-covered areas and which makes no reference to the IMO nor to the general diplomatic conference and therefore allows for unilateralism, although this has been questioned with the adoption and entry into force of the Polar Code. For more

general reference to the IMO as a 'competent international organization' (singular, rather than plural). Another example is the designation of sea lanes and the prescription of traffic separation schemes under Article 22 of the LOSC, according to which the coastal State must take into account the recommendations of the 'competent international organization' (again, the IMO).[402]

4.2.2.2 Other 'Rules of Reference'

At times, the LOSC makes reference to the IMO by means other than the use of the term 'competent international organization' or 'general diplomatic conference'. In particular, it uses the concepts such as 'generally accepted international rules and standards' (GAIRAS), 'applicable international rules and standards' and similar expressions.[403] These concepts are commonly known as the 'rules of reference' – a mechanism through which the LOSC brings under its scope particular instruments developed at the IMO. This way the LOSC ensures that the regulatory framework for shipping is at all times supported by global consensus, rather than imposed by a single State or a small group of States.

Rules of reference are extensively (but not exclusively) used in Part XII of the LOSC, in the context of vessel-source pollution, which is generally considered the main source of 'powerful clashes' of competing interests between flag States on the one hand and coastal States on the other hand.[404] The purpose of the rules of reference may in this respect be seen as twofold. First, by requiring global consensus, rules of reference strike a balance between the juxtaposed interests of these States. Second, the aim of the rules of reference is to connect the jurisdictional framework, which is of a general and constitutional character, with more specific regulations, which are therefore operable in practice.

The operation of the so-called rules of reference is not without its challenges. They employ a variety of terminology, the meaning of which is often not clear. To be more precise, it is not clear which rules, subject to which conditions, are to be used. These challenges will be brought into discussion in chapter 8 of the thesis in order to identify whether the WRC has the potential to reflect GAIRAS and if yes, to what extent. At this stage, it is worthwhile reflecting upon the

see Ted McDorman, 'A Note on the Potential Conflicting Treaty Rights and Obligations between the IMO's Polar Code and Article 234 of the Law of the Sea Convention' (2015) *Law and Politics of the Arctic Ocean* 141-159.

[402] Article 22 (3) (a) of the LOSC.

[403] DOALOS, Bulletin No. 31 of 1996, 79. Article 21 (4) of the LOSC reads as follows: '[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea'.

[404] See Bartenstein (n 399) 1422.

implications of the rules of reference, which vary based on the capacity in which a State acts in a given situation.

If a State acts in its capacity as a flag State, its jurisdiction is linked to GAIRAS as a *mandatory minimum*. In this respect, Article 211 (2) of the LOSC stipulates that:

> States *shall* adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall *at least have the same effect* as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

While the use of the word 'shall' indicates that it is mandatory for the flag State to adopt laws and regulations that assimilate GAIRAS, the use of the expression 'at least have the same effect' leaves some discretion to flag States in that GAIRAS creates a minimum level, but the flag State is at any time allowed to adopt more stringent regulations than GAIRAS.[405]

As far as enforcement jurisdiction is concerned, Article 217 of the LOSC demands that flag States comply with 'applicable international rules and standards'.[406] While there is no reference to GAIRAS, it is to be noted that the term 'applicable' in fact captures GAIRAS. Molenaar explains that the word 'applicable' is used in its relative terms and captures 'a certain body of rules and standards' applicable between parties involved in specific enforcement cases.[407]

The LOSC imposes responsibility on flag States not only in relation to vessel-source pollution, but also maritime safety. In this respect, Article 94 (4) (c) of the LOSC demands flag States take measures necessary to ensure that the master and the crew are fully familiar with and required to observe the 'applicable international regulations' concerning, *inter alia*, the prevention of collisions. In taking these measures, flag States are obliged under Article 94 (5) to 'conform to generally accepted international regulations, procedures and practices'.

If, however, a State acts in its capacity as the coastal State, rather than the flag State, the situation is rather different. Within the EEZ, GAIRAS is used in relation to vessel-source pollution to denote an *optional maximum*.[408] According to Article 211 (5) of the LOSC:

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[405] Similar wording may be found in Article 94 (5) of the LOSC, which requires flag States to 'conform to generally accepted international regulations, procedures and practices […]' when taking measures to ensure safety at sea.
[406] See Article 217 of the LOSC.
[407] See Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 168-169.
[408] For more on mandatory minimum and optional maximum see Molenaar (n 407) 151.

> Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels *conforming to and giving effect* to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.[409]

Coastal States are therefore required not only to 'give effect to' but also to 'conform to' GAIRAS. The term 'conform' here includes 'the design of domestic laws and regulations'.[410] As far as the territorial sea is concerned, the situation is different in that GAIRAS creates an optional maximum only when it comes to the construction, design, equipment and manning (CDEM) standards, which are not relevant for this thesis.[411] In relation to all other matters, the coastal State is not limited in its powers by any reference to GAIRAS.

So far, it should thus be clear that the implications of the rules of reference vary based on the capacity in which a State acts in a given situation. As far as the concept of GAIRAS is concerned, it serves as a mandatory minimum for flag States, but optional maximum for coastal States. In addition, the implications of the rules of reference may be observed in the context of third States-effect. In this respect, while applying the COLREGs in the *South China Sea* Arbitration, the Tribunal made a reference to Article 94 of the LOSC and held that:

> Article 94 [of the LOSC] incorporates the COLREGS into the [LOSC], and they are consequently binding on China. It follows that a violation of the COLREGS, as "generally accepted international regulations" concerning measures necessary to ensure maritime safety, constitutes a violation of the [LOSC] itself.[412]

This is a so-called 'indirectly binding effect of the LOSC'.[413] It means that a certain treaty (such as COLREGs) may have a binding effect on a State which is not a party to that treaty but which is a party to the LOSC, provided that such a treaty may be incorporated into the LOSC through the rules of reference. One could argue that this approach is contrary to the *pacta tertiis*

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[409] It is generally observed that Article 211 (5) of the LOSC reflects customary international law. See Bartenstein (n 399) 1430.
[410] Bartenstein (n 399) 1437.
[411] See Article 211 (4) in relation to Article 21 (2) of the LOSC.
[412] The *South China Sea* Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, para 1083.
[413] Molenaar (n 407) 183. See also Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 31. Churchill here alludes to the indirectly binding effect of the LOSC by saying that the 'rules of reference' are the LOSC provisions 'that require States parties to observe provisions contained in other treaties or standards adopted by international organizations, whether or not they are parties to those treaties or members of those organizations'.

principle.[414] However, it has been submitted that the principle of *pacta tertiis* is not breached as States in fact gave their consent to this end when they consented to the LOSC.[415] If the consent to the LOSC is enough for flag States to be bound by GAIRAS, there seems to be no reason why the same should not be the case with coastal States, especially given that coastal States are given the right, rather than imposed upon with an obligation in this respect.

At the same time, the 'indirectly binding effect of the LOSC' could cause the reluctance of States parties to the LOSC to become parties to the relevant IMO instruments, as they could make the argument that in any case they will be bound by these instruments on the basis of being a signatory to the LOSC.[416] If the reluctance reaches a significant and widespread level, the rules or standards may simply be prevented from becoming 'generally accepted'. Against this backdrop, particular caution has to be taken when arguments are made that a certain treaty may be incorporated into the LOSC.

4.3 **IMO Membership, Organs and the Consensus-Based Approach in Decision-Making**

4.3.1 IMO Membership

The IMO is pursuing an open membership policy, which means that every State can become a member of the IMO.[417] As of 14 February 2020, the IMO has 172 Member States and 3 Associate Members (the Faroe Islands; Hong Kong, China; and Macau, China).[418] While this figure is still short of universal participation of all States,[419] it is nevertheless significant as most States which fall outside the IMO membership are land-locked States with no strong interest in shipping.

All member States of the IMO have equal rights.[420] However, some States, given their influence in a much broader perspective (mostly political and economic impact), may at times play a role

[414] Article 34 of the VCLT, as reflecting customary international law.
[415] Louis B. Sohn, '"Generally Accepted" International Rules" (1986) 61 *Washington Law Review* 1073, 1075, Molenaar (n 407) 157 and 183.
[416] Patricia Birnie et al. (eds), *International Law and the Environment* (3rd edition, Oxford University Press 2009) 1997; Bartenstein (n 399) 1436.
[417] Article 4 of the IMO Convention.
[418] See IMO Membership, List of Member States, available at <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> accessed 14 February 2020.
[419] At present, there are 193 States members of the UN. See UN Membership, List of Member States, available at <https://www.un.org/en/member-states/index.html> accessed 14 February 2020.
[420] However, one must appreciate that IMO organs are composed of all member States, save for the Council, which is the IMO's executive organ. It consists of 40 Member States, which are elected by the Assembly on the basis of special criteria, designed to ensure a fair representation of States. See IMO Assembly Resolution A.258 (IX) of 14 November 1975. M'Gonigle and Zacher refer to the Council as the IMO's 'central policy body'. See M'Gonigle and Zacher (n 366) 46.

that gives them a position more important than the position of others. For instance, being a major oil importer, Japan played a crucial role in the negotiations of the CLC and FUND Convention,[421] while in terms of the law of the sea issues, the USA often plays an important role, which is best explained in the words of Gaskell as follows:

> One area where the US does often take a political stand is on matters which relate to the UNCLOS 1982, where the US is always keen to curtail developments which might restrict rights of access or give new powers to coastal states.[422]

Indeed, the USA was a quite active participant in the negotiations of the WRC (although it has not yet become a party to it), as it was concerned about the WRC giving new powers to coastal States, while at the same time restricting the freedom of navigation. This will be addressed and explained in chapter 8 of the thesis and to some extent in chapter 6 also.

While States are the main actors within the IMO law-making process,[423] there are some non-governmental organizations (NGOs)[424] and inter-governmental organizations (IGOs)[425] that may play a significant role within the IMO as they may influence the position of the Governments. However, they cannot officially participate in the decision-making. They are merely provided with the right to observe the IMO meetings.

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[421] Nicholas Gaskell, 'Liability and Compensation Regimes: Pollution of the High Seas' in Robert Beckman et al (eds), *High Seas Governance: Gaps and Challenges* (Brill Nijhoff 2018) 247.

[422] Nicholas Gaskell, 'Decision Making and the Legal Committee of the International Maritime Organization' (2003) 18 (2) *The International Journal of Marine and Coastal Law* 155, 170-171. According to Gaskell, the reality often is that some States are simply more important than the others, even though this is not often articulated because of the obvious political sensitivities. In this respect, Gaskell speaks of 'key players' and 'key groups of players'.

[423] While all Members of the IMO have equal rights in making (developing) international law, not all of them contribute to the budget of the IMO but only those States with large fleets. To be more precise, member States are contributing to the budget of the Organization based on a particular formula, which is based on the tonnage of the fleet registered with their administration. This formula is different from the one normally used in other specialized agencies of the UN.

[424] Consultative status to the NGO is granted by the IMO Council and is subject to the approval of the IMO Assembly. A non-governmental organization (NGO) may have consultative status with the IMO, provided it fulfills two conditions. First, an NGO must reasonably be expected to make a 'substantial contribution' to the work of the IMO. Second, it needs to be 'truly international' in terms of its membership, component branches or affiliated bodies. See Rules 1 and 5 of the Rules and Guidelines for Consultative Status of Non-Governmental International Organizations with the International Maritime Organization of 2013. These Rules and Guidelines were first adopted by IMO Assembly Resolution A.31 (II) of 13 April 1961, and have been amended several times (1978/1979, 1985, 2001, 2012/2013).

[425] The IMO Convention enables the IMO to enter into agreements of cooperation with other inter-governmental organizations (IGOs) in matters of their common interests. See Articles 60 and 61 of the IMO Convention. So far, this has been done in relation to 64 IGOs. Some examples are the International Hydrographic Organization (IHO), the 1992 International Oil Pollution Compensation Fund (the IOPC Fund), the International Oil Pollution Compensation Supplementary Fund (the IOPC Supplementary Fund) and the European Union, represented by the European Commission. For the full list of IGOs see the IMO Web Site, available at: <http://www.imo.org/en/About/Membership/Pages/IGOsWithObserverStatus.aspx> accessed 2 October 2017.

The purpose of granting this status to NGOs is twofold. On the one hand, it is to enable the IMO to obtain information or expert advice from actors with special knowledge in a particular sector of the Organization's activities. On the other hand, it is to enable the NGOs to express their points of view.[426] This is of particular importance as NGOs represent large groups of environmental and industry-related interests. In fact, even though they do not have voting rights, NGOs are considered to be significant contributors to the work of the IMO and in general to the development of international law.[427] In the words of Chircop:

> non-State actors play, through the medium of the IMO, an indirect role with regard to aspects of the international law of the sea. It is likely that no other international organization provides non-State actors opportunities of similar scope and indirect influence on the law of the sea.[428]

As of 14 February 2020, the consultative status with the IMO is granted to 80 NGOs.[429] The main NGOs relevant for this thesis are: the International Chamber of Shipping (the ICS);[430] the International Salvage Union (the ISU);[431] the International Group of Protection and Indemnity Associations (the IG P&I Clubs);[432] the International Union of Marine Insurance (the IUMI)[433] and the Comité Maritime International (the CMI).[434] These NGOs were all actively involved in

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[426] Rule 2 of the Rules and Guidelines for Consultative Status of Non-Governmental International Organizations with the International Maritime Organization of 2013.

[427] Chircop (n 373) 116-117; See also the observation made by Alfred Popp, 'The Treaty-Making Work of the Legal Committee of the International Maritime Organization' in Aldo Chircop et al. (eds), *The Regulation of International Shipping: International and Comparative Perspective* (Martinus Nijhoff Publishers 2012) 223.

[428] Chircop (n 364) 427. See also Joseph Vorbach, 'The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping' 32 (1) *Ocean Development & International Law* 27, 34.

[429] See IMO Membership, List of NGO's, available at <http://www.imo.org/en/About/Membership/Pages/NGOsInConsultativeStatus.aspx> 14 February 2020.

[430] The International Chamber of Shipping (the ICS) is a non-governmental international organization with commercial interest in shipping. It is comprised of national shipowners' associations. See ICS, 'The International Chamber of Shipping (ICS) – Representing the Global Shipping Industry', available at: <http://www.ics-shipping.org/docs/default-source/about-ics/the-international-chamber-of-shipping-ics-representing-the-global-shipping-industry.pdf?sfvrsn=18> accessed 31 October 2019. The ICS represents approximately 80% of the world tonnage. For more on the ICS Membership and world tonnage covered, see ICS, 'International Chamber of Shipping – Annual Review 2019', available at: <http://www.ics-shipping.org/docs/default-source/resources/annual-review-2018.pdf?sfvrsn=14> accessed 31 October 2019.

[431] The International Salvage Union (the ISU) is a union representing interests of the marine salvage industry at the global level. Its membership comprises of 60 marine salvage companies from 34 States and of 80 affiliated and associated members, which are organizations and professionals with an interest in salvage. For more see the official web site of the ISU, available at <http://www.marine-salvage.com/> accessed 31 October 2019.

[432] The International Group of P&I Clubs (the IG P&I Clubs) is an association comprised of 13 non-for-profit mutual insurance associations (the P&I Clubs). See the official web site, available at: <https://www.igpandi.org/about> accessed 31 October 2019.

[433] The International Union of Marine Insurers (the IUMI) is an association representing the interests of the traditional marine insurers. See the official web site, available at: <https://iumi.com/about/introducing-iumi> accessed 31 October 2019.

[434] The Comité Maritime International (CMI) is a non-for-profit international organization, comprised of national maritime associations, established for the purpose of contributing to the unification of maritime law. See Article 1

the process of international law-making in the field discussed in this thesis and gave their input in this respect, as will become apparent in the next chapter.

4.3.2 IMO Organs

The institutional structure of the IMO consists of a number of organs, in particular: (i) the Assembly; (ii) the Council; (iii) Committees; (iv) Sub-Committees and (v) the Secretariat.[435] Save for the IMO Secretariat, members of the IMO organs are States.[436] As far as Committees are concerned, the IMO has five specialized committees and these are: (i) the Maritime Safety Committee (the MSC); (ii) the Marine Environment Protection Committee (the MEPC); (iii) the Legal Committee (the LEG); (iv) the Facilitation Committee (the FAL) and (v) the Technical Cooperation Committee (the TCC). Not all, but some of the IMO organs are relevant for this thesis and these are the Assembly, the LEG, and to some extent (in the context of places of refuge) the MSC and the MEPC.

The Assembly is the main governing organ of the IMO, which consists of all IMO member States and meets in regular sessions once every two years, as well as in extraordinary sessions if deemed necessary by the Council or upon the request of at least one third of its Members.[437] Apart from the IMO member States, sessions of the Assembly may be attended by all UN member States, even if they are not members of the IMO. However, their status is limited as they have no voting rights (they may only participate as observers).[438] This does not seem to be of much significance in practice since States that have an interest in shipping are indeed all members of the IMO.

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of the Constitution of the CMI. For a short summary see the CMI official Web Site <http://www.comitemaritime.org/part-1-general/0,2736,13632,00.html> accessed 31 October 2019. Members of national maritime associations are usually both maritime scholars and practitioners. For a brief history of the CMI see a note written by Frank Lawrence Wiswall, Vice-President Honoris Causa of the CMI, available at <http://www.imo.org/en/KnowledgeCentre/referencesandarchives/documents/cmi%20a%20brief%20history.htm > accessed 2 May 2019.

[435] Article 11 of the IMO Convention. The Secretariat is the main administrative organ of the IMO. It is comprised of the Secretary-General (the chief administrative officer of the IMO) and a number of administrative personnel. See Article 47 of the IMO Convention.

[436] Representatives of States meet within the IMO organs 'officially' as well as 'semi-officially' (outside the regular sessions). At times, however, they engage in a private email exchange to build upon their positions. See Gaskell (n 422) 155-214, 157. While Gaskell refers to the LEG in particular, the same applies to all the IMO organs, save for the Secretariat.

[437] Article 13 of the IMO Convention and Rule 2 of the Rules of Procedure of the Assembly, IMO, Basic Documents, Volume I, 2010 Edition.

[438] Rule 4 of the Rules of Procedure of the Assembly, IMO, Basic Documents Volume I, 2010 Edition.

One of the Assembly's main functions is to adopt regulations and guidelines, or amendments to such regulations and guidelines, concerning matters under the mandate of the IMO.[439] The Assembly is also assigned with the function to convene an international conference for the purpose of adopting international conventions or amendments to international conventions.[440] The work of the Assembly is relevant in the present study because it convened international conferences that have adopted the key IMO treaties observed in the thesis. Moreover, the IMO Assembly adopted the Resolution A.949 (23) incorporating Guidelines of Places of Refuge. The latter was based mostly on the work of the MSC and the MEPC.

The MSC was the first committee established within the IMO's institutional structure and the participation in the MSC is open to all IMO Member States.[441] The work of the MSC relates to issues affecting maritime safety such as construction, design, equipment and manning of ship (CDEM standards), prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, marine casualty investigation, salvage and rescue operations.[442] Within this context, the meetings of the MSC are normally attended by delegates with a specific technical expertise in the field.[443] The MSC usually makes proposals for safety regulations or their amendments and works on developing recommendations and guidelines regarding safety issues.[444] These experts were missing in the negotiations of the WRC, which explains why in fact the WRC is short of any technical details as to how a hazardous wreck should be removed.

The MEPC and the LEG emerged a considerable number of years after the establishment of the IMO, when States, in the wake of the *Torrey Canyon* (1967) and incidents of a similar environmental impact, started to become aware that the Organization was in an urgent need of expertise on legal, jurisdictional and environmental issues.[445]

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[439] Article 15 (j) of the IMO Convention.
[440] Article 15 (l) of the IMO Convention.
[441] UN Member States, which are not IMO Members, may be invited to attend the meetings in the capacity of observers, i.e. without voting rights. See Rule 4 of the Rules of Procedure of the Maritime Safety Committee, IMO, Basic Documents Volume II, 2010 Edition.
[442] Article 28 (a) of the IMO Convention.
[443] M'Gonigle and Zacher (n 366) 46.
[444] Article 29 of the IMO Convention. The MSC is also allocated a specific task - the adoption of amendments to some of the IMO treaties, such as the SOLAS, based on the *tacit acceptance* procedure. This power is delegated to the MSC by the relevant convention itself. In relation to those treaties, the participation in the meetings of the MSC is open not only to States that are members of the IMO but also to those States that are parties to a treaty in hand, without necessarily being the IMO Member State. See Rule 1 of the Rules of Procedure of the Maritime Safety Committee, IMO, Basic Documents Volume II, 2010 Edition. See also Chircop (n 373) 114.
[445] See Chart 1 in M'Gonigle and Zacher (n 366) 45.

The LEG was set up as an immediate response to the *Torrey Canyon* disaster.[446] It was created as an *ad hoc* committee,[447] assigned with a specific task 'to study as a matter of urgency and to report' on a number of 'problems'.[448] While the IMO was provided with the function of drafting conventions and convening diplomatic conferences from its very inception, the fact that the LEG was established almost 20 years after the Organization's establishment shows that the initial idea with the IMO was in essence related to standard-setting, i.e. technical aspects of navigation and shipping, which was more a matter for technical experts than for lawyers.[449]

The LEG is the IMO organ responsible for legal matters, which meets at regular sessions at least once a year.[450] Its sessions are open to all IMO member States (with the right to vote) and other States members of the United Nations or non-State members (with no right to vote).[451] However, as pointed out above, States that have an interest in shipping are all members of the IMO.

Both the Intervention Convention and the WRC are the result of the work of the LEG, although the majority of the LEG's work was so far dedicated to the drafting of liability and compensation conventions.[452] When it comes to the liability and compensation conventions, it is worth mentioning that these conventions are based on what Gaskell calls a 'boilerplate' text.[453] In other words, these conventions look very much the same as they use the same language in their textual part. The reason for this is twofold. First, the use of the same text reduces the time and complexities of drafting, and secondly, more political one, it prevents objections as it is hard to protest to a long tested and tried formula. In addition, the LEG was to

[446] This happened during the IMO Council's third extraordinary session. See IMO, 'Conclusions of the Council on the Action to be Taken on the Problems Brought to Light by the Loss of the 'Torrey Canyon', IMO doc, C/ES.III/5 of 8 May 1967.
[447] See Rule 222 of the Council's Rules of Procedure.
[448] IMO doc, C/ES.III/5 of 8 May 1967, para 15.
[449] See Rosalie Balkin, 'The Establishment and Work of the IMO Legal Committee' in Nordquist Myron and Norton Moore John (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 292. However, there was another organization that existed at the time, which was in fact responsible for the adoption of many international conventions on legal issues relevant in the field. The organization in point is the CMI.
[450] Rule 2 (a) of the Rule of Procedure of the Legal Committee, IMO, Basic Documents Volume II, 2010 Edition. According to the same rule, paragraph (b), the LEG may also meet at the extraordinary session upon the request made by its Chairman or not let than fifteen of its Members.
[451] Rule 4 (b) and (c) and Rule 5 (b)-(c) and Rule 27 (a) of the Rule of Procedure of the Legal Committee, IMO, Basic Documents Volume II, 2010 Edition. For a detailed study on the work of the LEG see Gaskell (n 422) 155-214.
[452] Such as the LLMC, the CLC, the Bunker Convention and the WRC. The goal of achieving uniformity in their respective field of maritime law is expressly spelled out in the Preambles of all these Conventions.
[453] See Gaskell (n 422) 165. The controversial issues are then left to the conference and when it comes to liability and compensation conventions, this is normally the case with where to draw the limits of liability, given these are the figures that call for a political choice. See Gaskell (n 422) 199.

some extent engaged in the drafting of the 1989 Salvage Convention. Yet, the majority of the work on the 1989 Salvage Convention came from the CMI, as will become evident in the main part of the thesis.

The MEPC was established in 1973, as a permanent subsidiary organ of the IMO Assembly.[454] The proposal for its establishment came from the United States. As M'Gonigle and Zacher observe:

> [w]ith an eye to the upcoming Law of the Sea Conference, the U.S. Government felt that upgrading and institutionalizing IMCO's pollution-control function would forestall potential demands for either an extension of coastal state jurisdiction to control pollution or for the creation of a new pollution prevention agency. In particular, the Americans hoped that the new body would increase IMCO's attractiveness as an environmental organization for the developing countries.[455]

The MEPC's work is concerned with the environmental aspect of shipping in a much broader sense.[456] It is assigned with the function to develop proposals for regulations, as well as 'recommendations and guidelines'.[457] As is the case with any other IMO organ, the MEPC's meetings (sessions) are open to all Members of the IMO.[458]

4.3.3 Consensus-Based Approach in Decision-Making

The decision-making process within the IMO organs is formally based on a voting system by which decisions are formally required to be made by a majority of member States, present and voting.[459] The term 'present and voting' means that States are required to actually vote by casting an affirmative or negative vote. In other words, Members abstaining from voting are considered as 'not voting'.[460] The same rule applies irrespective of the form of a decision in

[454] IMO Assembly Resolution A.297 (VIII) of 23 November 1973. For more on the MEPC's establishment see Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels* (Springer 2015) 25.
[455] M'Gonigle and Zacher (n 366) 48.
[456] As it is the case with the MSC, the MEPC is also assigned with the powers related to the *tacit acceptance* amendment procedure. This is for instance the case under the MARPOL.
[457] Article 39 of the IMO Convention.
[458] Rule 1 of the Rules of Procedure of the Marine Environment Protection Committee, IMO, Basic Documents Volume II, 2010 Edition.
[459] See Rule 32 of the Rules of Procedures of the Assembly; Rule 30 of the Rules of Procedure of the Council; Rule 26 of the Rules of Procedure of the MSC; Rule 28 of the Rules of Procedure of the Legal Committee; Rule 27 of the Rules of Procedure of the MEPC.
[460] See Rule 33 (1) (a) of the Rules of Procedure of the Assembly; Rule 26 (2) of the Rules of Procedure of the MSC; Rule 28 (b) of the Rules of Procedure of the Legal Committee; Rule 28 (b) of the Rules of Procedure of the MEPC.

point (decision, report, resolution or recommendation). In practice, however, the decision-making process is grounded in active consensus.[461]

4.3.4 Different Types of Instruments Adopted at the IMO

A significant number of instruments have been adopted at the IMO. Some are of a legally binding and some of a non-legally binding nature. The IMO conventions, including those observed in this thesis, can be taken as an example of the former, while an example of the latter are the IMO Assembly resolutions and guidelines,[462] including the Resolution A.949 (23) incorporating Guidelines of Places of Refuge.[463]

When one speaks of the legally binding or non-legally binding nature of an IMO instrument, it is important to distinguish between the *form* on the one hand and the *effect* on the other hand.[464] An instrument of non-legally binding form may nevertheless produce legally binding effect if incorporated into the national legislation of a given State or into a specific (legally-binding) treaty. The International Maritime Dangerous Goods Code (the IMDG Code) may serve as an example. It was adopted by the MSC by way of the Resolution MSC.122 (75), which in itself has a non-legally binding form. However, it generated legally-binding effect by being incorporated into the SOLAS (Chapter VII). At any rate, it is also important to take account of the fact that international law is developed with reference to the behavior of States and so, instruments adopted through the IMO, while not always mandatory, 'may have a similar effect to formal rules'[465] by influencing States' behavior.

4.3.5 The Requirement of a 'Clear and Well-Documented Compelling Need'

As explained earlier, the MSC, the MEPC and the LEG are all assigned with the task of drafting new conventions or amendments to existing conventions. In this respect, they are recommended to consider proposals for new conventions or amendments only on the basis of a 'clear and well-

[461] IMO Secretariat, 'Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization', IMO doc, LEG/MISC.8 of 30 January 2014, 8. Harrison (n 388) 190. As far as the work of the LEG is concerned, the Chair plays an important role in reaching the consensus among delegates by steering the discussion towards a practicable and workable solution. It is of little use to have an ideal version of a certain instrument if it attracts support from only a very limited number of States. See Gaskell (n 422) 187.
[462] IMO Secretariat, 'Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization', IMO doc, LEG/MISC.8 of 30 January 2014, 10.
[463] More in chapter 5 of the thesis (5.5.).
[464] Emphases added.
[465] Frederick Kirgis, 'Specialized Law-Making Process' in Oscar Schacter and Christopher Joyner (eds), *United Nations Legal Order, Volume 1* (Cambridge University Press 1995) 161.

documented compelling need'.[466] In addition, they must have regard to the 'costs to the maritime industry and the burden of the legislative and administrative resources of Member States'.[467] These requirements are partly the result of proposals made by States with large commercial fleets, as that group is of the view that shipping industry is already over-regulated and over-cumbersome in respect of the implementation requirements.[468]

When it comes to the requirement of a 'clear and well-documented compelling need', it is not entirely apparent what this term entails. Typically, States pursuing shipowners' interests will always oppose the view that there is a need for a new instrument or an amendment to the existing instrument because a new instrument or amendment would normally impose more liability and accumulate more costs for the shipowner.[469] The question of 'compelling need' within the competence of the LEG so far, as Balkin observes, has tended to be answered based on economic and political factors, i.e. based on the question of 'whether the matter could be left to the market […] for self-regulation.'[470] This in fact could explain the lack of a treaty on places of refuge issue, as will be seen in chapter 5 of the thesis. One of the approaches, as Balkin further argues, is to simply ask whether or not there is already a legal regime in place.[471] This was the approach in respect of the proposals concerning the Intervention Convention adopted in the aftermath of the *Torrey Canyon* accident. However, this did not seem to be the approach with the adoption of the WRC, as the latter included issues already regulated under the Intervention Convention, as will be discussed in the main part of the thesis.

4.4 **Conclusions**

The IMO is a UN specialized agency responsible for shipping. Its mandate, which has gradually expanded in practice, relates to maritime safety, vessel-source pollution and impacts of merchant shipping on the marine environment and its biodiversity. In particular, the IMO is assigned with the function to provide for the drafting of regulatory instruments, recommend these to Governments, and convene diplomatic conferences. The LOSC makes an implicit reference to the IMO through the so-called 'rules of reference'. The terminology used in this respect varies throughout the LOSC and includes the expressions such as 'competent

[466] IMO Assembly Resolutions A.500 (XII) of 20 November 1981 and A.777 (18) of 4 November 1993.
[467] IMO Assembly Resolutions A.500 (XII) of 20 November 1981 and A.777 (18) of 4 November 1993.
[468] Balkin (n 449) 299.
[469] Gaskell (n 422) 160.
[470] Balkin (n 449) 299.
[471] Ibid.

international organization' and 'generally accepted international rules and standards' (GAIRAS).

The main purpose of the rules of reference is to strike a fair balance between the juxtaposed interests of flag and coastal States and to connect the LOSC jurisdictional framework, which is of a general and constitutional character, with more specific and operable IMO regulations. The implications of the rules of reference vary based on the capacity in which a State acts in a given situation. In short, as far as the concept of GAIRAS is concerned, it serves as a mandatory minimum for flag States, but optional maximum for coastal States. The operation of rules of reference is not without its challenges as it is not clear which rules, subject to which conditions, count. This ambiguity will be discussed in chapter 8 of the thesis in relation to the question as to whether or not the WRC has the potential to be treated as GAIRAS. The implications of the rules of reference may in addition be observed in the context of third States-effect. This again will be brought to discussion in chapter 8.

The IMO is characterized by a truly global representation as it has 172 Member States and 3 Associate Members. The States which fall outside the IMO membership have no particular interest in shipping. The making of international law at the IMO is in practice based on the consensus approach, despite the formal rules that define the voting system. Moreover, the making of that law is linked to a 'compelling need', which the LEG tends to define with reference to whether or not a certain issue can be self-regulated on the market, although that interpretation is not universal. This seems to explain the lack of a treaty on places of refuge, as will be discussed in the next chapter. At times, the 'compelling need' is explained on the basis of the question as to whether or not there is a legal regime already in place. This was the approach taken in relation to the adoption of the Intervention Convention, but did not seem to be the approach when the WRC was adopted as the latter included issues already regulated under the Intervention Convention.

PART III
COASTAL STATE JURISDICTION OVER SHIPS IN PERIL AND SHIPWRECKS

5 The Plea of Necessity and Key IMO Instruments: Preliminary Observations

5.1 Introduction

Coastal State jurisdiction over foreign ships in peril and shipwrecks is essentially built on general international law and key IMO instruments, namely the Intervention Convention, the Salvage Convention, the Guidelines on Places of Refuge and the Wreck Removal Convention (WRC). These instruments emerged at different stages and have been triggered by various legal issues brought to light by different maritime accidents. The *Torrey Canyon* (1967) marked the turning point in this respect by transforming the excuse of the plea of necessity into primary norms of international law.

In order to indicate already at this stage certain trends and the direction in which international law has been developing since the *Torrey Canyon*, and to provide the necessary foundation for discussion that will follow in the subsequent chapters concerning the interpretation of the ambiguities in the current state of international law, this chapter investigates and explains the key issues that have triggered the adoption of the key IMO instruments and the main controversies raised during their negotiations, followed by an outline of their object, purpose and geographical scope of application. The chapter starts with the plea of necessity, and continues with the key IMO instruments following the chronological sequence of their adoption.

5.2 The Plea of Necessity

The casualty of the *Torrey Canyon* had demonstrated in the most dramatic way the staggering magnitude of the damage that a single tanker, located relatively far from the shore, can cause to coastal States.[472] By releasing into the sea its entire cargo of 120 000 tons of crude oil, this

[472] In the aftermath of the *Torrey Canyon* accident, the CMI circulated a questionnaire among its members to investigate, *inter alia*, the need for changes in international law. Norway, for example, made an observation as follows: 'It is apparent that the law in its present state does not effectively counteract the ever increasing pollution of the sea by the noxious products and by-products of modern civilization. The *Torrey Canyon* incident has

casualty caused an environmental catastrophe, which polluted more than 200 km of the British and the French coasts, and subsequently caused significant socio-economic and environmental damage and loss.[473] From the law of the sea perspective, the significance of this accident comes from the fact that the *Torrey Canyon* was a Liberia-flagged ship that ran into a maritime casualty outside the limits of the UK's territorial sea,[474] which at that time was high seas. Under customary international law, the high seas regime was characterized by freedom of navigation and exclusive flag State jurisdiction. To put it differently, general international law prohibited coastal States from interfering with navigation of foreign ships on the high seas and the only remedy the UK had at its disposal to interfere with the casualty of the *Torrey Canyon* was the plea of necessity.[475]

5.2.1 Main Features

The plea of necessity is a circumstance precluding wrongfulness.[476] It provides a State with justification for an action which would otherwise be unlawful.[477] As such, it does not confer any particular right on the coastal State.[478] The main features of the plea of necessity are reflected in Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (ASR).[479] This provision, while laid down in a non-legally binding instrument, produces

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demonstrated, in a dramatic way, one aspect of the problem: the very extensive damage which one single ship loaded with crude oil can inflict on innocent victims'. See IMO doc, CMI Documentation 1968 III annexed to LEG III/WP.2 of 1 May 1968, 2.

[473] For more on the *Torrey Canyon* accident and the UK's reaction to this see Patrick Griggs, '"Torrey Canyon", 45 Years On: Have We Solved All the Problems?' in Baris Soyer and Andrew Tettenborn (eds), *Pollution at Sea: Law and Liability* (Informa 2012) 3-5.

[474] At the time of the *Torrey Canyon*, the outer limit of the territorial sea of the UK was set at 3 nm. See Agustin Blanco-Bazan, 'Intervention in the High Seas in Cases of Marine Pollution Casualties' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 265; Aldo Chircop, 'Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 151.

[475] Vaughan Lowe, *International Law* (Oxford University Press 2007) 39. See also Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review* 514, 515.

[476] For general discussion on the plea of necessity see Maria Agius, 'The Invocation of Necessity in International Law' (2009) *Netherlands International Law Review* 95. See also Attila Tanzi, 'State of Necessity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edition updated February 2013); Malgosia Fitzmaurice, 'Necessity in International Environmental Law' in Ige F. Dekker and Ellen Hey (eds), *Netherlands Yearbook of International Law, Volume 41* (Springer 2010).

[477] In the words of Crawford, circumstances precluding wrongfulness are '"excuses", "defences", and "exceptions", that is, justifications available to states which exclude responsibility when it would otherwise be engaged'. See James Crawford, *Brownlies's Principles of Public International Law* (8th edition, Oxford University Press 2012) 563.

[478] Emanuelli shares the view. See Claude Emanuelli, 'The Right of Intervention of Coastal States on the High Seas in Cases of Pollution Casualties' (1976) 25 *University of New Brunswick Law Journal* 79, 90.

[479] The ASR are annexed to UN General Assembly Resolution A/Res/56/53 of 12 December 2001 as 'the modern framework of state responsibility'. See also James Crawford, *State Responsibility* (Cambridge University Press 2013) 45.

legally binding effect as it is widely regarded to reflect customary international law.[480] According to Article 25 of the ASR:

> (1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril, and
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> (2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) the international obligation in question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.

For the successful invocation of the plea of necessity, therefore, three main conditions must be fulfilled. First, an interest protected by the coastal State must be 'essential'. Second, an action taken by the coastal State must be 'the only way' to protect such an interest, which implies an absence of alternatives. Third, an action taken by the coastal State must be necessary due to a 'grave and imminent peril'.

So far, States have claimed different kinds of interests to be of an 'essential' (or 'vital') character. Examples in this respect range from the very existence of a State, through political and economic survival and development, to ecological preservation and protection of the environment.[481] In the case of the casualty of the *Torrey Canyon*, the UK claimed an essential

[480] In 1990, in the *Rainbow Warrior* Case, the Arbitral Tribunal held that the doctrine of necessity is rather controversial and, as formulated in the ASR, does not reflect a rule of general international law. However, in 1997, in the *Gabcikovo-Nagymaros Project* Case, the International Court of Justice was clear in holding that the 'state of necessity *is* a ground *recognized by customary international law* for precluding the wrongfulness of an act not in conformity with an international obligation [emphasis added]'. Not only did the Court find the ground of necessity recognized in customary international law, but it also treated the very conditions contained in Article 33 (now Article 25) to reflect customary international law. See the *Case Concerning the Difference between New Zealand and France Concerning the Interpretation of Application of Two Agreements Concluded on 9 July 1986 between Two States and Which Related to the Problems from the Rainbow Warrior Affair*, Decision of 30 April 1990, Reports of International Arbitral Awards, Volume XX, United Nations 2006, 215, 254, para 78; The *Gabcikovo-Nagymaros Project* Case (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7, paras 51 and 52.

[481] For discussion on selected case law see Agius (n 476) 102-104.

interest 'to preserve the coasts from oil pollution'.[482] While there is no hard and fast rule as to what exactly makes an interest 'essential', it has been suggested that the requirement of 'essential' relates not only to an interest of a given State, but also to an interest of the international community as a whole.[483]

The requirement that the measure of necessity must be 'the only way' to safeguard an essential interest of a given State is basically concerned with the non-availability of an alternative measure. This does not relate only to the State's unilateral action but also to a possibility to cooperate with other States and/or international organizations.[484] Hence, if there is a possibility for the coastal State to obtain the consent of the flag State for intruding into the competence of the latter, the coastal State would not be able to invoke the plea of necessity to justify its otherwise wrongful action(s). If an alternative measure is available, the plea of necessity cannot be successfully invoked, even if this means that a State must do what 'may be more costly or less convenient'.[485] This requirement is not surprising because necessity belongs to secondary norms of international law, excusing what would otherwise constitute a wrongful act. In practice, many cases have turned precisely on the availability of alternative(s).[486]

As for the requirement of 'grave and imminent peril', it needs to be stressed first that a peril includes the notion of 'risk', which is different from the concept of 'damage'.[487] In other words, it gives the coastal State an opportunity to take preventive measures. The problem, however, lies in the qualification of 'grave and imminent', which may make it hard in practice to take preventive, rather than remedial, measures. In the case of the *Amoco Cadiz*, salvors came when it was already too late.[488]

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[482] Lowe (n 475) 39. The *Torrey Canyon* casualty is used in the commentary on the draft ARS as an example of a breach of an international obligation and necessity precluding its wrongfulness. See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, with Commentaries, Official Records of the General Assembly Fifty-Sixth Session, Supplement No 10', A/56/10, 82.

[483] ILC (n 482) 83.

[484] Ibid.

[485] Ibid. Crawford explains, 'here "only" means "only"'. See James Crawford, *State Responsibility* (Cambridge University Press 2013) 311. No State, however, is required to bear costs that are so high as to pose a threat in itself to the essential interests of that State. See Agius (n 476) 104.

[486] See for example, the *Fisheries Jurisdiction* Case (Spain v. Canada), Jurisdiction of the Court, Judgement of 4 December 1998, ICJ Reports 1998, 432. Referring to this case, Crawford observes that 'Spain might have been able to establish that Canada could instead have taken conservation measures through the Northwest Atlantic Fisheries Organization, although Canada argued that its regulatory measures had previously been ineffective'. See Crawford (n 479) 311. See also the *M/V SAIGA (No. 2)* Case (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, ITLOS Reports 1999, 10, para 135; The *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para 140.

[487] The *Gabcikovo-Nagymaros Project* Case (n 480) para 54.

[488] Edgar Gold, 'Marine Salvage: Towards a New Regime' (1989) 20 (4) *Journal of Maritime Law and Commerce* 487, 489-490. See also observations made by the correspondence group on wreck removal, IMO doc, LEG 75/6/1 of 14 February 1997, 7.

Regarding the requirement of 'grave', it implies certain seriousness. It has been suggested that 'any threat likely to destroy the possibility of realizing an essential state interest constitutes "grave peril"'.[489] The problem with this requirement is that the coastal State may not know the exact impact that hazardous substances may have in the long run if released into the sea or into the atmosphere (the nature and the extent of their harmful effect).[490] Experts may express different views in this respect.

As for the requirement of 'imminence', in the *Gabcikovo-Nagymaros Project* Case, the Court held that 'the mere apprehension of a possible "peril" could not suffice'.[491] As the Court further explained, the term 'imminence' is synonymous for the terms 'immediacy' or 'proximity' and 'goes far beyond the concept of "possibility"'. However, this 'does not exclude' the possibility that a peril:

> appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[492]

The term 'imminent', therefore, relates to the likelihood of the realization of a risk in point and implies that the measure based on the plea of necessity taken by the coastal State may only be justified if without such a measure the coastal State's interests would be inevitably affected, no matter how far in the future.[493] The International Law Commission (ILC) explains that:

> a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.[494]

The term 'clearly established' is somewhat confusing as it might suggest that the peril must be proved with certainty. However, given the context (acknowledgement of the scientific uncertainty and associated challenges) and the ruling of the Court in the *Gabcikovo-Nagymaros Project* Case (according to which the term 'imminence' goes 'far beyond the concept of "possibility"', but cannot be equated with 'certainty'), this should not be read as 'absolutely

[489] Agius (n 476) 103.
[490] The short-term consequences of oil spills are rather well-know. The long-term impact, however, is less certain. See Aage Thor Falkanger, *Maritime Casualties and Intervention* (Fagbokforlaget 2011) 13. The uncertainty may also be associated with misdeclared cargo (either due to ignorance or a fraudulent attempt) on board the container ships.
[491] The *Gabcikovo-Nagymaros Project* Case (n 480) para 54.
[492] Ibid.
[493] Kari Hakapää, *Marine Pollution in International Law* (Suomalainen Tiedeakatemia 1981) 268.
[494] ILC (n 482) 83.

established'. Crawford succinctly explains that 'complete certainty is not required, especially since relevant essential interests, such as conservation of the environment and the safety of large structures, may be subject to divergent scientific or expert views'.[495] He continues that this 'is in harmony with the precautionary principle, albeit (in order to keep necessity within tight bounds), Article 25 was not amended to reflect this expressly.'[496] Given that 'imminence' does not stand for absolute certainty, but nevertheless in the words of the Court goes beyond possibility, in the view of this author, the term 'imminence' should be considered within the concept of 'probability'. In particular, since it goes 'far beyond' possibility, it should be perceived as 'highly probable', rather than simply 'probable'.

Article 25 of the ASR is silent on the question of who shall determine, and how, whether the requirements for the successful invocation of the plea of necessity are met. In terms of the question of 'who', it appears logical that the State invoking the plea of necessity is entitled to determine this. Yet, the State in breach 'is not the sole judge' in this respect.[497] In other words, its actions are subject to the scrutiny of other States and judicial bodies.[498] This implies that, regarding the question of how shall one determine the fulfilment of the necessity requirement, an objective approach is needed, albeit no specific guidance is provided in this respect.

One of the most important features of the doctrine of necessity is the act of balancing interests of the State invoking necessity with the affected interests of other States. As stipulated in Article 25 (1) (b) of the ASR, a State may act on the basis of necessity only if it 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'. This provision, however, does not explain how 'essential' the affected interest must be. The ILC in this respect takes the view that the interest of a State invoking necessity must 'outweigh all other considerations'.[499] In other words, the interest of a State acting based on necessity must be far superior to the interest affected. This, again, is not surprising given the plea of necessity assumes a breach of an international obligation.

In the case of the *Torrey Canyon* accident, little doubt existed as to whether the interests of the UK in the protection from severe oil pollution were far superior to those of Liberia in the freedom of navigation of a single ship flying its flag. In fact, even though the UK ultimately

[495] Crawford (n 479) 311.
[496] Ibid.
[497] The *Gabcikovo-Nagymaros Project* Case (n 480) para 51.
[498] Fitzmaurice (n 476) 179.
[499] ILC (n 482) 84; Report of Special Rapporteur Mr. Roberto Ago, 'Addendum to the Eighth Report on the State Responsibility, The Internationally Wrongful Act of the State, Source of International Responsibility (Part I)', A/CN.4/318/ADD.5-7 of 29 February, 10 and 19 June 1980, 20.

bombed the ship, Liberia did not object to such an action and thus impliedly acknowledged that the UK was indeed in the state of necessity.[500] However, as Brown explained while referring to this accident:

> [t]he difficulty for the future may well be that subsequent cases will not present such a clear contrast between the minimal interest of the foreign State of registry in the freedom of the high seas and the considerable interest of the coastal State in the integrity of its shores.[501]

In no case may necessity be invoked by a State that has contributed to the situation of necessity.[502] On this basis, in the *CMS Gas Transmission v Argentina* Case the Tribunal did not accept the plea of necessity by Argentina as it found that the Argentinian 'government policies and their shortcomings significantly contributed to the crisis and the emergency'.[503] In addition, necessity may not be invoked if the international obligation in question excludes such a possibility.[504]

5.2.2 Limitations

While necessity is nowadays clearly a doctrine of international law, it is worthwhile mentioning that such a doctrine was highly controversial in the early 20th century as some States had the tendency to occupy the territories of others under its pretext. The most cited example in this respect is the occupation of Luxemburg and Belgium by Germany in 1914, on which occasion the German Chancellor von Bethmann-Hollweg stated 'we are in a state of self-defence and necessity knows no law'.[505] This, and many other examples, led to doubt as to whether necessity deserves any place in international law.[506] While it was acknowledged that these cases of abuse

[500] Lowe (n 475) 39.
[501] Edward Brown, *The Legal Regime of Hydrospace* (Stevens & Sons 1971) 145. While deliberating on the earlier draft of Article 25, the ILC further explained that: '[…] there had to be taken into account proportionality between the interest the State wanted to protect and the interest sacrificed through non-compliance with the international obligation. A State should not claim to be protecting an interest of some importance if it breached an obligation towards another State that protected an interest of equal or greater importance to that other State. In other words, the interest sacrificed must be inferior to the interest protected, particularly since originally one had been largely protected and other had not'. See Report of Special Rapporteur Mr. Roberto Ago (n 499) para 7. Although not ruling on the issue of proportionality given the absence of other conditions required for the plea of necessity, in the *Gabcikovo-Nagymaros Project* Case the Court nevertheless acknowledged that the countervailing interests of others must be taken into account. See the *Gabcikovo-Nagymaros Project* Case (n 480) para 58.
[502] Article 25 (2) (b) of the ASR.
[503] CMS Gas Transmission Company v. The Argentine Republic, International Centre for Settlement of Investment Disputes, ICSID No. ARB/01/8, Award of 12 May 2005, para 329.
[504] Article 25 (2) (a) of the ASR.
[505] The occupation of Luxemburg and Belgium by Germany in 1914 is generally referred to as a 'classic case of an abuse' in this respect. See ILC (n 482) 80.
[506] Crawford (n 479) 305-306.

merit substantial attention, it was also acknowledged that necessity is too present in the minds of States for it not to form any part of international law.[507]

Even though necessity is well rooted in general legal thinking, it is of an extremely exceptional character, which is indeed reflected through the carefully worded provision of Article 25 of the ASR. In contrast with provisions on other circumstances precluding wrongfulness, Article 25 uses the rather negative formula stipulating that 'necessity may not be invoked […] unless […]'. This formulation has been opted for to emphasize that the invocation of necessity as a circumstance precluding wrongfulness must really be considered as 'constituting an exception – and one even more rarely admissible than in the case with the other circumstances precluding wrongfulness'.[508]

So far, the plea of necessity has been invoked before international courts and tribunals on a number of occasions. In most of these occasions, however, the invocation of necessity was unsuccessful,[509] which only confirms its extremely exceptional character. Accepting a plea of necessity on a regular basis would certainly undermine the system of international law. As judge Anzilotti explained in the *Oscar Chinn* Case, 'international law would be merely an empty phrase if it sufficed […] to invoke the public interest in order to evade the fulfilment of […] engagements'.[510]

5.3 **Intervention Convention**

5.3.1 Historical Background and Object and Purpose

In an attempt to protect its vital interests from the catastrophe, the UK bombed the *Torrey Canyon* and thus destroyed the ship located on the high seas. While bombing the ship is extremely radical, it happened only after all other alternatives had been exhausted, such as dispersing of detergents. Moreover, the UK waited for 12 days until it became clear that salvage was no longer an option. Hence, the decision of destroying the ship came only after a proper

[507] As observed by Crawford, necessity is: 'too deeply rooted in general legal thinking for silence on the subject to be considered a sufficient reason for regarding the notion as totally inapplicable in international law, and, in any case, there would be no justification for regarding it as totally so. The fact that abuses are feared – abuses which are avoidable if detailed and carefully worded provisions are adopted – is no reason to bar the legitimate operation of a ground for precluding the wrongfulness of conduct by a State in cases in which the utility of this ground is generally acknowledged'. See Crawford (n 479) 306. See also Tanzi (n 476) para 3.
[508] ILC, 'Report of the International Law Commission on the Work of Its Thirty-Second Session, 5 May – 25 July 1980, Official Records of the General Assembly Thirty-Fifth Session, Supplement No 10', A/35/10, 51.
[509] Crawford (n 477) 564.
[510] The *Oscar Chinn* Case, Judgement of 12 December 1934, PCIJ Reports, Series A./B. Separate Opinion of judge Anzilotti, 112.

consideration was given to the private interests associated with the ship. In particular, it was realized that 'destroying the ship and its cargo would be an affront to the private property system […]'.[511] Furthermore, the UK was aware that 'the government would risk condemnation by states if it violated international law'.[512] In this respect, the UK's Secretary of State for Defense made the following observation:

> We are not in a position to be able to set fire to the ship until they [the ship's owners] give their agreement that this can be done. The vessel is *on the high seas* at the present time.[513]

The UK was thus well aware of limitations in international law that existed at that time.[514] Probably best explained in the words of Blanco-Bazan, the general view among States was:

> better to suffer some damage than to invade international waters and interfere with the interests of the flag State and the private parties involved, until the inaction of the latter resulted in a catastrophe of major proportions.[515]

However, the devastating consequences of the *Torrey Canyon* accident and the UK's vulnerability to these caused a significant rethinking.[516] As reported in media, the *Torrey Canyon* caused so much immediate public awareness that 'the public interest might begin to weigh more heavily in the balance than the property rights of the tanker's owners'.[517] Moreover, it was felt that the time had come for coastal States to claim certain powers that were until then only available to flag States,[518] which may explain why Liberia, the flag State of the *Torrey Canyon*, did not object to the UK's actions on the high seas.[519]

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[511] Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review*, 514, 537-538.
[512] Ibid.
[513] Emphasis added. The UK's Secretary of State for Defense was hoping the ship would eventually be destroyed. Yet, when he was expressing his preference, he was still cautious of the shipowner's interests. In his words 'I hope it will be decided later this afternoon by the owners whether they wish to go on trying to refloat the ship or whether they would agree that steps should be taken to destroy it and to try to fire the oil aboard'. See Edward Cowan, *Oil and Water: The Torrey Canyon Disaster* (J. B. Lippincott Company 1968) 64.
[514] See Cundick (n 511) 539-540. At the time of the casualty, the ship was still of some value. In particular, it was worth 10 million USD. This in fact explains why the UK did not bomb the ship immediately, but waited for salvage to prove successful or unsuccessful. Eventually, the overall loss was greater than the value of the ship. Just the clean-up operation costs were already in the range of 14-16 million USD. See Falkanger (n 490) 21.
[515] Blanco-Bazan (n 474) 265. See also Richard Shaw, 'The Nairobi Wreck Removal Convention' (2007) 13 *The Journal of International Maritime Law* 429, 430.
[516] Chircop (n 474) 151. For more on the factual background of the casualty of the *Torrey Canyon* see chapter 2 of the thesis. See also Falkanger (n 490) 20; Griggs (n 473) 3-5.
[517] Cundick (n 511) 538.
[518] See Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 202-203.
[519] Lowe (n 475) 39.

As it became apparent that similar incidents may recur at any time, changes in international law were obviously needed.[520] It was essential to ground the right of the coastal State to take protective measures on the high seas in positive rules of primary norms, which would also be more precise than the ambiguities associated with the possibility of pleading on necessity as a circumstance precluding wrongfulness.[521] Of controversy was, however, to what extent and in which scenarios should coastal States be provided with the right to invade international waters and thus intrude into the private interests associated with a ship and into the exclusiveness of flag State jurisdiction. The IMO Council immediately conveyed an extraordinary session during which an *ad hoc* Legal Committee (the LEG) was established to prepare the work for the upcoming general diplomatic conference which ultimately adopted the Intervention Convention.

The LEG was established to study a number of legal issues as a matter of urgency. Liability and compensation and jurisdictional powers of coastal States to interfere with international navigation were among the issues on the agenda of this body. Ultimately, the IMO convened a general diplomatic conference, which took place in Brussels between 10 and 29 November 1969 and was attended by the representatives of 48 States.[522] The final result of the conference was the adoption of the two separate treaties: (i) the CLC and (ii) the Intervention Convention.[523]

In contrast with the contemporary practice at the IMO (consensus decision-making, as explained in chapter 4), the Intervention Convention was adopted on the basis of a voting system, in accordance with the Rules of Procedure, which spelled out the requirement that the

[520] While the accident of the *Torrey Canyon* (1967) was by no means the first oil spill that had occurred by then, it was certainly the biggest one. Even more than 50 years later, the *Torrey Canyon* is still present in media and in fact still perceived in the UK as the 'worst environmental accident'. In March 2017, while commemorating 50 years since the *Torrey Canyon*, the Guardian reported on the *Torrey Canyon* as the casualty that produced 'the UK's worst-ever oil spill'. See the Guardian, available at <https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary> accessed 31 October 2019. A similar report was made by the BBC: 'Torrey Canyon Oil Spill: The Day the Sea Turned Black'. See BBC, available at <https://www.bbc.com/news/uk-england-39223308> accessed 31 October 2019. The *Torrey Canyon* was surely a catalyst for the international law-making at the IMO. However, as Griggs observes, there was a series of incidents predating the *Torrey Canyon* disaster as a result of which some States already introduced laws to combat pollution risks, at least in terms of voluntary pollution compensation scheme. See Griggs (n 473) 3. For more on major accidents of oil pollution between 1959 and 1969 see IMO doc, LEG/CONF/6 of 13 October 1969.

[521] Report of Special Rapporteur Mr. Roberto Ago (n 499) 29.

[522] IMO doc, LEG/CONF/INF.2 of 10 May 1971, 1-2. The conference was also attended by some observers such as the CMI and the ICS.

[523] The Conference was split into two committees. The Committee of the Whole I was working on jurisdictional (public law) issues, i.e. States' rights and obligations. See IMO doc, LEG/CONF/C.1/2 of 26 November 1969. The Committee of the Whole II was working on liability and compensation (private law) issues. See IMO doc, LEG/COF/C.1/2 of 26 November 1969 and LEG/CONF/C.2/2 of 26 of November 1969.

convention could only be adopted if a two-thirds majority of representatives present and voting gave their affirmative vote.[524] Article I of the Convention, however, was adopted almost unanimously – by 41 vote to none, with one abstention.[525] The Convention as a whole was adopted by 38 votes against none, with 7 abstentions.[526]

One of the key challenges during the negotiations of the Intervention Convention was the question of substances that would be covered by the treaty. Given the *Torrey Canyon* experience, there was no doubt oil should be the main such substance. However, States were aware that substances other than oil could have harmful effects too. The question was therefore whether those substances deserved to be included in the treaty or not. Some States advocated for the inclusion of substances other than oil arguing that the problem brought up by the *Torrey Canyon* incident was not about oil, but about pollution.[527] The UK argued that if the treaty was to be applicable only in relation to oil then:

> its authors would be exposing themselves to the reproach often levelled against jurists; that they were producing legislation to deal with events of the past, that they were never abreast of the present and that they had failed to provide for the future.[528]

On the other hand, some States were of the view that the application of the Convention should be confined to oil.[529] While these States were undoubtedly aware that substances other than oil may indeed create pollution, they preferred to confine the scope of application of a new treaty to oil because of the need for legal certainty. At that stage, little was known about these 'other substances' and the magnitude of the problem they might cause. Certainly, there was no document with a list of all the potential substances that might produce harm[530] and making such a list on the spot was rather difficult and time-consuming. The need for legal certainty was

[524] Rules 33 and 34 of Rules of Procedure adopted by the Conference. See IMO doc, LEG/CONF/2 of 4 August 1969, 12.
[525] IMO doc, LEG/CONF/SR.5 of 24 July 1970, 5.
[526] IMO doc, LEG/CONF/SR.5 of 24 July 1970, 49. States that abstained from voting did so mostly concerning the provisions of Article VI (liability for damage caused by excessive measures) and Article VIII (settlement of disputes) of the Convention.
[527] Canada, for example, argued that a convention which did not take account of pollution as a general problem (regardless of its cause) would ultimately have little support among coastal States. For the Canadian view, as well as the view of others, see IMO doc, LEG III/SR.3 of 1 August 1968, 8.
[528] IMO doc, LEG/CONF/C.1/SR.1 of 12 November 1969, 7.
[529] For example Brazil, Germany, Greece, Norway. See IMO doc, LEG/CONF/C.1/SR.1 of 12 November 1969, 9-12.
[530] The USSR in this respect argued that it would be unrealistic to expect States to ratify an agreement, which left uncertainties as to what substances exactly are covered. See IMO doc, LEG/CONF/C.1/SR.1 of 12 November 1969, 11.

observed to be of a particular importance given the exceptional character of the treaty,[531] although eventually it was acknowledged that further work needed to be done in this respect. For that matter, in 1973, a Protocol was adopted to extend the application of the Intervention Convention to 'substances other than oil', which are grouped into two categories:

(i) substances listed in an annex to the Protocol [e.g. radioactive substances, liquefied gases];[532] and

(ii) substances with characteristics similar to those contained in the list, i.e. those which are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.[533]

5.3.2 Object and Purpose

The Intervention Convention confers on coastal States the right of intervention to tackle a problem of an exceptional character – accidental (maritime casualty) pollution of a particularly severe nature, which as such calls for measures to be taken by the coastal State for the purpose of protection. The object and purpose of the Intervention Convention, and its exceptional character, are outlined in its Preamble which emphasizes that States have agreed on this treaty because of 'the need to protect the interests of their peoples against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines', while at the same time being 'convinced that under these circumstances measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the high seas'.

During the negotiations of the Intervention Convention, it was absolutely clear that the right of intervention belongs to coastal States only as an exception – in other words, that the freedom of navigation continues to apply on the high seas. Against this backdrop, flag States were particularly concerned with ensuring that the exceptional character of the right of intervention would be reflected throughout the whole text of the treaty. It is not surprising, therefore, that

[531] Poland, for example, argued that the treaty should be restricted as much as possible given its exceptional character. See IMO doc, LEG III/SR.3 of 1 August 1968, 7. While recognizing the importance of the freedom of the high seas, a delegate from Cameroon at the same time emphasized that the 'freedom of the high seas did not imply complete anarchy and disregard of the legitimate interests of coastal States'. See IMO doc, LEG/CONF/C.1/SR.1 of 12 November 1969, 6.

[532] The list has been amended on several occasions by resolutions of the IMO's Marine Environment Protection Committee (MEPC). See IMO doc, MEPC.49 (31) of 4 July 1991, MEPC.72 (38) of 10 July 1996, MEPC.100 (48) of 11 October 2002, MEPC.165 (56) of 13 July 2007.

[533] Article 1 (2) of the Intervention Protocol. The burden of establishing that a given substance indeed poses the risk analogous to the risk posed by substances listed in the annex is on the coastal State.

the right of intervention is subject to significant substantive and procedural restrictions imposed on coastal States. The content of these will be addressed in chapter 6 of the thesis.

5.3.2 Geographical Scope of Application

The Intervention Convention was adopted to regulate coastal States' powers outside the territorial sea, which was back then subject to the regime of the high seas. This is why the Convention in Article I stipulates that its application is related to measures 'on the high seas'. A strict interpretation of the term 'high seas' would suggest the geographical scope of application is confined only to the high seas and would consequently leave out the EEZ. However, this approach is not tenable for several reasons.

First, the Intervention Convention was adopted at the time of the existence of the 1958 Geneva Convention on the High Seas, which defines the high seas as 'all parts of the sea that are not included in the territorial sea or in the internal waters of a State'.[534] As demonstrated in chapter 3, with the adoption of the LOSC, the area that is not included in the territorial sea or in the internal waters may belong to the regime of the EEZ, if such a regime is proclaimed by the coastal State. Second, the purpose of the Intervention Convention was to provide the coastal State with the right of intervention where such a right does not exist because of the freedom of navigation, which freedom applies both on the high seas and in the EEZ.[535] Third, the EEZ emerged for the purpose of extending, rather than reducing, coastal State jurisdiction. To say that the 'high seas' relates only to waters beyond the EEZ would defeat the purpose of both the Intervention Convention and the legal regime of the EEZ.[536]

During the negotiations, some delegates proposed the geographical scope of application of the Convention to be extended to the territorial sea. The UK, for example, argued that it would be impossible to distinguish between the high seas and the territorial sea from a practical point of view because, depending on the circumstances, a casualty may occur in one maritime zone, while intervention measures may be called for in another maritime zone.[537] Indeed, while a casualty may happen in one maritime zone, oil and substances other than oil may be released

[534] Article 1 of the 1958 Convention on the High Seas.
[535] Articles 58 (2) and 87 of the LOSC.
[536] For the same view see Myron Nordquist et al (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary, Volume 1* (Martinus Nijhoff Publishers 1985) 306. See also Colin de la Rue and Charles Anderson, *Shipping and the Environment* (2nd edition, Informa 2009) 901; Alan Khee-Jin Tan, *Vessel-Source Marine Pollution* (Cambridge University Press 2006) 182.
[537] See IMO doc, LEG/CONF/C.1/SR.3 of 13 November 1969, 11 and LEG/CONF/C.1/SR.4 of 13 November 1969, 5-6.

and spread quickly to another maritime zone. Moreover, it is not hard to imagine a casualty ship drifting from one maritime zone to another in unstable conditions, being pushed by winds, waves, tides and currents. The casualty of the *Sanchi* (2018) serves as a good example in this respect. It was an oil tanker that caught on fire after colliding with the bulk carrier *CF Crystal* on 6 January 2018 in the East China Sea. In only couple of days, the *Sanchi* has drifted 65 nm from the initial location of the collision, which was about 300 km off Shanghai, in the mouth of Yangtze River, and entered into Japan's EEZ.[538]

The German delegation supported the extended application of the Intervention Convention based on the argument that there was a disagreement among States over the width of the territorial sea. While some States extended their territorial seas to 3 nm, others followed with 12, 100 or even 200 nm.[539] Against this backdrop, Germany felt that there would exist uncertainty as to whether a large area of the sea is covered by the Convention. Along these lines, Germany favored the application of the treaty 'to all seas'.[540]

However, the majority of States opposed an extended application of the treaty, arguing that the Convention would then impose on coastal States restrictions that were greater than those that already existed under international law. In their view, the extended application of the treaty would have created an unnecessary infringement on their territorial sovereignty.[541] In this respect, it is worth mentioning the view of the Soviet Union, which largely supported shipping interests, but nevertheless opposed the extended application of the Convention arguing that:

> the Soviet Union, being a country that owns a very large tanker fleet which sails over the seas of the entire world, was permanently conscious that one of its ships might one day cause an accident; it was obvious that in such a case it hoped that the coastal State which was obliged to take measures to prevent pollution would not take excessive measures liable to cause the Soviet fleet any damage which would not give rise to compensation.[542]

[538] World Maritime News, available at <https://worldmaritimenews.com/archives/239924/iranian-tanker-ablaze-off-china-32-missing/> and <https://worldmaritimenews.com/archives/240466/report-burning-sanchi-drifts-into-japanese-waters/> accessed 31 October 2019.
[539] At the time of the *Torrey Canyon*, the outer limit of the territorial sea of the UK was set at 3 nm. See Blanco-Bazan (n 474) 265; Erik Franckx (ed), *Vessel-source Pollution and Coastal State Jurisdiction* (Kluwer Law International 2001) 154. See also Treves Tullio, 'Historical Development of the Law of the Sea' in Donald Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 5.
[540] IMO doc, LEG/CONF/C.1/SR.3 of 13 November 1969, 14.
[541] IMO doc, LEG/CONF/C.1/SR.3 of 13 November 1969, 19.
[542] IMO doc, LEG/CONF/C.1/SR.19 of 24 November 1969, 15.

In essence, the Soviet Union was pointing out the convenience of the proportionality principle. However, it was not ready to accept such a convenience as a rule of law that would encroach on territorial sovereignty.[543] Ultimately, the geographical scope of application of the Intervention Convention was restricted to the area outside the territorial sea. In the aftermath of the *Amoco Cadiz* accident, some suggestions were made to amend the Intervention Convention so as to extend its geographical scope of application to cover the territorial sea. These suggestions were not accepted for the same reason – the need to keep territorial sovereignty intact.[544] In the words of M'Gonigle and Zacher, the unsuccessful attempt at the extended scope of application of the Intervention Convention to the territorial sea 'demonstrated the limits of the [IMO] organization' because such an extension 'would have substantially restricted coastal powers in an area where they had hitherto had almost unlimited sovereign rights'. As they further explain, such a change 'would have been, in essence, a jurisdictional change'.[545]

5.4 **Salvage Convention**

The Salvage Convention addresses private law issues in the relationship between the shipowner and cargo owner on the one hand, and the salvor on the other hand. Nonetheless, this Convention bears certain, albeit limited, relevance in the public international law domain given the implications of salvage for the protection and preservation of the marine environment, to which the LOSC devotes a considerable attention in its Part XII.

5.4.1 Historical Background

The history of the Salvage Convention is commonly linked to the *Amoco Cadiz* (1978) accident,[546] which resulted in a spill of around 227 000 tons of crude oil, subsequently causing significant harm to the nearby French coastline (around 360 km of a rocky coastline ended up covered in black oil) and industry (primarily tourism and fisheries).[547] This accident triggered the rethinking of the traditional salvage law in that it showed: (i) certain limitations in the 'no cure-no pay' principle underlying salvage activity at that point and (ii) the need to bring salvage

[543] IMO doc, LEG/CONF/C.1/SR.19 of 24 November 1969, 15.
[544] De la Rue and Anderson (n 536) 903; Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 2 *Lloyd's Maritime and Commercial Law Quarterly* 92, 100, fn 47.
[545] M'Gonigle and Zacher (n 518) 203-204.
[546] CMI, *The Travaux Préparatoires of the Convention on Salvage 1989* (Comité Maritime International 2003) 2. See also Archie Bishop, 'Law of Salvage' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume II Shipping Law* (Oxford University Press 2016) 474-475.
[547] Chapter 2 of the thesis.

law up-to-date with the developments in international environmental law.[548] These two points call for some clarifications.

From the outset, it needs to be recalled from chapter 2 that salvors are normally the first line of response to incidents at sea and that salvage is at its core a commercial activity. Salvors are thus primarily driven by business considerations and prospects of earning a profit. The 'no cure-no pay' principle means that salvors are entitled to claim salvage reward only in cases of success. This was clearly reflected in the 1910 Brussels Convention, which predated the Salvage Convention.[549] It also needs to be pointed out that the traditional salvage reward is paid by the shipowner and/or cargo owner or (practically speaking) by their property insurers – the H&M and cargo insurers.[550]

In the aftermath of the *Amoco Cadiz*, however, it became apparent that the financial loss represented by environmental damage in serious cases may far outweigh the financial gains in successfully saving maritime property.[551] In this respect, it was realized that the engagement of salvors can help the prevention of pollution, irrespective of whether a maritime property is saved or not. It was obvious that the 'no cure-no pay' principle does not provide incentive for salvors to actually take the environment into account when considering whether or not to undertake salvage activity, or in fact during such an activity.[552] Moreover, it was realized that preventing damage to the marine environment does not benefit the proprietary interests of the shipowner and/or the cargo owner, but rather the interests of the shipowner or the ship operator in preventing or minimizing their responsibility and liability towards third parties. To put it

[548] The traditional law of salvage is associated with the concept of successful preservation of maritime property (ship and cargo) in danger at sea. For the elements of the traditional law of salvage see Francis Rose, *Kennedy and Rose: Law of Salvage* (9th edition, Sweet & Maxell 2017) 1; See also CMI, *The Travaux Préparatoires of the Convention on Salvage 1989* (n 546) 2 and 15; Archie Bishop, 'The Development of Environmental Salvage and Review of the Salvage Convention 1989', available at <https://comitemaritime.org/wp-content/uploads/2018/05/2012-02-09-Development-of-Environmental-Salvage-Archie-Bishop-.pdf> accessed 31 October 2019.

[549] The 1910 Brussels Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, UKTS 4 (1913) Cd 6677. For more see Geoffrey Brice, 'The Law of Salvage: A Time for Change? "No Cure-No Pay" No Good?' (1999) 73 *Tulane Law Review* 1831, 1832; Bishop (n 548) 2. As succinctly explained by Bishop, the principle of 'no cure-no pay' should be understood as: 'If you fail you are entitled to nothing, but if you succeed you will be rewarded generously'. See Bishop (n 546) 475.

[550] See the report prepared by professor Erling Selvig in April 1980, which report is included in the preparatory work of the 1989 Salvage Convention. See CMI, *The Travaux Préparatoires* (n 546) 16 and 19.

[551] Edgar Gold, *Gard Handbook on Protection of the Marine Environment* (3rd edition, GARD AS 2006) 435.

[552] CMI, *The Travaux Préparatoires* (n 546) 2. See also Samir Mankabady, *The International Maritime Organization, Volume II* (Croom Helm 1987) 208.

differently, it became apparent that measures of prevention of oil pollution actually benefit P&I insurers, rather than H&M or cargo insurers.[553]

In addition to issues of payments and the inadequacy of the traditional 'no cure-no pay' principle, States were aware of the environmental developments in international law[554] that emerged with the adoption of the LOSC, as reflected in particular in its Part XII. Against this backdrop, it was obvious that salvors needed to be subjected to certain obligations to take account of environmental considerations when exercising salvage.

These two points caused the LEG to request the CMI to undertake an extensive review of salvage.[555] In response, the CMI set up a Sub-Committee, chaired by the Norwegian professor Erling Selvig, which conducted an extensive study and came with a report eventually considered at the CMI conference held in Montreal (Canada) between 24 and 29 May 1987.[556] Based on the conclusions of the Montreal Conference and the draft convention thereby produced, the IMO convened a diplomatic conference in London between 17 and 28 of April 1989, which adopted the final text of the Salvage Convention.[557] Its adoption was clearly not as urgent as the adoption of the Intervention Convention, as it took more than 10 years after the *Amoco Cadiz* (compared to 2 years after the *Torrey Canyon*) for States to meet at the conference to agree on how to combat problems brought to light with this casualty.

5.4.2 Object and Purpose

The Salvage Convention retains the traditional 'no cure-no pay' principle.[558] At the same time, to ensure that salvors are provided with enough incentives to undertake salvage irrespective of

[553] In other words, it was clear that the proprietary interests ultimately represented by the H&M and cargo insurers should not be those who are paying for the liability interests ultimately represented by the P&I insurers. For more on the difference between H&M and P&I insurance see chapter 2 of the thesis (2.4.3.).
[554] In particular, States were aware of the contribution of salvage to the protection of the environment. See the Preamble to the Salvage Convention.
[555] During its 35th session, the IMO Legal Committee (LEG) requested the IMO Secretariat prepare a report on the legal questions that the *Amoco Cadiz* accident brought to light, as it was realized that various aspects of the traditional law of salvage could merit a revision. See IMO doc, LEG XXXV/4 of 7 June 1978, Annex 1. The CMI offered its assistance, which was accepted by the LEG at its 40th session in June 1979. See Letter issued by the IMO Secretary General to the President of the CMI of 22 June 1979, Annex 3.
[556] CMI, *The Travaux Préparatoires* (n 546) 2. The LEG discussed the work of the CMI on several occasions. In 1983, at its 50th session, the LEG decided the revision of traditional salvage should be set out as a priority item on its agenda for 1984-1985, as well as its work should be based on the draft convention resulting from the Montreal Conference. See IMO doc, LEG 50/8 of 17 March 1983, 25. This matter was eventually placed on the agenda of the LEG's 52nd session, when the LEG considered the CMI draft convention article by article. See IMO doc, LEG 52/4 of 3 July 1984, Annex 1, LEG 52/9 of 21 September 1984, 21-22. The CMI draft convention continued to be considered at the 53rd – 58th session of the LEG.
[557] The Convention entered into force on 14 July 1996, after 15 States expressed their consent to be bound by it according to Article 29 (1) of the Convention.
[558] Articles 12 and 13 of the Salvage Convention.

any prospect of success in saving the maritime property, [559] the Salvage Convention confers on salvors the right to claim special compensation, ultimately payable by the P&I Clubs, in cases of salvage 'of a vessel which by itself or its cargo threatened damage to the environment'.[560] The Convention therefore addresses compensation payable to salvors in cases of both traditional ('no cure-no pay') and modern (environmental) salvage and it does so in relation to all kinds of commercial ships, for as long as these are 'in danger' and thus in need of salvage.[561] Hence, the application of the Salvage Convention is not confined to casualties or to any specific types of ships, in contrast to the Intervention Convention, which applies only to casualty ships.

The Salvage Convention recognizes the right of the coastal State to take salvage measures on its own, or to subject salvage operations by others to its control, in both of which cases salvors remain entitled to invoke the Salvage Convention to claim compensation.[562] This means that public authorities acting in a capacity of salvors (exercising in essence the right of intervention) are able to rely on the Salvage Convention in relation to matters of payments. The extent to which a State authority that is under an obligation to perform salvage operations would be able to avail itself of such rights and remedies would depend on the national law of the State where such authority is situated.[563] In addition to issues of compensation, the Salvage Convention, clearly recognizing the developments in international environmental law as reflected in Part XII of the LOSC, demands salvors take account of environmental considerations and exercise salvage activity with 'due care'.[564]

5.4.3 Geographical Scope of Application

The Salvage Convention does not address law of the sea issues and consequently does not contain any specific provision on its geographical scope of application that would follow a zonal approach the law of the sea is normally based on, which is in clear contrast to the Intervention Convention and, as will be seen later on, with the WRC. The Salvage Convention may technically apply anywhere as it brings to its focus salvage that is defined as any act or

[559] See the Preamble to the Salvage Convention.
[560] See Article 14 of the Salvage Convention. The salvor is at least entitled to claim expenses accrued. If, however, the salvor is successful in preventing or minimizing damage to the environment, a top-up may be claimed. Article 14 carries some ambiguities as to how this special compensation should be calculated, for which reason it is normally replaced by the SCOPIC clause, which is then incorporated into the Lloyd's Open Form (LOF) by way of reference. For more on issues associated with the SCOPIC clause see Bishop (n 548).
[561] Article 1 (a) of the 1989 Salvage Convention.
[562] Article 5 (1) and (2) of the Convention. See also the preparatory work of the 1989 Salvage Convention. CMI, *The Travaux Préparatoires* (n 546) 2.
[563] Article 5 (3) of the Salvage Convention.
[564] Article 8 (1) (a) and (b) of the 1989 Salvage Convention.

activity taken to assist a maritime property in danger 'in navigable waters or in any other waters whatsoever'.[565] However, the right of the coastal State to invoke the Salvage Convention (for instance in relation to a claim for salvage compensation in cases of salvage that are under control of a public authority)[566] will depend on the nature and extent of its jurisdiction and in that sense the geographical scope of application of the Salvage Convention may be rather limited – not because of the Salvage Convention itself, but because of the law of the sea restrictions reflected elsewhere (in customary international law, the Intervention Convention, the LOSC and the WRC).

5.5 **IMO Guidelines on Places of Refuge**

5.5.1 Historical Background

The history of the 2003 IMO Guidelines on Places of Refuge can also be traced back to an accident, or in fact three main incidents that occurred in a relatively short period of time between 1999 and 2002 – the *Erika* (1999), the *Castor* (2000) and the *Prestige* (2002).[567] As far as the accident of the *Erika* is concerned, its main impact is primarily linked to the developments of certain construction, design, equipment and manning (CDEM) standards.[568] To illustrate the problem of places of refuge, suffice it to mention the challenges with the *Castor* and the *Prestige*. These challenges were of both legal and technical character. However, the Guidelines were adopted merely to tackle technical problems.

The *Castor* was a twenty-three-year-old tanker flagged in Cyprus and owned by Greek nationals. On 26 December 2000, while carrying approximately 30 000 tons of gasoline from Romania to Nigeria, the ship encountered bad weather conditions[569] and in a couple of days developed a 20-24 m long crack across two of its tanks while off the coast of Morocco.[570] To

[565] Article 1 (a) of the 1989 Salvage Convention.
[566] Article 5 of the 1989 Salvage Convention.
[567] For more on the problem of places of refuge and incidents of the *Erika*, the *Castor*, the *Prestige* and similar ones, see Aldo Chircop et al, 'Characterising the Problem of Places of Refuge for Ships' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 1-6; Anthony Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers 2012) 28-38; Erik van Hooydonk, *Places of Refuge* (Lloyd's List 2010) 3-8; Aldo Chircop, 'The IMO Guidelines on Places of Refuge for Ships in Need of Assistance' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 35-61.
[568] For example, the *Erika* accident accelerated the phasing out of single hulled tankers. See Regulation 13 of Annex 1 of the MARPOL 73/78 (also referred to in this study as 'MARPOL'). Based on the *Erika I* Package, the European Union (EU) demanded the phase out of single hulled tankers regardless of age from operating in the EU waters, with the denial of entry into port as a remedy in cases of non-compliance.
[569] Morrison (n 567) 33. De la Rue and Anderson (n 536) 911.
[570] CEDRE, '*Castor'*, available at <http://wwz.cedre.fr/en/Resources/Spills/Spills/Castor accessed 7 June 2019> accessed 31 October 2019. See also Xenophon Constantinides, 'The Castor Case and its Ramifications' (2002) *BIMCO Review* 251, 251.

stabilize its condition, discharge the cargo and undertake repairs to the damaged tanks, the *Castor* requested a place of refuge in Nador (Morocco). The request was, however, refused, without any investigation by Morocco into the situation.[571] A place of refuge was subsequently requested from Spain, which provided assistance to the crew, but refused to grant refuge to the ship itself.[572] The ship was then left under control of salvors, who continued requesting a place of refuge from Algeria, Greece, Malta, Tunisia and Gibraltar, but with no success.[573]

On 3 February, Cyprus (flag State) announced that it was considering taking the ship in refuge. However, the conditions of the ship were deteriorating and it was unlikely the ship could actually make this journey.[574] The closest refuge that was ultimately offered was in Greece, albeit refuge was approved only after cargo was previously transferred to another ship with the assistance of Tunisia, some 30 km from the shore between Tunisia and Malta.[575] The ship arrived in Greece on 14 February 2001.

The aforementioned facts highlight several issues. First, the *Castor* was left at the mercy of the sea for more than forty days, which is an extremely long time to cope with rough sea and bad weather in whatever conditions, let alone in conditions that call for assistance. Second, there were indications that the ship was sufficiently seaworthy. In fact, the ship successfully managed to withstand 40 days of strong winds and rough seas, without actually causing an accident.[576] Third, except for Spain, all States refused the ship refuge without any inspection to assess the seriousness of the situation, or any inquiry into the situation whatsoever. Spain on the other hand denied the seaworthiness of the ship[577] and provided assistance to the members of the crew, while making a clear statement that it did not feel obliged to provide any refuge to the stricken ship once human life was no longer at risk.[578] The point that also deserves to be highlighted is that the ship needed to go all the way to Greece to find a shelter, which was quite far from the place where refuge was initially requested.

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[571] Morrison (n 567) 38.
[572] Christopher Murray, 'Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the *Erika* and the *Castor'* (2002) 63 *Ohio State Law Journal* 1465, 1471.
[573] Ibid. Murray also makes a reference to France refusing refuge. However, in its analysis of the *Castor*, Morrison comes to the conclusion that France has not been mentioned in any of the reports into the accident of the *Castor*. See Morrison (n 567) 38. See also American Bureau of Shipping, 'Investigation into the Damage Sustained by the MV Castor on 30 December 2000', Final Report of 17 October 2001, 5-7.
[574] De la Rue and Anderson (n 536) 911.
[575] Ibid; Morrison (n 567) 33.
[576] On the other hand, the *Erika* was also certified as a seaworthy ship but the validity of its certificate was seriously called into question. See Morrison (n 567) 34.
[577] Morrison (n 567) 34.
[578] IMO doc, MSC 74/2/4 of 11 February 2001, 3.

Soon after the *Castor*, another accident caught public attention, albeit this time because of its disastrous consequences. It was the *Prestige* accident, which involved a twenty-six-year-old Bahamas-flagged tanker laden with approximately 77 000 tons of oil en route from St. Petersburg (Russia) to Singapore. The ship broke in two and sank some 133 nm off the Spanish coast, at the depth of around 3 500 m, while spilling into the sea around 63 000 tons of oil thereby polluting around 1 900 – 2 000 km of the nearby Spanish, French and Portuguese coastline, and heavily affecting fishing and tourism industries in the area.[579]

On 13 November 2002, six days before it sunk, the *Prestige* experienced problems with its ballast tanks, while in high winds and heavy seas conditions, and subsequently developed a thirty degree list. The ship initially spilled into the sea between 1 000 and 3 000 tons of oil and thereafter requested refuge from Spain.[580] The Spanish authorities provided assistance to the members of the crew by airlifting them to a place of safety. However, they refused to grant refuge to the ship itself and ordered it to be towed further out to open sea.[581] For the next six days, the ship was trying to stabilize its conditions in an open sea environment, while repeatedly, yet unsuccessfully, requesting refuge from Spain and Portugal. Eventually, on 19 November 2002, the ship broke in two and sank, causing one of the biggest environmental catastrophes ever.[582]

What if the *Prestige* catastrophe could have been avoided or minimized had the *Prestige* been provided a place of refuge? There were some post-event indications that the catastrophe could have been at least minimized with refuge being granted.[583] Whether this would have in fact occurred or not is a matter of speculation. At the same time, one must also acknowledge that bringing a stricken ship closer to the shore, especially in circumstances in which such a ship is

[579] Erik Jaworski, 'Developments in Vessel-Based Pollution: Prestige Oil Catastrophe Threatens West European Coastline, Spurs Europe to Take Action Against Aging and Unsafe Tankers' (Yearbook 2002) *Colorado Journal of International Environmental Law and Policy* 101, 103. See also Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Martinus Nijhoff Publishers 2007) 2-3.

[580] See the European Parliament Resolution on Improving Safety at Sea in Response to the *Prestige* Accident (2003/2066(INI)); P5_TA(2003)0400; available at: <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2003-0400+0+DOC+PDF+V0//EN> accessed 31 October 2019.

[581] Nuno Marques Antunes, 'Decision-Making in the Imminence of Disaster: "Places of Refuge" and the Prevalence of National Interests' in Marta Chantal Ribeiro and Erik J Molenaar (eds), *Maritime Safety and Environmental Protection in Europe. Multiple Layers in Regulation and Compliance* (Gráfica Ediliber 2015) 97.

[582] De la Rue and Anderson (n 536) 912.

[583] According to Shaw, 'it is self-evident that if each of these ships had been allowed into a place of refuge where her cargo could be transferred the very substantial costs incurred, and in the case of the *Prestige*, the substantial losses, could have been significantly reduced. The price of such a step would have been the running of a risk of pollution of the immediate area which must be acknowledged to be significant, but in both cases the impact would have been unlikely to prove as expensive as what eventually occurred'. See Richard Shaw, 'Places of Refuge – International Law in the Making?' in *CMI Yearbook 2003* (Comite Maritime International 2003) 333-334.

already leaking oil, puts the coastal State at significant risk, both from socio-economic and environmental perspectives.

To avoid situations of the *Castor* (rejection without inspection, despite certain indications as to the seaworthiness of the ship, coupled with a long delay in the decision-making process that resulted in a forty days battle in rough seas) which may produce the *Prestige*-like consequences, and to balance the interests of the coastal State on the one hand, and the interests of the ship, safety of navigation and the environment on the other hand, the IMO developed operational guidelines with a list of risks and factors that States are encouraged to consider when provided with a request for a place of refuge. These Guidelines were adopted by IMO Assembly Resolution A. 949 (23) on 5 December 2003. It is also worth noting that the IMO on the same day adopted Resolution A.950 (23) to recommend coastal States establish a maritime assistance service (MAS) for the purpose of, *inter alia*, serving as a point of contact between the ship's master, the coastal State and other parties involved in salvage operations.

While the IMO Guidelines on Places of Refuge are the result of the work of the IMO sub-committee on safety of navigation (the NAV, now the NCSR),[584] rather than the LEG, the latter was engaged in the issue of places of refuge on several occasions, to follow up on this matter from the point of view of States' rights and obligations.[585] In essence, the LEG was working on the dilemma that Antunes succinctly paraphrased in the words of Shakespeare – 'to grant or not to grant access to a place of refuge'.[586] To put it differently, the dilemma emerged as to who has or should have which right as the point of departure – is it the right of the ship to enter a place of refuge or the right of the coastal State to grant or refuse refuge?

The CMI argued that the LEG should work on the adoption of a new instrument on places of refuge that would have a legally binding form and that would impose a clear obligation on coastal States to grant refuge, unless this would appear unreasonable in a given situation. The CMI thus advocated for a presumption that would favor the right of the ship as the point of departure because the CMI essentially feared a repetition of disasters such as with the *Castor* and the *Prestige* in the future. The CMI proposal was discussed in the LEG on several occasions

[584] See MEPC 47/5/3 of 18 December 2001, Annex 1 (Draft Terms of Reference for the Work on Places of Refuge, Prepared by NAV). The Marine Environment Protection Committee (the MEPC) was involved to some extent too, as well as some sub-committees such as the Fire Protection Sub-committee (FP) and the Radiocommunications and Search and Rescue Sub-committee (COMSARS). For an extensive overview of the negotiations see Morrison (n 567) 144-160.
[585] See IMO doc, LEG 87/17 of 23 October 2003. See also Rosalie Balkin, 'The IMO Position with Respect to Places of Refuge' in *CMI Yearbook 2005-2006* (Comite Maritime International 2006) 154, 157.
[586] Antunes (n 581) 86.

but failed to get the necessary support among States. While the CMI proposal will be discussed in chapter 7 of the thesis, to make the thesis more readable it is worthwhile saying a few words about its unsuccessful outcome at this stage.

5.5.2 The Unsuccessful CMI Proposal for a Treaty on Places of Refuge

5.5.2.1 The Proposal

Following the adoption of the IMO Guidelines, an extensive debate developed regarding their non-legally binding form and rather 'soft' language used. The CMI in this respect argued that a legally binding instrument was needed.[587] At its plenary session in Athens (Greece) in 2008, the CMI proposed a presumption of a *right of access* to a place of refuge (in other words, a presumption of an *obligation to grant* a place of refuge),[588] which would nevertheless be rebuttable by the coastal State.[589] While the coastal State would indeed be in a position to eventually deny access, the main trick with this idea was to reverse the burden of proof. As the point of departure would be the right of access, it would be on the coastal State to prove that the principle of reasonableness requires refusal instead of access.[590]

The CMI draft instrument was made in the form of a 'convention' even though it was not called a 'draft convention'. The omission of such a title ('convention') was deliberate so to send the signal that the IMO may eventually come forth with whatever form States find to fit their interests the best.[591] The CMI draft instrument defined its scope of application in a similar way as the IMO Guidelines do. However, the definition of the term 'place of refuge' was expanded. According to the IMO Guidelines, the term 'place of refuge' is 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.[592]

The CMI proposal went a step further so as to include the interests of the ship in the very purpose of a 'place of refuge', which referred to:

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[587] IMO doc, LEG 89/16 of 4 November 2004, para 182.
[588] Article 3 of the CMI draft instrument.
[589] Article 3 of the CMI draft instrument.
[590] Hooydonk (n 567) 238.
[591] Richard Shaw, 'CMI Working Group on Places of Refuge' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 208. For more on different types of IMO instruments see chapter 4 of the thesis (4.3.4.).
[592] Paragraph 1.19 of the IMO Guidelines on Places of Refuge.

> a place where action can be taken in order to stabilise 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.[593]

The CMI proposal thus explicitly included the loss of the ship (as well as its cargo) in the purpose of a place of refuge, even though the IMO Guidelines stipulate that the inspection team needs to have 'due regard […] to the preservation of the hull, machinery and cargo',[594] and thus make it clear that the interests of the ship, while not explicitly included in the definition (purpose) of a 'place of refuge', must at any rate be taken into account. The CMI proposal was made on the insistence of the IUMI as the insurers would not be in a position to cover expenses if no serious consideration is given to seeking to preserve the ship and cargo.[595]

The inclusion/omission of the ship's interests in the definition (purpose) of a place of refuge bears certain relevance for discussion on the current state of international law on places of refuge, as will be explained in chapter 7 of the thesis.

5.5.2.2 Industry Pushed but States Pulled Back

The CMI proposal was largely supported by the NGOs with environmental interests and by the shipping industry, save for the IG P&I Clubs.[596] In this respect, it needs to be appreciated that this was a rather unique situation in which environmental and shipping interests advocated the same proposal, as these two groups of interests normally compete. With regards to the view of the liability insurers, the IG P&I Clubs argued that the IMO Guidelines 'have been effective in achieving a workable balance between the interests of the coastal State and the shipping

[593] Article 1 (c) of the CMI proposal, available at <https://comitemaritime.org/work/places-of-refuge/> accessed 31 October 2019.
[594] Paragraph 3.11 of the IMO Guidelines on Places of Refuge.
[595] See IMO doc, MSC/77/8/2 of 14 February 2003 and MSC/77/8/11 of 8 April 2003. See also Morrison (n 567) 155.
[596] The ISU and the IUMI were of a strong view that the CMI draft instrument and a firm obligation on coastal States in relation to the places of refuge problem were necessary. For the position of the IUMI see IMO doc, MSC 77/8/2 of 14 February 2003, 8, para 14. While fully supporting the CMI initiative, the ISU was nevertheless of the view that the CMI draft instrument does not offer enough incentive for States to actually accept it. The ISU thus suggested some amendments to the CMI draft. See Archie Bishop, 'Places of Refuge' in *CMI Yearbook 2009* (Comite Maritime International 2009) 201-203. Ultimately, however, industry changed their mind and now seems to be fine with the non-binding instrument. The IUMI, for instance, expressed the view that 'the prevailing regulations as set out, for example, by the IMO and the EU are sufficient but that the necessary steps have to be taken to make the rules work. Also, the industry 'do not see merit in pursuing additional legislation which will be a lengthy process and will consume resources', but will, instead, 'campaign for better application of, compliance with and enforcement of existing rules and guidance'. See ISU official web site, available at <http://www.marine-salvage.com/?s=place+of+refuge> accessed 31 October 2019.

interests'.[597] In its view, the CMI initiative would make sense only after the functioning of the liability conventions had been evaluated.[598] The CMI proposal was thus not unanimously accepted by the members of industry, but nevertheless enjoyed the support of the majority. Ultimately, it was accepted by 16 votes to 10, with 2 abstentions.[599]

The main problem with the CMI proposal was, however, its failure to acquire the support among the representatives of States who felt that there was no sufficient justification for them to give up their territorial sovereignty. In this respect, it is worth mentioning the view of the IAPH in that the CMI proposal did not provide coastal States with sufficient incentives for them to waive their sovereignty. As put by van Zoelen, the CMI proposal was perceived by the IAPH as some sort of a wish list for shipping interests and not a 'serious attempt to bridge the divide of conflicting interests which continues to exist in this area of law'.[600]

The LEG considered and rejected the CMI proposal on two occasions. This was first done during its 90th session in 2005 with an explanation that the solution should be found in the liability and compensation conventions. The CMI nevertheless continued with its work on the draft instrument as it was not convinced that the solution to the problem of places of refuge was in the implementation of the existing IMO liability and compensation conventions.[601] However, during the 95th session in 2009, the LEG once again confirmed that the CMI proposal does not reflect a compelling need for a new convention.[602] The LEG was of the view that the current legal framework comprised of the IMO liability and compensation issues, coupled with the IMO Guidelines, is comprehensive enough and consequently suffices to deal adequately with the problem of places of refuge.[603]

5.5.3 Object and Purpose

As previously mentioned, the IMO Guidelines on Places of Refuge were developed from a practical point of view. As such, they produce a tool that balances in an operational manner the

[597] See IMO doc, LEG 89/7/1 of 24 September 2004, para 5. See also Andrew Bardot, 'Places of Refuge for Ships in Distress, The P&I Insurer's Perspective' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 196,199; Morrison (n 567) 173.
[598] Hooydonk (n 567) 181. See also Bardot (n 597) 200.
[599] Stuart Hetherington, 'Introduction' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 158, 162.
[600] Frans van Zoelen, 'An Instrument on Places of Refuge from a Ports' Perspective' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 181, 195. See also Hooydonk (n 567) 182.
[601] In March 2006, the CMI submitted a report to the 91st session of the LEG to inform the latter that the CMI will continue to work on the completion of its work on the topic of places of refuge. See IMO doc, LEG 91/6 of 2006 of 24 March 2006, 1-2.
[602] For more on the 'compelling need' see chapter 4 of the thesis (4.3.5.).
[603] IMO doc, LEG 95/10 of 22 April 2009, para 9 (a) 4.

interests of the ship and environmental interests on the one hand and the interests of the coastal State on the other hand, to ensure 'the effective response to a request for a place of refuge' as this 'would materially enhance maritime safety and the protection of the marine environment'.[604]

The IMO Guidelines apply to 'ships in need of assistance', which term is defined so as to include a situation that 'could give rise to loss of the vessel or an environmental or navigational hazard'.[605] These Guidelines are, therefore, not confined to maritime casualties but have a broader scope (which includes but is not limited to casualties).

The IMO Guidelines envisage the possibility of their amendments. In this respect, the IMO Assembly requested the MSC, the MEPC and the LEG to 'keep the annexed guidelines under review and amend them as appropriate'. So far, no amendment to these Guidelines has been adopted. Nonetheless, in August 2018, the IMO received a proposal from EU Member States and industry stakeholders[606] for a revision of the IMO Guidelines on the basis of the solutions provided in the EU Guidelines on the same matter.[607] This proposal will be discussed in chapter 7 of the thesis.

5.5.4 Geographical Scope of Application

The IMO Guidelines on Places of Refuge do not have a specific provision that defines their geographical scope of application, which is not surprising as these Guidelines do not address issues that would depend on the legal regime concerned with a specific maritime zone. These Guidelines are adopted from a practical, i.e., operational point of view to ensure 'the effective response' to a request for refuge. These Guidelines are applicable in whatever maritime zone the ship is located. In fact, as explained earlier, a ship in need of assistance may quite rapidly (but not necessarily intentionally) move from one maritime zone to another and to confine the geographical scope of application to a specific maritime zone would diminish the purpose of these Guidelines (which purpose is centered around the 'effectiveness' and 'operational aspect').

The IMO Guidelines encourage the coastal State to make an objective analysis of the advantages and disadvantages of allowing a ship to proceed to a place of refuge in waters under

[604] Preamble to the IMO Guidelines on Places of Refuge.
[605] Paragraph 1.18 of the IMO Guidelines on Places of Refuge.
[606] The ICS, IUMI, BIMCO, ISU, INTERTANKO and IG P&I Clubs.
[607] IMO doc, MSC 100/17/1 of 3 August 2018, MSC 100/17/1/Corr.1 of 21 August 2018 and NCSR 7/13 of 15 October 2019.

its jurisdiction. A place of refuge is a sheltered place. As such, it points at the port or a safe anchor, which is logically located close to shore, i.e. in internal waters, archipelagic waters or the territorial sea, albeit the request for refuge may be made while the ship is located beyond the outer limits of the territorial sea. This situation speaks of the relevance of the IMO Guidelines in the EEZ or on the high seas adjacent to the EEZ or the territorial sea, if no EEZ is proclaimed. At the same time, it needs to be appreciated that the coastal State's rights and obligations will predominantly depend on the regime applicable in the territorial sea or internal waters, including ports, rather than the regime of the EEZ or the high seas, as will be discussed and explained in chapter 7 of the thesis.

5.6 **WRC**

5.6.1 Historical Background

The WRC is the most recent instrument adopted at the IMO to address coastal State jurisdiction over ships in peril and shipwrecks. It was adopted in 2007 and entered into force in 2015, albeit its historical background can be traced back to the *Torrey Canyon* casualty. In particular, the LEG decided to work on this issue already at its 12th session in 1972.[608] It is important to realize that wreck removal was initially discussed only in relation to sunken and stranded ships and safety of navigation.[609] However, from 1994, work on what would become the WRC started for real and it now focused on a much broader scope as drifting ships were included together with sunken and stranded ships. Moreover, wreck removal was discussed in the context of environmental and coastal considerations too.

[608] The LEG made a reference to 'the substantive legal aspects of the removal of wrecks, including those related to aspects of salvage and the right to intervene on the high seas'. See IMO doc, LEG XII/4 of 8 March 1972, para 1.

[609] Wreck was related to a sunken or stranded ship even in 1995 when the proposal was made by Germany, the Netherlands and the United Kingdom to consider whether or not to include casualty in the scope. See Article I (2) of the draft Convention, IMO doc, LEG 73/11 of 8 August 1995 Annex, 2. Moreover, at the time of the *Torrey Canyon* casualty, save for the scenarios of intervention into unfolding casualties, wreck removal was discussed only in relation to wrecks that may endanger safety of navigation. See IMO doc, LEG XII/4 of 8 March 1972, 1, para 2. Given that maritime safety is one of the primary goals of the IMO, it was felt that the IMO had to take into consideration this issue in case there might be an interest in drafting a convention on this matter. See IMO doc, LEG XII/4 of 8 March 1972, para 2. Two draft proposals were made in this respect. One proposal was prepared by professor Yzal from Spain (LEG XII/4 of 8 March 1972) and another one was made by Liberia, which was the flag State of the *Torrey Canyon* (LEG XII/4/2 of 6 April 1972). Liberia, for example, suggested (i) a joint responsibility of States for the removal of wrecks that obstruct navigation and (ii) fault based liability for the costs thereby incurred. Regarding the former, Liberia suggested a joint responsibility of the Contracting State which owns or registers the wreck, the Contracting State(s) whose zone(s) of territorial sovereignty lie closest to the wreck and the Contracting State (s) whose commerce and navigation are directly endangered by the wreck. See IMO doc, LEG XII/4/1 of 24 March 1972, 7.

5.6.1.1 The Key Issues that Triggered the Negotiations of the Convention

As it is today, the WRC finds its origin in the draft proposal submitted by Germany, the Netherlands and the UK to the LEG's 73rd session held in 1995.[610] This draft emerged as a result of the two main problems encountered in practice. Similar to the background of the Intervention Convention, one problem related to public international law issues, while the other one concerned private (maritime) international law. With regards to public international law issues, Germany, the Netherlands and the UK experienced difficulties with sunken and stranded ships located in their EEZs.[611] These ships, due to rather shallow waters of the North Sea, often created obstacles to navigation and obstructions to the nearby ports.[612] Accordingly, the three coastal States had a strong interest in the removal of these ships. However, the legal basis for coastal State jurisdiction in this respect was questioned.

While Article 221 of the LOSC, which will be discussed in the next chapter, confirms the coastal State intervention powers that could apply in relation to sunken and stranded ships in the EEZ, its application is tailored for exceptional situations of severe pollution.[613] Against this backdrop, Germany, the Netherlands and the UK were left with the ambiguities as to their rights and obligations.[614] France and Belgium experienced the same problem. The wrecks of the *Tricolor* (2002) and the *Mont Louis* (1984) provide examples.[615]

Recalling from chapter 2, the *Mont Louis* sank off the Belgian coast in 1984, creating a navigational hazard and disruption to the port of Zeebrugge. While Belgium ordered the wreck to be removed, it was unclear whether it had the power to do so.[616] The uncertainty was finally resolved amicably but the question regarding the current state of international law remained. With the *Tricolor*, which sank in the French EEZ, the problem with navigational hazard was not linked to the disruption to ports as much as to the possibility of subsequent collisions and

[610] IMO doc, LEG 73/11 of 8 August 1995.
[611] In only a few years, between 1987 and 1994, the Netherlands struggled with the removal of at least 12 wrecks located outside its territorial sea. See IMO doc, LEG 74/13 of 22 October 1996, para 35.
[612] Jan de Boer, 'The Nairobi Perspective: Nairobi International Convention on the Removal of Wrecks, 2007' in *CMI Yearbook 2007-2008* (Comite Maritime International 2008) 340.
[613] Alfred Popp, 'The Treaty-Making Work of the Legal Committee of the International Maritime Organization' in Aldo Chircop et al (eds), *The Regulation of International Shipping: International and Comparative Perspective* (Martinus Nijhoff Publishers 2012) 220. See also Dromgoole and Forrest (n 544) 93-94.
[614] Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007' (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly* 49, 51.
[615] Richard Shaw, 'The Nairobi Wreck Removal Convention' (2007) 13 *The Journal of International Maritime Law* 429, 430-431. See chapter 2 on the facts concerning the incidents of the *Tricolor* and the *Mont Louis*.
[616] Gaskell and Forrest (n 614) 51. According to Shaw, the *Mont Louis* casualty 'revealed the absence of a legal right for a coastal state to institute outside its territorial limits legal measures to protect access to a major port'. See Shaw (n 613615) 431.

pollution. In this respect, it is to be recalled from chapter 2 that two vessels subsequently collided with the *Tricolor* and several more were near-collisions, despite the navigational warnings.[617]

From the maritime law aspect, wrecks were problematic in both EEZs and territorial seas because States were engaged in costly wreck removal operations, often without an identified person responsible to ultimately bear these costs and without any available insurance or other financial guarantees in this respect.[618] In terms of the latter, wreck removal costs were usually either excluded from the private insurance cover or subject to the 'pay to be paid' rule.[619] The wrecks of the *An Tai* (1997),[620] the *Assi Eurolink* and the *Iugo* (2003)[621] are often taken as examples. Moreover, owners of these wrecks were regularly either insolvent or single-ship companies with no property in addition to the ship itself.[622]

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[617] See chapter 2 of the thesis (2.2.3.).

[618] Popp (n 613) 220.

[619] The 'pay to be paid' rule means that the shipowner (in the context of the P&I insurance, the shipowner is called the 'member') is liable for a certain claim and did in fact pay for such claim. For example, Rule 2 of the Swedish Club's Rules for P&I Insurance 2020/2021 stipulates as follows: 'Unless the Association otherwise decides the Member is only covered in respect of such sums as he has paid to discharge liabilities, costs or expenses […]'. The rule 'pay to be paid' finds its *raison d'etre* in the fact that P&I Clubs operate on a mutual, non-profit basis. In the *Fanti and the Padre Island* Case, the court provided the following clarification: 'In a mutual insurance association such as a P&I club, it is essential that members should be able to assume the financial probity of other members, because all of them are insurers as well as insured. To that end it is customary to require each member to discharge his own liability before he can be indemnified against it by the club. Each member is, after all, running his own business; it is up to him to make sure that a claim against him is well founded, and the best way of ensuring that is to require him first to pay the claim before seeking indemnity from the club'. See the *'Fanti' and the 'Padre Island'* Case (Firma C-Trade S.A. v. Newcastle Protection and Indemnity Association and Secony Mobil Oil Co. Inc v. West of England Shipowners Mutual Insurance Association Ltd) [1990] 2 Lloyd's Rep 191, 202. In reality, the P&I Clubs do issue letters of undertaking as a financial security for claims against shipowner's liability, without insisting on the 'pay to be paid' rule and in that respect they do settle claims with third parties directly. However, the 'pay to be paid' rule has an important 'psychological' significance for the clubs. See Marko Pavliha and Adriana Vincenca Padovan, 'The law of Marine Insurance' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume II Shipping Law* (Oxford University Press 2016) 591. The 'psychological' significance of the rule 'pay to be paid' may be demonstrated on the example of the *Assi Eurolink* (2003), which was a wreck owned by a single ship company. The P&I insurer made the explicit statement that it would invoke the 'pay to be paid' clause, unless the Netherlands drops part of its claims. See IMO doc, LEG 86/4/2 of 28 March 2003, para 21. It is interesting to note that it went unmentioned whether the Dutch authorities in fact had the authority to order the wreck's removal beyond the limits of the territorial sea. In this respect, it should be recalled that the *Assi Eurolink* sank 'seaward of the territorial sea' (see chapter 2 of the thesis – 2.2.3.). Theoretically speaking, therefore, the insurer could also rely on this argument as the 'pay to be paid' rule assumes the existence of the liability. No liability exists if there is no authority to impose it (no LOSC authority).

[620] The wreck of the *An Tai* sank in Port of Klang, Malaysia. For more on this incident see Gaskell and Forrest (n 614) 52.

[621] The *Iugo* was a wreck that sank near the Dutch coast in March 2000. The wreck removal costs were in the range of 9.6 million EUR, but could not be recovered because the owner was again a single ship company and the P&I insurer refused to pay the costs, relying on the 'pay to be paid' rule. This time no 'psychological' element was playing the role. However, one may also note that the insurer in this case was not a member of the IG P&I Clubs. See the submissions made by the Netherlands to the 86th session of the IMO Legal Committee. IMO doc, LEG 86/4/2 of 28 March 2003, para 20.

[622] It is often the case that the value of the ship is far less than the costs for the removal. See Gaskell and Forrest (n 614) 51. These authors observe that '[p]owers to sell a wreck have proven to be of little use where the removal

5.6.1.2 'Compelling Need' Questioned

While Germany, the Netherlands and the UK strongly urged the adoption of the WRC given the aforementioned problems, some States did not see the need for the WRC given that the majority of wrecks are located in areas under the territorial sovereignty, and hence jurisdiction of coastal States.[623] Doubts were also expressed among industry members, who felt that a stand-alone treaty providing a shipowner's strict liability, backed with compulsory insurance and direct action, would be a 'disproportionate response to what appeared to be a small problem'.[624] The ICS was of the view that there was no compelling need for the adoption of a new treaty, which is in clear contrast to the situation of places of refuge where they strongly supported the CMI proposal.[625] Nevertheless, the ICS argued that in case such a compelling need would eventually be established, it would be more useful if a new treaty applies also in relation to wrecks located within the territorial sea.[626]

The IG P&I Clubs argued the same.[627] In essence, industry was concerned about ensuring uniformity in maritime law. At the same time, if one recalls the commercial interests of Clubs and their members (shipowners) as explained in chapter 2, one could also argue that industry saw the benefit of the WRC being linked to the liability limitation under the LLMC.[628] In this respect, it is to be appreciated that the LLMC leaves the option to States parties to make a reservation when it comes to wreck removal claims in that these claims may be exempted from limitation of liability.[629] However, the WRC makes a linkage to the LLMC in a way which makes the claim against the insurers subject to limitations regardless of any reservation to the LLMC. In particular, Article 12 (1) of the WRC requires the registered owner to maintain insurance or other financial security to cover liability for wreck removal costs 'in an amount equal to the limits of liability under the applicable […] regime, but in all cases not exceeding an amount *calculated* in accordance with article 6 (1) (b) of the [LLMC, as amended]'.[630] Moreover, the WRC places liability for wreck removal costs on the registered owner, rather

costs far exceed any remaining value; if there had been a net value, salvors and shipowners would usually undertake the work themselves'.

[623] IMO doc, LEG 63/5 of 18 May 1990, para 14.

[624] Linda Howlett, 'Nairobi International Convention on the Removal of Wrecks, 2007' in *CMI Yearbook 2007-2008* (Comite Maritime International 2008) 341.

[625] For more on the requirement of the 'compelling need' in the law-making process at the IMO see chapter 4 of the thesis (4.3.5.).

[626] Howlett (n 624) 341-342.

[627] IMO doc, LEG 101/8/4 of 21 February 2014, para 9. See also Gaskell and Forrest (n 614) 116.

[628] Article 10 (2) of the WRC.

[629] Article 18 (1) of the LLMC.

[630] Emphasis added. This view is also shared by Richard Shaw, 'The Nairobi Wreck Removal Convention' in *CMI Yearbook 2009* (Comite International Maritime 2009) 414-415.

than on the 'shipowner' in its broader context, including 'owner, charterer, manager and operator of the ship'.[631]

Ultimately, the WRC was adopted at the general diplomatic conference convened by the IMO in Nairobi between 14 and 18 May 2007.[632] The conference was attended by 64 States, associate member Hong Kong and observers from industry. The conference adopted the rules of procedure which set out the voting system that would adopt the convention on the basis of the majority of representatives present and voting, where 'present and voting' means casting an affirmative or negative vote.[633] In this respect, it is to be recalled that this voting system was also included in the rules of procedure of the 1969 Brussels Conference, which adopted the Intervention Convention. However, while the Intervention Convention was adopted by a majority (with some States voting against and some abstentions), the WRC was adopted by consensus and thus confirmed the more recent practice at the IMO.[634]

5.6.1.3 Departure from the Previous Work of the LEG

Both the P&I Clubs and the ICS felt that the WRC created a 'significant departure' from the previous work of the LEG as its ambition was to tackle public and private international law issues in one single instrument.[635] Indeed, based on the previous work of the LEG, there are at least two arguments in support of the observation that it is rather unusual to include private and public law provisions in the same treaty. First, in the aftermath of the *Torrey Canyon* accident, two separate working groups were formed and two separate conventions were adopted. Second, when the Salvage Convention was under negotiation, the places of refuge problem as a 'public law' issue was raised but in the end it was decided not to deal with it, save for the context of cooperation between public authorities, salvors and other interested parties (Article 11), precisely because of the private law nature of the convention.

It is nevertheless interesting to mention the 1999 proposal by a LEG's correspondence group to have a scaled-down version of the WRC that would only address jurisdictional issues since no agreement could be reached on the liability and compensation part. It was explained that this approach would be better 'in order to ensure quick progress and on the understanding that these [liability] issues will be governed by national law'.[636] In 2002, however, the liability and

[631] See the definition of the shipowner in Article 1 (2) of the LLMC, as amended.
[632] IMO doc, LEG/CONF.16/DC/3 of 17 May 2007, 1-4, LEG/CONF.16/RD/3 of 18 May 2007, 1.
[633] Rules 32 and 33 of the Rules of Procedure. See IMO doc, LEG/CONF.16/2/1 of 14 November 2006, 9-10.
[634] IMO doc, LEG/CONF.16/DC/3 of 17 May 2007, LEG/CONF.16/RD/3 of 18 May 2007, 1.
[635] See Howlett (n 624) 341.
[636] IMO doc, LEG 80/5 of 10 September 1999, para 11.

compensation part was brought back,[637] probably because States did not see the value of the jurisdictional part of the Convention without having an adequate guarantee that wreck removal costs would ultimately be recovered.

5.6.2 Object and Purpose

The WRC was adopted for the purpose of establishing uniform international rules, which would ensure prompt and effective removal of hazards created by wrecks, and payment of compensation for the costs thereby incurred.[638] In essence, this sought to fill the previously mentioned gap in relation to State jurisdiction over wreck removal in general, for the purpose of safety of navigation and the protection of the marine environment.[639] Against this backdrop, the Preamble to the WRC makes no specific reference to the need for coastal States to be authorized to take and enforce measures necessary to protect their coastlines and related interests as this is clearly something the Intervention Convention and Article 221 of the LOSC already do.[640] Nonetheless, as will be discussed and explained in chapter 6 and 8 of the thesis, the WRC to some extent overlaps with the Intervention Convention and Article 221 of the LOSC as it defines a hazard as any condition or threat that creates navigational obstruction or 'may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the *coastline* or *related interests* of one or more States'.[641]

5.6.3 Geographical Scope of Application

The WRC applies to the 'Convention area', which is defined as:

> the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.[642]

The geographical scope of application of the WRC is confined to the EEZ or the corresponding area up to 200 nm, if the EEZ is not proclaimed. In case of the latter, the geographical scope of

[637] IMO doc, LEG 84/4 of 18 February 2002.
[638] The Preamble to the WRC.
[639] The Preamble to the WRC.
[640] The Preamble to the WRC emphasizes the fact that 'wrecks, if not removed, may pose a hazard to navigation or the marine environment'.
[641] Article 1 (5) of the WRC. Emphasis added.
[642] Article 1 (1) of the WRC

application of the convention is therefore confined to the continental shelf and the high seas, albeit only up to 200 nm. In this respect, the WRC spells out the outer limit of the high seas area and the continental shelf that is subject to the WRC regime. This is in clear contrast with the Intervention Convention and Article 221 of the LOSC, as these two do not stipulate any outer limit for the coastal State to be able to rely on the right of intervention. During the WRC negotiations, it was suggested that the WRC should apply to any 'wreck located beyond the territorial sea of States Parties'.[643] Yet, the suggestion was not accepted. In practical terms, it is hard to imagine a ship that would be beyond 200 nm and that would still pose a risk to the nearby coastal States or navigational obstruction to ships passing by. This, however, is not to say that such a ship could not pose a risk to the marine environment in general (e.g. marine life). As observed by the managing director at SMIT:

> If a ship sinks mid-Atlantic, there may still very well be an impact to the immediate environment but no immediate danger of pollution further afield, then unfortunately generally they sink and they stay there. [644]

It is in this context that the WRC geographical scope of application may already at this stage be observed as some sort of a shortcoming if one is to recall from chapter 3 that Part XII of the LOSC speaks of the responsibility of States to protect and preserve the marine environment beyond areas of national jurisdiction, for the benefit of the global community. Given the WRC does not address areas beyond 200 nm, the problem remains as to which State would in fact be responsible for the removal of a hazardous wreck beyond national jurisdiction as there is no obvious 'candidate' in this respect.

If the coastal State so wishes, the application of the WRC may be extended to internal waters, archipelagic waters and the territorial sea.[645] The extended application of the WRC was an issue that was endlessly debated. Should the convention apply to the extended area or not? If yes, should it merely be an option or should it be mandatory? Moreover, how can it be ensured that the territorial sovereignty of the coastal State is not compromised and that its broad powers are thus preserved?[646] These questions could not be agreed upon until the very last moment during

[643] IMO doc, LEG 73/11 of 8 August 1995, Annex, 3.
[644] Observation available at <https://www.ship-technology.com/features/featurecleaning-up-shipwrecks-across-the-world-5728943/> accessed 31 October 2019.
[645] In this respect, Article 3 (2) of the Convention contains an opt-in clause.
[646] IMO doc, LEG 77/5 of 13 February 1998, 2-3. Before the WRC was discussed at the conference, an intersessional meeting was held on 13 March 2007 to discuss the most workable solution for an extended application of the WRC to the territorial sea, internal waters and archipelagic waters. The meeting was attended by 34 States, the CMI, ICS, IG P&I Clubs and the IMO Secretariat. See IMO doc, LEG/CONF.16/12 of 24 April

the conference. In the words of Popp, the extended application of the WRC was a true 'bone of contention'[647] because States were aware that the majority of wrecks are indeed located in areas under territorial sovereignty.[648]

The CMI conducted a survey of national (maritime) laws concerning the matter at stake and discovered many similarities in the national regimes for the removal of wrecks located within the territorial sea. Based on this finding, in 1996 the CMI asserted that the unification of the rules dealing with the removal of wrecks 'would be much more complete, if the WRC by itself was applicable also to national waters, but permitted a state to exempt such waters from its application'.[649] It was therefore suggested that the WRC's geographical scope of application should be extended so as to allow coverage of the 'territorial waters'.[650] The LEG recognized the CMI suggestion as a valid one and observed that the WRC, if applicable only outside the territorial sea, would serve little useful purpose.[651] An opt-in clause was consequently included in the final text of the Convention (Article 3 (2)). While some provisions are excluded from the extended scope of application, the principle of proportionality remains applicable, which creates a significant departure in the developments of international law since 1967, as will be discussed in chapters 7 and 8.

5.6.4 The Potential of the WRC to Reflect General International Law: The Issue of Opposability to Non-Parties

The WRC is a relatively new treaty as it entered into force in 2015. Its status in customary international law has been neither authoritatively confirmed nor discussed. In contrast, the right of intervention undisputedly finds its source in customary international law, as confirmed in Article 221, which will be discussed in the subsequent chapter.

During the negotiations of the WRC, the USA expressed the view that the Convention 'went beyond customary international law, as codified in UNCLOS' and that it is therefore necessary to make it clear that the WRC does not apply to non-parties.[652] In this respect, the USA

2007. The main concern these participants argued about was how to keep the sovereignty of the coastal State intact. See IMO doc, LEG/CONF.16/12 of 24 April 2007, Annex 2. See also de Boer (n 612) 336-338.
[647] Popp (n 613) 220.
[648] IMO doc, LEG 63/5 of 18 May 1990, para 14.
[649] IMO doc, LEG 74/5/2 of 20 August 1996, Annex, 7; LEG 75/6/1 of 14 February 1997, 3.
[650] While reference is made to the 'territorial waters', from the Note made by Secretariat to the 63rd session of the IMO Legal Committee, it can be observed that this refers to both the territorial sea and the internal waters. See IMO doc, LEG 63/5 of 18 May 1990, Annex 2.
[651] IMO doc, LEG 63/5 of 18 May 1990, para 23; See also de Boer (n 612) 340; Shaw (n 615) 432.
[652] IMO doc, LEG 92/13 of 3 November 2006, para 4.67.

suggested a provision be added which would 'clarify' that the WRC parties have no intention to alter the rights of States non-parties that already exist in 'customary international law'.[653] In particular, the USA expressed the following view:

> While States are free to join the DWRC and consent, through being a party to that convention, to subject their flag vessels to the enhanced authority of coastal States provided under that convention, States that do not join it have not consented to the enhanced authority of coastal States provided under that Convention.[654]

The majority of States, however, did not find the justification for the proposal made by the USA.[655] Some States even argued that the Convention cannot produce any effects on non-parties given the principle of *pacta tertiis* 'very well-established under customary international law, as codified in article 34 of the Vienna Convention on the Law of Treaties'.[656] Some of them argued that the proposal of the USA, if accepted, would call into question this principle and 'create confusion' and 'send out the wrong signals'. Against this background, the proposal of the USA was rejected.[657]

Article 34 of the VCLT certainly plays a crucial role in stipulating that a treaty does not produce an effect for non-parties. However, Article 34 is a general rule, to which the VCLT itself recognizes certain exceptions. To be more concrete, it is not necessary for a State to be party to a treaty in order to be bound by it. Based on Articles 35 and 36 of the VCLT, a treaty may create rights and obligations even for States non-parties, provided however that certain requirements are fulfilled. First, there must be a clear intention of States parties to create rights and/or obligations for third States. Second, a third State must, at some point, accept these rights and/or obligation, although it is not necessary for it to formally become a State party. In the case of a treaty providing rights for a third State, the acceptance is presumed, although rebuttable. In the case of a treaty providing for obligations for a third State, which is hard to see happening, the acceptance must be explicit and must be given in writing.

Regardless of a general rule as codified in Article 34 of the VCLT, there is thus a possibility of a treaty producing effects on States non-parties. Against this backdrop, one could argue that there was in fact a possibility of the WRC producing legal effects even in relation to States non-parties. However, what the aforementioned discussion among States might suggest is that there

[653] IMO doc, LEG 92/4/8 of 15 September 2006 para 1.
[654] IMO doc, LEG 92/4/8 of 15 September 2006 para 4.
[655] IMO doc, LEG 92/13 of 3 November 2006, para 4.68.
[656] IMO doc, LEG 92/13 of 3 November 2006, para 4.69.
[657] IMO doc, LEG 92/13 of November 2006, para 4.70.

was an element of intention missing, at least in terms of the WRC alone creating rights and obligations for third States on the basis of Articles 35 and 36 of the VCLT.[658]

This does not mean that a certain treaty rule cannot reflect customary international law, if supported by state practice and *opinio juris*. Article 38 of the VCLT provides that: '[n]othing […] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such'. This also does not prevent a certain treaty rule to be brought under the scope of the LOSC through the mechanism of the rules of reference, as indicated earlier in chapters 3 and 4. Whether the WRC has the potential to indeed influence customary international law, or to be incorporated into the provisions of the LOSC through the rules of reference, will be discussed in chapter 8 of the thesis.

While the debate around the effects of the WRC on third States took a long portion of the negotiations, the question that was somehow neglected was the one concerning the very purpose of the 'third States' debate, i.e. to make a clarification as to which extent the WRC in fact introduced greater jurisdictional powers for coastal States than those that already existed in general international law. The question is valid not because of the need to clarify the content of the WRC, but because of the need to clarify the content of international law that exists irrespective of the WRC. This question will also be discussed in chapter 8 of the thesis.

5.7 **Conclusions**

This chapter demonstrated the rather incremental nature of law-making in the field of coastal State jurisdiction over ships in peril and shipwrecks. Various legal issues concerning the matter at stake have emerged at different stages throughout the span of more than fifty years, and have been triggered as such by a number of maritime accidents, often with disastrous consequences. The current legal regime in place is thus somewhat fragmented, at least when it comes to a number of relevant regulatory instruments. The implications of this fragmentation, i.e. the complementary/non-complementary relationship between these instruments and the content of coastal States' rights and obligations, will be discussed in the subsequent chapters. At this stage, it suffices to identify certain trends and the direction in which international law has been developing since the *Torrey Canyon* accident.

While the *Torrey Canyon* was by no means the first oil spill, it was surely the biggest one at the time. It brought to light the relevance of public law concerns in the field that traditionally

[658] Emphasis added.

belonged to pure maritime law. Moreover, its devastating consequences made a shift in the law of the sea in that coastal States obtained the right to interfere with the freedom of navigation beyond the area of their territorial sovereignty, which at that time belonged exclusively to flag States. The right of intervention came as an exception to the freedom of navigation. Even though in essence a modification of the traditional law of the sea regime, the right of intervention soon gained general support among States. What, however, remained short of such a support was the suggestion to expand the application of the Intervention Convention to areas under territorial sovereignty.

A decade after the *Torrey Canyon* casualty, the *Amoco Cadiz* (1978) triggered the rethinking of the traditional salvage law and ultimately the adoption of the 1989 Salvage Convention, which brought the traditional salvage law up-to-date with developments in international environmental law, as reflected in Part XII of the LOSC. While the negotiators of the Salvage Convention recognized the problem of places of refuge and the dilemma with coastal State rights and obligations in this respect, it was not until the *Erika* (1999), the *Castor* (2000) and the *Prestige* (2002) incidents that the IMO started to work on this issue. However, the only instrument the IMO came up with were non-legally binding guidelines – the 2003 IMO Guidelines on Places of Refuge, containing a set of risks and factors that States are encouraged to weigh when faced with a request for a place of refuge.

The CMI proposed the adoption of a legally binding instrument that would, as the point of departure, impose on coastal States an obligation to provide refuge to ships in need of assistance. The CMI proposal challenged territorial sovereignty and associated jurisdiction of coastal States. However, this challenge remained unsuccessful. It was pushed by industry, but clearly rejected by States.

The 2007 WRC is the most recent instrument adopted at the IMO to address risks posed by ships in peril and shipwrecks. It was adopted almost forty years after the adoption of the Intervention Convention and – somewhat similar to the Intervention Convention – it was adopted to deal with jurisdictional challenges that had emerged in practice in relation to ships located beyond the limits of the territorial seas, such as the *Tricolor* (2002). The adoption of the WRC confirmed the general trend, i.e. the expansion of coastal State jurisdiction in the context of maritime casualties. At the same time, the WRC, in contrast to the Intervention Convention, managed to extend its application (albeit only optionally) to areas under territorial sovereignty.

The WRC is relatively new as it entered into force in 2015. Its implications for general international law are still unclear. To the knowledge of this author, there is no authoritative confirmation as to whether or not, and if yes to what extent, this treaty represents customary international law. While this thesis has no ambition to make any such statement, it nevertheless intends to reflect upon the potential of the WRC to create rights and obligations for third States. The discussion on this point will come at the end of the thesis.

6 Coastal State Jurisdiction over Ships in Peril in Maritime Zones beyond Marine Areas under Territorial Sovereignty

6.1 Introduction

As demonstrated in the previous chapter, at the time of the *Torrey Canyon* environmental disaster, the plea of necessity was the only legal defense coastal States could have possibly invoked to take measures beyond their territorial sea against foreign ships that posed socio-economic and environmental risks to their coastlines and related interests. The plea of necessity, however, belongs to secondary norms of international law and as such assumes a breach of an international obligation. In other words, invoking the plea of necessity opens for potential claims for damages thereby caused.[659] While the catastrophe produced by the *Torrey Canyon* triggered the international community to generally acknowledge that coastal States deserve to be given the right of intervention (rather than the mere excuse) to combat pollution risks at the costs of intruding into the interests of navigation, the applicable scenarios and conditions were debatable. As a result, States have negotiated and adopted the Intervention Convention. Ever since, international law on coastal State jurisdiction in maritime zones beyond the area of territorial sovereignty and foreign ships in peril continued to evolve: first through the adoption of the LOSC, and later on through the adoption of the Salvage Convention, the IMO Guidelines on Places of Refuge and the Wreck Removal Convention (WRC).

Against this backdrop, this chapter investigates and explains the rights and obligations of coastal States beyond the limits of their territorial sea in relation to foreign ships in peril, and how these have evolved since the *Torrey Canyon*. In so doing, the chapter takes the instrument-by-instrument approach, following the chronological sequence of the adoption of each.

6.2 Intervention Convention

To enable coastal States take measures beyond their territorial sea to prevent the *Torrey Canyon* and similar scenarios in the future, the Intervention Convention confers on coastal States the right to intervene into maritime casualties. In order to ensure that such a right is invoked only if and when strictly necessary (so that the freedom of navigation remains intact to the maximum extent possible), this Convention allows intervention only under very strict conditions. These

[659] Article 36 of the ASR.

are outlined in, what Hakapää calls, a 'heavy packed sentence'[660] of Article I (1), which reads as follows:

> Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil [and substances other than oil[661]]; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

Before any analysis of the conditions required for the invocation of the right of intervention takes place, three preliminary observations need to be made. First, the expression 'intervention' is used to denote the exercise of power against another's will.[662] Second, the expression 'measures on the high seas' makes it clear that the location of a maritime casualty must be distinguished from the location of an intervention measure. It is the latter that is relevant. In one of the initial drafts of the Convention, it was suggested the coastal State be provided with the right to take intervention measures 'following upon a *maritime casualty on the high seas*'.[663] This would have put the emphasis on the location of the maritime casualty, rather than the location of the measure. However, the suggestion failed to obtain the necessary support among States.

Third, the expression 'on the high seas' suggests that the Intervention Convention does not apply in the EEZ. However, as already discussed in the previous chapter, the geographical scope of application of the Intervention Convention needs to be interpreted so as to include both the high seas and the EEZ, given that the Intervention Convention was adopted before the LOSC addressed the legal regime of the EEZ.

A different question is whether the coastal State has the right to exercise intervention in the EEZ of another State, rather than in its own EEZ. This author takes the view that the coastal State could not intervene in the EEZ of another State on the basis of the Intervention Convention. The purpose of this Convention is to provide the coastal State with the right of intervention in the waters where such a right would otherwise not exist because of flag State

[660] Kari Hakapää, *Marine Pollution in International Law* (Suomalainen Tiedeakatemia 1981) 265.
[661] The 1973 Intervention Protocol extended the scope of application to substances other than oil.
[662] Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review* 514, 516.
[663] Emphasis added. Official Records of the International Legal Conference on Marine Pollution Damage, 1969, 201-202.

jurisdiction, rather than because of jurisdiction of another coastal State.[664] If the coastal State wants to intervene in the EEZ of another State, it would need to ask that State for permission. Otherwise, it could expose itself to a claim for a breach of an international obligation not to infringe upon the other State's sovereign rights and jurisdiction, including jurisdiction over the protection and preservation of the marine environment. In this respect, the plea of necessity would be the only remedy at its disposal.

6.2.1 Conditions for Triggering the Right of Intervention

6.2.1.1 Casualty Ship

Before the coastal State may take any action on the basis of the right of intervention, a maritime casualty must have happened. This is evident already from the Preamble, which opens with the expression that States are aware of the need to protect their interests from 'grave consequences of a maritime casualty' and is further clarified in Article I of the Convention, which uses the expression 'following upon a maritime casualty or acts related to such a casualty'. Therefore, the coastal State cannot intervene to prevent a casualty as such, even though a ship may already be in peril.

The Convention defines a 'maritime casualty' as:

> a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo.[665]

In principle, any ship may fall under the scope of the Intervention Convention, save for warships and State owned ships, which are excluded from its scope.[666] The meaning of the word 'occurrence' in the definition of a maritime casualty raises some doubts as to whether the casualty must unfold suddenly for the coastal State to be able to invoke its right of

[664] Preamble to the Intervention Convention. This view seems to be shared by Bartenstein who argues that 'if the situation corresponds to a state of necessity and the measures taken meet the conditions of application, then an intervention in foreign territorial waters or a foreign EEZ would be justified under the customary law of state responsibility'. See Kristin Bartenstein on Article 221 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea, A Commentary* (C.H.Beck, Hart, Nomos 2017) 1518. Dromgoole and Forrest seem to argue that the coastal State would be allowed to exercise intervention in the EEZ of another State, albeit this would necessitate a cooperation among States. See Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 2 *Lloyd's Maritime and Commercial Law Quarterly* 92, 101.
[665] Article II (1) of the Intervention Convention.
[666] Article I (2) of the Intervention Convention.

intervention.[667] Of further ambiguity is the last part of the definition in that it is not clear whether the material damage to a ship, or imminent threat thereof, would be required even in relation to a collision, stranding or other incident of navigation. The ambiguity in point comes from the fact that there is no comma before the phrase 'resulting in material damage […]' and so, one may argue that the requirement in point relates only to the 'other occurrence on board a ship or external to it'. The initial draft of Article II (1) of the Convention was, however, different in that a maritime casualty referred to:

> a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or cargo.[668]

The difference lies in the use of the comma before the expression 'resulting in material damage […]'. In this respect, during the negotiations of the Convention, the Dutch delegation argued that the material damage to a ship or its cargo should relate only to 'other occurrence on board a ship or external to it'.[669] The comma was eventually not included in the text, with no particular explanation. Given the exceptional character of the Convention and the fact that the right of intervention was given to coastal States only to the extent strictly necessary to keep the freedom of navigation intact, this author takes the view that the requirement of the material damage or threat thereof relates to all four alternatives.[670] This argument finds support in the commentary on Article 221 of the LOSC, which starts by explaining the problem of pollution originating from an accidental 'damage to a vessel'.[671] Moreover, as will be demonstrated below, even the WRC, which is of a less exceptional character than the Intervention Convention, defines a maritime casualty so as to clearly require a ship to be damaged or in imminent threat thereof.

The rather strict approach in the interpretation of the Intervention Convention (which is explained by the exceptional character of the Convention) would also suggest that the word 'occurrence' means a casualty that unfolds suddenly, i.e. that incidents which evolve over time

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[667] This is relevant if one is to think of hull corrosion and other incidents, which evolve over time. See Aage Thor Falkanger, *Maritime Casualties and Intervention* (Fagbokforlaget 2011) 149.
[668] Official Records of the International Legal Conference on Marine Pollution Damage, 1969, 204.
[669] Official Records of the International Legal Conference on Marine Pollution Damage, 1969, 316. The Finnish delegation seconded the interpretation taken by the Dutch delegation.
[670] Hakapää argues the same. See Hakapää (n 660) 266. See also Agustin Blanco-Bazan, 'Intervention in the High Seas in Cases of Marine Pollution Casualties' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 273.
[671] Myron Nordquist et al (eds.), *United Nations Convention on the Law of the Sea 1982, A Commentary, Volume 1* (Martinus Nijhoff Publishers 1985) 304. Article 221 of the LOSC uses exactly the same definition (the comma being omitted) as the Intervention Convention does.

are not covered thereunder. Further support for this argument may be found in Article II (4), which demands that interests of the coastal State be 'directly affected or threatened by the *maritime casualty*'. The explicit reference to a 'maritime casualty', rather than to oil or other substances, points at an unfolding scenario.[672]

6.2.1.2 Risks Covered

The coastal State is given the right of intervention for a specific purpose, which is to combat the risk of pollution caused by a specific type of pollutant, namely oil or substances other than oil. This purpose is further tailored for the specific interests of the coastal State: 'coastline' and 'related interests'.[673] The ordinary meaning of the word 'coastline' suggests the 'interface between water and land'.[674] As far as 'related interests' are concerned', Article II (4) defines them as the interests of the coastal State 'directly affected or threatened by the maritime casualty', such as:

> (a) maritime coastal, port or estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;
>
> (b) tourist attractions of the area concerned;
>
> (c) the health of the coastal population and the well-being of the area concerned, including conservation of living marine resources and of wildlife.[675]

There is no specific reference to the economic interests of the coastal State. Nonetheless, the expression 'such as' indicates that the list provided in Article II (4) is a non-exhaustive one. Given the reference to fisheries activities, there is no reason why economic interests should not be covered too. The scope of 'related interests' is thus broad. However, these interests must at any rate be 'directly affected or threatened by the maritime casualty',[676] which, as previously explained, must be suddenly unfolding.

Furthermore, a danger in relation to which the coastal State is given the right of intervention needs to be of a particular character. First, it needs to be 'grave and imminent' and second, it must lead to a reasonable expectation of 'major harmful consequences'.[677] These requirements

[672] Article II (4) of the Intervention Convention. Emphasis added.
[673] Article I (1) of the Intervention Convention.
[674] See Bartenstein (n 664) 1520.
[675] Article II (4) of the Intervention Convention.
[676] Article II (4) of the Intervention Convention. See also Bartenstein (n 664)664 1520.
[677] Article I of the Intervention Convention.

suggest a very high threshold for the coastal State to be able to rely on the Intervention Convention in a given situation and in fact do not seem to depart from the plea of necessity.

As far as the requirement of 'grave and imminent danger' is concerned, its interpretation should be guided by the reasoning of the Court in the *Gabcikovo-Nagymaros Project* Case,[678] especially given that Article I (1) makes an explicit reference to the principle of necessity by stipulating that the coastal State is allowed to take only those measures of intervention that are 'necessary'. In concrete terms, the requirement of 'imminent danger' should be interpreted as 'highly probable' realization of a given risk.

Regarding the requirement of 'major harmful consequences', it needs to be read together with the Preamble, which clarifies that the right of intervention is given to coastal States only when they are faced with 'grave consequences'. The initial draft of the Preamble was different in that it referred to '*disastrous'* rather than 'grave' consequences. Brown explains the difference as follows:

> [t]hough it may not always be simple in practice to distinguish between "grave" and "disastrous" consequences or between "major harmful" as against "major or catastrophic" consequences, the intention is clear – to lessen the degree of threat which may be taken to justify action on the high seas.[679]

While the term 'major harmful' should thus point at something less serious than 'catastrophe' or 'disaster', in the view of this author it should still be considered as something more than 'serious', as it would otherwise suffice to keep the term 'harmful' without the additional qualification of 'major'. The risk of 'major harmful consequences' requires a very high threshold to be met, which may appear problematic in practice, especially if circumstances require immediate action to be taken and the coastal State does not have immediately at its disposal the necessary facts to determine whether the threshold is indeed met.

The exact meaning of the term 'major harmful consequences' remains ambiguous as there is no particular criteria to guide the assessment. To the knowledge of this author, no international court or tribunal has had a chance to rule on this particular point yet. On the other hand, in the *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* Case,[680] the Court of Justice of the European Union had an opportunity to interpret the requirement of 'major damage' under

[678] See chapter 5 of the thesis (5.2.1.).
[679] Edward Brown, *The Legal Regime of Hydrospace* (Stevens & Sons 1971) 149. See also Cundick (n 662) 527.
[680] The *Bosphorus Queen Shipping Ltd Corp. v. Rajavartiolaitos* Case (C-15/17), the Court of Justice of the European Union, Judgement of 11 July 2018.

Article 220 (6) of the LOSC and Article 7 (2) of the EU Directive 2005/35. The Court held that the meaning of the term 'major damage' depends on the specific circumstances such as 'the nature of the harmful substances […], the amount, direction, speed and period of time over which the discharge spreads'.[681]

Article 220 (6) of the LOSC is not concerned with pollution from maritime casualties, and does not use the phrase 'major harmful consequences' but rather 'major damage'. Nonetheless, the reasoning of the Court of Justice of the European Union may be used by analogy for two main reasons. First, Article 220 (6) uses the same technique to balance between the interests of coastal States and those of flag States. Second, the ordinary meaning of the word 'damage' and 'harmful' consequences is the same.

The assessment of 'major harmful consequences' may further be guided by Article 6 of the WRC, which, as will be explained below, contains a list of criteria that should be taken into account in determining whether a casualty ship poses a hazard. At the same time, it needs to be appreciated that the WRC defines a 'hazard' in much broader terms than the Intervention Convention does. This will be elaborated upon further in the chapter. At this stage, it suffices to mention that the list of criteria in the WRC refers to, *inter alia*, tidal range and currents in the area, nature and quantity of the ship's cargo, the amount and type of oil on board, and vulnerability of port facilities. Similar criteria are contained in the IMO Guidelines on Places of Refuge, which in fact refer to the Intervention Convention as one of the treaties that form the legal context within which these Guidelines are supposed to operate.[682]

For the right of intervention to be triggered, the Intervention Convention requires strict conditions to be cumulatively fulfilled and these relate to both danger and damage. While each casualty is unique, and accordingly must be assessed on a case-by-case basis, one may nevertheless ask whether the threshold is too onerous given the magnitude of the problem of pollution,[683] especially because the requirement of 'grave and imminent danger', coupled with the fact that the ship does not necessarily have to be damaged, but must at any rate be at least in 'imminent threat' thereof, may lead to problems in practice in that a measure of intervention would be more a remedial effort than a preventive response to combat grave pollution.[684]

[681] The *Bosphorus Queen Shipping Ltd Corp. v. Rajavartiolaitos* Case (n 680) para 101.
[682] See Appendix 1 and Appendix 2 of the IMO Guidelines on Places of Refuge.
[683] As demonstrated in chapter 2 of the thesis.
[684] See Cundick (n 662) 519.

During the negotiations of the Convention, Indonesia argued that the requirement of 'grave and imminent danger' should be abandoned altogether, while Canada was of the view that the requirement of 'major harmful consequences' is not needed given that the requirement of 'grave and imminent danger' was sufficiently restrictive to underscore the exceptional nature of the right of intervention.[685] The USA argued that it might be too late if one needs to wait for the catastrophe to be imminent.[686] Nonetheless, most States felt that both requirements were needed because of the exceptional character of the Convention. The German delegation in this respect argued that anything less than that could mean that coastal States would be given broader rights than urgently needed. Sweden took the same position and argued that both requirements were needed to justify granting coastal States the power to take protective measures in international waters.[687] The drafting history of the Intervention Convention thus clearly shows that the general preference was still given to the navigational interests over the interests of coastal States as the latter can override the former only in very extreme and exceptional scenarios.

6.2.2 Measures of Intervention

6.2.2.1 Types of Measures

The Intervention Convention does not explicitly define the types of measures that the coastal State may take in the context of intervention. Hence, the coastal State is given considerable discretion in this respect. It may, for example, instruct the master of the ship to follow a certain route or to reduce the speed or it may instruct the salvor to tow the ship to a certain place in a certain way. While regulating the relationship between the salvor and the shipowner/operator, the Salvage Convention preserves the coastal State's right of intervention and offers an explanation in this respect by stipulating that such a right includes 'the right of a coastal State to give directions in relation to salvage operations'.[688]

Measures of intervention as captured under the Intervention Convention are sufficiently broad to include an instruction for the ship to be towed further out to open sea or to be towed closer to the shore, i.e. to a place of refuge. It has been acknowledged that in the scenario in which the ship has suffered an incident, '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'

[685] See IMO doc, LEG/CONF/C.1/SR.5 of 14 November 1969, 3 and 13. See also LEG/CONF/C.1/SR.6 of 14 November 1969, 15.
[686] See IMO doc, LEG/CONF/C.1/SR.5 of 14 November 1969, 3 and 13.
[687] See IMO doc, LEG/CONF/C.1/SR.5 of 14 November 1969, 12.
[688] Article 9 of the 1989 Salvage Convention.

in a place of refuge.[689] For that matter, a place of refuge does not necessarily have to be a port. A safe anchor outside the port may also serve the purpose of refuge by providing an adequate shelter.[690] However, bringing a casualty ship closer to the shore may put the coastal State at risk from both environmental and socio-economic aspects. Whether the coastal State has the obligation to provide refuge to a ship in need of assistance, including a casualty ship, is debatable.[691] From the general international law perspective, this debate goes to the very heart of territorial sovereignty and will as such be at the focus of the next chapter. Nonetheless, this chapter will touch upon places of refuge, as the request for a place of refuge may be posed while the ship is located beyond the territorial sea.

As far as other conceivable measures of intervention are concerned, it is not entirely clear whether the coastal State is authorized to prohibit navigation for ships that are not directly involved in a casualty but are merely passing by. The Convention contains no specific rules on the extent to which the right of intervention may indeed restrict the freedom of navigation. During the negotiations of the Convention, the delegation of Singapore proposed a specific provision to this end, but the proposal found no support among other delegates. While the occurrence of a 'maritime casualty' requires the involvement of a 'ship',[692] this author takes the view that a casualty ship does not necessarily have to be an object against which the intervention is directed. The latter can be explained on account of the fact that the Intervention Convention places the emphasis on the location of the measure rather than on the location of the casualty. Therefore, even a prohibition of navigation that affects ships other than a casualty ship could be claimed as a measure of intervention, for as long as it is of a temporary and exceptional character and fulfils the conditions required under the Convention. According to Falkanger, the reason why the proposal by Singapore did not find support among other States was probably because:

> the size of the problem did not justify further efforts. Practically speaking, it is hard to conceive of a situation where closing off actually represents a threat to the freedom of

[689] Paragraph 1.3 of the IMO Guidelines on Places of Refuge.
[690] This was also reported in the case of the *Castor* and the *Prestige*. See IMO doc, MSC 77/8/2 of 14 February 2003, para 14.
[691] The debate is due to uncertainties concerning the status of maritime custom associated with a refuge tradition, which has been the focus of extensive study by eminent scholars. See Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006); Anthony Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers 2012); Erik van Hooydonk, *Places of Refuge* (Lloyd's List 2010).
[692] Article II (a) of the Intervention Convention. A 'ship' is defined in Article II (2) of the Convention as: (i) any sea-going vessel of any type whatsoever, and (ii) any floating craft, with the exception of an installation or device engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof.

the seas. The strict conditions in the Intervention Convention ensure that such closings will only concern relatively small areas for a limited period of time. This may be the reason for the Preamble's clear statement that the parties were convinced that measures provided for in the Convention did "not affect the principle of freedom of the high seas".'[693]

The Intervention Convention is silent on the question of whether the most radical measure of the destruction of a ship can fall under its scope. During the negotiations of the Convention, the delegation of Singapore was again active and argued that:

> [i]n the case of the "Torrey Canyon" the British destroyed the tanker with rockets and napalm. But would this be a permissible measure under the draft articles? If so, what preliminary measures must first be exhausted? What if the tanker had not been abandoned, or if the flag State opposes the proposed destruction?
>
> The questions are not answered by the draft Articles. Article I does talk of "measures as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution" […] It is thought that it will be a strained interpretation to read into "eliminate the danger" permission to destroy the tanker causing the pollution.
>
> There can be circumstances where destruction of the maritime casualty may be required. It seems desirable that the proposed Convention deals with this point and to prescribe the circumstances when such extreme action may be taken.[694]

While the Convention does not specifically address the issue of ship destruction, it does not exclude it as a conceivable measure either. If the circumstances so require, no reason seems to suggest that the destruction of a ship, regardless of its extreme character, could not be claimed as an intervention measure.

6.2.2.2 The Principles of Necessity, Proportionality and Reasonableness

Even though the coastal State is not restricted to any particular type of intervention measures, it is not entirely free to choose in a given situation whatever it deems appropriate to protect its national interests in the context of intervention. In making its choices, the coastal State is at any

[693] Falkanger (n 667) 176.
[694] IMO doc, LEG/CONF/3* of September 1969, as referred to in the Official Records of the International Legal Conference on Marine Pollution Damage, 1969, 200-201.

rate obliged to abide by the general principles of necessity, proportionality and reasonableness. These serve to safeguard the rights and interests of others and thus require a certain balancing act to be taken by the coastal State.

According to Article I (1) of the Convention, the coastal State is authorized to take only those intervention measures 'as may be necessary'. During the conference, some delegations were in favour of a more subjective approach. In particular, Indonesia proposed to replace the wording *as may be* necessary, with the wording '*as it* [a coastal State] *deems* necessary', arguing that it is the coastal State which is in the best position to assess if it is threatened by pollution or not.[695] This view, however, was not shared by others and was consequently not reflected in the final text. The expression 'as may be' surely suggests that the necessity must be observed from an objective point of view. A certain degree of discretion, however, is simply inevitable in practice and seems to be acknowledged as such in jurisprudence.[696]

The Convention further requires that the measure of intervention taken by the coastal State be 'proportionate to the damage actual or threatened to it'.[697] In considering whether a given measure of intervention satisfies the proportionality test, Article V (3) of the Convention provides a list of criteria to be taken into account and these are: (i) the extent and probability of imminent damage if those measures are not taken; (ii) the likelihood of those measures being effective; and (iii) the extent of the damage which may be caused by such measures. No further guidance is provided in this respect.[698]

While criterion ad (i) was accepted by States without particular comments, criteria ad (ii) and (iii) were subject to some discussion. In terms of criterion ad (ii), i.e. the likelihood of the measures of intervention being effective, the question was raised as to the time relevant for determining effectiveness. Canada was concerned that measures taken in the agony of the moment might be questioned at a later stage when certain information, which might not be available at the time of the action, would become known.[699] Canada therefore argued that there

[695] IMO doc, LEG/CONF/C.1/SR.5 of 14 November 1969, 3.
[696] In the *Continental Casualty v. Argentine Republic*, the Tribunal took the view that an 'objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight'. See the *Continental Casualty v. Argentine Republic*, ICSID Case no ARB/03/09, Arbitration Award of 5 September 2008, para 181.
[697] Article V (1) of the Convention.
[698] It is not entirely clear whether the list of criteria provided in Article V (3) is exhaustive. The language of the provision does not seem to exclude the possibility of other factors to indeed be considered. See also Falkanger (n 667) 174. While not all damages are monetary, for those that are, monetary factors may still enable a comparison and in this respect serve as guidance. See Cundick (n 662) 529.
[699] IMO doc, LEG/CONF/C.1/SR.11 of 18 November 1969, 3.

should be an explicit rule stipulating that this assessment should be based on the circumstances that exist 'at the time of the emergency'. The Canadian proposal was ultimately rejected and the reason is probably best explained in the words of the French delegation – not to 'open the door for hasty and perhaps unjustified actions'.[700]

Nonetheless, under the IMO liability and compensation conventions, such as the Fund Convention, the time relevant for assessing the reasonableness of preventive measures is the time when the measures are taken.[701] If this is so under the liability and compensation regime, this should be even more so in relation to the Intervention Convention. Moreover, one needs to appreciate that circumstances of a particular case may require intervention measures to be taken immediately, and thus under a certain degree of pressure, if for no other reason than because pollution spreads quickly. It would be reasonable therefore to say that it is the time of action, rather than the later time, that counts.

In relation to criterion (iii), i.e. the extent of the damage which may be caused by such measures, Canada proposed it be abandoned, especially in relation to the damage that could be caused to the ship. It was of the view that the coastal State should not be expected to weigh any damage to the vessel when combating pollution 'in the best interest of the largest number of people'.[702] This view was strongly opposed by Germany who argued that this criterion represents the hard core of the principle of proportionality and, as such, requires a balance to be struck 'between the importance of the cleanliness of the coastal State's seashore and all other interests on the high seas which might be affected'.[703] Germany also referred to the report on the *Torrey Canyon* incident, which revealed that the harmful effects of the measures taken by the UK (dispersing chemicals to combat pollution) were worse than the harmful effects of oil itself. Against this backdrop, the Canadian proposal did not attract support among delegations and criterion ad (iii) was clearly retained.

Of some ambiguity is whether the measure of intervention must be the only way to prevent, mitigate or eliminate pollution in that no alternative measure is conceivable. The Intervention Convention is silent on this question, even though it makes an explicit reference to the principle of 'necessity'. From the negotiation history of the Convention and its Preamble it is rather apparent that the right of intervention was given to the coastal State only as an exception, to the

[700] IMO doc, LEG/CONF/C.1/SR.11 of 18 November 1969, 4.
[701] See para 3.15 of the IOPC Funds, 'Claims Manual, 2019 Edition. See also chapter 7 of the thesis (7.5.2.).
[702] IMO doc, LEG/CONF/C.1/SR.11 of 18 November 1969, 6.
[703] IMO doc, LEG/CONF/C.1/SR.11 of 18 November 1969, 6.

extent strictly necessary, given the intrusion into the freedom of navigation.[704] However, preventing the coastal State from intervention on the basis of the existence of two or more conceivable measures would have significant implications in practice to the point that the purpose of the Convention would be refuted and the plea of necessity reintroduced. As put by Falkanger, 'the coastal State will often have to choose between alternative measures. In a way, none of these are then necessary since the others can replace them'. This author shares the view taken by Falkanger in that the term 'necessary' relates to the 'alternative *passivity* from the coastal State'.[705] This does not go to say that the availability of alternatives is irrelevant whatsoever.

The Convention further requires that the measure of intervention does not go beyond what is reasonably necessary.[706] At any rate, it must 'not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned'.[707] The obligation to refrain from unjustifiable interference was considered by the Tribunal in the *Chagos* Arbitration as 'functionally equivalent to the obligation to give "due regard"', set out in Article 56 (2) [of the LOSC], or the obligation of good faith that follows from Article 2 (3) [of the LOSC]'.[708] In both the *Chagos* Arbitration and the *South China Sea* Arbitration, the Tribunal held that:

> the ordinary meaning of "due regard" calls for the [first State] to have such regard for the rights of [the second State] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of [the second State's] rights; nor does it uniformly permit the [first State] to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [first State], and the availability of alternative approaches.[709]

[704] See chapter 5 of the thesis (5.3.1.). See also Blanco-Bazan (n 670) 273.
[705] Falkanger (n 667) 165.
[706] Article V (2) of the Convention.
[707] Article V (2) of the Convention.
[708] The *Chagos* Arbitration (The Republic of Mauritius v. the UK), Award of 18 March 2015, para 540.
[709] The *South China Sea* Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, para 742.

Hence, even though bombing the ship can indeed be a lawful measure under the Intervention Convention, it would not seem to be lawful in circumstances in which there is a measure that would be less damaging or less inconvenient (not only for the ship but also for the opposite or adjacent States) and that would still give the coastal State the necessary protection. If pollution may be prevented by transferring hazardous cargo from one ship to another, destroying the ship would clearly be disproportionate and unreasonable.[710]

In scenarios which require the coastal State to take immediate action to combat pollution,[711] and thus allow certain deference on the side of the coastal State,[712] it could be hard to prove in practice that the coastal State is in fact in breach of these principles. Nonetheless, the coastal State may open itself to potential claims. According to Article VI of the Convention, the coastal State is liable to pay compensation for damages 'to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I'.[713]

6.2.2.3 The Proposal to Make the Coastal State's Liability Dependent upon the Flag State's Participation in the CLC

The Intervention Convention was adopted as a result of the same conference that adopted the CLC and so, during the negotiations, Canada proposed an amendment to Article VI, which would have established a link between Article VI and the CLC.[714] Canada expressed the view that, although dealing with different issues and bearing different titles, these two instruments (the Intervention Convention and the CLC) are 'no more than two aspects of one and the same system, namely that governing the rights and obligations of States in the event of pollution consequent upon a maritime casualty'.[715] Against this backdrop, Canada argued that the liability of a coastal State for damages caused by excessive intervention measures should be

[710] For more on the conceivable measures and interests associated with the ship, see chapter 2 of the thesis.
[711] Combating oil pollution may be contrasted to wreck removal. During the 78th session of the Legal Committee (LEG), an observation was made that: 'there would often be plenty of time to plan a wreck removal, while combat of oil pollution is urgent'. See IMO doc, LEG 78/4/1 of 13 August 1998, 8.
[712] For a similar argumentation see James Harrison, 'Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of UNCLOS Safeguards Relating to the Arrest of Foreign-Flagged Ships' (2018) 42 *L'Observateur des Nations Unies* 139.
[713] Article VI used the expression 'any Party' and thus equally applies to flag States. See Blanco-Bazan (n 670) 274. Emanuelli characterizes the right of compensation on the basis of two elements. First, the measure of intervention must be in contravention of the Convention. Second, it must fail on the 'reasonable man' test. See Claude Emanuelli, 'The Right of Intervention of Coastal States on the High Seas in Cases of Pollution Casualties' (1976) 25 *University of New Brunswick Law Journal* 79, 86.
[714] These two conventions developed from the same conference, but as a result of the work of different committees established. See chapter 5 of the thesis (5.3.1.).
[715] See IMO doc, LEG/CONF/C.1/SR.12 of 19 November 1969, 4.

consequential upon the participation of States in the CLC regime. In other words, Canada argued that Article VI should apply only in relation to flag States parties to the CLC.[716]

The Canadian proposal was ultimately rejected with no extensive debate, save for the view expressed by Denmark, the Netherlands and Norway that Article VI reflects nothing more and nothing less than the existing international law.[717] Indeed, while both the Intervention Convention and the CLC deal with the matter of compensation, they nevertheless address different types of issues in that the Intervention Convention speaks of some sort of reparation of a breach of an international obligation.[718] On the other hand, the purpose of the CLC is to provide adequate compensation to the victims of pollution.[719] These two should be distinguished.

6.2.3 Obligations to Notify and Consult

Before any measure can be taken on the basis of the Intervention Convention, the coastal State is in principle obliged to consult with 'States affected by the maritime casualty'.[720] This obligation could prove particularly important if the maritime casualty affects the opposite or adjacent coastal States. Furthermore, the coastal State is obliged to notify, without delay, measures to any person, physical or corporate, that has an interest which can reasonably be expected to be 'affected by the measures' and, moreover, 'take into account any views they may submit'.[721]

The coastal State, therefore, owes certain obligations towards both States and private actors. While the obligation towards States concerns consultation, the obligation towards private actors relates to notification. The difference between the term 'notification' and 'consultation' may be explained on the basis of their ordinary meaning. The term 'notify' is generally used as 'importing a notice given by some person, whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it, or be notified'.[722] On the other hand, the term 'consultation' implies some sort of a conference between parties, in addition to

[716] See IMO doc, LEG/CONF/C.1/SR.12 of 19 November 1969, 4. Canada took the view that a coastal State 'should not be required to undertake the potential financial obligations imposed by Article VI of the public law Convention in relation to States which are not prepared to accept the corresponding financial obligations in the private law Convention'.
[717] See IMO doc, LEG/CONF/C.1/SR.12 of 19 November 1969, 11 and LEG/CONF/SR.5 of 24 July 1970, 12.
[718] See also Emanuelli (n 713) 90.
[719] The Preamble to the CLC.
[720] Article III (a) of the 1969 Intervention Convention.
[721] Article III (b) of the 1969 Intervention Convention.
[722] The term 'notify' as defined in the Black's Law Dictionary.

notification.[723] This does not mean that the coastal State has an obligation to abide by the other State's view. In other words, the other State cannot claim veto. Otherwise, the purpose of the Convention would be defeated and the plea of necessity (obligation to ask for the consent) reintroduced. Moreover, if that had been the intention, different terminology would have been used in the text of the Convention.

At the same time, the requirement of consultation cannot be read as to mean a mere formality because it would then be equated with notification. Moreover, given that the coastal State is authorized to take only those measures that are justified on the basis of the principle of reasonableness, necessity and proportionality, to argue that the requirement of consultation is a mere formality would again defeat the purpose of the Convention and would go against the principle of good faith. As recognized in the *Lake Lanoux* Case:

> [c]onsultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities.[724]

It is also worthwhile noting the view of the ILC expressed in relation to similar rules contained in international law on transboundary harm. Namely, the ILC explains that the principle of good faith is an 'integral part of any requirement of consultations'.[725] In the *Chagos* Arbitration, the Tribunal also recognized the linkage between the requirement of consultations and the principle of good faith.[726] The Tribunal did not accept that the UK had fulfilled this requirement for three main reasons. First, there was a lack of information provided. Second, there was an absence of a reasoned exchange of views between the parties. Third, the statements and conduct of the UK created reasonable expectations on the part of Mauritius that there would be further opportunities to respond and exchange views, which eventually did not occur.[727] Similar requirements could be read into the obligation to consult under the Intervention Convention.

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[723] The term 'consultation' is defined in the Black's Law Dictionary as '[a] conference between the counsel engaged in a case, to discuss its questions or arrange the method of conducting it'.
[724] The *Lake Lanoux* Case, UNRIAA, vol. XII (Sales No. 63. V.3) p. 281 as cited in ILC (n 725) 161, fn 915 in relation to fn 873. On the same line of reasoning, in the *North Sea Continental Shelf* Cases, the Court held that 'the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it. See the *North Sea Continental Shelf* Case (Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para 85.
[725] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001', Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, Yearbook of the International Law Commission, 2001, Volume II, Part Two, 2007, 160.
[726] The *Chagos* Arbitration (The Republic of Mauritius v. the UK), Award of 18 March 2015, para 534.
[727] Ibid.

While the obligation to consult is a general rule, the Intervention Convention nevertheless recognizes an exception to this rule in scenarios of 'extreme urgency', which are basically scenarios that require 'measures to be taken immediately'.[728] Given the principles of proportionality, reasonableness, due regard and good faith that apply at any rate, it would be incorrect to say that the coastal State can simply disregard the interests of others. While perhaps it would not have an obligation to consult, it would still, for example, need to give proper consideration to the interests of the ship before deciding to take such far-reaching measures as destroying the ship.[729]

To consult and notify is clearly a requirement to which an emergency situation comes as an exception. This is also reflected in the structure of Article III of the Intervention Convention, which starts with the rule, and continues with the exception. During the negotiations on Article III, Canada proposed the emergency exception to be listed first. Its proposal was, however, rejected on the ground that this would imply the emergency to be the normal course of action, which would contradict the very aim of the Convention – the right of intervention as an exception given the need to retain the freedom of navigation intact as much as possible.[730] In this regard, it is worthwhile recalling that the careful choice of language was also of a particular importance in drafting the conditions for the plea of necessity spelled out in Article 25 of the ASR.

According to Article III (c) of the Convention, the coastal State is given the right to proceed to a consultation with independent experts from the list maintained by the IMO.[731] While given the right, rather than being imposed an obligation, the coastal State is still obliged to act in accordance with the principle of good faith. Such an obligation, coupled with the requirements imposed by the principles of necessity, reasonableness and proportionality, would probably give the coastal State enough incentives to indeed consult an independent expert, if time allows.[732]

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[728] Article III (d) of the 1969 Intervention Convention. Emanuelli refers to this provision as to an 'escape clause'. See Emanuelli (n 713) 84-85.

[729] The IMO Guidelines on the Control of Ships in an Emergency, as spelled out in the MSC's circular MSC.1/Circ.1251 of 19 October 2007, speak of an 'advice' that the coastal State 'should' seek from the flag State in scenarios of intervention.

[730] IMO doc, LEG/CONF/C.1/SR.9 of 7 May 1971, 12. The right of intervention was tailored to what was strictly necessary. Only exceptional circumstances could justify it because of the starting point that the coastal State lacked any right to interfere with the freedom of navigation. See Palmer Cundick, 'Oil Pollution: Negotiation – An Alternative to Intervention?' (1972) 6 (1) *International Lawyer* 34, 36. See also Blanco-Bazan (n 670) 273.

[731] Article III (c) of the 1969 Intervention Convention.

[732] Emanuelli suggests that 'it is to be expected that coastal States threatened with oil pollution casualties will generally use these loopholes to exercise their rights under the Convention without interference or delay from other

Once the coastal State takes a certain measure of intervention, it has an obligation to notify such a measure, without delay, to the States and to the known physical or corporate persons concerned, as well as to the IMO Secretary-General.[733]

6.2.4 Intervention Convention and Customary International Law

During the negotiations of the Intervention Convention, flag States were particularly concerned with the broader implications of a new treaty for the regime of the high seas, which was subject to the principle of freedom of navigation and flag State jurisdiction. While the right to take protective measures was not really disputed, flag States were particularly loud in advocating that a new treaty should reflect the fact that the source of the right of intervention is a contractual consent of States parties.[734] Yet, customary international law emerged quite rapidly and independently of the treaty.

According to Lowe, '[i]nternational law as it then stood [at the time of the *Torrey Canyon*] provided no basis for the assertion of control by the coastal State over foreign ships on the high seas'.[735] However, the action of the UK encountered international approval that was 'so general […] that the right to take such action against shipping casualties on the high seas was established, a treaty concluded at a multilateral conference in 1969, and passed rapidly into customary law'.[736] This is a clear example that the passage of a short period of time does not necessarily represent a bar to the creation of a new rule of customary international law,[737] as already pointed out in chapter 1.[738] It also confirms the argument made by Harrison that customary international law may develop more rapidly through the engagement of international institutions.[739]

In the course of the negotiations on the Intervention Convention, coastal States did not pursue any economic or territorial aspirations but merely powers of protection against pollution.[740]

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parties involved'. See Emanuelli (n 713) 84-85. It seems, however, that the rules in point did not prove to be particularly problematic in practice. See Falkanger (n 667) 177-178.

[733] Article III (f) of the 1969 Intervention Convention.

[734] Cundick (n 662) 522.

[735] Vaughan Lowe, *International Law* (Oxford University Press 2007) 39.

[736] Ibid.

[737] The *North Sea Continental Shelf* Cases (Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para 74.

[738] See chapter 1 of the thesis (1.5.2.2.).

[739] James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 19.

[740] As succinctly explained by Cundick, '[c]oastal States which are potential interveners are merely seeking mitigation of a situation forced upon them. There is no attempt to extend sovereignty nor to increase domestic wealth at the expense of the shipping industry. They seek to preserve the means of livelihood for those dependent on local sea resources, but in a much broader sense, to preserve the resources for all who would rightfully share

This could explain the general support for the right of intervention. Such a support was already evident from the fact that Article I was adopted almost unanimously,[741] albeit it may be asked whether the Intervention Convention merely codified a customary right of intervention or whether such a right was rather 'clarified and crystallized'. Churchill and Lowe argue the latter,[742] while Cundick and Tan argue the former.[743] Based on the preparatory works of the Convention and controversies previously discussed, this author shares the view of Churchill and Lowe.

The right of intervention caused a significant jurisdictional shift in that coastal States were provided with the right, which did not exist before and in this respect overtook certain powers from flag States. M'Gonigle and Zacher observe that the negotiations of the Intervention Convention in essence involved a 'jurisdictional change', even though 'some states supported it on the grounds that it would simply be a "contractual" arrangement applicable only to the intervention question'. However, as they continue:

> [t]his is an often repeated argument in favour of jurisdictional amendments at IMCO [IMO] and, from a short-term, strictly legal perspective, it has merit. However, the argument ignores the important fact that international law develops from the extrapolation of narrow precedents, and in 1969, with a new law of the sea conference imminent, this was especially important.[744]

During UNCLOS III it was recognized that the right of intervention finds its place in both customary international law and treaty law. Article 221 of the LOSC in this respect addresses the right of intervention 'pursuant to international law, both customary and conventional'. The content of Article 221 of the LOSC is, however, ambiguous and will now be discussed in more detail.

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them. The well-being of the wealth-producing resources of the inhabitants of the coastal state is threatened, whereas the threat to shippers is exclusively economic and finite'. Cundick (n 662) 536.

[741] See chapter 5 of the thesis. The IMO web site refers to the Intervention Convention as a convention that *affirms* rather than *creates* the right of intervention. The IMO web site, available at <http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-relating-to-intervention-on-the-high-seas-in-cases-of-oil-pollution-casualties.aspx> accessed 31 October 2019.

[742] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edition, Manchester University Press 1999) 355.

[743] Alan Khee-Jin Tan, *Vessel-Source Marine Pollution* (Cambridge University Press 2006) 182. See also Cundick (n 662) 526.

[744] Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 203-204.

6.3 **General International Law and the LOSC**

6.3.1 Article 221 of the LOSC

Article 221 of the LOSC finds its place in Part XII of the LOSC, which dedicates considerable attention to the protection and preservation of the marine environment and in this respect, as will be explained further below, imposes certain obligations on all States, including coastal States. Nonetheless, Article 221 (1) opens with the expression:

> [n]othing in this Part shall prejudice the right of States pursuant to international law, both customary and conventional, to take and enforce measures [of intervention] beyond the territorial sea […].

The term 'conventional' in Article 221 (1) surely captures the Intervention Convention. Of controversy is, however, what exactly the 'customary' right of intervention entails. Bartenstein argues that the reference to customary international law 'includes in particular the defence of necessity [referring in her footnote to Article 25 of the ASR]'.[745] Indeed, the plea of necessity finds its source in customary international law, as reflected in the ASR. However, it belongs to secondary norms of international law and in that sense it is not really a *right* but an *excuse*. This means that, strictly speaking, the plea of necessity is not captured under Article 221 (1) of the LOSC, even though it continues to exist in customary international law.[746] In the view of this author, the term 'both customary and conventional' refers to the same type of right – the right of intervention that simply exists simultaneously in treaty and customary international law.

6.3.1.1 Conditions for Triggering the Right of Intervention

What, however, Article 221 (1) is notable for is the question of whether the customary right of intervention is nowadays subject to a lower threshold than under the Intervention Convention. In this respect, it is important to realize the wording of the remaining part of Article 221 (1), which refers to the right of the coastal State:

> to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to

[745] Bartenstein (n 664) 1519.
[746] Falkanger (n 667) 206.

> such a casualty, which may reasonably be expected to result in major harmful consequences.

Article 221 is confined to pollution caused by maritime casualties and by and large resembles Article I of the Intervention Convention, albeit it is not confined to any specific type of pollutant. In contrast, the Intervention Convention is explicitly confined to oil and substances other than oil. The provision of Article 221 does not make any reference to the requirement of 'grave and imminent danger'. The requirement of 'imminent threat' is nonetheless retained in the definition of a maritime casualty contained in paragraph 2, which prescribes that:

> [f]or the purposes of this article, 'maritime casualty' means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

There are several observations to be made here. First, the definition of a maritime casualty as provided in this provision is identical to the definition of a maritime casualty under the Intervention Convention, which is not surprising given that Article 221 of the LOSC was indeed modeled on the Intervention Convention. However, the opening of the provision of Article 221 (2) – '[f]or the purpose of this article' – is rather odd as it suggests that its relevance concerns only the application and interpretation of Article 221, even though the provision in point clearly refers to the right of intervention that exists in both treaty and customary law. As Nordquist et al. argue, there is no reason for limiting the meaning of this term solely to Article 221.[747]

Second, Article 221 of the LOSC offers no specific definition of a 'ship'. Given it is modeled on the text of the Intervention Convention, one should in this respect be guided by the definition of the term 'ship' as provided in Article II (2) of the Intervention Convention. This would mean that in principle any ship may fall under the scope of Article 221, save for warships and other ships owned or operated by a State. These are at any rate excluded from the scope of application of Article 221 by virtue of Article 236 of the LOSC, which expressly prescribes that '[t]he provisions of this Convention regarding the protection and preservation of the marine environment do not apply' to these types of vessels. The expression 'provisions of this Convention' refers, among others, to Article 221 of the LOSC.

Third, while the expression 'grave and imminent danger' is omitted from paragraph 1 of Article 221, the definition of a 'maritime casualty' in paragraph 2 still requires 'material damage or

[747] Nordquist et al (n 671) 313.

imminent threat of material damage to a vessel or cargo'. During UNCLOS III, the French delegation proposed the definition of a maritime casualty to read as follows:

> Under the terms of the present article, "maritime casualty" means a collision of ships, stranding or other incident of navigation or occurrence on board the ship or external to it resulting in material damage or threat of material damage which, by affecting the vessel or its cargo, would or might cause damage to the marine environment.[748]

The French proposal omitted the word 'imminent' from the phrase 'imminent threat of material damage'. Such a proposal came as a result of the experience that the French authorities had with the *Amoco Cadiz* casualty – i.e. salvors came when it was too late.[749] Ultimately, the French proposal was rejected and the requirement of 'imminent threat' in the definition of the casualty was retained, which means that the casualty ship indeed must be either damaged or in imminent threat thereof. Yet, the requirement of 'imminent danger' in relation to the ship is not the same as the requirement of 'imminent danger' in relation to the interests of the coastal State. In this respect, it is to be reiterated that the omission in paragraph 1 of Article 221 concerns the expression which is formulated in Article I of the Intervention Convention as a 'grave and imminent danger to [the] coastline or related interests'. The question of whether Article 221 lowers the threshold for intervention powers to be triggered thus remains.

During UNCLOS III, the Soviet delegation pointed out that:

> the proposed text of article [221] should not be held to give the coastal State more extensive rights of intervention in cases of maritime casualty than the rights of intervention it already enjoyed under the terms of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, signed in Brussels in 1969. The words "pursuant to international law, both customary and conventional" meant only one thing: they gave States which were not parties to the 1969 Convention the right to intervene within the limits defined by that Convention. […].[750]

At the same time, during the same conference, the Chairman of the Third Committee stressed the importance of taking into consideration the new developments in the field, as emerged in the wake of the casualty of the *Amoco Cadiz* (1978) and the Committee was thus advised to:

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[748] Nordquist et al (n 671) 309.
[749] See IMO doc, LEG 75/6/1 of 14 February 1997, 6-7. In the aftermath of the *Amoco Cadiz* incident it became apparent that negotiations between the master and the salvor took a significant delay, which was ultimately proved detrimental. See Samir Mankabady, *The International Maritime Organization, Volume II* (Croom Helm 1987) 209.
[750] Nordquist et al (n 671) 313.

> take into consideration some new developments in the field of marine pollution control [,] and the *Amoco Cadiz* disaster has increased the awareness and the concern of the magnitude of possible hazards and the need to improve *preventive* measures by strengthening both the standard-setting procedure and the enforcement measures.[751]

The ambiguity still remains, which is not surprising given that Article 221 was clearly considered as '[a] compromise formula with enough support as to provide a reasonable prospect for consensus, but on which there were still some reservations and objections'.[752]

Scholars have different views on the controversy in point. One group of scholars argue that Article 221 lowers the threshold for the right of intervention. Hakapää, for example, is of the view that the omission of the term 'grave and imminent' in Article 221 of the LOSC 'may introduce *some* further flexibility into the exercise of coastal intervention'.[753] Along the same lines, Kwiatkowska argues that the omission of the expression 'grave and imminent danger […] allows a broader basis for intervention than that permitted under the Intervention Convention'.[754] Forrest and Gaskell argue that 'Art.221 indeed provides a substantive right of intervention different from that provided fro in the Intervention Convention, and reflects the development of environmental law since 1969'.[755] Falkanger takes the view that the Intervention Convention is the 'prevailing basis for intervention'. However, as he continues, the interpretation of the Convention and the 'corresponding customary law' is 'influenced by Article 221, and that the criterion "grave and imminent danger" should not be read too strictly'.[756]

Another group of scholars argue that the requirement of 'grave and imminent danger' is still present. Welden is, for example, of the opinion that the right of intervention 'remained unchanged after the entry into force of the 1982 Law of the Sea Convention'.[757] In a similar

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[751] Nordquist et al (n 671) 312. Emphasis added.
[752] Nordquist et al (n 671) 310.
[753] Hakapää (n 660) 272.
[754] Barbara Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice' (1991) 2 (22) *Ocean Development and International Law* 173.
[755] Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007' (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly* 49, 58.
[756] Falkanger (n 667) 221. Concerning the interpretation of a treaty in light of new developments, one should bear in mind the *Indus Waters Kinshenganga Arbitration* Case, in which case the Tribunal held:' [i]t is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law'. See the *Indus Waters Kinshenganga* Arbitration (Pakistan v. India), Permanent Court of Arbitration (PCA), Partial Award of 18 February 2013, para 452. While this case was not about the coastal State's right of intervention whatsoever, it still shows the tendency of the courts and tribunals to interpret treaties in accordance with developments that have emerged in the field.
[757] Philipp Wendel, *State Responsibility for Interferences with Freedom of Navigation in Public International Law* (Springer 2007) 49.

way, Bartenstein maintains the view that the provision of Article 221 of the LOSC is of a 'conservatory' character and, as such, does not create any new right but rather recognizes the existing one.[758] In this respect, one needs to appreciate that Article 221 finds its place in Part XII of the LOSC and opens with the expression '[n]othing in this Part shall prejudice the right [of intervention]', which alludes to the 'conservatory' character.

This author, however, shares the view of the first group of scholars based on four main arguments. First, while the provision of Article 221 starts with the 'non-prejudicial' expression, which sends the signal of its conservatory character, the provision nevertheless continues with a specific reference to the substantial restrictions imposed on the right of intervention, i.e. the requirement of 'major harmful' and the principle of reasonableness and proportionality. If the intention was to keep the right of intervention unchanged, there would have been no need to include some conditions and leave out the others. Second, while the principle of proportionality and reasonableness are explicitly mentioned, the principle of necessity is omitted, which stands in clear contrast to Article I of the Intervention Convention, where 'necessity' is explicitly referred to. This suggests that the coastal State should indeed be given more flexibility than it would have otherwise be given at the time of the adoption of the Intervention Convention, when the main ambition was to ground the content of the plea of necessity in primary norms of international law.

Third, the LOSC defines 'pollution of the marine environment' as an introduction into the marine environment of substances or energy that are 'likely to result' in deleterious effects. The term 'likely to result' points at the likelihood of a risk materializing and in the view of this author should not be equated with 'imminence'. It is to be recalled from the previous chapter that the requirement of a risk being 'imminent' suggests something less than certain but far beyond 'possible', which would be more in line with the term 'highly likely' than the term 'likely'. Fourth, even when the WRC was adopted, as will be explained below, States had no intention to reintroduce the threshold of 'imminent peril'.

While the ship must be damaged or in imminent threat thereof, the omission of the requirement of 'grave and imminent danger to the coastline and related interests' from paragraph 1 of Article 221 should thus be read so as to give the coastal State somewhat greater flexibility in deciding on when to take a certain measure of intervention to prevent, rather than to remedy pollution.

[758] Bartenstein (n 664) 1517-1518.

6.3.1.2 Types of Measures and the Principles of Proportionality and Reasonableness

Article 221 of the LOSC does not say anything about the exact type of intervention measures that the coastal State is allowed to take. The coastal State is therefore given a considerable leeway in this respect, as in fact under the Intervention Convention. Furthermore, Article 221 of the LOSC makes it clear that the measures of intervention taken by the coastal State must be reasonable and 'proportionate to the actual or threatened damage'. The wording differs from the initial draft which stipulated that the 'measures taken pursuant to this article shall be proportionate to the *danger'*.[759] By linking the test of proportionality to 'damage' rather than 'danger' (which is in any case not mentioned), the final version of Article 221 of the LOSC follows the same pattern as Article V (1) of the Intervention Convention, which prescribes that the measures of intervention 'shall be proportionate to the damage actual or threatened to it'.

Article 221 of the LOSC provides no criteria for assessing the proportionality. The criteria provided in the Intervention Convention may nonetheless be used as a guidance given Article 221 of the LOSC was modeled on the Intervention Convention.[760] At the same time, given the previously expressed view that Article 221 lowered the threshold for the right of intervention to be invoked, criterion ad (i) in Article V (1) of the Intervention Convention (the extent and probability of imminent damage if intervention measures are not taken) should be interpreted less strict.

6.3.2 Part XII of the LOSC and Obligations to Protect and Preserve the Marine Environment

As mentioned earlier, Part XII of the LOSC is notable for imposing certain obligations on all States, including coastal States, for the purpose of protection and preservation of the marine environment. Of particular relevance for this thesis are obligations imposed under Articles 192, 194, 195 and 225. According to Article 192, the coastal State is in general obliged to protect and preserve the marine environment. In more specific terms, Article 194 (2) requires States to take all measures:

> to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution

[759] Nordquist et al (n 671) 308. Emphasis added.
[760] On the argument that the Intervention Convention is to be used as guidance in interpreting Article 221 of the LOSC see Richard Shaw, 'The Nairobi Wreck Removal Convention' (2007) 13 *The Journal of International Maritime Law* 429, 434.

> arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.[761]

The obligation in point relates to scenarios involving 'activities' under State jurisdiction or control. Peril in which a ship may find itself cannot be considered 'activity'. However, if the coastal State avails itself of the right to take the measures of intervention against maritime casualties, and in this respect intrudes into navigation and takes salvage under control, Article 194 (2) could then come into play because navigation, including salvage, is indeed an activity. It also needs to be observed that Article 194 (2) of the LOSC demands States 'to ensure […]', which is an obligation of conduct. As such, it requires a 'certain level of vigilance' necessary to prevent pollution damage to other States and their environment,[762] rather than a particular result.

Article 195 further imposes on States an obligation not to transfer damage or hazards or transform one type of pollution into another. It stipulates that:

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

This would mean, for example, that the coastal State should not combat oil pollution by dispersing chemicals that have even worse effects on the marine environment.[763] Moreover, the coastal State should be particularly cautious if it wants to order the ship to be towed further out to open sea (on account of the right of intervention) not to transfer the hazard or damage to its neighbors.

Coastal States are in addition required to avoid adverse consequences when taking measures against foreign ships. In this respect, Article 225 obliges coastal States in the exercise of their

[761] This provision finds its origin in Principle 21 of the Stockholm Declaration, according to which States have 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

[762] Article 194 (2) of the LOSC merely stipulates an obligation of conduct and in this respect requires from States a 'certain level of vigilance in [the] enforcement and the exercise of administrative control', as the ITLOS confirmed in its Advisory Opinion concerning Sub-Regional Fisheries Commission (SRFC). See the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), ITLOS, Advisory Opinion of 2 April 2015, para 131. The same was already confirmed in the *Pulp Mills on the River Uruguay* Case (Argentina v. Uruguay), Judgement of 20 April 2010, ICJ Reports 2010, 14, para 197. See also the *South China Sea* Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, para 94.

[763] Detlef Czybulka on Article 195 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 1319.

powers ‘under this Convention’ not to ‘endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk’. This provision, even though located in Part XII of the LOSC, applies in general given the explicit reference ‘under this Convention’.

The LOSC further requires States to ‘jointly develop and promote contingency plans for responding to pollution incidents in the marine environment’.[764] Of relevance in this respect is the OPRC, which places a clear focus on States’ obligation to develop contingency plans, to exchange reports and in general to cooperate on both international and regional levels.[765] According to Article 6 (1) of the OPRC, every State is obliged to ‘establish a national system for responding promptly and effectively to oil pollution incidents’.

All these obligations may appear relevant if the coastal State avails itself of intervention powers and receives a request for a places of refuge. Depending on the circumstances of a given situation, providing assistance to a casualty ship close to the shore may prevent or minimize pollution damage. While the rights and obligations of the coastal State in this context will be discussed in the next chapter, these obligations already at this stage indicate that the coastal State cannot disregard the request for a place of refuge and push the ship to open seas without giving any consideration to the rights and interests of the neighboring States and the community as a whole. In this context, Part XII of the LOSC should be read together with the IMO Guidelines on Places of Refuge, as will be addressed below, as well as with the general principles of reasonableness, good faith and the prohibition of abuses of rights. If the coastal State avails itself of the right of intervention, its obligation to take account of the rights and interests of others becomes stricter and, as observed by Falkanger, ‘passivity may then induce liability’.[766] It is also important to recall that the potential breach of these obligations is subject to the scrutiny of international courts and tribunals given the compulsory dispute settlement mechanism in Part XV of the LOSC.

Nonetheless, one also needs to appreciate that Article 221, which finds its place in Part XII of the LOSC, opens with the phrase ‘[n]othing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures [of intervention] to protect their coastline or related interests’. This phrase suggests that the

[764] Article 199 of the LOSC.
[765] The Preamble to the OPRC.
[766] See Falkanger (n 667) 25.

interests of the coastal State should weigh somewhat more heavily if in a given situation juxtaposed to the rights and interests of others.

6.3.3 Obligations to Notify and Consult

According to Article 198 of the LOSC:

> When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.

The LOSC does not contain any other provision that spells out the obligation of the coastal State to notify or consult with other States in cases of risks posed by ships in peril. However, in the view of this author, if the coastal State is aware of a certain peril that may affect other States,[767] if time allows, some cooperation between States would be expected. In this regard, it is worthwhile noting that in the *Mox Plant* Case, the ITLOS held that the obligation to cooperate is a 'fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'.[768] In the scenarios of intervention into maritime casualties, the coastal State would at any rate be obliged to consult with other States (again, if time allows).[769]

6.4 **Salvage Convention**

As explained in the previous chapter, the Salvage Convention is primarily a private law convention.[770] Nonetheless, given the environmental risks associated with ships in peril (which

[767] The coastal State will, for example, be aware of a certain peril if informed about a certain incident on the basis of the MARPOL, which requires the master of a ship to report to the coastal Sate incidents involving harmful substances. See Article 8 and Protocol 1 of the MARPOL. See also Article 4 of the OPRC, which requires the master to report to the coastal State any event involving a discharge or probable discharge of oil. The IMO requirements for reporting have been combined in a single document. See General Principles for Ship Reporting Systems and Ship Reporting Requirements, Including Guidelines for Reporting Incidents Involving Dangerous Goods, Harmful Substances and/or Marine Pollutants, Resolution of the IMO's Assembly, IMO doc, A.851 (2) of 27 November 1997, as supplemented by Resolution MEPC.138 (53) of 22 July 2005.

[768] The *Mox Plant* Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, para 82. In the words of Judge Wolfrum: '[t]he obligation to cooperate with other States whose interests may be affected is a Grundnorm of Part XII of the Convention, as of customary international law for the protection of the environment'. See the *Mox Plant* Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate Opinion of Judge Wolfrum, 135.

[769] This view seems to be shared by Cundick (n 662) 530.

[770] This is reflected already in the definition of salvage provided in Article 1 (a) which stipulates that salvage means 'any act or activity undertaken *to assist* a vessel or any other *property in danger* […]'. Emphases added.

are as such *in danger*), salvage nowadays firmly finds relevance in the domain of public law.[771] In performing salvage operations, salvors are explicitly obliged to exercise 'due care to prevent or minimize damage to the environment'.[772] The same obligation is imposed on the shipowner, the cargo owner and the master of the ship.[773] In this respect, the Salvage Convention in essence complements Part XII of the LOSC.[774]

Depending on the circumstances of a given situation, salvage may be hard to perform in an open sea environment. For example, if cargo needs to be lifted up or transferred to another ship, the lack of an adequate equipment[775] or simply rough weather and sea conditions may make the task challenging, or even impossible. As indicated earlier, in these and similar circumstances, the ship may want to proceed to a place of refuge in order to undertake the assistance safely, and to continue with the voyage as quickly as possible.[776] In this respect, Article 11 of the Salvage Convention stipulates that the coastal State:

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

While this provision indeed recognizes previously mentioned obligations imposed on States under Part XII of the LOSC,[777] it does not impose on the coastal State any specific obligation to indeed accommodate a ship in peril in a place of refuge.[778] At the same time, the Salvage Convention does recognize the coastal State's right of intervention, including the right to subject salvage to its control, by stipulating in Article 9 of the Convention that:

> [n]othing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to

[771] See Edgar Gold, 'Marine Salvage: Towards a New Regime' (1989) 20 (4) *Journal of Maritime Law and Commerce* 489-490.
[772] Article 8 (1) (b) of the Salvage Convention. This obligation is also referred to as such in paragraph 7.3 of the IMO Guidelines on the Control of Ships in an Emergency, as spelled out in the MSC's Circular MSC.1/Circ.1251 of 19 October 2007.
[773] Article 8 (2) (b) of the Salvage Convention.
[774] See chapter 5 of the thesis.
[775] For instance, the cargo handling equipment that is usually provided only in ports.
[776] For more on the interests on the side of the ship see chapter 2.
[777] Of particular relevance in this respect are Articles 192, 194 (2) and 195 of the LOSC.
[778] According to Gaskell, this provision is an 'empty exhortation'. See Nicholas Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form of Salvage Agreement' (1991) 16 *Tulane Maritime Law Journal* 1, 20.

protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

It is interesting to observe that Article 9 of the Salvage Convention speaks of the right of intervention that finds its basis in 'generally recognized principles of international law', rather than 'customary and conventional' international law, which is the wording used in Article 221 of the LOSC. In this respect, one needs to appreciate that the Salvage Convention was adopted after the adoption of the LOSC. The reference to 'generally recognized principles of international law' may infer that the right of intervention finds its basis in general international law, without any persistent objector to this end, or that it simply finds its basis in jurisdictional principles of territorial sovereignty (for internal waters, archipelagic waters and the territorial sea) and the principles of protection (for the EEZ and high seas). Another approach could be to interpret the phrase 'generally recognized principles of international law' to refer to the principles of reasonableness and proportionality. Eventually, the expression in point may simply be seen as a generic terminology that is wide enough to cover all these approaches. The right of intervention, however, remains relevant only in the context of maritime casualties, while a ship may run into peril at sea, without necessarily being involved in a maritime casualty.

6.5 **IMO Guidelines on Places of Refuge**

Depending on the circumstances of a given situation, the coastal State may wish to consider providing refuge to a ship in peril, including a casualty ship, to prevent or minimize pollution damage, as well as to ensure safety of navigation. In this regard, the coastal State may be assisted by the IMO Guidelines on Places of Refuge[779] while balancing its own interests with the interests of others.

6.5.1 Objective Analysis Based on Relevant Risks and Factors

The IMO Guidelines on Places of Refuge provide a set of risks and factors that coastal States, once provided with the request for a place of refuge, are recommended to take into consideration

[779] See Aldo Chircop, 'The IMO Guidelines on Places of refuge for Ships in Need of Assistance' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 38. See also Nuno Marques Antunes, 'Decision-Making in the Imminence of Disaster: "Places of Refuge" and the Prevalence of National Interests' in Marta Chantal Ribeiro and Erik J Molenaar (eds), *Maritime Safety and Environmental Protection in Europe. Multiple Layers in Regulation and Compliance* (Gráfica Ediliber 2015) 120.

for the purpose of ensuring safety of navigation and protection and preservation of the marine environment. In this respect, the IMO Guidelines encourage coastal States to establish certain procedures and to have a Maritime Assistance Service (MAS) in place (unless there is a different arrangement between neighboring States).[780] Furthermore, paragraph 3.5 of the Guidelines recommend that:

> The maritime authorities (and, where necessary, the port authorities) should, for each place of refuge, make an objective analysis of the advantages and disadvantages of allowing a ship in need of assistance to proceed to a place of refuge, taking into consideration the analysis factors listed in paragraph 2 of Appendix 2.

In addition, these authorities are recommended to take account of the factors spelled out in paragraph 3.9 (event-specific assessment). All these risks and factors are essentially focused on the socio-economic and environmental considerations (e.g. threat to public safety, pollution caused by the ship, fisheries, economic/industrial facilities, sensitive habitats and species); as well as conditions of the ship (e.g. seaworthiness of the ship, nature and condition of cargo); natural conditions (e.g. prevailing winds, tides and tidal currents); navigational characteristics (such as space to maneuver the ship, even without propulsion, dimensional restrictions of the ship); available financial security; and available facilities (e.g. pumps, barges, pontoons, reception facilities for dangerous cargo, repair facilities such as dockyards).[781]

The IMO Guidelines acknowledge the importance of coastal States in being prepared in advance in order to ensure effectiveness of their response to incidents at sea. In that sense, coastal States are 'encouraged' to have an adequate procedure in place, which would address the issue of receiving and acting on 'requests for assistance with a view to authorizing, where appropriate, the use of a suitable place of refuge'.[782] However, as will be explained further in the next chapter, current international law does not impose on coastal States an obligation to pre-designate places of refuge and draw up plans in this respect or to have any particular procedure in place (not to be confused with the OPRC plans).[783] In other words, the question of

[780] See paragraphs 3.2 and 3.3 of the IMO Guidelines on Places of Refuge.
[781] See paragraph 3.9 and paragraph 2 of Appendix 2 of the IMO Guidelines on Places of Refuge.
[782] Paragraph 3.4 of the IMO Guidelines on Places of Refuge. On the official IMO web-site, it is stated that: 'It would be highly desirable if, taking the IMO Guidelines into account, coastal States designated places of refuge for use when confronted with situations involving ships (laden tankers, in particular) in need of assistance off their coasts and, accordingly, drew up relevant emergency plans, instead of being unprepared to face such situations and, because of that, risking the wrong decision being made by improvising or, in the heat of the moment, acting under pressure from groups representing various interests. See the IMO web site, available at <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/PlacesOfRefuge.aspx> accessed 31 October 2019.
[783] This should not be confused with an obligation that exists in more general terms under the OPRC.

the coastal State's rights and obligations in relation to places of refuge is concerned with the stage in which the request is made, rather than the stage of preparedness.

The coastal State is recommended to make an objective assessment of a given situation and to decide to allow or refuse admittance by weighing the risks and factors provided in the IMO Guidelines. How each and every risk is to be weighed and how a certain level of vigilance is to be exercised[784] ultimately remains a 'matter of judgement',[785] and the outcome (refuge being granted or refused) will thus always depend on the specific circumstances of each individual case.[786]

6.5.2 Financial Security as a 'Practical Requirement' for Access to a Place of Refuge

The IMO Guidelines stipulate that, if necessary, the ship may be asked to fulfil certain practical requirements,[787] such as to provide financial security to the port or coastal State to guarantee that all expenses which may be incurred in relation to port operations (e.g. measures to safeguard the operation, port dues, towage, mooring etc.) will eventually be paid.[788] By analogy, the same should be the case for any place of refuge (not necessarily a port). It is to be noted that the IMO Guidelines in this context only speak of financial security for expenses (operational costs). In other words, no reference is made to financial security for potential damages and/or loss. Nevertheless, in Appendix 1 (which refers to the legal context within which the IMO Guidelines are supposed to function), an explicit reference is made to the IMO liability and compensation conventions, which indeed address the issue of financial security for damages and/or loss.[789] Of some debate is, however, whether the coastal State may be fully driven by the presence or absence of such a security in its decision-making.

The IMO Guidelines are silent on this question. In contrast, the relevant EU legislation explicitly stipulates that the absence of an insurance certificate cannot in itself be treated as a sufficient reason to refuse to grant a place of refuge.[790] This does not mean that the coastal State

[784] Antunes (n 779) 119-120.
[785] Antunes (n 779) 120.
[786] See Erik Røsæg and Henrik Ringbom, Liability and Compensation with Regard to Places of Refuge, Study No. EMSA/RES/001-2004, Report of 12 October 2004, 55. No two marine casualties are the same. Particulars of a certain ship and the nature of the problem will always differ. See Richard Shaw, 'Designation of Places of Refuge and Mechanism of Decision Making' in *CMI Yearbook 2003* (Comite Maritime International 2003) 446.
[787] Paragraph 3.13 of the IMO Guidelines on Places of Refuge.
[788] Paragraph 3.14 of the IMO Guidelines on Places of Refuge.
[789] The list does not include the WRC and in that regard needs to be updated.
[790] Article 20 (c) of the of the Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending 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 and repealing Council Directive 93/75/EEC, OJ L 131, 28 May 2009, 101-113.

is prevented from asking the financial security whatsoever, but rather that the absence of an insurance certificate cannot be the main nor the only driver in its decision-making process. While the IMO Guidelines are silent on the question of whether the coastal State should be fully driven by the presence or absence of a financial security in deciding on the request for a place of refuge, paragraph 1.7 of the Guidelines nevertheless implicitly suggests that the coastal State not be fully driven by considerations in relation to financial security. In particular, it stipulates that:

> granting access to a place of refuge could involve a *political* decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the *risk to the environment* resulting from that ship being near the coast.[791]

By making an explicit reference to the 'risk to the environment', the IMO Guidelines implicitly assume that the coastal State not be driven in its decision-making process only by financial security considerations and that it should assess the environmental risk involved in the places of refuge context, albeit it is not obliged to follow any particular procedure in this respect. This may explain why the Guidelines speak of the financial security to be asked for if 'necessary'. While the coastal State is not obliged to follow any particular procedure in assessing the seriousness of a given situation and the environmental risk involved, it does have to act reasonably and not to abuse its rights.

Depending on the circumstances of a given situation, by not giving any consideration to the environmental risk involved, the coastal State could risk acting negligently, and thus to be unable to get compensated under the existing IMO liability and compensation conventions if things ultimately go wrong. The threshold in this respect, however, is very high and merits some further explanation.

The IMO liability and compensation conventions are normally based on the strict liability of a shipowner, which means that a shipowner is liable for certain losses, damages and costs irrespective of any fault.[792] The liability of a shipowner exists by virtue of a shipowner being in charge of operation (shipping), which in a given situation represents the source of pollution. While the shipowner's liability is strict, it is by no means absolute. There are a few commonly

[791] Emphasis added.
[792] See chapter 3 of the thesis. See also Røsæg and Ringbom (n 786) 17.

recognized grounds on which the shipowner may be exonerated (either wholly or partly) in this respect. Of relevance for this thesis is the situation in which the shipowner can prove that pollution damage resulted, wholly or partially, either from an intentional act or omission by the victim or from the victim's negligence.[793] The WRC is different in that negligence is required 'wholly', rather than 'wholly or partly'.[794]

While it is hard to imagine that the coastal State, being a victim, indeed behaves with intent to cause pollution damage, what seems plausible to envisage is that the coastal State behaves negligently, as a result of which the ship breaks in two and causes pollution to that State.[795] While this situation is perhaps possible in theory, negligence of the coastal State is in practice hard to prove because, as indicated earlier and as will be demonstrated in chapter 7, there is no specific due diligence obligation imposed on the coastal State in relation to the places of refuge request. It is hard to attribute the actual damage to the coastal State's decision to refuse (or accept) refuge in a given situation as there must be a direct link between pollution (damage) and refusal (or acceptance) of refuge (cause). It is difficult to prove such a causal link *post facto* due to the fact that both granting and refusing refuge may in essence produce the same result, i.e. pollution. This in short explains why industry was pushing for the reverse burden of proof – a presumed obligation to grant refuge, as explained in chapter 5 of the thesis.

The right to be exonerated from liability in case of the coastal State's contributory negligence belongs not only to a shipowner but also to the IOPC Fund, which, as explained in chapter 3, operates as a second tier fund available to the victims in case the shipowner is not liable for pollution damage or the compensation due is not adequate. However, the right of exoneration of the IOPC Fund does not apply in scenarios of preventive measures, which is in contrast with the right of exoneration that belongs to a shipowner.[796] In other words, if the coastal State grants or refuses to grant refuge to prevent pollution (preventive measure) and acts negligently in this respect, it may still get compensated from the second tier fund, albeit the second tier fund exists only for the CLC and HNS[797] claims. Claims on the basis of the Bunker Convention and the WRC are only covered in the first tier fund, which brings back the previously mentioned problem of the coastal State not being able to obtain compensation (albeit probably only in theory).

[793] Article III (3) of the CLC; Article 3 (4) of the Bunker Convention and Article 7 (3) of the HNS.
[794] Article 10 (1) of the WRC.
[795] For more on this issue see Røsæg and Ringbom (n 786) 43.
[796] Article 4 (3) of the FUND Convention and Article 14 (4) of the HNS Convention.
[797] The HNS Convention is still not in force.

While it may be hard to prove negligence of the coastal State, the mere fact that it is possible and that the coastal State may consequently be prevented from being compensated, coupled with its obligation to conduct a certain level of vigilance would give the coastal State enough incentive not to ignore the request for a place of refuge and to give serious consideration to the assessment of the situation. The IMO Guidelines on Places of Refuge may be of assistance in this respect. While the core discussion on coastal State rights and obligations in relation to places of refuge is yet to come in the next chapter, it suffices to emphasize already at this stage that the coastal State cannot stay passive and turn the blind eye on the request for a place of refuge, especially not if it takes control over salvage on the basis of its right of intervention in the context of maritime casualties. The negligence of the coastal State may in that case be easier (albeit still not easy) to prove.

6.6 **WRC**

The WRC confers on coastal States the right to take measures 'in relation to the removal of a wreck which poses a hazard'. This formulation is not as 'heavy-packed' as the one of Article I (1) of the Intervention Convention. Moreover, it does not on its face seem relevant in the context of ships in peril. However, this formulation is quite complex given the rather intricate definition of the terms 'removal', 'wreck' and 'hazard', which indeed speak of the relevance of the WRC in the present context, as will be explained below.

6.6.1 Conditions for Triggering the Right of Intervention

6.6.1.1 Wreck: Casualty Ship, But!

Article 1 (4) of the WRC defines a 'wreck' so as to include, *inter alia,* a ship in peril, which may reasonably be expected to sink or to strand. For such a ship to fall under the scope of the WRC, however, a maritime casualty must have occurred. Article 1 (4) of the Convention in this respect opens with the following wording: '"wreck", following upon a maritime casualty, means […]'.

The WRC defines a maritime casualty by using the same wording as the Intervention Convention and Article 221 of the LOSC do, but inserts an additional comma after 'external to it'. According to Article 1 (3) of the WRC, a 'maritime casualty' means:

> a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.[798]

Hence, the WRC in all scenarios clearly requires a casualty ship to indeed suffer some damage, or to be subject to an imminent threat thereof.[799] Given that the WRC is intended to confer on coastal States less extreme powers than those provided under the Intervention Convention and Article 221, this definition also confirms that some damage to a ship, or at least an imminent threat thereof, is required in all scenarios under the Intervention Convention and Article 221 of the LOSC.

The WRC was initially negotiated only in the context of risks posed by sunken and stranded ships (treated in this study as shipwrecks).[800] In this respect, the WRC did not link the coastal State's powers to a maritime casualty. The inclusion of the term 'maritime casualty' was brought under the WRC to give the coastal State powers to take intervention measures that would prevent a ship from sinking or stranding. The reason for this inclusion may be found in one of the initial WRC drafts prepared by Germany, the Netherlands and the UK, which observed that:

> [t]he definition of *casualty* could be used to extend the scope of the Convention to cover ships which have not yet become wrecks, but which, in the absence of intervention, would probably become wrecks.[801]

This observation could thus explain the distinction between a ship and a wreck as general concepts. When this observation was made, a wreck was defined simply as 'a sunken or stranded ship, or any part thereof, including anything that is or has been on board such a ship.'[802]

The WRC does not require any specific qualification for a sunken or stranded ship to fall under the WRC's scope of application, as will be seen in chapter 8. In contrast, when it comes to a casualty ship, an important qualification is made as it must be a ship:

> that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.[803]

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[798] Article 1 (3) of the WRC.
[799] The initial draft was different in that it followed exactly the same technique as the Intervention Convention and the LOSC (no comma). See IMO doc, LEG/CONF.16/3 of 13 November 2006, 2.
[800] See chapter 5 of the thesis (5.6.1.)
[801] IMO doc, LEG 73/11 of 8 August 1995, n 3.
[802] IMO doc, LEG 73/11 of 8 August 1995, Annex, 2
[803] Article 1 (4) of the WRC.

This qualification has two main components. First, a ship is required to be 'reasonably expected to sink or to strand'. Second, 'effective measures to assist the ship or any property in danger' must not already be 'taken'. Both of these qualifications surely aim at preventing unnecessary intrusion into navigational interests. At the same time, there is no specific guidance as to how to determine whether or not the ship may reasonably be expected to sink or to strand. While the principle of reasonableness implies an objective test, some discretion on the side of the coastal State is inevitable.[804] The preparatory work of the WRC suggests that a ship drifting without power could indeed reasonably be expected to sink or to strand.[805]

As far as the qualification 'effective measures to assist the ship or any property in danger are not already being taken' is concerned, it can be observed in the context of salvage as it builds on the wording used in Article 1 (a) of the Salvage Convention, i.e. 'to assist the ship'. It somehow suggests that salvage operations take the casualty ship outside the WRC's scope.[806] Indeed, the expression 'not already being taken' suggests that measures to assist the ship without any intervention from the coastal State must be given some chance. However, the term 'effective' preserves the right of the coastal State to determine whether or not salvage operations are producing satisfactory results.[807] In this respect, the WRC essentially preserves the right of the coastal State to intervene into a maritime casualty. It would thus be erroneous to say that in a given situation the mere exercise of salvage operations on the side of the ship prevents the coastal State to intervene on the basis of the WRC into such an operation.

While the assessment of 'effectiveness' is in the hands of the coastal State, it must be based on the principle of reasonableness. In this respect, if the coastal State avails itself of the right to intervene into salvage operations on the basis of the WRC, the measure of accommodating a ship in a place of refuge may in a given situation reasonably prove to be an 'effective measure to assist the ship or any property in danger' and to prevent it from becoming a wreck. In this regard, the coastal State may be assisted by the previously addressed IMO Guidelines on Places of Refuge.

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[804] In the *South China Sea* Arbitration, while addressing the issue of environmental impact assessment in relation to activities in the Area, the Tribunal held that 'the terms "reasonable" and "as far as practicable", contain an element of discretion for the State concerned'. See the *South China Sea* Arbitration, (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, para 948.
[805] IMO doc, LEG 73/11 of 8 August 1995, 2.
[806] See Craig Forrest, 'At Last: a Convention on the Removal of Wrecks' (2008) 14 *The Journal of International Maritime Law* 394, 396.
[807] See Patrick Griggs, 'Law of Wrecks' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume II Shipping Law* (Oxford University Press 2016) 506.

6.6.1.2 Risks Covered

The WRC empowers coastal States with the right to take measures in relation to 'the removal of a wreck which poses a hazard […]'.[808] A hazard is defined in Article 1 (5), which reads as follows:

> "Hazard" means any condition or threat that:
>
> (a) poses a danger or impediment to navigation; or
>
> (b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

While Article 1 (5) of the WRC is split into two parts, the risk thereby covered may nevertheless be split into three main categories: (i) safety of navigation, (ii) marine environment and (ii) coastline[809] and related interests.[810] As far as the first category (safety of navigation) is concerned, it is surely a new purpose for which the coastal State is explicitly given jurisdictional powers beyond the limits of the territorial sea, which casts some doubt on the relationship of the WRC to the LOSC,[811] as will be elaborated upon further in chapter 8 of the thesis. At this stage, it suffices to raise the question: what exactly distinguishes environmental from navigational hazard in practice? In this respect, one could recall the case of the *Tricolor*, in which two ships subsequently collided with the wreck of the *Tricolor*, and several more were near-collisions.[812] A ship that creates a hazard to navigation could in fact at the same time be seen as a ship that creates a threat to the environment, if for no other reason than because the collision risk consequently causes the pollution risk.[813] Nonetheless, by keeping safety of

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[808] Article 2 (1) of the WRC.

[809] Article 1 (5) does not provide a definition of the term 'coastline'. One should therefore rely on its ordinary meaning of 'interface between water and land', as in the case with the Intervention Convention and Article 221 of the LOSC.

[810] Related interests are defined in the WRC as 'the interests of a coastal State directly affected or threatened by a wreck, such as: (a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned; (b) tourist attractions and other economic interests of the area concerned; (c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and (d) offshore and underwater infrastructure'. It should be rather clear that the term 'related interests' refers only to the coastline and not to the marine environment in general. See IMO doc, LEG 78/4/1, 2.

[811] The doubt was also expressed among States in the process of negotiations and adoption of the WRC. See IMO doc, LEG 74/5/2/Add.1 of 5 September 1996, 5; LEG 86/4/12 of 27 March 2003; LEG 87/4/1 of 8 September 2003, para 6.

[812] GARD News, available at <http://www.gard.no/web/updates/content/51625/tricolor-the-collision-sinking-and-wreck-removal> accessed 31 October 2019.

[813] This has also been observed in the paper prepared by the IMO Secretariat in consultation with the United Nations Division of Ocean Affairs and the Law of the Sea (DOALOS). See IMO doc, LEG 86/4/1 of 27 March 2003, 14. This document has been prepared for the purpose of establishing the IMO's mandate in relation to the wreck removal issues.

navigation a risk on its own, the WRC makes it easier for the coastal State to invoke the right of intervention as the coastal State would not need to demonstrate the direct connection between safety and environmental concerns.

Regarding the second category (the marine environment), the WRC makes the right of intervention subject to the qualification of 'major harmful consequences', but not to the qualification of 'grave and imminent danger', which confirms that international law is clearly developing in a way which abandons the requirement of imminence as too high a threshold to combat environmental risks. However, the risk of 'major harmful consequences' is retained and the reason is probably to avoid vague environmental claims (short of market value) that are ultimately paid by the registered owners and their insurers. In addition, it needs to be stressed that the reference to the 'marine environment' in the WRC is not confined to pollution in its narrow sense, but also includes any type of environmental damages such as breaking up coral reefs. In this respect, the WRC follows the rather broad approach of Article 1 (4) of the LOSC,[814] instead of pollution in its narrow sense as captured under the Intervention Convention.

As far as the third category is concerned (the coastline and related interests), the WRC is again not confined to pollution. More importantly, no threshold is imposed whatsoever, which is a significant novelty compared to the Intervention Convention and Article 221 of the LOSC. Since the coastal State does not have to demonstrate any potential 'major harmful consequences', it is now easier for the coastal State to intrude into the navigational rights and interests associated with the ship, including salvage. However, the coastal State must clearly take account of the rights and interests of its neighbors and give them equal weight as to its own interests. This conclusion finds support in the fact that a hazard to 'the coastline or related interests' is linked to 'one or more States', rather than one particular State closest to the ship (i.e. the State assigned with the decision-making powers).

When it comes to the term 'related interests', the WRC contains a definition that largely resembles the definition contained in the Intervention Convention. At the same time, it goes a step further by making an explicit reference to 'economic interests of the area concerned'[815] and 'offshore and underwater infrastructure'.[816] In this respect, the WRC in essence brought the

[814] Ibid.
[815] Article 1 (6) (b) of the WRC.
[816] Article 1 (6) (d) of the WRC.

definition of 'related interests' up-to-date with the LOSC (the regime of the EEZ and the regime of the continental shelf).

In determining whether a wreck creates a hazard, the coastal State is guided by specific criteria that 'should be taken into account' such as the type, size and construction of the wreck; tidal range and currents in the area; particularly sensitive sea areas; nature and quantity of the wreck's cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment; and prevailing meteorological and hydrographical conditions.[817] The criteria in point to large extent correspond to what the Court of Justice of the European Union used in its interpretation of the requirement of 'major damage' as contained in Article 220 (6) of the LOSC. These criteria should also be used in determining whether there is in fact a 'major harmful' threat to the marine environment.

6.6.2 Measures of 'Wreck Removal'

6.6.2.1 Types of Measures

The WRC empowers coastal States with the right to take measures in relation to 'the removal of a wreck which poses a hazard […]'.[818] It says nothing about the types of measures that the coastal State may possibly take in this respect. The term 'removal of a wreck' suggests that the scope of the WRC is confined to the physical removal of wrecks and that the coastal State could not take measures in respect of ships that are not indeed wrecks, e.g. ships passing by. However, the term 'removal' is defined so as to mean any form of 'prevention, mitigation or elimination of the *hazard* created by a wreck'.[819] This would thus allow the coastal State to take measures in respect of ships passing by, and in fact to take any measures necessary to actually prevent the ship from becoming a wreck, including an instruction for the ship to be brought to a place of refuge.[820] In this context, the coastal State could again be assisted by the IMO Guidelines on

[817] Article 6 of the WRC. The initial proposal was that coastal States shall take account of these criteria, rather than 'should'. See IMO doc, LEG 63/5 of 18 May 1990, Annex 1, 3.
[818] Article 2 (1) of the WRC.
[819] Article 1 (7) of the WRC. Emphasis added.
[820] It is worthwhile mentioning that preventing a ship from sinking or stranding is particularly relevant in deep waters that are not so accessible. See Gregory Timagenis, 'Places of Refuge as a Legislative Problem' in *CMI Yearbook 2003* (Comite Maritime International 2003) 376. The *Prestige* was, for example, not possible to fully remove from the bottom precisely due to its position in deep waters. See the European Parliament Resolution on Improving Safety at Sea in Response to the *Prestige* Accident (2003/2066(INI)); P5_TA(2003)0400, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2003-0400+0+DOC+PDF+V0//EN> accessed 31 October 2019.

Places of Refuge, which aim at both safety of navigation and the protection of the marine environment.

Should the circumstances so require, there is nothing to suggest that the coastal State would not be allowed to take the most extreme measure of destroying the ship. The WRC is not specific in this regard. At the same time, as the definition of the term wreck includes not only a ship but also cargo, a wreck removal measure may be exercised simply by removing the hazardous cargo from the ship, e.g. pumping out oil, without the ship as a whole being the target. However, depending on the circumstances of a given situation and the conditions of the ship, pumping out oil may cause the ship to sink even more easily and rapidly.[821]

The right of intervention is also brought enough to allow the coastal State to sink or beach the ship. However, the coastal State should be particularly careful in this respect as under the 1996 London Protocol,[822] dumping is in principle prohibited,[823] except in the exceptional scenarios included in the so-called 'reverse list',[824] such as the scenario of emergency 'posing an unacceptable threat to human health, safety, or the marine environment and admitting of no other feasible solution'.[825] In this respect, it is to be recalled from chapter 2 that the UK deliberately beached the *MSC Napoli* as this was considered to be the most effective measure to avoid long term implications for environment and safety of navigation.[826]

As a general rule, the coastal State is not allowed to take measures under the WRC on its own. These measures are first to be taken by the registered owner,[827] while the coastal State is merely given the right to issue an order in this respect. In so doing, it may impose conditions and set a

[821] Cundick (n 730) 39.
[822] The 1996 London Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the 1996 London Protocol).
[823] Article 4 (1) of the 1996 London Protocol. Dumping includes 'any deliberate disposal into the sea of vessels, aircrafts, platforms or other man-made structures at sea'. See Article 1 (4) (1) (2) of the 1996 London Protocol.
[824] The 1996 London Protocol is distinguished from the 1972 London Convention in that it uses the so-called 'reverse list', which means that dumping is in principle prohibited unless explicitly allowed. In contrast, the 1972 London Convention uses the so-called 'black list-gray list' approach in that dumping is in principle allowed. However, some items are prohibited from dumping (these are blacklisted), while for some dumping is allowed, albeit subject to special permission (gray list). For more on the London Convention and its Protocol see Robert Beckman, 'Responsibility of Flag States for Pollution of the Marine Environment: The Relevance of the UNCLOS Dispute Settlement Regime' in Myron H. Nordquist et al (eds), *Freedom of Navigation and Globalization* (Brill 2014) 265-267.
[825] Article 8 (2) of the 1996 London Protocol.
[826] See chapter 2 of the thesis (2.3.). See also UK's Report on the *MSC Napoli*, available at <https://www.gov.uk/government/news/tenth-anniversary-of-the-msc-napoli-shipwreck-disaster> accessed 31 October 2019; UK Government, Press Release 'Tenth anniversary of the MSC Napoli shipwreck disaster' of 18 January 2017, available at <https://www.gov.uk/government/news/tenth-anniversary-of-the-msc-napoli-shipwreck-disaster> accessed 31 October 2019.
[827] Article 9 (2) of the WRC.

deadline by which these conditions are to be fulfilled.[828] Once the registered owner starts fulfilling the conditions, the coastal State is authorized to intervene to the extent necessary to ensure 'effectiveness'.[829] It is only if the registered owner fails to abide by the coastal State's conditions within the set deadline that the coastal State may intervene and take measures on its own.[830] This is different from the Intervention Convention in that the coastal State is not explicitly obliged to wait for the shipowner to do something in order to intervene. This is not surprising as the WRC was primarily adopted to tackle hazardous shipwrecks when the maritime casualty has already unfolded, as opposed to scenarios that demand measures to be taken immediately. Nonetheless, the WRC recognizes (as an exception rather than as a rule) the need for the coastal State to take immediate action if the circumstances so require and in that situation the WRC does not require any waiting period to be given to the registered owner, albeit the registered owner and the flag State must be adequately notified.[831]

While Article 9 (8) of the WRC says nothing about when exactly 'immediate action' would be required, one should note that Article 9 (6) (c) of the WRC deals with an immediate intervention 'in circumstances where the hazard becomes particularly severe', which requires an urgent response. The expression 'particularly severe' somehow reintroduces the threshold of 'major harmful consequences' as spelled out in the Intervention Convention, even though the definition of 'hazard' does not require any such threshold.

6.6.2.2 The Principles of Necessity, Proportionality and Reasonableness

The WRC imposes a clear restriction on the coastal State in that measures taken under this Convention:

> shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned.[832]

[828] Article 9 (4) of the WRC.
[829] Article 9 (5) of the WRC. This provision greatly resembles the provision of Article 9 (4) of the Convention, save for the expression 'effective', which logically does not serve the purpose before the operations actually commence.
[830] Article 9 (6) (b) of the WRC. In practice, this will mean that the salvor will take the measures on behalf of the coastal State.
[831] Article 9 (8) of the WRC.
[832] Article 2 (3) of the WRC.

This provision in essence resembles Article V (2) of the Intervention Convention, albeit it refers to the removal of a wreck, rather than the removal of a hazard. However, given the previously mentioned definition of the term 'removal', the terms 'to remove a wreck' and 'wreck has been removed' should be read so as to mean the removal of a hazard, rather than the removal of a wreck. The WRC further stipulates that the coastal State is allowed to take only those measures that may be justified on the principle of proportionality.[833] The coastal State is thus clearly expected to take account of the rights and interests of others and to balance these against its own interests. In this respect, the WRC brings nothing new in comparison to the Intervention Convention and Article 221 of the LOSC. Moreover, even though the WRC lowers the threshold for the coastal State to be able to act, the principle of proportionality essentially means that the extreme measure of destroying the ship would require a serious hazard to be at stake.

6.6.3 Obligations to Notify and Consult

The WRC does not depart much from the Intervention Convention when it comes to the obligation to notify and consult. Before any measure is taken, the coastal State is obliged 'to consult' the flag State, as well as other States potentially affected by the wreck.[834] In this respect, the WRC follows the same approach as the Intervention Convention and the previously elaborated meaning of the term 'consultations' equally applies here. The obligation to consult could prove particularly relevant in the scenarios in which a ship is located in the EEZ of one State but affects the interest of the neighboring State or a State with opposite coastline given the tidal range and currents in the area. According to the WRC, it is the coastal State in whose area the ship is located that is allowed to take measures of intervention. Nonetheless, a 'hazard' is to be determined in relation to the coastline and related interests of one or *more* States.[835]

As demonstrated earlier, the WRC acknowledges the right of the coastal State to take measures of intervention immediately, i.e. without the need to wait for the registered owner to do something. Taking immediate action by its very nature means that there is no time for consultations before any measure is taken. In this regard, Article 9 (8) of the WRC merely requires the registered owner and the flag State to be notified. However, as previously discussed, the immediate action by the coastal State is allowed only in circumstances under which 'the hazard becomes particularly severe'.[836] Hence, to safeguard the rights and interests

[833] Article 2 (2) of the WRC.
[834] Article 9 (1) (b) of the WRC.
[835] Article 1 (5) (b) of the WRC. Emphasis added.
[836] Article 9 (6) (c) of the WRC.

of others and prevent possible abuses on the side of the coastal State, the WRC requires either consultations without threshold, or threshold without consultations.

As opposed to the Intervention Convention, the WRC does not require the coastal State to take into account views that the registered owner or any other private actor might submit, nor is it even required to notify these. The lack of an obligation of this kind is not so surprising if one appreciates that the coastal State is in any case not allowed to take any measures before giving the shipowner an opportunity to do so. In other words, the shipowner would in fact be notified when receiving an order from the coastal State to 'remove' the hazard. However, as indicated earlier, the WRC captures the right of the coastal State to take immediate measure when the urgency so requires, the coastal State has an obligation to notify the flag State and the registered owner accordingly. The approach is different from that in the Intervention Convention which does not impose an obligation to notify in a case when immediate action is required.[837]

The reason why this obligation is spelled out in the WRC may perhaps be explained in the light of the technological advances that have occurred since late 1960s and early 1970s. It is nowadays much easier to notify interested parties by way of a simple e-mail communication. Against this backdrop, one may conclude that notification would be required even when one speaks of emergency cases under the Intervention Convention. In the view of this author, notification is truly the minimum one should expect on account of the principle of good faith.

6.6.4 Relationship to the Intervention Convention

As explained earlier in chapter 5, the WRC was initially drafted for the purpose of dealing with a wreckage stage in which a ship has already touched the bottom of the sea. However, at some later point in the negotiations, it was decided that a pre-wreckage stage was to be included and the definition of maritime casualty was therefore incorporated into the definition of a wreck. This created an overlap with the Intervention Convention and necessitated the inclusion of the relationship provision in Article 4 of the WRC, which reads as follows:

> This Convention shall not apply to *measures taken* under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended.[838]

[837] Article III (1) (d) of the Intervention Convention.
[838] Emphasis added.

In contrast to Article 16 of the WRC, which gives preference to the LOSC over the WRC,[839] Article 4 of the WRC produces no such effect concerning the relationship WRC-Intervention Convention. The expression 'measures taken' suggests that the coastal State is given the choice in deciding which convention to rely upon in cases of intervention.[840]

As previously discussed, the WRC clearly applies to broader scope of risks and in this regard requires no particular threshold, save for the requirement of 'major harmful consequences' in relation to the risk to the marine environment.[841] The broader scope of risks covered and the lower threshold surely give the coastal State powers that go beyond the powers under the Intervention Convention, which explains why the coastal State would in fact prefer the WRC over the Intervention Convention. At the same time, the WRC imposes more obligations on the coastal State (as will be demonstrated in chapter 8), which may prove relevant for the coastal State in making choices.

6.7 **Conclusions**

This chapter demonstrated the gradual expansion of coastal State powers in relation to foreign ships in peril in waters beyond the coastal State's territory, which powers are continuously and persistently tailored for the scenarios of maritime casualties, i.e. incidents that involve ships which are damaged or in imminent threat thereof.

In the aftermath of the *Torrey Canyon*, the Intervention Convention was adopted to provide the coastal State with the right of intervention in extremely serious scenarios of emerging casualties, which evolve suddenly and which involve a ship that is damaged or in imminent threat thereof, thereby posing a risk of pollution by oil or other harmful substances carried on board. This Convention demands a very high threshold for the right of intervention to be invoked as there must be a 'grave and imminent danger' and a reasonable expectation of 'major harmful consequences'. In this respect, the Convention does not depart much from the plea of necessity, albeit, given the reverse burden of proof, intervention as such is easier to justify.

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[839] Article 16 of the WRC provides that '[n]othing in this Convention shall prejudice the rights and obligations of any State under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea'. This provision must be read together with Article 30 (2) of the VCLT, which stipulates that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provision of that other treaty prevail'. As explained in chapter 3 of the thesis, the LOSC itself contains the relationship clauses in Articles 237 and 311, which both speak of the primacy of the LOSC over other agreements.

[840] Falkanger (n 667) 228.

[841] The threshold of 'major harmful consequences' is in this respect retained probably to avoid vague environmental claims (short of market value) that are ultimately paid by the registered owners and their insurers in accordance with Articles 10 (1) and 12 (10) of the WRC.

Article 221 of the LOSC, which is confined to casualties and the pollution risk but not to any particular type of pollutant, arguably lowered the threshold for the right of intervention to be triggered by omitting the requirement of 'grave and imminent danger', while still keeping the requirement of 'major harmful consequences'. The WRC abandoned the threshold altogether (save for an exception in relation to environmental claims that are not captured under the coastline and related interests) and significantly expanded the risks in relation to which the coastal States may interfere with navigational interests beyond the limits of its territorial sea. These now include any condition or threat that may obstruct navigation or may cause any type of damage to the marine environment.

The right of intervention gives the coastal State a very powerful tool in that the coastal State is given extremely wide discretion in choosing the type of measures to combat socio-economic and environmental risks posed by foreign casualty ships. For that matter, it may order the ship to be towed further out to open sea or take the most radical and destructive measure of bombing the ship. However, the right of intervention is at any rate made subject to the principle of reasonableness and proportionality, which means that the coastal State must balance its own interests against the interest of others, such as the flag State, the neighboring States, the shipowner and the international community as a whole.

While the coastal State is obliged to consult with other States, this is not the case in the scenario in which an immediate action is required. The time pressure would normally mean that possible errors would not be judged as strictly as in the events when such a pressure does not exist. However, the absence of consultations may be justified only under particularly severe circumstances. In this respect, even the WRC requires either consultations without the threshold or threshold without the consultations, and thus clearly prevents possible abuses of otherwise significant discretion in the hands of the coastal State.

While widening coastal States powers in the scenarios of maritime casualties, international law has been gradually developing in a way which gives considerable attention to the protection and preservation of the marine environment. Part XII of the LOSC obliges the coastal State to take account of the environmental considerations and not to expose the marine environment to an unreasonable risk, including (but not limited to) in the context of maritime casualties. For that matter, the Salvage Convention obliges the coastal State to cooperate with salvors and other actors engaged on the spot. Depending on the circumstances of a given situation, the coastal State may be provided with the request for a place of refuge and in that sense it could not simply push the ship to open sea without giving any consideration to the rights and interests of the

neighboring States and the international community as a whole. Moreover, the coastal State is obliged under the LOSC not to endanger safety of navigation or create any hazard to a ship, including bringing a ship to an unsafe port or anchorage. These obligations are not dependent on an occurrence of a maritime casualty and may thus appear relevant even in the context of a less serious peril. Yet, the rights and obligations of the coastal State in the context of places of refuge are predominantly explained on the basis of the regime applicable within its territory, as will be discussed in the next chapter.

7 Coastal State Jurisdiction over Ships in Peril in Marine Areas under Territorial Sovereignty

7.1 Introduction

In waters under its territorial sovereignty, the coastal State is in principle free to act as it determines, subject to commonly acknowledged exception, which entitles foreign ships to enjoy the right of innocent transit and archipelagic sea lanes passage.[842] How such rights translate in the scenarios of peril is not immediately apparent. Furthermore, of some ambiguity is whether ships in peril (when no human life is at risk) enjoy the right of access to a place of refuge. As explained in chapter 5, the CMI proposal was an attempt to resolve this controversy by imposing an explicit obligation on coastal States to provide refuge to ships in need of assistance. The proposal, however, failed to obtain support among States and the applicability of international law remained short of clarity.

Against this backdrop, this chapter investigates and explains the rights and obligations of coastal States in waters under their territorial sovereignty in relation to foreign ships in peril, and how these have evolved since the *Torrey Canyon* accident. In so doing, the chapter starts with general international law and the LOSC by discussing the rules applicable to innocent transit and archipelagic sea lanes passage, access to ports and internal waters. The chapter then continues with analysis of the relevant provisions of the Salvage Convention, the IMO Guidelines on Places of Refuge, the IMO liability and compensation conventions and the Wreck Removal Convention (WRC). The chapter concludes with reflections on the way in which the tide is flowing. The latter essentially concerns the problem of places of refuge, which never made it to the stage of negotiating a specific treaty on States' rights and obligations. This stands in clear contrast to the problem of intervention and wreck removal (which are predominantly discussed in chapters 6 and 8 of the thesis) and thus calls for some observations to be made on lessons learned and the potential way forward.

[842] A relatively unfettered jurisdiction of the coastal State in the area under that State's territorial sovereignty is also recognized under Article 2 (3) of the LOSC, which stipulates that sovereignty in the territorial sea is subject to the LOSC and 'other rules of international law' (see chapter 3 of the thesis). A question may arise as to whether Article 2 (3) is merely of a descriptive character or it actually imposes an obligation on the coastal State. In the *Chagos* Arbitration, the Tribunal took the view that Article 2 (3) of the LOSC is of an obligatory character. See the *Chagos* Arbitration (The Republic of Mauritius v. the UK), Award of 18 March 2015, para 502.

7.2 **General International Law and the LOSC**

Under general international law, foreign ships enjoy the right to exercise innocent transit and archipelagic sea-lanes passage, which under certain circumstances allow these ships to stop and anchor, or to reduce the speed, and take necessary assistance without any intervention from the coastal State. It is not entirely clear how these rights translate in the scenarios of peril, which is now to be discussed in more detail.

7.2.1 Innocent Passage

For the right of innocent passage to be lawfully exercised, two conditions must be cumulatively met. First, a ship must be in 'passage', and second, passage must be 'innocent'. If both of these conditions are fulfilled, a foreign ship is allowed to use the coastal State's territorial sea without any intervention from the coastal State.[843] This means that the coastal State cannot deny innocent passage, prevent the ship from entering its territorial sea, or expel the ship which is already in its territorial sea.[844] This does not go to say that the coastal State cannot regulate passage as such. Indeed, Article 21 (1) of the LOSC allows the coastal State to adopt laws and regulations for various purposes, including safety of navigation, preservation of the environment and the prevention, reduction and control of pollution. In other words, the coastal State is allowed to make the exercise of passage subject to certain conditions.[845] The coastal State could in this regard ask a ship to have an adequate insurance on board[846] in order to ensure

[843] See Article 24 (1) of the LOSC. For more on the right of innocent passage as the 'chief limitation of a sovereign's jurisdiction over his own territory' see Joseph Beale, 'The Jurisdiction of a Sovereign State' (1923) 36 *Harvard Law Review* 241, 259.

[844] Article 25 (1) of the LOSC allows the coastal State to 'prevent passage which is not innocent', which implies the right to expel the ship from the territorial sea for the same reason.

[845] See Article 21 (1) of the LOSC. The laws and regulations of the coastal State adopted in this respect must not affect the construction, design, equipment and manning (CDEM) standards, unless giving effect to 'generally accepted international rules and standards' (GAIRAS). See Article 21 (2) of the LOSC. See also Article 211 (4) of the LOSC.

[846] Having insurance on board may have an impact on safety issues and ship finance market. To be more precise, ships are under commercial pressure to obtain insurance certificates for at least two reasons. First, ship building and ship sale and purchase is regularly dependent on the terms and conditions of the ship finance contracts. Providers of a financial support (usually banks) normally require clean papers and valuable ship as a collateral/mortgage. In this respect they regularly require insurance certificates obtained from reputable insurers (H&M insurance certificates). Second, if things go wrong and liability claims are to be enforced against the ship, maritime liens may obstruct the mortgage and hence, banks want to prevent these situations as much as possible. In this respect, they regularly require P&I insurance certificates. For more on this see Erik Røsæg and Henrik Ringbom, Liability and Compensation with Regard to Places of Refuge, Study No. EMSA/RES/001-2004, Report of 12 October 2004, 15. See also Nicholas Gaskell and Craig Forrest, *The Law of Wreck* (Informa 2019) 381 and 386. The IMO urges shipowners to maintain their ships under the insurance of the leading P&I Clubs, which are those forming the IG P&I Clubs. See IMO Assembly Resolution A.898 (21) of 4 February 2000, 'Guidelines on Shipowners' Responsibilities in respect of Maritime Claims'. Also, it seems that ships that are insured by the insurers other than those belonging to the IG are 'overrepresented among vessels that are detained or otherwise appear to be substandard'. See IMO doc, LEG 76/WP.1 of 13 October 1997, 1 and Annex. This document indicates

both safety of navigation and environmental protection. This, however, seems to be debatable in practice.[847] At any rate, while the coastal State has the right to adopt certain laws and regulations, it must not hamper the innocent passage as such (e.g. by causing delays).[848] Moreover, Article 21 (1) makes an explicit reference to the right of the coastal State to *adopt* laws and regulations (legislative powers), while no reference is made to enforcement powers. These points could suggest that the coastal State does not enjoy enforcement jurisdiction. Another approach could be to argue that enforcement jurisdiction, while not explicitly mentioned, is not explicitly excluded and thus exists on the basis of territorial sovereignty. However, when it comes to the requirement of having an adequate insurance certificate on board, the favorable approach seems to be the former one. This conclusion comes from the IMO liability and compensation conventions and the particular way these are drafted. The WRC in Article 12 (12), for example, prescribes that:

> each State Party shall ensure, under its national law, that insurance or other security to the extent required by paragraph 1 is in force in respect of any ship of 300 gross tonnage and above, wherever registered, entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea.[849]

This means that coastal States are not enforcing the IMO requirements concerning compulsory insurance (or similar financial guarantee), unless a foreign ship is entering or leaving their ports or offshore terminals in the territorial sea.[850] At the same time, this does not appear to be so

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that ships which are not insured in a leading P&I Club are overrepresented among vessels that are detained or otherwise appear to be substandard.

[847] See Alan Khee-Jin Tan, Vessel-Source Marine Pollution (Cambridge University Press 2006) 300; Colin de la Rue and Charles Anderson, *Shipping and the Environment* (2nd edition, Informa 2009) 125.

[848] Article 24 of the LOSC.

[849] Emphases added. The same is prescribed by Article VII (11) of the CLC, Article 7 (12) of the Bunker Convention, Article 12 (11) of the HNS Convention.

[850] Moreover, Article 12 (1) of the WRC provides that the registered owner of a ship 'flying a flag of a State Party' is required to maintain insurance (the emphasis here is placed on flag State jurisdiction, rather than coastal State jurisdiction). Under the legislation of the UK, the compulsory insurance requirements in relation to foreign ships are limited to port entry. See the UK Merchant Shipping Act 1995, Section 192A ('Compulsory insurance or security'). The preparatory work of the WRC reveals that the USA strongly argued against imposing compulsory insurance requirements on ships flying a flag of a non-State party. See IMO doc, LEG/CONF.16/18 of 17 May 2007, 1 and LEG/CONF.16/6 of 1 March 2007. The view of the USA was expressed in the following words: 'The draft wreck removal convention would authorize coastal States to impose financial costs on foreign shipowners not as a condition of port entry, which is not a coastal State authority provided under customary international law. (Several IMO conventions have been elaborated to fill that gap, most recently the Bunkers Convention)'. See IMO doc, LEG/CONF.16/7 of 15 March 2007, para 5.

problematic in practice as the commercial pressure normally ensures that almost all ships indeed have an insurance on board.[851]

It is only if the ship fails to meet at least one of the two conditions ('passage' or 'innocence') that the coastal State is allowed to take measures of intervention to protect its interests against socio-economic and environmental risks posed by such a ship. It is thus necessary to analyze and explain the meaning of 'passage' and 'innocence'.

7.2.1.1 The Meaning of Passage

Article 18 (1) of the LOSC defines 'passage' as 'navigation through the territorial sea' for two particular purposes: (i) lateral passage (traversing the territorial sea without going outside its inner limits) and (ii) proceeding to or from internal waters or a call at a roadstead or port facility. Regarding the second purpose, the right of entry into ports and internal waters is not implied in the right of innocent passage but depends on the legal regime applicable in ports and internal waters, as discussed below. It is the lateral passage that this section deals with.

Passage means 'navigation', which is 'continuous and expeditious'.[852] The phrase 'continuous and expeditious' does not mean that the ship is required to navigate at full speed. Rather, it is expected to proceed at the normal operational speed.[853] Nonetheless, in exceptional circumstances confined to three scenarios, as will be explained below, a foreign ship is allowed to stop and anchor, which would also give it the right to navigate at the reduced speed (*in majore stat minus*). This is indeed relevant for a ship in peril.

Given that 'passage' is defined so as to mean 'navigation through the territorial sea',[854] and to 'stop and anchor' is explained so as to represent the 'practical need to *interrupt* passage',[855] a ship in peril would arguably already need to be in passage in order to be entitled to stop and anchor. In other words, stopping and anchoring could not in itself be the purpose for which the ship is allowed to enter the territorial sea of the coastal State. However, depending on the circumstances of a given case and on the basis of the principle of reasonableness, coupled with

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[851] As previously explained, banks normally require clean papers and valuable ship when considering whether or not to provide loans for ship purchase or ship building. For commercial pressures see also Gaskell and Forrest (n 846) 381 and 386.
[852] Article 18 (2) of the LOSC.
[853] Richard Barnes on Article 18 in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 184.
[854] Article 18 (1) of the LOSC.
[855] Myron Nordquist, 'International Law Governing Places of Refuge for Tankers Threatening Pollution of Coastal Environments' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers 2007) 500. Emphasis added.

the general obligation under Part XII of the LOSC concerning the protection and preservation of the marine environment and the principle of good faith and the prohibition of abuses of rights, the coastal State could be expected to honor permission for entry to its territorial sea for the purpose of anchoring.

The right to stop and anchor is limited to three scenarios: (i) when stopping and anchoring is 'incidental to ordinary navigation'; (ii) in cases of *force majeure* or distress; (iii) when stopping and anchoring is needed for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[856] The last scenario relates to ships, which are not themselves in any peril, but render assistance to ships or persons in peril.[857] The second scenario concerns extraordinary circumstances, which are external, real and unavoidable.[858] Exceptionally bad weather and sea conditions illustrate the point.

As far as the first scenario is concerned, it relates to circumstances 'incidental to ordinary navigation'. The phrase 'incident to ordinary navigation' may somewhat point at a maritime casualty, which is defined under the Intervention Convention, Article 221 of the LOSC and the WRC as, *inter alia*, 'incident of navigation'. However, an 'incident to ordinary navigation' must be distinguished from a 'maritime casualty' (as defined under the Intervention Convention, Article 221 of the LOSC and the WRC) because the latter, as discussed and explained in the previous chapter, implies that a ship is damaged or in imminent threat thereof. This is certainly not an 'ordinary' situation. At any rate, a foreign ship in peril (whether or not involved in a maritime casualty) must fulfill the requirement of innocence.

7.2.1.2 The Meaning of 'Innocence'

The requirement of 'innocence' is spelled out in Article 19 of the LOSC, which offers in paragraph 1 the explanation as follows:

> Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. […][859]

[856] Article 18 (2) of the LOSC.
[857] This would mean that a salvage ship, which is rendering assistance to a ship in peril, also benefits from the right to stop and anchor. See Aldo Chircop, 'Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 149.
[858] See Barnes (n 848) 185.
[859] Article 19 (1) of the LOSC is identical to Article 14 (4) of the 1958 Convention on the Territorial Sea and Contiguous Zone.

Paragraph 2 then continues with a clarification of 'non-innocence' by stipulating that passage of a foreign ship is to be considered 'non-innocent' if 'it engages in any of the […] activities' listed thereafter, such as an act of 'willful and serious pollution' and 'any other activity not having a direct bearing on passage'.[860] Regarding the latter, if a ship decides to stop and anchor to receive salvage assistance, the coastal State could not rely on the example of 'any other activity not having a direct bearing on passage'. Salvage is indeed an activity that has a direct bearing on passage, provided that conditions of 'passage' are fulfilled.

Of some controversy is whether an event that does not qualify as an 'activity' may nevertheless be considered 'non-innocent'. The wording of Article 19 (2) of the LOSC suggests that nothing but the activity makes a passage 'non-innocent'. However, this interpretation is not tenable as it would negate the right of intervention that exists beyond the territorial sea in the scenarios of maritime casualties. A casualty ship is not involved in any particular activity. Yet, the coastal State has the right beyond the limits of the territorial sea to order such a ship to be towed further out to open sea in order to protect its national interests from risks thereby posed. If this is so beyond the territorial sea, it should be even more so within the territorial sea. The point to be made here is that the right of intervention has the same purpose as the right to prevent passage which is non-innocent. This would thus suggest that the word 'act' or 'activity' should in the context of 'innocence'/'non-innocence' be interpreted as 'event', rather than 'activity'. In other words, if a ship runs into a maritime casualty, such a ship can be considered non-innocent, even though it is not really engaged in any 'activity'. However, in this respect, the basis for treating a ship as 'non-innocent' would be paragraph 1 of Article 19, rather than paragraph 2 (l).

While it should be beyond any doubt that a maritime casualty may be treated as non-innocent, the question is whether there is any threshold to this end. It is to be recalled from the previous chapter that the Intervention Convention and Article 221 of the LOSC, which both deal with intervention scenarios beyond the limits of the territorial sea, require 'major harmful consequences' for the coastal State to be authorized to take the intervention measures. In the absence of clear evidence to the contrary, the coastal State's territorial sovereignty would suggest no particular threshold for the right of intervention in the territorial sea. However, the principle of reasonableness and the most recent developments in the field, as reflected in the WRC, suggest that some seriousness must nevertheless be present.

[860] The expression 'any other activity not having a direct bearing on passage' is of an open-ended character, which creates uncertainties as to its meaning. Yang is of the view that the provision includes a broad range of activities such as 'dumping, bunkering, broadcasting […]'. See Haijang Yang, *Jurisdiction of the Coastal State of Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 167.

In particular, the WRC, whose geographical scope of application may be extended to the territorial sea and which will be addressed below, does not impose any threshold for the coastal State to take the intervention measures to protect its coastline and related interests from risks posed by casualty ships.[861] Nonetheless, it requires that these measures are at any rate proportionate to the hazard.[862] The principle of proportionality surely points to some level of seriousness. In addition, some probability of harm would seem reasonable, albeit not necessarily 'imminence' ('high probability') given the principle of territorial sovereignty in the background.

At any rate, on the basis of its territorial sovereignty, the coastal State would be allowed to take the intervention measure and order the ship to be towed just outside the point of the outer limit of its territorial sea. To be able to order it to be towed further than this point, the coastal State could only invoke the right of intervention, which applies beyond the territorial sea, as discussed in the previous chapter.

As established so far, perils at sea do not take away the right of a foreign ship to exercise innocent passage (and the consequential obligation of the coastal State not to intervene), including the right to stop and anchor if necessary due to distress or *force majeure*, or due to an incident to ordinary navigation. The letter, however, is not to be equated with a maritime casualty as defined in the Intervention Convention, Article 221 of the LOSC and the WRC. An occurrence of a maritime casualty is a ground for the coastal State to claim that the ship is not in 'passage', or at least to treat the passage of such a ship non-innocent.[863] In theory, even an incident which does not yet qualify as a maritime casualty may be considered non-innocent, if the seriousness of the circumstances so require. According to Nordquist, Article 19 was 'deliberately negotiated and drafted to exclude situations wherein a vessel in distress is automatically deemed "innocent"'.[864] However, if the ship is not damaged nor in any threat thereof, it is hard to imagine an incident which would indeed raise the seriousness of the situation.[865] What is plausible is that the ship is not damaged but threatened to so become,

[861] Article 1 (5) of the WRC.
[862] See Article 4 (4) (a) of the WRC, which excludes from the extended scope of application certain provisions, but not the obligation to act on the basis of the principle of proportionality as spelled out in Article 2 (3) of the WRC.
[863] Taking the example of the *Prestige*, which was already damaged and leaking oil into the sea, Nordquist explains that these circumstances cannot be considered innocent in any ordinary sense of the meaning of language. See Nordquist (n 855) 503.
[864] See Nordquist (n 855) 502.
[865] Save for arguably security issues, which are not a focus of this study.

without such threat necessarily being imminent (as required under the definition of a maritime casualty within the regime of the EEZ and on the high seas).

7.2.2 Transit Passage and Archipelagic Sea Lanes Passage

A foreign ship is allowed to exercise transit passage through straits used for international navigation, and archipelagic sea lanes passage in archipelagic waters. In terms of the latter, rules applicable to transit passage apply *mutatis mutandis* to archipelagic sea lanes passage.[866]

Article 38 (2) of the LOSC defines transit passage as follows:

> Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Transit passage is thus allowed 'solely for the purpose of continuous and expeditious transit'. The term 'continuous and expeditious' should be interpreted the same way as regarding innocent passage in that it does not mean that the ship is required to navigate at full speed but rather at the normal operational speed.

Article 39 (1) (c) further stipulates that, while exercising the right of transit passage, ships must:

> refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.

This provision calls for two observations. First, a ship may be involved in an activity which is necessary on account of *force majeure* or distress, but not on account of any incident to ordinary navigation, let alone maritime casualty. Second, *force majeure* or distress would allow the ship to take certain assistance or to reduce the speed, but not to stop and anchor. This stands in clear contrast to the right of innocent passage.[867] While the LOSC typically offers a greater freedom of navigation under transit passage than under innocent passage, which is for example evident in the right of submarines to navigate submerged,[868] when it comes to ships in peril the situation seems to be different. A possible explanation may be found in the fact that straits used for international navigation are normally narrow and thus offer limited space for maneuvering. If a

[866] See Article 54 of the LOSC.
[867] Bing Bing Jia on Article 39 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 303.
[868] Article 39 (1) (c) of the LOSC. See also chapter 3 of the thesis (3.3.2.1.).

ship in peril stops and anchors, it could more likely endanger the safety of navigation of ships passing by.

7.2.3 Rules Applicable to Ports and Internal Waters

7.2.3.1 General Access to Ports and Internal Waters

The LOSC is silent on the issue of general access to ports and internal waters given the idea that this part of the sea should be subject to the same legal regime as the one applicable on land, which centers around unqualified freedom of the coastal State to prescribe and enforce laws and regulations as it determines.[869] Often cited in this respect is the judgement made in the *Nicaragua* Case, in which the Court held that 'it is by virtue of its sovereignty that the coastal State may regulate access to its ports'.[870]

Even though the LOSC does not specifically deal with ports and internal waters, it nevertheless implicitly acknowledges that international law knows no general access to these and in this respect confirms the finding in the *Nicaragua* Case.[871] According to Article 25 (2) of the LOSC, in the case of a ship proceeding to internal waters (or a call at a port facility outside internal waters), the coastal State is given the right to take all necessary measures to prevent any breach of the conditions to which admission of such ship to internal waters (or a call at a port facility outside internal waters) is subject. Furthermore, Article 211 (3) of the LOSC makes it clear that the coastal State has the right to establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign ships into its ports or internal waters. In this respect, coastal State jurisdiction is not constrained by GAIRAS, which stands in clear contrast to the regime applicable in the EEZ,[872] and to some extent to the regime of the territorial sea.[873]

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[869] Nordquist (n 855) 498. Marten observes that it is 'a long-established principle, now enshrined in UNCLOS, that a state may exercise sovereignty over its internal waters in essentially the same manner that it does in relation to its land territory'. See Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 16. See also the *Fisheries* Case (UK v. Norway), Judgment of 18 December 1951, ICJ Reports 1951, 116, 133.

[870] The *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Judgement of 27 June 1986, ICJ Reports 1986, 14, para 213.

[871] As explained by Churchill and Lowe, 'just as the State is in principle free to deal with its land territory, so it should be free to deal with its internal waters as it chooses; and for this reason those waters have not been made the subject of detailed regulation in any of the Conventions on the Law of the Sea'. See Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edition, Manchester University Press 1999) 61.

[872] Article 211 (5) of the LOSC.

[873] Article 211 (4) of the LOSC. This provision needs to be read together with Article 21 (2) of the LOSC, which requires GAIRAS in relation to the CDEM standards.

The Preamble to the LOSC affirms that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'. There are some suggestions that foreign ships enjoy the general right of access to ports on the basis of the argument that States have an obligation to promote international trade and free communication and so, to grant access to their ports means that States are fulfilling their international obligation. The position has been expressed in the following words:

> [A]s no State appears to be regarded as having the right to isolate itself wholly from the outside world, or to remain aloof from all commercial or economic intercourse with it, there would seem to be a corresponding obligation imposed upon maritime powers not to deprive foreign vessels of commerce of access to all its ports.[874]

In a similar way, the arbitrator in the *Aramco* Arbitration held that:

> [a]ccording to a *great principle of public international law*, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the state so require.[875]

The arbitrator was referring to, *inter alia*, the 1923 Convention on the International Regime of Maritime Ports and the Statute incorporated therein. While freedom of communication and international trade is indeed a key feature of the 1923 Convention, there is nothing to suggest that this Convention is generally accepted by the international community. It is a treaty-based arrangement that offers to States certain trade benefits in their mutual relationships, rather than addressing rights and obligations of a general kind.

As apparent from its Preamble, the 1923 Convention was adopted 'for purposes of international trade equality of treatment between the ships of all *Contracting States*, their cargoes and passengers'.[876] In this respect, States parties undertake to grant the ships of other States parties equality of treatment with their own ships regarding freedom of access to ports and the use of the port facilities. Such an undertaking is explicitly referred to as a 'benefit'[877] and is clearly made subject to the principle of 'reciprocity'.[878] Moreover, the Convention explicitly stipulates that it does 'in no way restrict the liberty of the competent Port Authorities to take such

[874] J. N. Hyde, International Law (1949), at 582, as cited by Vaughan Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *San Diego Law Review* 597-622.
[875] *Aramco* Arbitration *(Saudi Arabia v. Aramco)*, Arbitration Award of 23 August 1958 (1963) 27 ILR 117, 212. Emphases added.
[876] Preamble to the 1923 Convention on the International Regime of Maritime Ports. Emphasis added.
[877] Article 8 (1) of the 1923 Convention on the International Regime of Maritime Ports.
[878] Article 2 (1) of the 1923 Convention on the International Regime of Maritime Ports.

measures as they may deem expedient for the proper conduct of the business of the port'.[879] In addition, each State party is given the right to suspend the benefit of equality[880] and is not bound by the Convention to permit the transport 'of goods of a kind of which the importation is prohibited, either on grounds of public health or security, or as a precaution against diseases of animals or plants'.[881] While the previously cited passage of the *Aramco* decision refers to the 'great principle of public international law', this decision has been strongly criticized in literature, primarily because it does not find support in the sources used.[882] Moreover, the arbitrator was referring to the closure of ports 'when the vital interests of the state so require'. This expression essentially reverses the state of international law by completely negating territorial sovereignty of the coastal State and pointing at the plea of necessity. The *Aramco* decision, therefore, cannot be taken as an authoritative statement on the state of general international law.

According to Lowe: '[t]here is not sufficient evidence to support the proposition that the principle of free commerce has become a rule of customary international law'. As he further argues, '[t]his is not to say that the exigencies of international relations do not in fact constitute a principle which effectively prohibits economic isolation; this principle simply is not a rule of law'.[883] Barnes and Morrison take the same position.[884] It seems appropriate to conclude that in the absence of firm evidence to the contrary, it is the coastal State's territorial sovereignty that dictates general access to ports and internal waters. In other words, general access to ports and internal waters depends exclusively on the decision made by the coastal State,[885] who may: (i) allow such entry, or (ii) refuse it, or (iii) make it subject to certain conditions. In respect of the latter, the coastal State may, for example, require a ship to present a financial security for the costs associated with entry (pilotage, towage etc), as well as for any loss or damage that may occur if things go wrong. There is nothing to suggest that these financial considerations cannot be the only or the main driver in the coastal State's decision-making process in relation to

[879] Article 3 of the 1923 Convention on the International Regime of Maritime Ports.
[880] Article 8 (1) of the 1923 Convention on the International Regime of Maritime Ports.
[881] Article 17 (1) of the 1923 Convention on the International Regime of Maritime Ports.
[882] Churchill and Lowe (n 871) 61. See also Anthony Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers 2012) 73.
[883] Lowe (n 874) 618. See also Churchill and Lowe (n 871) 61-62.
[884] Barnes argues that historically access to ports was based on many bilateral treaties of friendship, commerce and navigation. However, as he continues, '[i]n the absence of such treaty rights, access by ships remains a privilege'. See Richard Barnes on Article 2 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 184. See also Morrison (n 882) 73.
[885] The *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Judgement of 27 June 1986, ICJ Reports 1986, 14, para 213. Morrison shares this view. See Morrison (n 882) 72.

general access to its ports and internal waters. A mere political reasoning would in this respect suffice. In the scenarios of ships in peril, however, the situation is somewhat different.

7.2.3.2 Ships in Peril: Dilemma Concerning Places of Refuge

7.2.3.2.1 Tradition

Traditionally, ships in peril would have in many instances proceeded to the nearest ports or similar sheltered areas, where they would have taken assistance to stabilize their conditions, or simply waited for better weather, and continue with the initially planned voyage as safely and expeditiously as possible. In so doing, these ships rarely, if ever, asked the coastal State for permission, despite the fact that they were flying a foreign flag.[886] Rather, they would have merely notified the coastal State of their presence and the reason thereof.[887] In this respect, it was enough that ships are in imminent danger due to an unforeseen event.[888] Moreover, once in a shelter, foreign ships would have been exempted from local custom and immigration laws of the coastal State[889] as the presence of these ships in such a shelter was short of a voluntary character.[890]

Accommodating ships in peril in a shelter close to the shore was a long-established maritime practice, reflected as such in some case law, national legislation and bilateral and multilateral treaties of friendship, commerce and navigation.[891] It clearly served maritime interests of a particular ship (saving ship and cargo), but it also served humanitarian interests (saving human lives). The refuge tradition, however, underwent considerable stress with the emergence of super tankers and the increase in volume of their hazardous cargoes, especially as a number of maritime accidents demonstrated vulnerability of States to pollution. Coastal States now started to be more protective of their own national interests and less benevolent towards various risks

[886] Recalling his 16-year sea career, Gold explains that 'the entry to places of refuge by stricken vessels had been part of maritime custom and tradition since seafaring began'. He further recalls that 'in earlier times, access to such places was simply taken for granted and permission was hardly ever requested'. See Edgar Gold, Foreword to Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) xi-xii.
[887] Morrison (n 882) 76.
[888] Often cited in this respect is the *Elenor* (1809) Edwards' Admiralty Reports 135, 165 Reprints 1058.
[889] Churchill and Lowe (n 871) 68. At the same time, however, such a ship was prohibited from cargo unloading and trading, unless it was necessary to remove distress. For example, trade was allowed if necessary for the master to purchase necessaries for the ship to be able to continue with the voyage. See Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 191; See also Chircop (n 857) 146.
[890] Churchill and Lowe (n 871) 68. See also John Noyes, 'Ships in Distress' in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edition updated October 2007) para 21; Aldo Chircop, 'Living With Ships in Distress – A New IMO Decision-Making Framework for the Requesting and Granting of Refuge' (2004) 3 *World Maritime University Journal of Maritime Affairs* 31, 33.
[891] Chircop (n 857) 147; Noyes (n 890) para 11.

associated with ships in peril. In many instances, coastal States took the 'not-in-my-backyard' approach and refused to accommodate stricken ships close to their shore.[892] In the case of the *Torrey Canyon* casualty (1967), the UK 'reserved the right to refuse entry for the ship into British territorial waters'.[893] Nonetheless, it was mostly in the wake of the *Erika* (1999), the *Castor* (2000) and the *Prestige* (2002) that the legal discussion on the state of international law developed[894] and the refuge 'dilemma' raised as to whether the coastal State has, or should have, an obligation to provide a place of refuge to a ship in need of assistance and if so, on what basis and under which circumstances.

As explained earlier in chapter 5, the CMI proposal was an attempt to answer this question by spelling out the right of entry as the point of departure. However, it did not produce any successful results. In the absence of specific rules on coastal State rights and obligations in relation to places of refuge matter, coupled with the Preamble to the LOSC, which affirms that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law', the actual state of international law remained subject to uncertainties. Nevertheless, the humanitarian component of refuge custom was never questioned.

7.2.3.2.2 Humanitarian Component

As pointed out earlier, providing a shelter to ships in peril serves not only maritime interests, but also human lives. While some incidents caused coastal States to take the 'not-in-my-backyard' approach, these States never questioned their obligation in international law to assist human lives in distress. Indeed, there is an undisputed rule of customary international law, codified in various treaties, that imposes on all States an obligation to provide assistance to human lives in distress at sea.[895] This obligation, however, does not imply that ships

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[892] See also Gold (n 886) xii; Nuno Marques Antunes, 'Decision-Making in the Imminence of Disaster: "Places of Refuge" and the Prevalence of National Interests' in Marta Chantal Ribeiro and Erik J Molenaar (eds), *Maritime Safety and Environmental Protection in Europe. Multiple Layers in Regulation and Compliance* (Gráfica Ediliber 2015) 86 and 93. For the 'not-in-my-backyard' approach, see the observation made by the International Salvage Union, available at <http://www.marine-salvage.com/media-information/press-releases/isu-urges-governments-to-adopt-imo-places-of-refuge-guidelines/> accessed 31 October 2019.

[893] Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review* 514, 540.

[894] Aldo Chircop et al, 'Characterizing the Problem of Places of Refuge for Ships' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 4.

[895] Article 98 of the LOSC spells out the duty to render assistance at sea. It demands that flag States require masters 'to render assistance to any person found at sea in danger of being lost'; 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him'; 'after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call'. See Article 98 (1) of the LOSC. Moreover, according to Article 98 (2) of the LOSC, every coastal State

automatically enjoy the right of access to a place of refuge or, to put it differently, that coastal States have the obligation to accept such access. Churchill and Lowe cautiously observe that there exists a customary right of a distress ship to enter a port in order to preserve human life. However, as they continue, it is:

> unsafe to extend that principle further. In particular, it is by no means clear that a ship has a right to enter ports or internal waters in order to save its cargo, where human life is not at risk.[896]

States have demonstrated on several occasions that they indeed perceive a distinction between the humanitarian and maritime aspect of refuge custom, and take the view that their obligation under international law exists only in so far as the humanitarian component is involved. In 1995, in the case of the *Toledo*,[897] the Irish Court held that the coastal State's obligation is limited only to saving human lives. The view of the deciding judge was as follows:

> […] I am satisfied that the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognized practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede to any such request.[898]

This judgement may nowadays be criticized for not taking account of the 'bigger picture' and the fact that the coastal State cannot act as an absolute sovereign but has certain obligations towards its neighbors and the international community as a whole, at least concerning the

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is obliged to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service […]'. Of relevance in this respect is the 1979 International Convention on Maritime Search and Rescue (the SAR Convention). Further, Article III (e) of the Intervention Convention spells out the obligation of the coastal State 'before taking such measures [of intervention] and during their course, use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ships' crews, and to raise no obstacle thereto'. Next, Article 10 (a) of Chapter I of the SOLAS prescribes that '[t]he master of a ship at sea, on receiving a signal from any source that a ship or air craft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so'.

[896] See Churchill and Lowe (n 871) 63. According to Frank, '[i]ndeed, under customary international law, ships in need of assistance enjoy a long-standing right of access into ports, although this seems to be restricted to situations involving the preservation of human life'. See Veronica Frank, 'Consequences of the Prestige Sinking for European and International Law' (2005) 20 *The International Journal of Marine and Coastal Law* 1, 55-56. Even on the IMO web site it has been stated that '[t]he right of a foreign ship to enter a port or internal waters of another State in situations of *force majeure* or distress is not regulated by UNCLOS, although this constitutes an internationally accepted practice, *at least in order to preserve human life*'. See IMO web site, available at <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/PlacesOfRefuge.aspx> accessed 31 October 2019.

[897] The right of entry for the purpose of saving human life was also confirmed in the *Creole* (1853) and the *Rebecca* or *Kate A. Hoff* Case (1929) as referred to by Churchill and Lowe (n 871) 63.

[898] High Court (Admiralty) (Ireland), 7 February 1995, m/v Toledo, ILRM, 1995, 30.

protection and preservation of the marine environment. Nonetheless, it is still relevant to show that the humanitarian aspect is to be distinguished from the maritime component of refuge custom.

Similar to the *Toledo* case, in the case of the *Prestige*, Spain provided assistance to the members of the crew by airlifting them to a place of safety. However, it refused to grant refuge to the ship itself. On the contrary, it ordered the ship to be towed further out to open sea.[899] Whether such a decision was right or wrong is controversial. Nonetheless, the point is rather clear in that human lives may nowadays not necessarily be saved by accommodating a stricken ship in a port or elsewhere close to the shore. Rather, human lives may be assisted in different ways, such as by airlifting people and bringing them to the land or by transferring them to another ship.[900]

At the same time, depending on the circumstances of a given situation, bringing the ship to a place of refuge may be the safest way to actually preserve human lives.[901] This would probably be the case with large passenger ships that have on board a significant number of people, while search and rescue capacities are limited. The *Viking Sky* (2019), for example, was a cruise ship with more than 1 300 people on board when it ran into heavy storm and developed engine problem after it departed the Norwegian port of Molde. Hundreds of people were initially evacuated by helicopter (one by one). However, this operation could not continue for every single person on board and the majority of people (436 passengers and 458 crew members) was left on board and brought back to Molde together with the ship.[902]

7.2.3.2.3 Maritime and Environmental Component

The state of international law regarding the maritime aspect of refuge custom (saving the ship and its cargo) is not as clear as its humanitarian component (saving human lives). Hooydonk seems to hold the view that the maritime aspect of refuge custom finds its place in general

[899] Antunes (n 892) 97. See also the European Parliament resolution on improving safety at sea in response to the *Prestige* accident (2003/2066(INI)); P5_TA(2003)0400, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2003-0400+0+DOC+PDF+V0//EN> accessed 31 October 2019.

[900] When fire occurred on the container ship *Yantian Express* in January 2019, the crew was immediately evacuated by being transferred to another ship. See news available at <https://www.hapag-lloyd.com/en/press/releases/2019/01/container-fire-on-the-yantian-express--crew-successfully-evacuat.html> accessed 31 October 2019.

[901] Antunes (n 892) 89. In the words of Chircop, '[a]n underlying and longstanding belief is that the saving of the vessel betters the chances of saving the crew'. See Chircop (n 857) 144.

[902] See The New York Times, available at <https://www.nytimes.com/2019/03/24/world/europe/norway-ship-viking-sky.html> and World Maritime News, available at <https://worldmaritimenews.com/archives/273894/viking-sky-to-move-to-kristiansund-for-repairs/> all accessed 31 October 2019.

international law,[903] while Tanaka and Morrison argue the opposite.[904] Even though accommodating ships in peril in places of refuge used to be a maritime practice, to the knowledge of this author there exists no firm evidence that States generally perceived such a practice to be a matter of customary international law, rather than a matter of a mere expediency (not to be confused with the customary law obligation to assist human lives in distress). No international court or tribunal made any authoritative statement in this respect and even if one accepts that the maritime aspect of refuge custom finds its source in customary international law, it is hard to identify the precise scenarios in this respect. At any rate, customary international law may change[905] and there are several arguments to support the conclusion that the current state of international law is not premised on any customary right that belongs to a ship itself, when no human life is at risk.

First, States continuously refuse to agree on any specific written rules concerning their alleged obligation regarding refuge. As seen in chapter 5, the CMI proposal failed and the closest that States came in producing international regulations on places of refuge is the IMO Guidelines, which are aimed at assisting States in weighing the risks associated with ships in peril either being granted or refused refuge. Second, even the IMO Guidelines are based on the assumption that no ship is entitled to access a place of refuge, i.e. that indeed permission is required from the coastal State in this respect. The Guidelines make it explicit from the outset that:

> [w]hen permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.[906]

[903] Erik van Hooydonk, *Places of Refuge* (Lloyd's List 2010) 1 and 331-332.
[904] Yoshifumi Tanaka, 'Key Elements in International Law Governing Places of Refuge for Ships: Protection of Human Life, State Interests, and Marine Environment' (2014) 45 *Journal of Maritime Law & Commerce* 157, 179-180. Morrison (n 882) 126. In the words of Chircop, 'the humanitarian duty to provide assistance to vessels and persons in distress at sea continues to survive in international law, despite the stress. The discourse on places of refuge has not diminished the essential humanitarian principle at the heart of the norm, but has affected the scope of measures that may be employed in assisting the distressed vessel after the crew is airlifted to safety and has introduced a standard for decision-making by the coastal State and communications between the distressed vessel and the coastal State'. See Chircop (n 857) 161.
[905] In the *Barcelona Traction* Case, the ICJ made an observation that '[i]n seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law'. See the *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, 3, Separate opinion of Sir Gerald Fitzmaurice, para 34. As explained by D'Amato, 'what may be perceived to be illegal might in fact constitute the seed for a new rule'. See Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 60 and 97.
[906] Paragraph 3.12 of the IMO Guidelines on Places of Refuge.

The IMO Guidelines thus explicitly specify that the coastal State has 'no obligation' to grant a place of refuge to a ship in need of assistance.[907] Moreover, an assumption is made that: (i) there will indeed be a certain 'request' before any action in relation to a place of refuge is taken and (ii) such a request will be honored or declined by the coastal State. These assumptions confirm that under general international law, as the point of departure, it is the coastal State who decides whether and when refuge access is to be granted or refused. This conclusion complements the Preamble that speaks of the *prerogative* of a ship in need of assistance 'to *seek* a place of refuge', rather than the right to actually enter a place of refuge.[908] While the IMO Guidelines are merely of a soft-law nature and as such produce no legally binding effects on States,[909] they are nonetheless adopted by States themselves. Even though the purpose of these Guidelines is to tackle the problem of places of refuge from a technical, rather than from a legal point of view, these Guidelines are surely made on presumptions that relate to the state of international law. In this respect, these guidelines do provide the evidence of law, even though not the law itself.

Third, a recent EU case study on places of refuge acknowledged 'the over-riding regulations and necessary approval of the Coastal State authority'.[910] As will be discussed below, the EU legislation reflects a rather robust due diligence regime concerning the request for a place of refuge. Such a regime indeed inclines towards acceptance, rather than refusal. Nonetheless, EU Member States confirm that the point of departure in the decision-making process is the right of the coastal State to decide on access to a place of refuge, rather than the right of the ship to enter a place of refuge.

All these points, in the absence of a firm rule to the contrary, and coupled with the basic territorial principle, suggest that the starting point in relation to the places of refuge dilemma (when no human life is at risk) is the same as in relation to general access in that the coastal State has the right to decide on the request for a place of refuge by denying it, honoring it, or making it subject to specific conditions,[911] such as the presentation of a financial security. For

[907] This is again confirmed in Appendix 1 (Applicable International Conventions), which in footnote 3 explicitly provides that '[i]t is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance'.
[908] Emphasis added.
[909] The UN General Assembly constantly '*encourages* States to draw up plans and to establish procedures' to implement them. See for example UNGA Resolution 72/73 of 5 December 2017, para 163. The use of the word 'encourages' is surely different from the word 'urges', which word is well-used by the UN General Assembly when it comes to mandatory IMO instruments.
[910] EU – EEA Member States, Table Top Exercise on the EU Operational Guidelines – Places of Refuge, NCA CHEM, Horten, Norway, Exercise Report, October 2017, 15.
[911] Lowe (n 874) 619.

as long as a ship in peril poses certain socio-economic or environmental risks to the coastal State, the maritime aspect of refuge custom (observed on its own) does not seem to find its place in general international law. This, however, does not mean that the coastal State cannot in fact be expected to honor access to a place of refuge if circumstances of a given situation reasonably so require and allow. The coastal State is at any rate obliged to act on the basis of the principle of reasonableness and not to abuse its rights. Moreover, if a ship runs into peril at sea due to *force majeure* event (e.g. exceptionally bad weather conditions) but nevertheless remains in seaworthy conditions and does not pose any serious risk to the interests of the coastal State, the coastal State would most probably be expected to accept the ship in shelter, if shelter is available. The FAO PSM Agreement, for example, makes a reference to port entry for reasons of *force majeure* or distress by stipulating that:

> [n]othing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of *force majeure* or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[912]

While this provision uses neutral language in that it speaks of 'entry', rather than the *right* of entry or *right* to decide on entry, it may nevertheless be used to show that the coastal State may in a given situation be expected not to deny access to a sheltered place as a reasonable measure of response to distress or *force majeure*. If, however, a ship runs into a maritime casualty and suffers material damage as a result of which it starts leaking oil or releasing toxic chemicals, the coastal State would most probably have reasonable grounds to deny entry to a place of refuge to such a ship.

In the case of the casualty of the *Torrey Canyon*, no one really disputed the reasonableness of the action of the UK when it 'reserved the right to refuse entry'.[913] Yet, not every casualty is as dramatic as the one of the *Torrey Canyon*. Depending on the circumstances of a given situation (e.g. the stability and structural integrity of the ship, the engagement of professional salvors, prevailing weather and sea conditions), the coastal State may reasonably be expected to honor a place of refuge even to a casualty ship on account of environmental considerations. In this regard, it needs to be appreciated that the longer a damaged ship is forced to remain in the open

[912] Article 10 of the 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (FAO PSM Agreement), available at <http://www.fao.org/3/i5469t/I5469T.pdf> accessed 31 October 2019.

[913] In the case of the *Torrey Canyon*, the UK 'reserved the right to refuse entry for the ship into British territorial waters'. See Cundick (n 893) 540.

sea and rough weather conditions, the greater the risk that such a ship will ultimately suffer loss and cause further damage.[914] A ship in peril, including a casualty ship, can be better assisted close to the shore, and this indeed can contribute to pollution being prevented or minimized.[915]

The incident of the *Modern Express* (2016) may serve as an example to show that States may find no particular problems when accommodating in places of refuge ships that are in stable conditions and under control. The *Modern Express* was a ship that developed a severe list but was considered stable and therefore provided with a place of refuge, albeit after an adequate financial security was presented.[916] Another example is the *MSC Nikita,* a 32 600 cellular containership that collided with the containership *Nirint Pride* in 2009. The collision took place in the North Sea, 12 nautical miles off Hook of Holland, the Netherlands. As a consequence of the collision, the *Nirint Pride* caught fire on board, while the *MSC Nikita* started to take on water. Salvage started immediately and since the weather conditions were deteriorating, it was of a vital importance to make a rapid move to prevent the ship from capsizing or sinking. The Port Authority of Rotterdam allowed entry into a place of refuge within only 48 hours (after the commence of salvage operations).[917]

Clearly, not every casualty, let alone calamity at sea, is perceived by coastal States as a valid reason to refuse refuge and keep its territorial sovereignty intact. In fact, bringing the ship to a place of refuge may serve the interests of the coastal State itself, and may in a given situation prove to be truly the best way to save human lives (compared to, for example, the measure of airlifting people from the ship to the land), ensure safety of navigation and prevent pollution. Chircop observes that '[i]n most cases the request for a place of refuge is uncontentious and administered in a perfunctory manner by coastal States'.[918] The point to be made here is that the measure of accommodating ships in peril in places of refuge should be given serious consideration and States do seem to recognize this. Even Spain, which historically suffered extensive damages caused by maritime casualties accepts ships in peril in shelter. Between 2000 and 2001, there were 304 foreign ships admitted by Spain into sheltered areas.[919] In 2002, the additional number of 202 was reported.[920]

[914] See para 1.6 of the General Introduction to the IMO Guidelines on Places of Refuge.
[915] Chircop (n 894) 6.
[916] EU – EEA Member States, Table Top Exercise, NCA CHEM (n 910) 22.
[917] See EMSA MAR2009; For more on this see <http://www.maritimejournal.com/news101/tugs,-towing-and-salvage/rapid_response_averts_dutch_disaster> accessed 31 October 2019.
[918] See Chircop (n 857) 157.
[919] IMO doc, MSC 74/2/4/Add.1 of 24 February 2001.
[920] IMO doc, MSC 77/8/10 of 4 April 2003.

Ultimately, however, each request for a place of refuge falls under the discretion of the coastal State. The reasonableness of the coastal State's decision will in this respect always turn upon the facts of a given situation. While there is no hard and fast rule as to how the coastal State is expected to act in each possible scenario, it would be reasonable to expect the coastal State to weigh the conditions of the ship against the risks involved, the probability of these materializing, the seriousness of harm to outside interests, availability of sheltered facilities and financial security. In this respect, while arguing that it is by no means clear that ships in peril enjoy the right to enter a port or internal waters of the coastal State when no human life is at risk, Churchill and Lowe nevertheless explain that this uncertainty exists '[a]t least in circumstances where the condition of the ship carries a risk of serious pollution'. If there is no serious risk to the interests of the coastal State (e.g. a ship simply encounters exceptionally bad weather conditions, but remains seaworthy and stable), prohibiting shelter to a ship in peril could thus amount to an unreasonable action. As Churchill and Lowe further argue:

> the better view is that coastal States may forbid such ships to enter their internal waters if measures have been taken to save the lives of persons on board: the decision should be taken by weighing the gravity of the ship's situation against the probability, degree and kind of harm to the coastal State that would arise were the ship allowed to enter.[921]

Canada has, for example, developed a risk matrix to help determine the overall risk associated with different options of response to a place of refuge request. The matrix is comprised of the two main components, namely the severity and probability of adverse consequences.[922] The coastal State could at any rate be assisted by the IMO Guidelines on Places of Refuge to ensure the reasonableness of its behavior while seeking to balance the advantage for the ship and the environment resulting from granting a place of refuge and the risk to the coastal State and the environment resulting from the ship being close to the shore.[923] At the same time, however, no State is required to take account of the interests of the ship and the environment at the costs of

[921] Churchill and Lowe (n 871) 63.

[922] Transport Canada, 'National Places of Refuge Contingency Plan (PORCP)', TP 14707 E, First Edition of 3 July 2007, available at <https://www.tc.gc.ca/eng/marinesafety/tp-tp14707-menu-1683.htm> accessed 24 February 2020. As far as the severity is concerned, there are four main categories to be considered and these are: (i) catastrophic (multiple deaths, multiple major injuries, extreme property or environmental damage, extreme negative impact on the economy, major national or long term impact); (ii) severe (death, major injuries, severe property or environmental damage, loss of the ship, major risk to safety or restriction to shipping, regional impact); (iii) significant (many injuries, significant property or environmental damage, short-term consequences, local impact); (iv) minor (some minor injuries, some property or environmental damage, minor short-term consequences). As far as the probability is concerned, the categories to be considered are as follows: (i) highly probable (almost certain that the accident will occur), (ii) probable (accident likely to occur), (iii) unlikely (accident could occur), (iv) improbable (accident not likely to occur).

[923] Para 1.7 of the General Introduction to the IMO Guidelines on Places of Refuge.

being damaged in its own 'backyard'. If the interests of others are directly confronted with the interests of the coastal State, in the view of this author it is the interests of the coastal State that should be given more weight on account of territorial sovereignty.

7.3 **Salvage Convention**

As explained in the previous chapter, the Salvage Convention brought traditional salvage up-to-date with Part XII of the LOSC and in this respect imposed an obligation on salvors to exercise 'due care' to prevent or minimize damage to the environment. This could in a given situation lead salvors to request a place of refuge from the coastal State and in this respect, Article 11 of the Salvage Convention prescribes that the coastal State must take into account the need for cooperation between salvors and other interested parties to ensure the efficient and successful performance of salvage. While nothing prevents the coastal State to exercise the right of intervention into salvage operations in order to protect its own interests against risks posed by emerging casualties, as discussed in the previous chapter and confirmed by Article 9 of the Salvage Convention, the coastal State is still expected to act reasonably and to take account of the interests of others.

Moreover, a prudent coastal State should act without unnecessary delays. Incidents at sea are truly dynamic in their nature and may turn into catastrophes in a very short period of time, even within only a couple of hours. Yet, practice has shown significant delays in coastal States' response to requests for places of refuge. As pointed out earlier in chapter 5, the *Castor* (2000) was left at the mercy of the sea for more than 40 days. In the case of the *Maritime Maisie* (2012), the ship was drifting in the Sea of Japan for almost 100 days before it was brought to the port of Uslan, South Korea.[924] In order to act reasonably and without unnecessary delays, the coastal State should make use of the recommendations set out in the IMO Guidelines on Places of Refuge.

7.4 **IMO Guidelines on Places of Refuge**

As discussed in the previous chapter, the IMO Guidelines on Places of Refuge aim at ensuring both safety of navigation and protection and preservation of the marine environment. For that

[924] See Maritime News, available at <https://www.seatrade-maritime.com/asia/maritime-maisie-successfully-salvaged> accessed 31 October 2019. The *Maritime Maisie* ran into a collision with the *Gravity Highway* on 29 December 2013 and immediately caught fire, which was extinguished by the salvors on 16 January 2014. The ship then requested a place of refuge as it proved too dangerous to undertake salvage operation in open sea conditions. However, it was not until 2 April 2014 that refuge was eventually honored. See IMO doc, III 1/INF.33 of 14 May 2014, 1-2.

matter, the IMO Guidelines provide a set of risks and factors that coastal States are encouraged to take into consideration once provided with the request for a place of refuge. These risks and factors are essentially focused on socio-economic and environmental risks, conditions of the ship, natural conditions, available facilities and available financial security.[925] Regarding the latter, on the basis of its territorial sovereignty, the coastal State may require the ship to present a financial security as a condition for entry into a place of refuge. Of some debate is, however, whether the coastal State may be fully driven by the presence or absence of such a security in its decision-making. As discussed in the previous chapter, to say that the coastal State is allowed to be driven only by the presence or absence of a financial security would diminish the coastal State's obligations and responsibilities concerning the protection and preservation of the marine environment. In a given situation, it could also prove contrary to the principle of reasonableness, good faith and the prohibition of abuses of rights.

A different question is whether and to what extent the existing IMO liability and compensation conventions may speak of reasonableness in terms of conditions imposed by the coastal State in relation to financial security. It is thus necessary to say a few words about the relevance and significance of the IMO liability and compensation conventions in this respect.

7.5 The Relevance and Significance of the IMO Liability and Compensation Conventions

The IMO liability and compensation conventions do not specifically address the issue of places of refuge and the respective rights and obligations of the coastal State, nor do they confirm or negate the state of international law in that regard. These conventions are predominantly adopted for the purpose of ensuring that victims of vessel-source pollution are provided with prompt and adequate compensation for damages thereby caused, and uniformity in international maritime law. In this respect, the IMO liability and compensation conventions find their place in the maritime law domain and Article 235 of the LOSC, as explained in chapter 3. The IMO liability and compensation conventions are relevant and significant for the present discussion for two main reasons.

First, these conventions suffer from certain weaknesses that may inform the reasonableness of the coastal State's demands to subject access to a place of refuge to conditions that are more stringent than the conditions under these conventions. These weaknesses are important to bear

[925] See paragraph 3.9 and paragraph 2 of Appendix 2 of the IMO Guidelines on Places of Refuge.

in mind as they explain (albeit only partly) why coastal States were not willing to surrender their territorial sovereignty when the CMI proposal was made to adopt a places of refuge treaty with the presumed obligation at its core. Second, these conventions are at the same time characterized by certain strengths that, depending on the circumstances of a particular situation and especially the conditions of a ship, may explain the willingness of the coastal State to reasonably be satisfied with a standardized insurance certificate obtained by the ship in accordance with these conventions.

7.5.1 A Strong and Well-Tested System

The IMO liability and compensation conventions are generally perceived as a well-tested system that ensures prompt and effective compensation for victims of pollution, including coastal States.[926] As mentioned in chapter 3 of the thesis, the promptness and effectiveness in point is assured on the basis of three main components: (i) strict liability of a shipowner, (ii) compulsory insurance or other financial security, and (iii) direct action against the provider of such insurance/security. It is these three components that explain the strength of the IMO liability and compensation conventions and thus may explain why the coastal State would indeed be willing to grant a foreign ship in need of assistance access to a place of refuge, especially if the ship runs into peril but does not reach the stage of a maritime casualty that has already caused a material damage to the ship, and surely if the ship merely runs into exceptionally bad weather and sea conditions but does not pose any serious risk to the national interests of the coastal State.

Strict liability has a very important practical value because to prove fault may be a quite challenging and time consuming process with an uncertain outcome.[927] At the same time, the compulsory insurance and the direct action against the insurer gives the coastal State a guarantee that compensation for losses, damages or costs will be immediate at least for three

[926] The best evidence that such system is well-tested and efficient is the fact that all the IMO liability and compensation conventions to a large extent use the same form and language. See, for example, Article VII (8) of the CLC, Article 12 (8) of the HNS, Article 7 (10) of the Bunker Convention, Article 12 (10) of the WRC. Gaskell explains this standardized model through the expression 'boilerplate' text. See Nicholas Gaskell, 'Decision Making and the Legal Committee of the International Maritime Organization' (2003) 18 (2) *The International Journal of Marine and Coastal Law* 155, 165. See also Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007' (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly* 49, 84 and 103, fn 376.

[927] For more on the problems associated with the liability and compensation issues encountered in practice see Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Bloomsbury 2016) 393-399; Steven Rares, 'Ships that Changed the Law – the *Torrey Canyon* Disaster', 2. This paper was presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017, available at <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171005> accessed 31 October 2019.

main reasons. First, the right of direct action avoids the 'pay to be paid' rule and lengthy and uncertain court proceedings.[928] Second, more than 90 % of world tonnage is insured by members of the International Group of P&I Clubs, which is significant given their visibility, reputation and financial strength.[929] Third, as pointed out earlier, the insurance certificate obtainable under the IMO liability and compensation conventions is part of a standardized system that has proven to be well-tested and undisputed in practice.[930] The problem, however, lies in the weaknesses of the IMO liability and compensation conventions, which are associated with the limited type and amount of claims recoverable.

7.5.2 Weaknesses Associated with the Types of Claims (Un)covered

As the point of departure, the IMO liability and compensation conventions cover a wide range of ships and hazardous substances carried on board. When it comes to the CLC, the scope of its application is confined to pollution damage caused by oil tankers. In this respect, it covers damage caused by the escape or discharge of persistent oil (irrespective of whether it is carried as cargo or bunker).[931] With regards to the Bunker Convention, it covers pollution damage caused by fuel oil carried in bunkers.[932] The HNS Convention, which is not yet in force, covers pollution damage caused by harmful cargo other than oil (hazardous and noxious cargo such as chemicals).[933] These conventions are thus predominantly concerned with compensation for damage, which includes both damage to property and economic loss (i.e. the traditional concept of damage).[934] Nonetheless, subject to certain conditions, reasonable environmental restoration costs[935] are covered too, as well as costs for preventive measures.

Regarding preventive measures, these are covered only if considered to be 'reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution

[928] For more on the 'pay to be paid' rule see chapter 5 of the thesis (5.6.1.1.).
[929] The shipowner may not always be identifiable and solvent.
[930] For the same perception in media, see Safety4Sea, available at <https://safety4sea.com/norway-ratifies-first-the-2010-hns-convention/> accessed 31 October 2019.
[931] Article I (5) of the CLC.
[932] Article 1 (5) and (9) of the Bunker Convention.
[933] Article 1 (5) of the HNS Convention. 2022 has been anticipated as the 'target date' for entry into force of the HNS Convention. For more see SKULD, 'Insight: HNS Convention', available at <https://www.skuld.com/topics/environment/hns-convention-2010/insight-hns-convention/> accessed 24 February 2020.
[934] Article 1 (5) of the HNS Convention.
[935] The CLC and the Bunker Convention define 'pollution damage' as 'loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken' as well as 'costs of preventive measures and further loss or damage caused by preventive measures'. See Article 2 of the CLC and Article 1 (9) of the Bunker Convention. See also Article 1 (6) of the HNS Convention.

damage'.[936] The expression 'after an incident has occurred' is somewhat confusing. However, the point is further made 'to *prevent* or minimize pollution damage'.[937] Moreover, the term 'incident' is defined as 'any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent *threat* of causing such damage'.[938] Hence, the preventive measures are surely covered. Whether the costs accrued by preventive measures will ultimately be recoverable or not depends on the test of reasonableness. The IMO liability and compensation conventions fall short of any specific criteria that should be taken into consideration in this respect. Nonetheless, the IOPC Funds Claims Manual makes it clear that:

> [c]laims for the costs of measures to prevent or minimize pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and technical advice.[939]

There are four main observations to be made here. First, the IOPC Funds Claims Manual clearly speaks of an objective test. As it is centered on the technical soundness of the measure,[940] it will probably largely depend on the opinion of the salvor or other technical expert. In this context, it is important to bear in mind that the coastal State has the right to preserve salvage operations for its national companies, or otherwise persons or companies of its own choice. However, this is allowed only within its territory (internal waters, territorial sea, archipelagic waters). Second, for reasonableness to be assessed of relevance are the facts and information available at the time when the decision under examination was made. Third, the requirement of reasonableness requires the coastal State to continuously reassess the soundness of its decision. Furthermore, according to para 3.16 of the IOPC Funds Claims Manual:

> [c]laims for costs of response measures are not accepted when it could have been foreseen that the measures taken would be ineffective, for example if dispersants were

[936] See Article I (7) of the CLC, Article 1 (7) of the Bunker Convention and Article 1 (7) of the HNS Convention.
[937] Emphasis added.
[938] Emphases added. See Article I (8) of the CLC. The same definition is contained in Article 1 (8) of the Bunker Convention and Article 1 (8) of the HNS Convention.
[939] Paragraph 3.15 of the IOPC Funds, 'Claims Manual', 2019 Edition.
[940] Røsæg and Ringbom (n 846) 45.

> used on solid or semi-solid oils or if booms were deployed with no regard to their ineffectiveness in fast flowing waters. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection of a claim.

This provision must be read together with Article 195 of the LOSC. In other words, not only that the coastal State may be prevented from being compensated if a preventive measure could not have been foreseen as effective, but it may also find itself responsible and liable towards its neighbors and the community as a whole.

The WRC is different from the CLC, the Bunker Convention and the HNS Convention in that it is entirely concerned with costs rather than with loss or damage. It makes no specific reference to any type of ship or cargo. While wreck removal may indeed be considered as a preventive measure, costs of which are already covered under the CLC, the Bunker and the HNS, this is limited to cases of pollution in its narrow sense and hence does not capture measures taken for example solely on account of safety of navigation. While ensuring safety of navigation may indeed have a purpose of preventing pollution (e.g. oil spill), para 1.45 of the IOPC Claims Manual further stipulates that:

> [e]xpenses for preventive measures are recoverable even if no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The requirement of imminence essentially means that it would be hard to argue on safety of navigation, save for perhaps scenarios in very busy shipping lanes. It is interesting to note at this stage that the requirement of imminence is retained in the domain of liability and compensation regime, which stands in clear contrast to the public international law domain.

From the above, it is rather clear that the IMO liability and compensation conventions cover a wide range of claims. However, not all the IMO liability and compensation conventions are currently in force[941] and not all of those that are have universal or near-universal participation.[942] Moreover, even if this were so, certain claims are still not captured (environmental damage) or their recoverability is subject to uncertainties (pure economic loss).

As far as damage to the environment is concerned, compensation is due only in relation to 'the loss of profit from the impairment of the environment and the costs of reasonable reinstatement

[941] The HNS Convention is still not in force. See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 24 February 2020.

[942] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 6 December 2019.

measures'.[943] In other words, compensation is not provided for damage to the marine environment *per se* (pure environmental harm, which is short of any market value).[944] The IOPC Funds makes it clear that the assessment of compensation is not to be made on the basis of an 'abstract qualification calculated in accordance with theoretical models'.[945] As Jacobsson and Trotz explain, compensation can be paid by the IOPC Fund only if the economic loss suffered is 'quantifiable economic loss'.[946] This is not surprising if one appreciates the risk of opening 'the flood-gates for liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[947] While nothing prevents a separate fund from being established in this respect (national or industry-based),[948] so far this has not been done and no indication seems to exist that this will be done at any time in the near future.

When it comes to pure economic loss, the CLC, the Bunker Convention and the HNS define 'pollution damage' loosely enough to enable courts to take different approaches based on different legal traditions and tort law principles. Indeed, national laws diverge on claims for pure economic loss. In his study, Morrison comes to the conclusion that some States reject claims for pure economic losses altogether, some allow them unconditionally, while some allow them provided that certain requirements are fulfilled.[949] The IOPC Fund seems to take a flexible approach, yet short of any hard and fast rule.[950] The fact that a certain claim for pure economic loss might end up not being compensated has significant implications for States whose economy depends on activities such as tourism.

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[943] See Article I (6) (a) of the CLC, Article 1 (9) (a) of the Bunker Convention, Article 1 (6) (c) of the HNS Convention.
[944] Rothwell and Stephens (n 927) 396.
[945] See paragraph 1.4.13 of the IOPC Funds, 'Claims Manual', 2019 Edition. See also Måns Jacobsson and Norbert Trotz, 'The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention' (1986) 17 (4) *Journal of Maritime Law and Commerce* 467, 481.
[946] See Report of 5th Intersessional Working Group, FUND/A.4/10, Annex, para 18 and 19, FUND/A.5/16 para 13. See also Jacobsson and Trotz (n 945) 481.
[947] Jacobsson and Trotz (n 945) 477.
[948] For a similar suggestion in the EU context see Henrik Ringbom, 'Places of Refuge and Environmental Liability and Compensation, With Particular Reference to the EU' in *CMI Yearbook* 2004 (Comite Maritime International, 2004) 208, 231.
[949] Morrison (n 882) 329-330.
[950] For example, in the case of the loss of the *Haven* (1991), the IOPC fund paid for the claims made by the shops, hotels and restaurants for the loss of their income and business. See Gotthard Mark Gauci, 'Places of Refuge: Compensation for Damage Perspective' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 306. Yet, it is to be noted that the claim for loss of tax revenues in the *Tanio* Case was rejected as it was not proved that such loss occurred as a direct result of pollution. See Jacobsson and Trotz (n 945) 479.

7.5.3 The Limited Amount of Compensation

Another weakness of the IMO liability and compensation conventions in the context of places of refuge is associated with not only limited types of claims covered but also a limited amount of compensation obtainable on account of those claims that are indeed covered because of a maritime tradition associated with the right of a shipowner to limit liability for maritime claims,[951] which explains the *quid pro quo* for the previously explained strength of these conventions associated with shipowner's strict liability.

The right of a shipowner to limit its liability is based on either the regime of general limits (the LLMC, which concerns claims under the Bunker and the WRC) or the regime of special limits (the CLC and the HNS). As far as general limits are concerned, it is to be noted that some maritime claims are explicitly excluded from the LLMC regime such as salvage claims, including claims for special compensation under Article 14 of the Salvage Convention.[952] Moreover, States are given the possibility to make reservations regarding wreck removal claims,[953] which also allows them to make wreck removal claims subject to the higher limits (*in majore stat minus*).

The right of the shipowner to limit its liability is not an absolute right. Certain conduct may still be seen as a bar to limitation. Namely, according to Article 4 of the LLMC, a person that is found liable for a particular maritime claim is not entitled to limit his or her liability if it is proved that 'the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. However, this is also known as almost unbreakable clause.[954]

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[951] Maritime claim is generally considered a claim related to the operation of the ship. See EMSA, Liability and Compensation in Relation to Accommodation of Ships in Places of Refuge, Technical Report of 9 February 2011, 11, available at <http://www.emsa.europa.eu/implementation-tasks/places-of-refuge/items.html?cid=316&id=2643> accessed 31 October 2019.

[952] Article 2 of the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976. In this respect, it is important to emphasize that it is the primary purpose that matters. Salvage operations may for instance lead to prevention of pollution. If the primary purpose of such operations is to prevent pollution, rather than to save the ship and cargo, the costs thereby incurred do qualify for compensation under these conventions. It might well be that salvage operations have another purpose – saving the ship and/or cargo. If this is the purpose, costs thereby incurred are not accepted under these Conventions. It may also be the case that salvage operations are undertaken for the purpose of both preventing pollution and saving the ship and/or cargo. If it is not possible to establish with any certainty the primary purpose, the costs are apportioned between pollution prevention and salvage. See Paragraph 3.1.15 of the IOPC Funds, 'Claims Manual', 2019 Edition.

[953] By virtue of Article 18 of the LLMC, a State party to the LLMC is allowed to make a reservation concerning wreck removal claims.

[954] The burden of proof is obviously on the claimant (victim) and the test is very hard to prove, as opposed to the test required under the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships (this convention is not in force anymore as it was replaced by the LLMC). See Nicholas Gaskell and Craig Forrest, *The Law of Wreck* (Informa 2019) 112-113.Nonetheless, in the *Erika* case, the French Court of

To be able to rely on the right to limit its liability under the IMO liability and compensation conventions, a shipowner needs to establish a fund, which is usually referred to as a first tier fund. The FUND Convention is complementary to the CLC as it provides a second tier fund. Its application is triggered by those situations in which the victim cannot obtain compensation under the CLC (e.g. shipowner is not liable because of exoneration) or the compensation obtained is not sufficient (e.g. because of the limits of liability). The IOPC Fund is financed by oil companies (oil receivers, i.e. owners of oil carried as cargo) rather than shipowners.[955] In this way, the compensation is distributed on two levels (two tier system) among both shipowners (through the CLC) and owners of oil cargo (through the IOPC Fund).

At times, the IOPC Fund may appear inadequate as it too has its own limits, which is why a new convention was adopted in 2003 to supplement the Fund Convention (the Supplementary Fund Convention). The HNS Convention is modeled on the CLC/IOPC system in that it too provides a two tier system for liability and compensation – HNS/HNS FUND, albeit it is not yet in force. Therefore, if loss, damages or costs are higher than the limits of liability, or the shipowner is not liable, the coastal State may still get compensated from the second tier fund, or possibly a third tier fund. However, this possibility is available only in case of claims under the CLC and—when it enters into force—the HNS Convention and not in case of claims under the Bunker Convention and the WRC. Whether the LLMC limits are enough to cover Bunker and WRC claims is controversial.[956]

7.5.4 Asking for More than the IMO Liability and Compensation Conventions Offer

Since the IMO liability and compensation conventions do not specifically address the issue of places of refuge and in fact suffer from certain weaknesses in this regard, there is nothing to suggest that, if the circumstances so require, the coastal State may not reasonably subject access to a place of refuge to conditions that are more stringent than those stipulated under the IMO liability and compensation conventions. Based on its territorial sovereignty, the coastal State is allowed to ask for more, i.e. to be compensated in full,[957] and to reasonably want to get insurance higher than the current limits, if circumstances so justify. It is hard to blame the

Cassation somewhat surprisingly equated the term 'recklessness' with 'lack of care'. See GARD, 'The Erika – The Cour de Cassation Decision', available at <http://www.gard.no/web/updates/content/20735233/the-erika-the-cour-de-cassation-decision> accessed 31 October 2020.

[955] See Article 10 of the IOPC Fund Convention.

[956] For more see Gaskell and Forrest (n 926) 98.

[957] Antunes (n 892) 123.

coastal State for wanting to be compensated for whatever damage may actually arise, even for pure economic loss or pure environmental harm. As explained by Donner:

> [w]hen a vessel is in need of assistance, any hesitation on the part of a port to provide refuge would probably be based on a fear of pollution or physical damage and disruption to its normal operations. On the other hand, such hesitation should reasonably be alleviated by the assurance that the port or place of refuge would be fully, or at least reasonably, compensated in a timely fashion for any such damage or disruption. [….] the fact that the shipowner's liability, in most cases, is limited by statute may actually be valid reason to hesitate to grant refuge.[958]

The CMI proposal intended to clarify circumstances under which the coastal State would be allowed to ask for letters of guarantee or other types of financial security. The idea was to limit the amount of security to what is reasonable and to what does not exceed limits that apply under the IMO liability and compensation conventions.[959] However, this proposal encountered strong opposition from coastal States. The IAPH was particularly loud in criticizing the existing liability and compensation regime and pointing at its gaps.[960]

While the coastal State is in principle allowed to ask a ship to present an insurance certificate with an 'open-ended' clause based on its territorial sovereignty, this right should be approached with particular care as the 'open-ended' requirement is not without its controversies. If the ship runs into extremely bad weather and sea conditions but remains seaworthy and in stable conditions, it would surely seem unreasonable to insist on an open-ended insurance certificate to allow the ship to proceed to a shelter.

Moreover, an open-ended insurance certificate may be hard to obtain on the market. In this respect, it is worth recalling that Spain, in the aftermath of the *Prestige* casualty, suggested that a ship in need of assistance have an unlimited insurance certificate in place in order to be considered for a place of refuge.[961] However, the IUMI warned that vessel and cargo insurers

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[958] Patrick Donner, 'Insurance Perspective on Places of Refuge' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 346.
[959] Article 7 of the CMI draft instrument.
[960] See IMO doc, LEG 90/8/1 of 18 March 2005, para 17. See also Frans van Zoelen, 'An Instrument on Places of Refuge from a Ports' Perspective' in *CMI Yearbook* 2009 *Part II* (Comite Maritime International 2009) 188; Morrison (n 882) 298.
[961] Spain also proposed there exists no obligation for the coastal State to grant access to a place of refuge unless the requirements established in the technical criteria resulting from these guidelines have been met, in accordance with the protocols previously established by the IMO, and it is reasonably possible. The Spanish proposal was therefore seeking a presumption in favour of a coastal State and suggested a very strict requirement for such a presumption to be successfully rebutted – virtually all technical criteria to be met. The idea behind the Spanish proposal was the 'prevention at source' principle, suggesting that the vessels are built, maintained, managed and

are not willing to provide such an insurance.[962] The Spanish proposal was thus rejected.[963] As far as P&I insurers are concerned, in its submission to the 89th session of the LEG, the IG P&I Clubs suggested a standard form letter of guarantee, which would keep the limit for the overall claims at 10 million USD.[964] While the IG P&I Clubs was still pointing out that Clubs would be willing to negotiate this limit on the case-by-case basis, the point to be made is still the same in that insurers will always seek to have some sort of a limit and the WRC stands as a good example in this respect. Even though wreck removal claims may be exempt from limitations under the LLMC, and consequently under the WRC, the insurance is at any rate linked to the cap calculated on the basis of the LLMC limit, as explained in chapter 5.

None of these points, however, imply that insurers cannot, or are not willing to, issue any insurance certificate outside the standardized system under the IMO liability and compensation conventions. Rather, it means that any other certificate will need to be individually negotiated between the insurer and its member (shipowner) first. This may take time and does not provide any guarantee that the certificate will eventually be issued. In terms of the latter, the insurer will almost certainly require an additional insurance premium to be paid by the shipowner. The shipowner, however, may be unable to pay such a premium for whatever reasons. At the same time, in order to avoid a delay in situations in which delay may be critical, nothing prevents the coastal State from coordinating this problem with the nearby States so as to honor the request for a place of refuge on the basis of the agreement that costs and potential damages that exceed the IMO limits will eventually be shared. In this respect, it needs to be reiterated that the longer a damaged ship is forced to stay at the mercy of bad weather and rough sea conditions, the greater the risk of the ship's condition deteriorating and the greater the risk of pollution. While the *Castor* managed to withstand the 40 days battle with strong winds and rough sea conditions,[965] another *Castor*-like situation might happen in the future, this time causing a catastrophe.

crewed in such a way that in fact 'the provision of outside assistance during their operation is not necessary'. See IMO doc, LEG 86/8/5 of 26 March 2003, para 3.

[962] See IMO doc, MSC 77/8/2 of 14 February 2003, para 12. The IUMI was referring to the practice of the Port of Singapore Authority, which often requires an insurance guarantee of minimum 10 million dollars in order to consider an access to a place of refuge for a vessel in need of assistance.

[963] See IMO doc, MSC 77/26 of 10 June 2003.

[964] See IMO doc, LEG 89/7/1 of 24 September 2004, para 6 and annexed standard letter of guarantee.

[965] See chapter 5 of the thesis (5.5.1.).

7.6 **WRC**

The WRC was adopted primarily to confer on coastal States jurisdiction powers beyond the limits of their territorial sea and to back up these with the liability and compensation benefits (strict liability, compulsory insurance and right of direct action).[966] Nonetheless, coastal States are given the option to extend the geographical scope of application to waters under their territorial sovereignty. As of 24 February 2020, only 20 States availed themselves of this option.[967]

The WRC confirms the right of the coastal State to take intervention measures, including preventive measures, to combat risks posed by ships in peril in the waters under its territorial sea. However, the WRC is confined to the scenarios of maritime casualties,[968] which implies that the ship is already damaged or in imminent threat thereof.[969] Even so, the Convention preserves the right of the coastal State under general international law to take measures that go beyond the scope of the WRC,[970] which arguably includes measures against ships in peril that pose certain risks to the coastal State but are neither damaged nor in *imminent* threat (but simply *threat*) thereof. However, the coastal State is not allowed to rely on the liability and compensation benefits in relation to measures that fall outside the scope of the WRC. As Article 3 (2) prescribes, '[t]he provisions of articles 10, 11 and 12 of [the WRC] shall not apply to any measures so taken other than those referred to in articles 7, 8 and 9'.

The WRC requires the coastal State to abide by the principles of reasonableness, which has already been authoritatively confirmed as a general principle of international law that applies irrespective of the coastal State's sovereignty.[971] Furthermore, the WRC requires the principle of proportionality to be adhered to.[972] Whether the applicability of this principle in the waters under territorial sovereignty already represents general international law or it merely stands as a progressive development is controversial.

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[966] In the preparations of what now became the WRC, States were clear in that 'new instrument would not be aimed at the establishment of new rights of coastal States but at the uniform regulation of wreck removal activities'. See IMO doc, LEG 69/11 of 12 October 1993, 19.
[967] Albania, Antigua & Barbuda, Bahamas, Belize, Bulgaria, Canada, Croatia, Cyprus, Denmark, Finland, France, Kenya, Liberia, Malta, Marshall Islands, Niue, Panama, Sweden, the Netherlands, the United Kingdom. See IMO, Status of IMO Treaties, comprehensive information available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020.pdf> accessed 24 February 2020.
[968] Article 1 (4) of the WRC.
[969] Article 1 (3) of the WRC.
[970] Article 3 (2) of the WRC.
[971] The *Fisheries* Case (UK v. Norway), Judgment of 18 December 1951, ICJ Reports 1951, 116.
[972] Article 2 (2) of the WRC.

The WRC is a liability and compensation convention and in this respect, the extended application of the principle of proportionality is not surprising. However, when it comes to the jurisdictional part, the extended application of this principle is indeed surprising since it goes to the very core of territorial sovereignty. The sensitivity of this issue was apparent already at the time when the Intervention Convention was negotiated. The Soviet Union, advocating strongly for navigational interests, observed that it would be convenient if the coastal State in a given situation pays attention to the proportionality principle.[973] However, despite this convenience, the Soviet Union was not ready to accept any encroachment on territorial sovereignty as a matter of law.[974]

The application of the principle of proportionality, without making a distinction between the jurisdictional and the liability and compensation parts of the treaty, implies that not only may the coastal State be precluded from obtaining compensation, but also that it may be responsible and liable for damages caused to the ship if measures taken on account of the WRC prove to be disproportionate. This is what may explain the reluctance of coastal States to indeed make use of the WRC opt-in clause. This is also what makes a significant departure from the *Torrey Canyon* time.

One could perhaps argue that the extended application of the principle of proportionality should not be read too strictly when it comes to the jurisdictional part of the WRC because the purpose of the WRC was not to change international law in this respect. As apparent from the preparatory work of the Convention, the primary purpose for having extended application of the WRC was in fact to get the benefit in relation to the insurance cover and direct action.[975] This could be further supported by Article 3 (2) of the WRC, which makes it clear that the WRC does not prejudice the coastal State from taking within its territory measures other than those under the WRC, albeit it would not be able to benefit from the liability and compensation part, i.e. strict liability of the registered owner, backed with compulsory insurance and direct action. On the other hand, Article 3 (2), coupled with the preparatory work, may also be used to argue that the general perception of the principle of proportionality has shifted over time in that coastal States do not seem to be too jealous of their territorial sovereignty as at the time of the *Torrey Canyon*. In fact, this approach seems to be part of the general trend as reflected in

[973] See chapter 5 of the thesis (5.3.2.). See also IMO doc, LEG/CONF/C.1/SR.19 of 24 November 1969, 15.
[974] See IMO doc, LEG/CONF/C.1/SR.19 of 24 November 1969, 15.
[975] IMO doc, LEG 63/6 of 18 May 1990 paras 12-27 and LEG 77/5 of 13 February 1998, 3. See also Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 1 *Lloyd's Maritime and Commercial Law Quarterly* 100.

jurisprudence.[976] It remains to be seen in practice if and how States will actually make use of the opt-in clause.

Ultimately, it needs to be stressed that the WRC does not require the coastal State to consult with others in choosing and taking measures of intervention under the WRC, which clearly makes territorial sovereignty intact. By virtue of Article 4 (4) (a), the obligation to consult is explicitly excluded from the extended scope of application of the WRC. Nonetheless, given that the coastal State remains obliged to act reasonably and to take only those measures that are proportionate to the hazard,[977] the coastal State would probably have enough incentive to indeed contact the potentially affected States and the shipowner, and take into account their views. The consultation could for example play a significant role in the circumstances in which the coastal State receives the request for a place of refuge.

7.7 **Which Way is the Tide Flowing?**

The problem of places of refuge never made it to the stage of negotiating a legally binding instrument, which stands in clear contrast with issues of intervention and wreck removal. As mentioned in chapter 5, the CMI proposal clearly failed to obtain sufficient support at the IMO. All that States were able to agree upon were non-legally binding guidelines. Whether and to what extent this will change in the future remains uncertain. Nonetheless, based on a number of factors that surround the current state of international law and challenges encountered so far, certain observations may be made to shed some light on the way in which the tide is currently flowing and the potential way forward. These observations are essentially related to two main points: (i) the prevalence of the theory of the qualified right of refusal and (ii) the significance of the EU proposal for a revision of the IMO Guidelines.

7.7.1 The Prevalence of the Theory of the Qualified Right of Refusal

In practical terms, the problem of places of refuge may be presented as a push and pull dilemma, illustrated in paragraph 1.2 of the IMO Guidelines through the following question:

[976] For the analysis of some case law, see James Harrison, 'Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of UNCLOS Safeguards Relating to the Arrest of Foreign-Flagged Ships' (2018) 42 *L'Observateur des Nations Unies* 117-143.

[977] See Article 4 (4) (a) of the WRC, which excludes from the extended scope of application the obligation to consult (Article 9 (1) of the WRC), but not the obligation to act on the basis of the principle of reasonableness and proportionality (Articles 2 (2) and 2 (3) of the WRC).

> What to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?

Clearly, there is no straightforward answer to this question and the outcome will always depend on the circumstances of a given situation. However, in situations in which circumstances may point to each side (push and pull), the problem of places of refuge may boil down to the question of what is the point of departure. In other words, who has *prima facie* the right to what: is it the coastal State that has the right to refuse access to a place of refuge or is it the ship in need of assistance that has the right to access a place of refuge?[978]

So far, four main theories have been discussed at different stages among scholars: (i) the absolute right of access, (ii) the absolute right of refusal, (iii) the qualified right of access, and (iv) the qualified right of refusal.[979] The first theory should in the view of this author be disregarded from the very outset given it completely negates the coastal State's territorial sovereignty. The second theory should nowadays also be disregarded from the start given it negates the rights and interests of other States and the international community as a whole in regard to the protection and preservation of the marine environment, to which the entire Part XII of the LOSC is dedicated.[980] Moreover, as Judge Alvarez held in the *Anglo-Norwegian Fisheries* Case, while referring to the argument that States may do whatever not expressly forbidden by international law because of their sovereignty:

> [t]his principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States, but also by other factors…which make up what is called the international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibitions of abus de droit.[981]

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[978] Antunes raises similar question, albeit for reasons of brevity his paper does not deal with such a debate. See Antunes (n 892) 85. Hooydonk, however, dedicates a considerable space to this dilemma in his book on places of refuge. See Hooydonk (n 903) 117-179.

[979] For a comprehensive study on these theories see Hooydonk (n 903) 117-179.

[980] Røsæg and Ringbom explain that '[t]he right of the ship in distress to enter a place of refuge vis-à-vis the right of the coastal State concerned to deny such entry represents, in public international law, a balance in which neither right is absolute'. See Røsæg and Ringbom (n 846) 8.

[981] See the *Fisheries* Case (UK v. Norway), Judgment of 18 December 1951, ICJ Reports 1951, 116, Individual opinion of Judge Alvarez, 40. In the *Island of Palmas* Case, the sole arbitrator (President of the Permanent Court of International Justice) stated that '[t]erritorial sovereignty involves the exclusive right to display the activities of

It is the third and the fourth theory that merit further attention.

The third theory—the qualified right of access—advocates a good management that would balance all the interests affected while taking the presumed right of access as the point of departure.[982] One of its main arguments is that in a given situation the coastal State is both the judge and the interested party and so, the qualified right of access, according to this theory, prevents abuses and possible political pressures on the side of coastal States and prevents situations in which coastal States fail to give grounds for their decisions.[983] This theory is essentially reflected in the CMI proposal.

7.7.1.1 The CMI Proposal and the Theory of the Qualified Right of Access

Following the adoption of the IMO Guidelines, the CMI argued that a new instrument was needed to address the issue of places of refuge, namely a legally binding instrument that would impose clear obligations and responsibilities on coastal States.[984] The CMI was essentially of the view that:

> there is no international convention which expressly requires States, (or those charged with the responsibility of making decisions concerning requests for admission to a place of refuge), to act reasonably in carrying out assessments of the condition of vessels which are in need of assistance and seek that assistance. Whilst the guidelines annexed to IMO Resolution A949(23) make it clear that maritime authorities should, for each place of refuge, make an objective analysis of the advantages and disadvantages of allowing a ship to proceed to a place of refuge in waters under their jurisdiction, there is no compulsion on them to carry out such an assessment. The CMI fears that a repeat of the events which took place in 2001 and 2002, in relation to the vessels "Castor" and "Prestige", may take place again in the future.[985]

To say that there is 'no international convention which expressly requires States […] to act reasonably' does not seem to be sufficiently precise because international law indeed demands from States that they act reasonably at any time and not even the principle of territorial

a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States'. See the *Island of Palmas* Case (USA v. The Netherlands), Permanent Court of International Justice, Award of 4 April 1928, 9.

[982] Erik van Hooydonk, 'The Obligation to Offer a Place of Refuge to a Ship in Distress' in *CMI Yearbook 2003* (Comite Maritime International 2003) 432.

[983] Hooydonk (n 903) 431.

[984] See IMO doc, LEG 89/16 of 4 November 2004.

[985] The CMI Summary, available at <https://comitemaritime.org/wp-content/uploads/2018/05/Refugee.pdf> accessed 31 October 2019. See also IMO doc, LEG 89/16 of 4 November 2004.

sovereignty can take that away, as demonstrated earlier. What is rather apparent is that no international convention explicitly stipulates that the principle of reasonableness implies access to a place of refuge as the point of departure. Moreover, no international convention actually obliges the coastal State to follow exactly what the IMO Guidelines recommend.

The CMI suggested the adoption of an IMO instrument that would give legally-binding character to the IMO Guidelines, as well as to any other applicable regional agreements or standards.[986] This indeed seems a laudable proposal, at least in relation to the risks and factors that coastal States would be obliged to weigh in order to make well-informed, sound and transparent decisions that would prevent abuses, political pressures and rejections without inspections (as appeared particularly problematic in the case of the *Castor*[987]). It surely complements Article 197 of the LOSC, which speaks of both global and regional cooperation in 'formulating and elaborating international rules, standards and recommended practices and procedures' for the protection and preservation of the marine environment.

The CMI further suggested that the scope of application of a new legally-binding instrument be defined in a similar way as the scope of the IMO Guidelines. However, the definition of the term 'place of refuge' was expanded to include the 'loss of the ship and its cargo' to follow up on the concerns of the IUMI.[988] In this respect, it is worth recalling from chapter 5 that the IMO Guidelines define a place of refuge as a place where a ship can take certain actions to stabilize its condition 'and reduce the hazards to navigation, and to protect human life and the environment'.[989] The IMO Guidelines do not make any particular reference to the prevention of loss of the ship and its cargo being the purpose of a place of refuge, but do recommend the inspection team to have 'due regard […] to the preservation of the hull, machinery and cargo'.[990] However, these two are different things. Omitting the interests of the ship and its cargo from the purpose of a place of refuge suggests that these interests are somewhat less important if juxtaposed to the interests of safety of navigation and protection of the environment.

The main problem, however, lies in the proposal that in essence tried to shift the burden of proof suggesting that coastal States should have a firm obligation to grant refuge by way of a presumption, even though the presumption would be rebuttable if the coastal State itself shows

[986] Article 1 (e) of the CMI draft instrument in relation to Article 6 of the CMI draft instrument. See also Richard Shaw, 'CMI Working Group on Places of Refuge' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 209.
[987] See chapter 5 of the thesis (5.5.1.).
[988] Morrison (n 882) 292.
[989] Emphasis added.
[990] Paragraph 3.11 of the IMO Guidelines on Places of Refuge.

that it would be unreasonable to grant access.[991] In the view of this author, this proposal stands as a radical and unrealistic approach, as will be explained below.

Acknowledging how sensitive it is to put upon coastal States the burden of a rebuttable presumption, the CMI proposal suggested that coastal States be given immunity from liability in cases in which refuge is granted, but loss or damage would nevertheless be caused to third parties.[992] Yet, immunity would in that case be linked to the principle of reasonableness, which would be on the coastal State to show.[993] The same would apply in case the coastal State denies refuge and the loss or damage occurs to third parties – the coastal State would be liable, unless it could show the reasonableness of its actions.[994]

While both situations boil down to the question of reasonableness, they must nevertheless be distinguished. Once provided with legally-binding character, coupled with the presumed obligation on the side of the coastal State to honor refuge, the IMO Guidelines would suggest a greater need for justification of reasonableness in case of refusal. Namely, the point of departure of these Guidelines is that 'the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel's condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard'. In this respect, according to these Guidelines, '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', which operation 'is best carried out in a place of refuge'. Moreover, they indicate that 'in fact it is rarely possible to deal satisfactorily and effectively with a marine [maritime] casualty in open sea conditions'. Hence, if the coastal State wants to deny refuge, it would be very hard to argue on the reasonableness of its decision.

These opening remarks of the IMO Guidelines in essence speak of an ideal situation. To the knowledge of this author, there is no specific data that shows that in the majority of cases in which the place of refuge was refused pollution would have actually been prevented or minimized had the refuge been granted. Recalling the accident of the *Prestige*, the salvors were apparently objecting to the decision of towing the ship further to open sea and argued in favour of taking the ship to port.[995] In this respect, some observations were made that the catastrophe

[991] Article 3 of the CMI draft instrument. See also Hooydonk (n 903) 238.
[992] Article 4 of the CMI draft instrument.
[993] Article 5 of the CMI draft instrument.
[994] Article 6 of the CMI draft instrument.
[995] Antunes (n 892) 98.

could have been prevented or minimized had the *Prestige* been granted refuge.[996] While this scenario could have been possible, there is no firm evidence that this would have indeed happened. Antunes reminds of an old saying and observes as follows:

> *Beware of opinions from someone who does not have to live with the consequences of a decision.* [and, as he adds] It is especially so when such opinions are provided in hindsight. […] 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 Finisterre could hypothetically result in an environmental catastrophe similar or worse to that which ultimately occurred.[997]

In the case of the *Tribulus* (1990), Ireland granted place of refuge, although the ship subsequently caused pollution in Bantry Bay, which is why Ireland refused to grant a place of refuge to the *Toledo*.[998] These observations, coupled with the presumed obligation to grant refuge, imply that the CMI proposal would put the coastal State in extremely inconvenient situation, as it would be much easier to attribute adverse consequences to the decision-making of the coastal State.[999] This would be easier not only because of the opening remarks of the IMO Guidelines, but also because the CMI proposal suggested an obligation for coastal States to designate places of refuge in advance (without, however, being obliged to make information on their location publicly available) and to draw up plans to accommodate ships in need of assistance in a place of refuge.[1000]

At present, no international obligation exists that would require coastal States to be prepared in advance and to draw up plans specifically for the scenarios of places of refuge. To create such an obligation does not *per se* seem such a radical intrusion into territorial sovereignty and it could be applauded in the context of preventing abuses and unnecessary delays under political pressure. However, such an obligation would seem radical if combined with the obligation (rather than the right) to grant refuge as it would pose a significant encroachment upon the most sensitive issue in international law – territorial sovereignty, without a sound justification for it.

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[996] Richard Shaw, 'Places of Refuge – International Law in the Making?' in *CMI Yearbook 2003* (Comite Maritime International 2003) 333-334.
[997] Antunes (n 892) 103-104.
[998] Chircop (n 857) 159.
[999] In fact, during the 84th session of the LEG, concerns were expressed that, at some time in the future, the decision to refuse entry to a ship in distress might subject the coastal State to some degree of liability for failing to put alternative measures in place. See IMO doc, LEG 84/14 of 7 May 2002, para 94.
[1000] Article 8 of the CMI draft instrument.

Accommodating in a place of refuge a ship in need of assistance can only be seen as one type of a conceivable measure of response to incidents at sea. In other words, it should be seen the same way as in fact towing a ship further to open sea.[1001] Making a place of refuge an obligation would in essence extrapolate such a measure from some sort of a lower level (types of measures) to a higher level (rule of response) and diminish the core principle of territorial sovereignty. The fact that there were different opinions even in the case of the *Prestige* that was leaking oil when requesting refuge clearly speaks of the problem of extrapolating a place of refuge from the types of measures to the rule of response. This extrapolation would also refute the right of intervention and wreck removal. At any rate, international law is simply developing in the opposite direction in this particular field of coastal State jurisdiction over foreign ships in peril and shipwrecks.

7.7.1.2 The Direction of Legal Developments in the Field

The direction of legal developments in the field of maritime accidents firmly and persistently inclines towards the right of the coastal State as the point of departure. The WRC is a good example in this respect. As explained in the previous chapter, the WRC gives the coastal State significant powers in relation to ships that are not yet sunken or stranded but may reasonably be expected to so become if 'measures to assist the ship or any property in danger are not already being taken'.[1002] Given the definition of the term 'removal' as provided in Article 1 (7), the WRC gives the coastal State powers to indeed take measures to prevent the ship from sinking or stranding. Accommodating a ship in a place of refuge may be one such preventive measure. Moreover, it may be a measure that provides 'effective' assistance to the ship. Yet, no reference to any specific obligation concerning refuge was made.

These developments only confirm the direction already triggered in the negotiations of the Salvage Convention. Namely, the IMO first considered the problem of places of refuge from a legal point of view during the negotiations of the Salvage Convention, when some suggestions were made that the Convention should contain a provision which would impose a clear obligation on coastal States to grant access to a place of refuge.[1003] However, the view of the majority was that a 'public law' rule should not be introduced in a treaty of a 'private law' character.[1004] Ultimately, it was decided to leave the places of refuge problem outside the scope

[1001] See chapter 2 (2.3.).
[1002] Article 1 (4) (d) of the WRC.
[1003] IMO doc, LEG 83/13/3 of 28 August 2001, para 5-7.
[1004] IMO doc, LEG 83/13/3 of 28 August 2001, para 5.

of the Salvage Convention, based on the fact that places of refuge require 'stricter' requirements to be followed by coastal States and that the inclusion of those requirements into the Salvage Convention might endanger its successful outcome (entry into force).[1005] Nevertheless, it was agreed that the Salvage Convention would include a provision to require cooperation between the actors involved in the matter, as explained earlier.

The CMI proposal was surely an attempt to succeed in what the Salvage Convention failed to address. However, as explained in chapter 5, the CMI proposal was primarily pushed by industry, supported by the NGOs with environmental interests. At the same time, the IG P&I Clubs seemed to have a more realistic view in that they did not really push for a new treaty but were merely of an opinion that the IMO Guidelines suffice and that a treaty initiative would make sense only after the functioning of the liability conventions had been evaluated.[1006] However, as previously discussed, the IMO liability and compensation conventions do not adequately address the coastal State's concerns in relation to socio-economic and environmental risks posed by ships in peril that need refuge. This means that the coastal State, depending on the circumstances of a given situation, may reasonably subject access to a place of refuge to conditions that are more stringent than those stipulated under the IMO liability and compensation conventions.

All these points clearly confirm the fourth theory as the direction of the evolvement of international law in the matter – the qualified right of refusal, which advocates the balancing act of weighing different factors and reaching an *ad hoc* decision, having the presumed right of refusal as the point of departure. While this theory has been criticized for leading to potential abuses and a failure by coastal States to give grounds for their decisions,[1007] such criticism does not seem to be convincing enough to give the preference to the third theory by reversing the burden of proof against the coastal State. Coastal States remain obliged to act reasonably at any time, not to abuse their rights and to give proper consideration to the interests of others. While

[1005] In reference to the CMI draft proposal on the obligation of States to cooperate on places of refuge matters, the preparatory work of the 1989 Salvage Convention suggests as follows: 'Some observers suggested that this article should place stronger obligations on States. Accordingly, several proposals were introduced to either pre-designate ports of refuge or to ensure the effectiveness of an adequate contingency plan. After due consideration, the Committee decided to retain the article in the form drafted by the CMI, rather than including more specific or far reaching obligations which, in imposing stricter requirements upon States, might delay the entry into force of the prospective salvage convention; other treaties, such as the regional conventions established in various parts of the world, could be relied on to meet the needs of vessels in distress. (LEG 56/9 - paragraphs 87 to 95)'. See CMI, *The Travaux Préparatoires of the Convention on Salvage 1989* (Comité Maritime International 2003) 285.

[1006] IMO doc, LEG 89/7/1 of 24 September 2004, para 5. See also Hooydonk (n 903) 181; Andrew Bardot, 'Places of Refuge for Ships in Distress The P&I Insurer's Perspective' in *CMI Yearbook 2009 Part II* (Comite Maritime International 2009) 200.

[1007] Hooydonk (n 903) 431.

it is inevitable that the starting point is the coastal State's right (rather than obligation), the potential way forward, in the view of this author, should be to work more on a robust due diligence regime and to require the coastal State to be prepared in advance, to be formally involved in the decision-making once provided with the request for a place of refuge and to state grounds for its decisions. In this respect, the EU legislation may assist as a model.

7.7.2 The EU Proposal for a Revision of the IMO Guidelines on Places of Refuge

In August 2018, the IMO received a proposal from EU Member States and the relevant industry stakeholders[1008] for a revision of the IMO Guidelines on Places of Refuge.[1009] The proposal advocates the IMO Guidelines to be amended on the basis of the EU Guidelines.[1010] The proposal makes it clear that the IMO is not expected to take the solutions of the EU Guidelines in their entirety but only in relation to its relevant parts.[1011] Before delving into the content of the EU Guidelines, it is important to realize that these guidelines operate within the robust due diligence regime, which calls for certain preliminary observations to be made.

7.7.2.1 EU Legal Framework on Places of Refuge (VTMIS Directive)

The EU legislation is often referred to in the context of improved maritime safety due to strict and efficient policy, mainly captured under the three packages adopted in the wake of the disasters with the *Erika* and the *Prestige*.[1012] While these packages put a significant burden on the maritime interests, the EU legislation is also known for being burdensome on coastal States due to its environment-oriented policy.[1013] Of particular relevance for this thesis is the Directive

[1008] The ICS, IUMI, BIMCO, ISU, INTERTANKO and IG P&I Clubs.
[1009] IMO doc, MSC 100/17/1 of 3 August 2018.
[1010] IMO doc, MSC 100/17/1 of 3 August 2018, MSC 100/17/1/Corr.1 of 21 August 2018 and NCSR 7/13 of 15 October 2019.
[1011] IMO doc, MSC 100/17/1 of 3 August 2018, 6.
[1012] The Erika I Package was about immediate measures concerned with: (i) more efficient port state control, (ii) stricter monitoring of the classification societies regarding ship inspection and (iii) replacement of single-hull oil tankers with double-hull oil tankers. The Erika II Package was about long-term measures concerning (i) monitoring, controlling and setting up an information system, (ii) establishing fund to compensate victims of oil pollution and (iii) the creation of a Maritime Safety Agency to monitor the organization and effectiveness of national inspections. The Erika III Package builds on long-term measures concerning port state control, liability and compensation system, classification societies, places of refuge and investigation. See Christina Ratcliff, 'Maritime Transport: Traffic and Safety Rules', paper available at <http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.4.11.pdf> accessed 31 October 2019.
[1013] The EU legislation essentially rests on the four main pillars: (i) precaution, (ii) prevention, (iii) rectifying pollution at source and (iv) 'polluter pays'. See Tina Ohliger, 'Environmental Policy: General Principles and Basic Framework', paper available at <http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.5.1.pdf> accessed 31 October 2019. For more on EU policy see Philippe Sands, 'European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection' (1991) 100 *Yale Law Journal* 2511.

2002/59/EC, as amended (VTMIS Directive),[1014] given it addresses the places of refuge problem.

The VTMIS Directive spells out in Article 18 the right of the coastal State to take measures of response to incidents at sea, including the right to prohibit a ship in need of assistance to enter or leave its ports.[1015] Article 18 (1) (b) of the VTMIS Directive stipulates that:

> Where the competent authorities designated by Member States consider, in the event of exceptionally bad weather or sea conditions, that there is a serious threat of pollution of their shipping areas or coastal zones, or of the shipping areas or coastal zones of other States, or that the safety of human life is in danger:
>
> […]
>
> (b) they may take, without prejudice to the duty of assistance to ships in distress and in accordance with Article 20, any other appropriate measures, which may include a recommendation or a prohibition either for a particular ship or for ships in general to enter or leave the port in the areas affected, until it has been established that there is no longer a risk to human life and/or to the environment.

The coastal State is therefore undoubtedly confirmed the right to decide on the request for a place of refuge by denying it. However, Article 18 makes it clear that it applies in cases of 'exceptionally bad weather or sea conditions' when there is a 'serious threat of pollution'. The term 'exceptionally bad weather or sea conditions' point at the situation of *force majeure*. Yet, it is coupled with the term 'serious threat of pollution', which means that if a ship runs into peril at sea due to *force majeure*, but remains in stable and seaworthy conditions and no serious threat of pollution exists, it would surely be unreasonable to deny refuge. Nonetheless, the term 'serious threat of pollution' is loose enough to give the coastal State considerable discretion.

When it comes to measures of response to incidents or accidents at sea in general (not necessarily concerned with scenarios of places of refuge, but still of a 'significant' risk), Article 19 of the VTMIS Directive imposes an *obligation* on the coastal State to take all appropriate measures necessary to ensure the safety of shipping and of persons, and to protect the marine and coastal environment.[1016] This obligation essentially means that the coastal State has the

[1014] Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002, as amended. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002L0059-20141118> accessed 31 October 2019.
[1015] Article 18 (1) (b) of the VTMIS Directive.
[1016] Article 19 (1) of the VTMIS Directive. Emphasis added.

obligation to take measures of intervention into maritime casualties, as opposed to the right to so do, and clearly suggests that the coastal State is in no case allowed to stay passive. In this respect, a non-exhaustive list of conceivable measures is provided in Annex IV of the Directive. Such a list refers, *inter alia*, to a measure of instruction given to the master 'to put in at a place of refuge in the event of imminent peril, or cause the ship to be piloted or towed'. Hence, accommodating a ship in a place of refuge is confirmed as one of many other conceivable measures of response to an incident or accident at sea.

The VTMIS Directive is greatly influenced by the IMO Guidelines.[1017] Yet, there exists a significant distinction in that the VTMIS Directive transforms some of the IMO recommendations into obligations for EU Member States. Despite the fact that the coastal State is confirmed the *right* to decide on a place of refuge by denying it, the coastal State is *obliged* to provide the formal decision in this respect[1018] and to make various advance preparations. Namely, the coastal State is obliged to designate one or more specific competent authorities with expertise and power to take independent decisions concerning requests for a place of refuge.[1019] As pointed out earlier, no such obligation exists on the global level and a possible explanation may be found in the lack of financial or personnel capacities of some developing States.

Next, the coastal State is obliged to draw up plans for the accommodation of ships in need of assistance. According to Article 20a (1):

> Member States shall draw up plans for the accommodation of ships in order to respond to threats presented by ships in need of assistance in the waters under their jurisdiction, including, where applicable, threats to human life and the environment. The authority or authorities referred to in Article 20 (1) shall participate in drawing up and carrying out those plans.

It is interesting to observe the difference in the original text of the cited provision, which was Article 20 (1) of the Directive 2002/59/EC prescribing that:

> Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and

[1017] Recital 11 of the Preamble of the EU Directive 2009/17/EC. To be more precise, it is the Directive 2009/17/EC which was greatly influenced by the IMO Guidelines.
[1018] Article 20b of the VTMIS Directive. Emphasis added.
[1019] Article 20 of the VTMIS Directive.

> procedures taking into account *operational and environmental constraints*, to ensure that ships in distress may immediately go to a place of refuge subject to *authorization by the competent authority*. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.[1020]

The reference to 'operational and environmental constraints' and 'authorization by the competent authority' is omitted in the current text as an attempt to make the places of refuge procedure even more robust.[1021] This conclusion is also supported by Article 20b which stipulates that the national authorities have an obligation to 'decide on the acceptance of a ship in a place of refuge'.[1022] The omission of the word 'refusal' (which was included in the original version of the Directive, but was subsequently deleted) next to the word 'acceptance' confirms that the EU legislation is inclining towards 'acceptance', which explains why the phrases 'operational and environmental constraints' and 'authorization by the competent authority' are now omitted. Despite the fact that the EU legislation inclines towards acceptance, the coastal State is confirmed the right to decide on the request for a place of refuge by denying it.

At the same time, the coastal State is explicitly obliged to take appropriate measures necessary to ensure safety of navigation, safety of lives and the protection and preservation of the marine and coastal environment, and for that matter to make a formal decision based on the specific assessment, which must be carried out on the basis of the previously mentioned plans for the accommodation of ships in need of assistance. To ensure safety of navigation, for example, the coastal State would be obliged to take into consideration whether granting access to a place of refuge may prevent a ship from becoming a hazardous shipwreck or whether it may prevent a drifting ship from creating an obstruction to navigation in a busy shipping lane. However, no reference is made to saving the ship or its cargo as being the purpose of a place of refuge.

Once provided with the request for a place of refuge, the coastal State may require a ship to provide financial security for possible claims that may arise if the ship is provided with a place of refuge and things eventually go wrong.[1023] However, the VTMIS Directive makes it clear that the absence of such a security does not exonerate the coastal State from its obligation to

[1020] Emphasis added.
[1021] Anthony Morrison, 'Shelter from the Storm – the Problem of Places of refuge for Ships in Distress and Proposals to Remedy the Problem' (PhD thesis, University of Wollongong 2011) 269.
[1022] Article 20b of the VTMIS Directive.
[1023] As confirmed in Article 20c (2) of the VTMIS Directive, the coastal State may request the ship to present an insurance certificate, within the meaning of Article 6 of the EU Directive 2009/20/EC.

undertake a preliminary assessment and cannot in itself be considered sufficient reason for the coastal State to refuse to accommodate a ship in need of assistance in a place of refuge.[1024] This complements the obligation imposed on the coastal State to actually take measures of intervention and the idea that ships should be admitted to a place of refuge if such an accommodation is truly 'the best course of action' in a given situation.[1025] The requirement of financial security must also not lead to a delay in the decision-making process, if the coastal State already decided to grant access.[1026]

7.7.2.2 EU Guidelines on Places of Refuge

The EU Guidelines[1027] were adopted after several years of experience and lessons learned in practice. These Guidelines are by and large based on the results of the Table-top exercise (TTE) program, which tested in practice some critical areas to assess, adjust and improve their operational use.[1028] This is what makes the key argument for the revision of the IMO Guidelines. The critical areas in point concern: (i) coordination and cooperation among States and other actors involved; (ii) designation of a specific national competent authority; (iii) clarification of the roles and responsibilities of parties involved, including insurers and classification societies;[1029] (iv) process, communication and reporting procedure; (v) handover procedure; (vi) media and information handling; (vii) learning from experience; (viii) administrative amendments.[1030] If compared to the IMO Guidelines, the EU Guidelines are clearly more informed, better structured and up to date.

[1024] Article 20c (1) of the VTMIS Directive.

[1025] See Articles 20 (2) and 20b of the VTMIS Directive, and Recital 12 of the Preamble, which spells out that '[t]o make provision for ships in need of assistance as referred to in IMO Resolution A.949 (23), one or more competent authorities should be designated to take decisions with a view to minimising risks to maritime safety, the safety of human life and the environment'. Moreover, the Directive's Preamble also explains that the accommodation of ships in need of assistance in a place of refuge is important in case of events 'that could give rise to the loss of a vessel or an environmental or navigational hazard'. The same Preamble further explains in Recital 16 that the accommodation of ships in need of assistance in a place of refuge is important in case of events 'that could give rise to the loss of a vessel or an environmental or navigational hazard'. The concept of 'navigational hazard' was not mentioned in the Preamble of the VTMIS Directive prior to the 2009 amendments.

[1026] Article 20c (2) of the VTMIS Directive.

[1027] Available at <https://ec.europa.eu/transport/sites/transport/files/por-operational-guidelines.pdf> accessed 31 October 2019.

[1028] The Table Top Exercises (TTE) program was running between 2013 and 2019. Within this program, the EU Guidelines have been tested in 4 different scenarios resembling real situations to the maximum extent possible. The host countries were the Netherlands in 2013, Malta in 2015, Norway in 2017 and Spain in 2019.

[1029] As far as classification societies are concerned, their input may prove particularly important in the stage of information gathering and risk assessment as they may for example provide information on the ship's stability and structural integrity. P&I Clubs, on the other hand, may play a critical role in obtaining information from the shipowner and ship operator.

[1030] IMO doc, NCSR 7/13 of 15 October 2019, 2-3.

Moreover, the EU Guidelines tackle both the preparedness as well as the response stage. The former is a direct consequence of the obligation to draw up plans for accommodating ships in need of assistance, which does not exist on the global level (not to be confused with the OPRC obligation). As far as the response stage is concerned, the EU Guidelines are premised on the right of the coastal State to refuse access to a place of refuge as the starting point. At the same time, these Guidelines operate on the basis of the obligation of the coastal State to actually take an adequate measure of response to incidents at sea to ensure safety of lives, safety of navigation, and protection of the marine and coastal environment.

In essence, there shall be 'no rejection without inspection' and thus, prior to deciding on any refusal, the coastal State is expected to conduct a risk assessment. In this respect, there is a list of information to be collected and weighed.[1031] A risk assessment is required even in cases of the highest urgency, albeit only a minimum amount of information would then have to be assessed. It is not clear what the minimum would be, but:

> [t]he quicker the decision has to be taken, the priorities to be considered in the decision making process must be those which are considered to be key from a socio-economic, public health and environmental perspective.[1032]

As no specific further guidance is provided, the coastal State is in this respect provided a significant discretion. The coastal State is at any time expected to assess: (i) the risk if the ship remains at sea as opposed to the alternative of moving it to a place of refuge and (ii) the risk if the ship is to be directed or recommended to a place of refuge. More importantly, the coastal State is expected to explain its decision.[1033] According to the EU Guidelines, before taking any decision, the coastal State is expected to complete the necessary risk assessments and/or inspection visits and cannot refuse access to a place of refuge only for commercial, financial or insurance reasons. If the coastal State is unable to accept a request for a place of refuge, it

[1031] Information in point includes: (i) basic information regarding ship and crew such as name, ship's position, size, draft etc., (ii) nature of incident, including information on the hull and machinery damage assessment, location of incident etc., (iii) environmental considerations concerning weather, sea state and tidal conditions, as well as ice conditions, (iv) pollution potential, including information on the type and quantity of bunkers and cargo, (v) environmental and public health considerations, including information on the proximity to human population, proximity to ports and other ships, (vi) information regarding owners and insurers, (viii) information on the initial response taken, (ix) master's or salvor's appraisal of the situation and (x) future intentions. See Appendix D of the EU Operational Guidelines on Places of Refuge, 40.
[1032] Paragraph 5.1 of the EU Operational Guidelines on Places of Refuge.
[1033] Paragraph 6.1.2. of the EU Operational Guidelines on Places of Refuge.

should point out the reason for its decision,[1034] which reason must be objective, rather than subjective.[1035]

The EU Guidelines work on the premise that the request for a place of refuge may be of concern to more than just one coastal State. While the decision-making process lies with the single coastal State, the problem of places of refuge may in practice involve a group of neighboring States. The incident of the *MSC Flaminia* illustrates the point.[1036] Against this backdrop, the EU Guidelines make a clear emphasis on the places of refuge coordination and cooperation element, which is something the IMO Guidelines lack. As stated in the EU Guidelines:

> [a] coordinated approach in managing PoR [places of refuge] requests is the solution towards which all efforts are to be made. All neighboring coastal states may always be involved *nolens volens* since risks can abruptly revolve to the jurisdiction of another NCA [neighboring coastal State] (e.g., wind direction change, etc …). […] The overall risk is always a common challenge that needs to be addressed within a mindset where each NCA put themselves "in one another's shoes" and shares the endeavor. In such a framework the passage plan for possible handover should always be the most valuable ready alternative.[1037]

In principle, each State involved in the process should start to examine its ability to provide a place of refuge and should share information with others. There should be direct contact between the competent authorities to decide who is best placed to take the role of the coordinator.[1038] If the place of refuge request immediately follows a search and rescue (SAR) operation, the SAR region in which the incident occurs should be the starting point for deciding who is responsible for the initial coordination of the places of refuge request, in order to ensure the continuity of coordination throughout the handling of the incident.[1039] In principle, each State involved should examine its ability to provide a place of refuge. Nonetheless, the EU

[1034] This may relate to: (i) safety of persons on board and threat to public safety on shore; (ii) environmental sensitivities; (iii) lack of availability of suitable resources at a desired place of refuge and concern over structural stability and ability for ship to make successful safe transit to same; (iv) prevailing and forecast weather conditions, i.e. lack of sheltered area for proposed works; (v) physical limitations and constraints, including bathymetry, navigational characteristics; (vi) foreseeable consequences escalation, i.e. pollution, fire, toxic and explosion risk; (vii) any other reason. See paragraph 6.1.2. of the EU Operational Guidelines on Places of Refuge.

[1035] Paragraph 6.1.3 of the EU Operational Guidelines on Places of Refuge. See also Identifier K ('reason for not granting a place of refuge') on the 'Member State Handover Co-ordination Form' in Appendix F.

[1036] See information available at <https://ec.europa.eu/transport/modes/maritime/digital-services/places-of-refuge_en> accessed 31 October 2019.

[1037] EU – EEA Member States, Table Top Exercise on the EU Operational Guidelines – Places of Refuge, NCA CHEM, Horten, Norway, Exercise Report, October 2017, 28.

[1038] Chapter 3 of the EU Operational Guidelines on Places of Refuge, 24.

[1039] Paragraph 3.1.1. of the EU Operational Guidelines on Places of Refuge.

Guidelines explicitly recognize that the final decision on granting a place of refuge is solely the responsibility of the Member State concerned, albeit each State should share any information relative to the potential places of refuge it is examining with the other States involved.[1040] If the coastal State cannot provide a suitable place of refuge, it is expected to communicate this to other parties involved.

The EU approach to places of refuge is strongly built on cooperation and coordination[1041] and this is where the IMO Guidelines could, and in the view of this author should, be amended. Cooperation and coordination is an important element if one is to think of an efficient and practical response to the problem, which inevitably requires regional cooperation. While the IMO Guidelines cannot impose a legal obligation on coastal States to follow a certain procedure on cooperation and coordination in scenarios of places of refuge, an obligation to cooperate may in a given situation be derived from the LOSC as some sort of a 'Grundnorm'[1042] of Part XII. The IMO Guidelines may in this respect assist States and amending these on the basis of the EU Guidelines indeed seems a laudable step forward.

Furthermore, it is rather clear that the EU policy in relation to the places of refuge problem attempts to combat the 'not-in-my-backyard' syndrome through the principle of preparedness and formal involvement in the decision-making process,[1043] ultimately leading to the approach of no rejection without inspection and explanation.[1044] On the global level, there is no obligation imposed on coastal States in this regard and the non-legally binding nature of the IMO Guidelines cannot rectify this. At the same time, while the IMO Guidelines are a non-legally

[1040] Paragraph 4.2. of the EU Operational Guidelines on Places of Refuge.

[1041] While the EU solutions on cooperation and coordination were brought to this study given the EU proposal for changes of the IMO Guidelines, it should be nevertheless pointed out that the EU is not the only regional arrangement that exists in this respect. There are other agreements that, even though not tailored specifically for places of refuge, nevertheless serve the same purpose and indeed include places of refuge in some parts. The agreements in point are the 1983 Bonn Agreement and the 1974 Helsinki Convention. See the 1983 Bonn Agreement for Cooperation in Dealing With Pollution of the North Sea by Oil and Other Harmful Substances, available at <https://www.bonnagreement.org/site/assets/files/3831/chapter29_text_of_the_bonn_agreement.pdf> accessed 31 October 2019; The 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, available at <http://www.helcom.fi/about-us/convention/annexes/annex-iv> accessed 31 October 2019.

[1042] In the words of Judge Wolfrum: '[t]he obligation to cooperate with other States whose interests may be affected is a Grundnorm of Part XII of the Convention, as of customary international law for the protection of the environment'. See the *Mox Plant* Case (Ireland v. UK), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate Opinion of Judge Wolfrum, 135.

[1043] In this respect, the salvors welcome the EU approach as in their view 'a negative response to a PoR [place of refuge] request is far preferable to no response at all'. See EU – EEA Table Top Exercise, NCA CHEM (n 1037) 19.

[1044] In other words, the EU approach shows that the mindset is changing in a way that: '"rejection" no longer is the end of the process at national level, but a hand-over to a neighboring state, in the interests of overall safety and in mitigation of any type of pollution whether at sea or in the air'. See EU – EEA Table Top Exercise, NCA CHEM (n 1037) 28.

binding instrument, they are still significant as a source of best practice and, as put by Noyes, these guidelines are indeed 'likely to influence State practice'.[1045] Some developing States could perhaps not afford such a robust regime as the one existing within the EU. While imposing an obligation to be prepared in advance does not seem to be so radical and unrealistic, but truly laudable solution, it could nevertheless require more to be done in alleviating financial and technical burdens.

Ultimately, few observations need to be made in relation to some of the language suggestions concerning potential amendments to the IMO Guidelines. It first needs to be noted that the EU proposal suggests the omission of paragraph 1.4 from the General Introduction. This paragraph in its relevant part reads as follows:

> […] to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

In the view of this author, while the omission of this statement from the IMO Guidelines would not have an impact on international law, it may nevertheless prove significant from the basic human psychology aspect given that such a statement may under political pressure create unnecessary reluctance on the side of the coastal State to give serious considerations to the relevant factors that may prove critical in a given situation, such as the stability and structural integrity of the ship.

The purpose of places of refuge, as defined in paragraph 1.19 of the IMO Guidelines, remains intact. However, later on in the text, the EU proposal suggests the purpose be expanded so to include the preservation of the ship and cargo, in addition to the safety of lives, safety of navigation and environmental considerations.[1046] This could encounter opposition among some coastal States. Recalling earlier discussion, when the CMI proposed the same, States were not willing to accept it and a possible explanation may be found in the idea that in cases of conflicts, the interests on the side of the ship should not be given the same weight as the interests of coastal States.

Furthermore, the EU proposal inclines towards acceptance as it operates on the assumption that the coastal State has the 'obligation to perform the risk assessment and to decide on the acceptance of the ship in a place of refuge'.[1047] There is no reference to the term 'refusal' next

[1045] Noyes (n 890) para 18.
[1046] See paragraph 3.5.1. of the EU draft proposal.
[1047] See paragraph 3.5.2. of the EU draft proposal.

to the term 'acceptance'. If amended accordingly, the IMO Guidelines may in this respect have an impact on the development of best practice, albeit the starting point would still be the same: the right of refusal.

Lastly, the EU Guidelines are based on the assumption that the coastal State is allowed to take intervention measures only in scenarios of 'serious and imminent risk to its coastline or related interests'.[1048] As discussed in chapter 6, this author takes the view that Article 221 of the LOSC lowered the threshold for the right of intervention to be invoked in that the requirement of 'grave and imminent danger' is now omitted (albeit it is still present within the liability and compensation regime). The EU proposal, if accepted, would essentially re-introduce this requirement given that States would then implicitly make assumptions regarding the current state of international law.

How the IMO will approach the EU proposal and how States will implement the IMO Guidelines (once amended) in practice is yet to be seen. The message the EU proposal clearly sends is that refusals of access to refuge should be minimized and abuses of rights (accompanied with political pressures and unnecessary delays) prevented through the rather robust due diligence regime and the system of cooperation and coordination.

7.8 **Conclusions**

In waters under its territorial sovereignty, the coastal State is in principle free under general international law to decide on how to combat socio-economic and environmental risks posed by ships in peril, subject to the obligation not to hamper the right of these ships to exercise innocent transit and archipelagic sea lanes passage. By running into perils at sea, ships do not automatically lose the right to exercise such passage. On the contrary, in scenarios of distress and *force majeure* and depending on the circumstances of a given situation, these ships may stop and anchor and take the necessary assistance, or simply reduce speed, without asking the coastal State for permission and without its intervention.

In the scenarios of maritime casualties, however, the coastal State is given the right to intervene, subject to arguably less strict conditions than beyond the limits of its territorial sea – at least in terms of the seriousness of a risk at stake and the probability of its realization. Whether the coastal State remains restricted in its actions through the principle of proportionality is debatable. While the WRC was adopted primarily for maritime zones beyond the area of

[1048] See paragraph 3.5.6. of the EU draft proposal.

territorial sovereignty, it contains an opt-in clause that enables States to extend its application to waters under their territories. Despite a number of provisions being non-applicable in the waters under territorial sovereignty, the principle of proportionality continues to apply. This is a significant departure from the *Torrey Canyon* time. When the Intervention Convention was negotiated, the extended application did not find any success among delegates precisely because they saw the proportionality principle as encroaching too much on territorial sovereignty. The WRC is a liability and compensation convention and in this respect the applicability of this principle is simply unavoidable. However, whether the proportionality principle finds its place in general international law is not entirely clear. There is surely room to argue that the general perception of the principle of proportionality has shifted over time, especially given some general trends in jurisprudence.

While ships in peril enjoy the right of innocent transit and archipelagic sea lanes passage (even though only in limited scenarios), these ships do not enjoy any specific right to enter a place of refuge in ports or internal waters of the coastal State (unless this is necessary to save human lives). It is the right of the coastal State to decide whether to honor refuge, deny it, or to make it subject to certain conditions such as the presentation of a financial security. The latter may even be subject to more stringent rules than those under the existing IMO liability and compensation conventions. However, the coastal State is obliged to act on the basis of the general principles of reasonableness, good faith and the prohibition of abuses of rights, which suggest that the level of stringency will ultimately depend on the circumstances of a given situation. Moreover, the coastal State owes certain obligations towards its neighbors and the international community as a whole in the context of environmental protection and Part XII of the LOSC.

It needs to be appreciated that a place of refuge provides a shelter where a ship in peril may stabilize its conditions more safely than in open sea and rough weather conditions. This may at the same time be the best way to ensure safety of lives, safety of navigation and pollution prevention. The Salvage Convention prescribes that coastal States take into account the need for cooperation between salvors and other interested parties to ensure the efficient and successful performance of salvage. Moreover, the WRC requires the coastal State to act on the basis of the principle of proportionality and to take account of the hazard to its neighbors and safety of navigation. While there is no hard and fast rule as to how the coastal State is expected to act in each possible scenario, it appears reasonable to expect the coastal State to weigh the conditions of the ship (e.g. stability and structural integrity) against the type of risks involved,

probability of these risks materializing, the degree of harm to the coastal State, the neighboring States and the international community as a whole (degree of seriousness), the availability of sheltered facilities and financial security. To ensure that the assessment of the situation is indeed made reasonably, the coastal State should be assisted by the IMO Guidelines on Places of Refuge. However, if the interests of others are directly confronted with the interests of the coastal State, in the view of this author it is the interests of the coastal State that should be given more weight on account of territorial sovereignty.

The issue of places of refuge never made it to the stage of negotiating a specific treaty on States' rights and obligations. While the CMI proposal was an attempt in this respect, it clearly failed to obtain the necessary support at the IMO. The reason for such a failure may be explained partly on the basis of the weaknesses that characterize the current IMO liability and compensation regime and partly due to the rather radical and unrealistic approach that goes to the heart of territorial sovereignty by reversing the burden of proof against the coastal State. In the view of this author, the CMI proposal will hardly see any success in the future as the direction of legal developments in the field of maritime accidents firmly and persistently incline towards coastal States' rights as the point of departure. The WRC serves as a good example in this respect. Nonetheless, a possible way forward could be to work more on a robust due diligence regime and the issue of cooperation and coordination among neighboring States. The EU regime may serve as a model in this respect.

8 Coastal State Jurisdiction over Shipwrecks

8.1 **Introduction**

That a sunken or stranded ship (a shipwreck) may pose certain risks in scenarios other than those of emerging and unfolding maritime casualties was already realized in the aftermath of the *Torrey Canyon* (1967), when the IMO was working on the draft of the Intervention Convention.[1049] Issues of hazardous shipwrecks, however, were kept for a later stage to be dealt with, partly because of the awareness of the LEG that general issues of jurisdiction could adequately be discussed only after the conclusion of UNCLOS III.[1050]

UNCLOS III ultimately resulted in the expansion of coastal State jurisdiction both spatially and substantively.[1051] It produced the LOSC jurisdictional framework on the basis of which territorial sovereignty of coastal States expanded to 12 nm, while beyond that limit coastal States were given and confirmed certain sovereign rights and jurisdiction on the basis of the EEZ and the continental shelf regime.[1052] At the same time, coastal State jurisdiction beyond the limits of the territorial sea, even though expanded, remained restricted due to the persistence of freedom of navigation and associated flag State jurisdiction. As far as hazardous shipwrecks are concerned, however, the LOSC remained silent.

In 2007, the IMO convened a general diplomatic conference, which adopted the Nairobi Wreck Removal Convention (WRC) to address coastal State jurisdiction over hazardous shipwrecks. On the basis of the WRC, coastal States are entitled to order the registered owners to remove hazardous shipwrecks, or to have hazardous shipwrecks removed, at the expense of the registered owners. However, the relationship of the WRC to the LOSC and general international law is somewhat debatable – partly due to certain ambiguities in the WRC itself and partly because of the silence of the LOSC. In particular, one may question the type of changes brought under the WRC to the LOSC regime – i.e. whether these came as a clarification, some sort of a modification or a novelty to the LOSC regime. This question is relevant not only in the context of the evolving component of international law observed in this thesis, but also in the context of opposability and the related question as to who is ultimately bound by changes brought under the WRC. Furthermore, the WRC addresses rights and obligations of States concerning the

[1049] See chapter 5 of the thesis (5.6.1.).
[1050] IMO doc, LEG 69/10/1 of 28 July 1993, para 4.
[1051] See chapter 3 of the thesis (3.3.1.2.).
[1052] And the contiguous zone, which is irrelevant for this thesis, as explained in chapter 3 of the thesis (3.3.2.2.).

reporting, determining, locating and marking of hazardous wrecks. The content of these is not entirely clear.

Against this backdrop, this chapter investigates and explains the rights and obligations of coastal States in relation to foreign shipwrecks, and how these have evolved since the *Torrey Canyon* catastrophe. The structure of the chapter follows the sequence of the adoption of the relevant sources. It starts with the analysis of the LOSC and general international law, followed by the analysis of the WRC. The Salvage Convention is discussed to some extent too. Discussion on the relationship of the WRC to the LOSC, and the implications for the question of opposability, concludes the chapter.

8.2 **General International Law and the LOSC**

8.2.1 Internal Waters, Archipelagic Waters and the Territorial Sea

In internal waters, archipelagic waters and the territorial sea,[1053] coastal State jurisdiction over foreign shipwrecks is presumed by virtue of coastal State territorial sovereignty. Moreover, it falls short of any restrictions normally present on account of navigational rights of innocent transit and archipelagic sea lanes passage (as discussed in the previous chapter) given that sunken and stranded ships are incapable of 'passage' by their very nature. This means that the coastal State is entirely free to order the registered owner to remove a shipwreck, or to have a shipwreck removed and order the registered owner to pay for the costs thereby incurred.[1054] However, this does not go to say that the coastal State is free from obligations towards others. On the contrary, the exclusive control of the coastal State over its territory implies the obligation to warn and notify other States and private actors with shipping interests of navigational hazards brought to its knowledge. This obligation is firmly rooted in customary international law, as confirmed in the *Corfu Channel* Case,[1055] and spelled out in Article 24 (2) of the LOSC. The latter explicitly requires the coastal State to give 'appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea'.[1056] The coastal State will, for example, obtain such knowledge on the basis of certain duties imposed on the master of the ship under the SOLAS. Regulation V/31 in this regard requires the master of the ship to report

[1053] The majority of hazardous wrecks lie within the territorial sea, i.e. in shallow coastal waters. See UNCTAD, 'Review of Maritime Transport 2014', 78-80. For the review of coastal State powers in the area under territorial sovereignty see IMO doc, LEG 63/5 of 18 May 1990, Annex 2, 7-16 and LEG 69/10/1 of 28 July 1993, para 7.
[1054] Gaskell and Forrest take the same view. See Nicholas Gaskell and Craig Forrest, *The Law of Wreck* (Informa 2019) 302.
[1055] The *Corfu Channel* Case, Judgment of 9 April 1949, ICJ Reports 1949, 4, 22.
[1056] Article 24 (2) of the LOSC.

to the competent authorities of the coastal State any 'derelict' that stands as a direct danger to navigation, which as such includes shipwrecks.[1057]

8.2.2 The Exclusive Economic Zone and the Continental Shelf

When it comes to the area beyond the limits of the territorial sea, coastal State jurisdiction cannot be presumed.[1058] While customary international law and Article 221 of the LOSC, as discussed in chapter 6, undoubtedly allow the coastal State to take and enforce measures necessary to protect its coastline and related interests against the particularly severe pollution risks, its application in this respect is limited to extreme and urgent situations of unfolding maritime casualties. Article 221 of the LOSC does not distinguish between sunken or stranded ships on the one hand and ships that are still afloat on the other hand.[1059] Article 221 is thus relevant to take account of in the context of coastal State jurisdiction over shipwrecks.[1060] However, in cases that do not fall under the scope of Article 221, the LOSC is rather silent on hazardous shipwrecks. It neither confers, confirms nor denies jurisdiction of the coastal State in this respect.[1061]

In the context of economic and environmental risks, the LOSC does associate with coastal States certain sovereign rights and jurisdiction on the basis of the regimes of the EEZ and the continental shelf. At the same time, freedom of navigation and the corresponding flag State jurisdiction continues to apply. How this translates when it comes to hazardous shipwrecks is subject to debate, which calls for an analysis of the relevant provisions of the LOSC. Before such an analysis takes place, it is necessary to say a few words on the navigational rights and interests associated with the ship, and the relevance of salvage in this respect.

[1057] Regulation V/31 of the SOLAS. The master is also obliged to report such a danger to nearby ships.
[1058] See chapter 3 of the thesis (.3.3.2.).
[1059] This was also confirmed during the negotiations of the WRC. See IMO doc, LEG 69/10/1 of 28 July 1993, para 12.
[1060] Conditions under which the coastal State is allowed to exercise the right of intervention, and the way these have evolved since the *Torrey Canyon* (1967), were already analyzed and explained in chapter 6. To avoid unnecessary repetition, the reader is referred to the discussion provided in chapter 6. This chapter focuses on an unfolded scenario of a sunken or stranded ship that poses certain socio-economic and environmental risks, but falls short of the requirements needed for the right of intervention to be lawfully exercised.
[1061] The concern about the silence of the LOSC on State jurisdiction over shipwrecks was raised among States on several occasions. See IMO doc, LEG 74/5/2/Add 1 of 5 September 1996, LEG 86/4/2 of 27 March 2003, LEG 87/4/1 of 8 September 2003, para 6, LEG 92/13 of 3 November 2006, Annex 4, LEG/CONF.16/6 of 1 March 2007, LEG/CONF.16/7 of 15 March 2007, LEG/CONF.16/8 of 15 March 2007.

8.2.2.1 The Relevance of Salvage

According to Article 1 (b) of the Salvage Convention, a ship is defined as 'any ship or craft, or any structure capable of navigation'. The lack of a comma after the expression 'any structure' suggests that criterion of navigability refers only to 'any structure'.[1062] Such a conclusion also finds support in the fact that Article 1 (b) uses the term 'any structure', rather than 'any other structure'. This means that a sunken or stranded ship, despite not being capable of navigating in a given time, remains a ship. Even if the expression 'capable of navigation' would have appeared relevant for 'any ship', in the same way as for 'any structure', the capability of navigation in the view of this author should not be equated with the actual navigation of a ship. Rather, it should include the ability of a ship to receive salvage assistance in order to be brought back to service (navigation).

Both stranded and sunken ships may indeed be successfully brought back to service, especially if they are stranded to a small degree and the outside weather and sea conditions are good. The *Thorco Lineage* (2018) is an example of a successful salvage of a ship that ran aground.[1063] Even at the time of the *Torrey Canyon*, before the UK took an intervention measure against a casualty ship, salvage was the first measure of response the UK necessarily had to try given the general awareness that the majority of stranded ships had been successfully saved in the past.[1064] While sunken ships are seemingly more difficult to save than stranded ships, this still does not

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[1062] CMI, *The Travaux Préparatoires of the Convention on Salvage 1989* (Comité Maritime International 2003) 87.

[1063] The *Thorco Lineage* was a relatively young general cargo ship (built in 2014) when drifted aground on the Raroia Atoll (of the Tuamotus chain in French Polynesia) in 2018, after developing engine problems while en route from the USA to Australia. The ship's hull was intact and consequently no pollution risk was highlighted. However, part of the ship's steering gear and propeller were damaged and salvage assistance was thus necessary. Ultimately, the ship was successfully refloated, repaired and continued with service. See news available at <https://www.rnz.co.nz/international/pacific-news/361477/ship-that-ran-aground-on-french-polynesia-reef-towed-to-papeete>; gCaptain at <https://gcaptain.com/thorco-lineage-refloated-but-remains-adrift-in-french-polynesia/>; gCaptain at <https://gcaptain.com/general-cargo-ship-thorco-lineage-hard-aground-in-french-polynesia/>; Maritime Executive at <https://www.maritime-executive.com/article/naval-tug-refloats-thorco-lineage-but-loses-tow>; Vessel Finder at <https://www.vesselfinder.com/vessels/THORCO-LINEAGE-IMO-9673197-MMSI-355304000> all accessed 6 September 2019. It is interesting to note, however, that the ship's flag has changed after the accident. The ship was first under the flag of the Philippines, while at present it is flying the flag of Panama. See Maritime Bulletin, available at <https://maritimebulletin.net/2018/06/25/thorcos-ship-aground-on-atoll-in-french-polynesia-waters/> and Marine Traffic, available at <https://www.marinetraffic.com/no/ais/details/ships/shipid:722338/mmsi:548882000/imo:9673197/vessel:THORCO_LINEAGE> all accessed 31 October 2019.

[1064] As observed by Cundick, experts (both private and governmental) felt there was a reasonable chance of saving the *Torrey Canyon*. However, the Government of the UK was also clear on that 'if salvage failed, bombing was the "only reasonable alternative left"'. See the view of the UK's Government as referred to by Palmer Cundick, 'High Seas Intervention: Parameters of Unilateral Action' (1972-1973) *San Diego Law Review* 514, 539-540.

go to say that these ships are incapable of being saved whatsoever. When the Salvage Convention was negotiated, it was explained that:

> a sunken vessel was not necessarily incapable of navigation and could be deemed a vessel under the definition. […] It was also remarked that property from a vessel (cargo, etc.) should also be within the scope of salvage. In this connection a distinction was drawn between a wreck and a sunken vessel which could be retrieved and made seaworthy. While wrecks should be excluded, sunken vessels might be covered.[1065]

When the Salvage Convention was negotiated, several attempts were made in formulating a precise definition of a ship capable of being salvaged in order to make a clear distinction between a ship and a wreck.[1066] In this respect, different views were expressed. Some delegations argued that both sunken and stranded ships are better to be considered wrecks than ships in danger.[1067] On the other hand, the ISU made an observation that a 'wreck' in practice means an 'object of no value',[1068] rather than an object that is sunken or stranded. Likewise, the representative of the International Association of Port and Harbors (IAPH) was speaking of the:

> distinction between the case where a vessel was in danger but could be preserved as a ship, and the case where the ship was a wreck for which the hope of preservation had been abandoned.[1069]

Ultimately, when the Salvage Convention was negotiated, States could not agree on the precise distinction between a ship and a wreck and the status of a sunken and stranded ship in this respect remained unclarified.[1070] Yet, it is clear that sunken and stranded ships are in principle capable of being salvaged,[1071] albeit in a given situation the shipowner may not have an interest

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[1065] CMI, *The Travaux Préparatoires* (n 1062) 45-46, para 31.

[1066] In circumstances in which a sunken or stranded ship may not be considered as a ship, it may still be considered as '*any* other property'. This conclusion finds support in the preparatory work of the Convention, which stresses that: 'even if a sunken ship were not to be included in the definition of vessel, it could nevertheless be included in the concept of "any property" under the draft definition *if it had any value to be rescued*. In this case, salvage should be decided simply on the basis of whether *property could be recovered*. It would be immaterial whether the property was under water, abandoned or incapable of floating at the time of salvage'. See CMI, *The Travaux Préparatoires* (n 1062) 75-76. When it comes to the expression 'any value to be rescued', one must take account of the fact that even a scrap value accounts for property. See Francis D. Rose, *Kennedy and Rose: Law of Salvage* (9th edition, Sweet & Maxwell 2017) 629-630.

[1067] CMI, *The Travaux Préparatoires* (n 1062) 70.

[1068] Ibid. One delegation endorsed this view by observing that 'the 1910 [Salvage] Convention had been implemented by salvors without difficulty'. In this respect, it is to be observed that Article 2 (1) of the 1910 Salvage Convention stipulated that '[e]very act of assistance or salvage of which has had a useful result gives a right to equitable remuneration'. However, [i]n no case shall the sum to be paid [to the salvor] exceed the value of the property salved'.

[1069] CMI, *The Travaux Préparatoires* (n 1062) 71.

[1070] CMI, *The Travaux Préparatoires* (n 1062) 84.

[1071] Especially in the days of modern technology. See also Gaskell and Forrest (n 1054) 295.

in salvage and may prefer to abandon the ship if salvage proves commercially non-viable in that the costs of salvage exceed the value of the ship. It is thus not surprising that under English law,[1072] the question as to whether a ship is to be considered a wreck or not must be assessed on the basis of the intention and expectations of those in charge of a ship, rather than on the basis of whether a ship is sunken or stranded.[1073] In particular, a ship is considered a wreck if it fulfils the requirement of a derelict,[1074] defined as:

> a thing which is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (*sine spe recuperandi*) and without intention of returning to it (*sine animo revertendi*).[1075]

This means that the fact that a ship has sunk or stranded does not necessarily mean that the shipowner has no intention to bring the ship back to seaworthy conditions. It is probably best explained in the words of the German delegation during the negotiations of the Salvage Convention:

> […] we do not rely on an attempt to define whether a sunken ship can be still regarded being a ship and thus an object of salvage, and whether a sunken vessel has to be regarded as a wreck and subject to reclamation. We do not believe that salvage situations which call for a salvage contract and situations of a sunken vessel which is an obstacle and calls for a contract of wreck removal can be successfully divided by a clear cut

[1072] Salvage is traditionally based on English law, which explains why English law is often the choice of law in many of the salvage contracts. See, for example, clauses D and J of the Lloyd's Standard Form of Salvage Agreement (LOF 2011), approved and published by the Council of Lloyd's.

[1073] According to Kennedy and Rose, this question is to be determined on the basis of: 'not what was actually the state of things when she was quitted by her master and crew, but what were their intentions and their expectation when they quitted her. The vessel is not a derelict if she is left by her master and crew temporarily […]'. See Rose (n 1066) 105. The intention and hope on the side of the shipowner is to be observed in the context of all the relevant circumstances. As Lord Finlay L.C. pointed out: '[…] In quitting the vessel the master and crew simply yielded to force. […] It would be extravagant to impute to them the intention of leaving the ship finally and for good'. As Kennedy and Rose further note: '[i]n judging of the intention and expectation of the master and crew at the time of abandonment, the Admiralty Court, in the absence of any direct evidence which is satisfactory, is guided by the consideration of the surrounding circumstances, such as the fact that the vessel was then near the coast and not in the open sea, or that the quitting of the ship took place without counsel or deliberation in the agony of collision, or under pressure of enemy action'. See Rose (n 1066) 104-105. In this respect, in the *Albionic* Case, Langton J commented on the *Sarah Bell* Case as follows: '[a]t the time when that case was determined I can well believe that there would have been few to differ from the judge's decision [that the vessel, waterlogged, ran aground on the Haisborough Sands and having lost her rudder, had been abandoned by her crew *sine spe revertendi*; and was thus a derelict for salvage purposes]. Today, with the vastly improved machinery of salvage, I can very easily imagine that most judges would decide the other way'. See Rose (n 1066) 105, fn 152 referring to the the *Sarah Bell* (1845) 4 Not. Of Cas. 144 at 146.

[1074] Derelict is defined as a wreck. According to Section 255 of the UK's Merchant Shipping Act, the term 'wreck' includes 'jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water'. For more on the topic see Rose (n 1066) 682.

[1075] This definition is based on the case law as referred to in Rose (n 1066) 104-105.

> definition of ship and wreck. It is the situation and the aim of the operation which makes the difference, whereas the difference between the terms ship and wreck seem to be of minor importance.[1076]

All this suggests that by virtue of being sunken or stranded, a ship does not lose its capability of being salvaged and continuously employed for the purpose of navigation.[1077] To put it differently, neither sinking nor stranding necessarily brings an end to the rights and interests associated with the ship and its commercial exploitability. From the law of the sea perspective, however, it is not clear whether these rights and interests imply that the regime of State jurisdiction over shipwrecks is to be associated with the legal regime characterized by the freedom of navigation and flag State jurisdiction. At the same time, coastal States are assigned with certain sovereign rights and jurisdiction for the economic and environmental purposes, which are now to be explained in more detail.

8.2.2.2 Coastal State Sovereign Rights within the Regimes of the Exclusive Economic Zone and the Continental Shelf

A sunken or stranded ship may interfere with economic activities in relation to which the coastal State enjoys sovereign rights under the regime of the EEZ and the continental shelf regime. As demonstrated in chapter 2, a sunken or stranded ship may for example release oil or other harmful substances, which may damage fish or create harm to spawning and breeding areas. Even if empty of oil and other harmful substances, a sunken or stranded ship may damage fishing nets or snag them and cause damage to fishing boats, including causing them to sink.[1078]

[1076] CMI, *The Travaux Préparatoires* (n 1062) 83.

[1077] Even though the 1989 Salvage Convention makes no specific reference to the question of whether or not sunken ships are capable of salvage, the preparatory work of the Convention clearly suggests that sunken ships may indeed be salved. See also Nicholas Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991) 16 *Tulane Maritime Law Journal* 1, 37.

[1078] The UK's Marine Accident Investigation Branch (MAIB) reported in 2010 that it was aware of 36 accidents that involved fishing boats having capsized or sunk after snagging their fishing gear on different kinds of materials, including sunken and stranded ships, on the seabed. See MAIB Report No 5/1010 of April 2010. The Norwegian Ministry of the Environment published a report on the Integrated Management of the Marine Environment of the North Sea and Skagerrak (Management Plan) arguing that a 'wreck on the seabed may obstruct fishing', and concluding therefore that: '[t]he rules should be tightened up to make it possible under certain circumstances to require the removal of wrecks that interfere with fishing operations. At present the main grounds for removing wrecks are their presence in a nature reserve or the environmental risk they pose. If a wreck is allowed to remain, its position must be made known, clearly and accurately, to the fishing fleet'. See Norwegian Management Plan, 70, available at <http://miljodirektoratet.no/Global/Havforum/Meld.%20St.37%20(2012-2013)%20Report%20to%20the%20Stortinng%20(white%20paper)%20Integrated%20Management%20of%20the%20Marine%20Environment%20of%20the%20North%20Sea%20and%20Skagerrak.pdf> accessed 31 October 2019. On the other hand, one also needs to appreciate that a sunken or stranded ship may present an opportunity for rich fishing. See Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 1 *Lloyd's Maritime and Commercial Law Quarterly*, 110.

It may also create an obstacle for drilling oil and gas on the location where it sank or got stranded.

If the coastal State proclaims an EEZ, it is automatically given exclusive sovereign rights for the purpose of 'exploring, exploiting, conserving and managing the natural resources', and with regards to 'other activities for the economic exploitation and exploration of the zone', such as the production of energy from the winds. [1079] For that matter, the coastal State is given both legislative and enforcement powers.[1080] However, there must be a direct connection between the activity in point and the purpose for which the coastal State is given the sovereign right and moreover, the activity must be actually undertaken.[1081] In other words, the coastal State cannot simply express its intention to undertake such an activity at one point.

The regime of the continental shelf is similar in that the coastal State again enjoys sovereign rights over natural resources. The LOSC in this respect refers only to the purpose of 'exploring and exploiting', while the purpose of 'conserving and managing' is entirely omitted. Nonetheless, if the coastal State is allowed to 'explore and exploit', it is logically also allowed to 'conserve and manage' (*in majore stat minus*).[1082] Thus, a better view is that the coastal State is allowed to exercise its sovereign rights for all four purposes, i.e. exploring, exploiting, conserving and managing. Of some controversy is the exact content of 'sovereign rights' in the context of the continental shelf regime. Article 77 (1) of the LOSC stipulates that the coastal State 'exercises over the continental shelf sovereign rights […]', without clarifying whether these include enforcement powers. A strict interpretation of Article 77 (1), coupled with the package deal character of the LOSC, would go to say that the coastal State has no enforcement powers. However, since the coastal State is given exclusive sovereign rights (rather than simply jurisdiction), which no other State enjoys, a better approach would be to say that both prescriptive and enforcement powers can be presumed to be included in 'sovereign rights'. In its commentary on what became Article 2 (1) of the 1958 Convention on the Continental Shelf (now Article 77 of the LOSC), the ILC made the following conclusion:

> the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the

[1079] Article 56 (1) (a) of the LOSC.
[1080] Enforcement jurisdiction is specifically prescribed for living resources (Article 73 of the LOSC), but arguably applies in general. See Alexander Proelss on Article 56 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 425.
[1081] Proelss (n 1080) 434.
[1082] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edition, Bloomsbury 2016) 126.

> natural resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law.[1083]

Sovereign rights enjoyed by the coastal State on account of the EEZ and the continental shelf regimes are exclusive,[1084] albeit by no means absolute.[1085] The coastal State is at any rate obliged to take account of the rights and interests of others, including navigational rights and interests associated with the ship. As far as the continental shelf regime is concerned, Article 78 (2) prescribes as follows:

> The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

Similar due regard obligation exists in the EEZ (which in fact overlaps with the continental shelf regime up to 200 nm), as spelled out in Article 56 (2) of the LOSC in that '[i]n exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States […]'. This provision needs to be read together with Article 58 (1) of the LOSC according to which freedom of navigation continues to apply so far it is not incompatible with such regime. In a given situation, the question may be raised as to whether the removal of a sunken or stranded ship is to be associated with the regime characterized by sovereign rights of the coastal State or with the regime characterized by freedom of navigation and the corresponding flag State jurisdiction.[1086]

There are many such examples where the LOSC opens for a potential conflict between the rights of the coastal State on the one hand and the rights of other States, including the flag State, on the other hand.[1087] This potential conflict indeed explains the 'unfinished business' of the LOSC, summarized in the words of Shearer as follows:

> [a]part from high seas fisheries and the protection of the marine environment, the major 'unfinished business' of the LOS Convention is likely to prove to be the sovereign rights

[1083] ILC, 'Report of the International Law Commission on the Work of Its Eight Session, 23 April – 4 July 1956', Report to the General Assembly, A/3159, 297.
[1084] With the exception of Articles 62 (2), 69 and 70 of the LOSC. See Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2015) 130.
[1085] Proelss (n 1080) 424.
[1086] See Article 92 (1) of the LOSC, which applies in the EEZ by virtue of Article 58 (2) of the LOSC. See also Articles 94 and 217 of the LOSC.
[1087] Proelss (n 1080) 430.

> and jurisdiction of coastal states in their EEZs and the rights and duties of other states in those zones.[1088]

To assume that preference is given to the coastal State due to the nature of sovereign rights would essentially negate the *sui generis* nature of the EEZ, characterized by the absence of jurisdictional presumptions, as reflected in Article 59 (the so-called 'Casteñeda' formula).[1089] While one activity may serve different purposes, it seems it is the activity of the addressee that counts. On this point, while referring to the *M/V Virginia* Case, Anderson analyzes the legal regime applicable to the activities of bunkering at sea and argues:

> In my analysis, bunkering at sea in the EEZ can be subject to different legal regimes, depending on the circumstances. What is required is a case-by-case approach. Bunkering is a service: when it serves navigation, the rules on navigation in the EEZ apply; when it serves fishing, the rules on fishing and fisheries operations in the EEZ apply. Leaving aside the environmental aspects, the applicable legal regime is determined by the nature of the recipient vessel's activity in the EEZ at the relevant time.[1090]

It has been submitted that 'the freedom of navigation includes the right to conduct salvage operation on the high seas'.[1091] This however, relates to the right of the ship which exercises salvage operation, rather than the ship which receives salvage. Nonetheless, it would be strange and impractical to subject the ship that exercises salvage to one regime and the recipient ship to another. Salvage could in this respect be perceived as a 'lawful use of the sea […] associated with the operation of ships'.[1092] In this respect and in light of the analysis made by Anderson,

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[1088] Ivan Shearer, 'Ocean Management Challenges for the Law of the Sea in the First Decade of the 21st Century' in Alex Oude Elferink and Donald Rothwell (eds), *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004) 1 and 10.

[1089] For the so-called Cateñeda formula (Article 59 of the LOSC) see chapter 3 (3.3.2.3.).

[1090] David Anderson, 'Coastal State Jurisdiction and High Seas Freedoms in the EEZ in the Light of the *Saiga* Case' in Clive R. Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers 2011) 114-115. In the *M/V Saiga* Case (No 2), the Tribunal did not come to any final conclusion on whether bunkering is to be associated with sovereign rights of the coastal State or with freedom of navigation. However, several judges made a separate opinion in this regard. In the view of judge Vukas, bunkering is 'related to the freedom of navigation "and associated with the operation of ships"' as articulated in Article 58 (1) of the LOSC. See the *M/V SAIGA* (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), ITLOS Judgement of 1 July 1999, Separate Opinion of Judge Vukas, para 17. On the other hand, in the view of judge Zhao, 'bunkering must not be regarded as falling within the high seas freedom of navigation or related to it. It is not navigation of M/V Saiga that is involved, but its commercial activities of offshore bunkering […]. The interpretation that freedom of navigation includes bunkering and all other activities and rights ancillary to it is incorrect'. See Separate of Judge Zhao, para 3.

[1091] See John Reeder (ed), *Brice on Maritime Law of Salvage* (5th edition, Sweet & Maxwell 2011) 268 and fn 15 on the same page.

[1092] Article 58 (1) of the LOSC.

the freedom of navigation of the ship that exercises salvage could be considered as associated with the freedom of navigation of the ship that receives salvage. These two should be seen as closely interlinked and should thus belong to the same legal regime.

Against this backdrop, if there is a prospect of salvage in that the ship may be brought back to service (rather than being preserved as scrap), there is room to argue that a sunken or stranded ship falls under the regime characterized by the freedom of navigation, unless there is no intention to employ the ship for navigational purposes after the successful completion of salvage. There is no hard and fast rule as to when should one reasonably assume that no such intention exists. As pointed out earlier, a physical absence of salvage does not mean that there is no hope of salvage or that the shipowner does not intend to engage the salvor at some point. In this respect, it is important to note that salvage is a market-driven activity in that the prospect of salvage may not be commercially viable today, but may happen to be so tomorrow.

Contra argument could be that the regime of freedom of navigation should be seen the same way as the regime of 'passage' (and so, the regime applicable to a sunken or stranded ship should not be equated with the regime associated with freedom of navigation). However, this approach is not tenable if one recalls that the negotiators of the LOSC did in fact distinguish between the concept of 'passage' and the concept of 'freedom of navigation'. To them, it was central to preserve freedom of navigation in a much broader sense compared to the restricted right of innocent passage.[1093] The ambiguity, however, remains.

In the scenarios in which the coastal State's natural resources are being damaged or when the threat of such damage exists, or when the ability of the coastal State to exercise its sovereign rights is interfered with, sovereign rights would give the coastal State authority to deal with hazardous shipwrecks. In concrete terms, sovereign rights could be used to order the removal of a wreck, or to have a wreck removed at the coastal State's expense if the shipowner does not want to engage in salvage. The problem arises if the shipowner wants to engage in salvage to bring the ship back to service (navigation).

If one accepts the argument that a sunken or stranded ship is under the regime associated with freedom of navigation, the coastal State would not be able to take control over salvage, and for that matter order or take and enforce wreck removal measures. Yet, the mutual due regard principle would still allow the coastal State to participate in the decision-making concerning

[1093] See Alan Boyle, 'EU Unilateralism and the Law of the Sea' (2006) 21 (1) *The International Journal of Marine and Coastal Law* 15, 28.

salvage (which is not to say that the coastal State would be entitled to ask the salvage plan and salvage method to be approved in advance).[1094] The situation would be different if one takes the view that a sunken or stranded ship does not fall under the regime of freedom of navigation. This would then give the coastal State authority to order on the basis of its sovereign rights the removal of a wreck (and ask the salvage plan and salvage method to be approved in advance) or have a wreck removed at its own expense. At no rate, however, do sovereign rights give the coastal State authority to undertake wreck removal at the expense of the shipowner.

It is hard to argue on the dilemma *sovereign rights v freedom of navigation* in terms of who has a preference. The priority of the interests of coastal States over the navigational interests is, however, acknowledged in relation to matters of vessel-source pollution, as regulated under Part XII of the LOSC concerning the protection and preservation of the marine environment, albeit subject to very strict conditions.[1095]

8.2.2.3 Coastal State Jurisdiction over Vessel-Source Pollution

Vessel-source pollution may at the same time have an impact on the economic interests of the coastal State. Nonetheless, it is important to realize that the basis for coastal State competence in this respect emanates from Article 56 (1) (b) (iii) of the LOSC (and the associated restrictions imposed under the relevant provisions of Part XII), rather than Article 56 (1) (a) (exclusive sovereign rights). At this stage, it is also worthwhile noting the definition of 'pollution of the marine environment' spelled out in Article 1 (4) of the LOSC as:

[1094] See Articles 56 (2) and 58 (3) of the LOSC. In this respect it is worthwhile noting the judgement in the *Fisheries Jurisdiction* Case, in which the Court held as follows: 'Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation'. See the *Fisheries Jurisdiction* Case (United Kingdom v. Iceland), Judgement of 25 July 1974, ICJ Reports 1974, para 71.

[1095] Part XII of the LOSC, which *inter alia* addresses coastal State jurisdiction over the protection and preservation of the marine environment, makes it obvious that freedom of navigation in the EEZ does not enjoy the same protection as freedom of navigation on the high seas. See Budislav Vukas, *The Law of the Sea* (Martinus Nijhoff Publishers 2004) 149. See also Edward Brown, 'The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ' (1977) 4 *Marine Policy and Management* 325, 337; Maria Gavouneli, *Functional Jurisdiction in the law of the Sea* (Brill Nijhoff 2007) 65. For the opposite view see Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Brill Nijhoff 1989) 214. It has been commonly acknowledged that Part XII of the LOSC is considered *lex specialis* to the regime of sovereign rights in the EEZ, and arguably on the regime of the continental shelf. See Erik Franckx (ed), *Vessel-Source Pollution and Coastal State Jurisdiction* (Kluwer Law International 2001) 94.

> the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

It is beyond any doubt that harmful substances carried on board the ship, either as cargo or as bunker fuel, fall under the scope of Article 1 (4) of the LOSC. Of some ambiguity is whether a wreck itself (a ship empty of any oil or cargo) may count as a 'substance or energy'. The LOSC definition of the marine pollution refers to 'all sources' of pollution and thus places at its focus the harmful impacts of pollution, rather than the source, i.e. the type of pollutant. It should be irrelevant whether vessel-source pollution regulations deal with a ship, wreck, oil or other types of pollutants, for as long as the ultimate target is the prevention of deleterious effects these may cause to the marine environment.[1096] Hence, a broad definition of 'pollution of the marine environment' spelled out in Article 1 (4) of the LOSC, coupled with the developments in international environmental law,[1097] does enable shipwrecks to fall under vessel-source pollution regulations, even if empty of any harmful substances.

However, jurisdiction over vessel-source pollution is given to coastal States only in limited scenarios and subject to strict conditions. Of relevance in this respect is Article 211 (5) of the LOSC, according to which the coastal State is authorized within the regime of the EEZ to adopt laws and regulations for the prevention, reduction and control of vessel-source pollution. These laws and regulations, however, must conform to and give effect to 'generally accepted international rules and standards' (GAIRAS). The exact meaning of GAIRAS and the content of Article 211 (5) is not entirely clear. Likewise, it is not immediately apparent whether the WRC may fall under the scope of Article 211 (5) or not. Against this backdrop, this chapter will now proceed with analysis of the WRC and will then continue with analysis of Article 211 (5) of the LOSC, followed by the debate on the potential of the WRC to be brought under the scope of Article 211 (5) of the LOSC.

[1096] Such an approach fits 'a paradigm shift in international law from the traditional freedom to pollute to an obligation to prevent marine pollution as much as possible'. See Yoshifumi Tanaka on Article 1 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H. Beck, Hart, Nomos 2017) 24.

[1097] See the *Indus Waters Kinshenganga* Arbitration (Pakistan v. India), Permanent Court of Arbitration (PCA), Partial Award of 18 February 2013, para 452. See also Tanaka (n 1096) 23.

8.3 **WRC**

While the WRC addresses coastal States jurisdiction over hazardous shipwrecks, it is to some extent dedicated to the reporting stage when no hazard is yet determined.

8.3.1 Reporting Stage

The WRC obliges flag States to require both the master and the operator of a ship flying their flag to report to the coastal State when the ship has been involved in a maritime casualty resulting in a wreck.[1098] The WRC rules on reporting find their origin in Article 211 (1) and (7) of the LOSC, according to which States (acting in whatever capacity) are obliged to establish, through the IMO or general diplomatic conference, international rules and standards to prevent, reduce and control vessel-source pollution, including rules and standards:

> relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.

These rules and standards are to some extent covered under both the MARPOL[1099] and the OPRC.[1100] The WRC is intended to merely build on the existing model of these two,[1101] and on the previously mentioned Regulation V/31 of the SOLAS. Nevertheless, some inconsistencies may be observed, as will be explained below.

8.3.1.1 Who?

Under the WRC, the duty to report a wreck rests with both the master and the operator of the ship.[1102] Article 1 (9) of the WRC defines the operator so as to include the shipowner.[1103] As far as the master is concerned, it is normally a person who acts for and on behalf of the operator. In practical terms, it is the ship's master (being on the spot), rather than the operator itself, who is in the best position to make any report on shipwrecks. Both the MARPOL[1104] and the

[1098] Article 5 (1) of the WRC.
[1099] Article 8 of the MARPOL and related provisions in Protocol I, MARPOL.
[1100] Article 4 (1) of the OPRC.
[1101] IMO doc, LEG 73/11 of 8 August 1995, Annex, 4.
[1102] Article 5 (1) of the WRC.
[1103] The WRC defines the operator as 'the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended'. See Article 1 (9) of the WRC.
[1104] Article I of Protocol I, MARPOL.

OPRC,[1105] as well as Regulation V/31 of the SOLAS, already introduced a practical approach in matters of reporting and in this respect the WRC brings nothing new. However, the WRC slightly differs in that the duty to report rests with the master and the operator simultaneously. As stipulated in Article 5 (1) of the WRC:

> To the extent that the reporting obligation under this article has been fulfilled either by the master or the operator of the ship, the other shall not be obliged to report.[1106]

In contrast, both the MARPOL and the OPRC use the term 'master *or* other person having charge of any ship'.[1107] Under the MARPOL, it is only if the ship is abandoned, or a report from the ship is incomplete or unobtainable, that the duty to report falls on the 'person having charge of the ship', rather than the master.[1108]

The term 'person having charge of the ship' (the term used in the MARPOL and the OPRC) seems to be broader than the term 'operator' (the term used in the WRC) thereby suggesting that the duty to report under the MARPOL and the OPRC concerns a wider range of responsible persons. However, the definition of the operator as envisaged in Article 1 (9) of the WRC is broad enough to correspond to the definition under the MARPOL and the OPRC as it makes a reference to the range of persons responsible for the ship operation captured under the International Safety Management Code (ISM Code).[1109]

The WRC duty to report a wreck rests with the master and the operator of the ship that 'has been involved in a maritime casualty resulting in a wreck'.[1110] In other words, the duty to report a wreck does not exist in relation to the masters and operators of ships that are passing by. Given the purpose of the WRC, which in short endeavors to make our seas and oceans safer and cleaner, as explained in chapter 5, this shortcoming could be seen as a significant weakness of the Convention. It is at any rate a surprising departure from the OPRC, on the basis of which the WRC was supposed to be modeled and which in Article 4 (1) (b) obliges flag States to:

> require masters or other persons having charge of ships […] to report without delay any *observed* event at sea involving a discharge of oil or the presence of oil.[1111]

[1105] Article 4 of the OPRC.
[1106] Article 5 (1) of the WRC.
[1107] Article I (2) of the Protocol I, MARPOL and Article 4 (1) (b) of the OPRC. Emphasis added.
[1108] Article I (2) of the Protocol I, MARPOL.
[1109] Article 1 (9) of the WRC.
[1110] Article 5 (1) of the WRC.
[1111] Emphases added.

According to the OPRC, therefore, the duty to report rests not only on ships involved in an incident but also on ships passing by. This approach, however, is not taken under the WRC and it is not clear why. In 1998, during the 78th session of the LEG, the CMI suggested the OPRC approach should be incorporated in the WRC.[1112] The suggestions made by the CMI did not find sufficient support among States and the reason may perhaps be found in the obligation triggered by the report, as will be explained below.

8.3.1.2 When?

The WRC requires an occurrence of a maritime casualty for the Convention to apply, albeit it is not an occurrence of a maritime casualty but an occurrence of a wreck that needs to be reported.[1113] If a maritime casualty results in a sunken or stranded ship (a shipwreck as defined in this thesis), the duty to report is rather straightforward. The situation, however, becomes somewhat complex if the casualty results in a ship that is not yet sunken or stranded, but still qualifies as a wreck in terms of the WRC – a ship that 'is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken'.[1114] As demonstrated in chapter 6, there is no criteria as to how the reasonableness and effectiveness are to be interpreted in this respect. At the same time, the reporting of a maritime casualty at the earliest stage should be seen as a minimum requirement reasonably expected from the master and the operator of the ship.

8.3.1.3 What?

The report of a wreck must contain: (i) the name and the principal place of business of the registered owner, and (ii) all the relevant information necessary for the coastal State to determine whether the wreck poses a hazard or not.[1115] The information concerning the name and the principal place of business of the registered owner is quite straightforward. As far as 'relevant information' is concerned, the WRC provides an open-list, which includes information on the precise location of the wreck; the type, size and construction of the wreck; the nature of the damage to, and the condition of, the wreck; the nature and quantity of the cargo, in particular any hazardous and noxious substances; and the amount and types of oil, including bunker oil and lubricating oil, on board. The list of relevant information provided in

[1112] IMO doc, LEG 78/4/1 of 13 August 1998, 5.
[1113] According to Article 5 (1) of the WRC, the duty to report a wreck exists when the ship 'has been involved in a maritime casualty resulting in a wreck'.
[1114] Article 1 (4) (d) of the WRC.
[1115] Article 5 (2) of the WRC.

the WRC corresponds to the list included in Article III of Protocol I to the MARPOL,[1116] save for information on the name and principal place of business of the shipowner. The omission of the latter in the MARPOL is not surprising because the MARPOL is not a liability and compensation convention, while the WRC is. Moreover, information on the name and principal place of business of the registered owner is needed for the delivery of the wreck removal order, as will be demonstrated later in the chapter.

The 'relevant information' that needs to be included in the wreck report is intended to provide information 'necessary for the coastal State' to be able to determine whether there is a hazard or not.[1117] While the coastal State is not given any explicit right to actually ask for a report from the master and the operator, it is submitted that such a right may be implicitly deduced from the right of the coastal State to take certain measures in relation to a wreck that is determined to be hazardous. Not allowing the coastal State to ask for information necessary to determine whether or not a hazard exists would refute the purpose of the WRC and prevent the coastal State from exercising its right that lies at the core of the Convention. However, the duty to report is to be imposed on the master and the operator by the flag State, rather than by the coastal State itself.[1118] This means that it is the flag State, rather than the coastal State, which possesses the right to expand the non-exhaustive list of 'relevant information'. While the coastal State may at any rate ask the master or the operator for more information, they are not required to provide such information, unless the flag State requires them to so do (either directly or through the flag State).

8.3.1.4 To Whom?

According to the WRC, a wreck is to be reported to 'the Affected State',[1119] which in the WRC context means only one State – that in whose area the wreck is located.[1120] This is surely the 'nearest coastal State' – the term used in the MARPOL and the OPRC.[1121] However, a wreck may in reality affect more than just one State.[1122] Article 5 (1) of the WRC is explicit in that only one particular State is to be provided with a report. However, this does not correspond to

[1116] Article III of the Protocol I, MARPOL stipulates that: '[r]eports shall in any case include: (a) identity of ships involved; (b) time, type and location of incident; (c) quantity and type of harmful substance involved; (d) assistance and salvage measures'.
[1117] Article 5 (2) of the WRC.
[1118] Article 5 (1) of the WRC.
[1119] Article 5 (1) of the WRC.
[1120] Article 1 (10) of the WRC.
[1121] Article V (1) of the Protocol I, MARPOL and Article 4 (1) of the OPRC.
[1122] Griggs in this respect brings the example of the Baltic Sea and the Mediterranean Sea. See Patrick Griggs, 'Wreck Removal Convention' (2008) 7 *Shipping & Transport International* 20, 22.

Article 211 (7) of the LOSC, which requires States to develop rules and standards relating to prompt notification to coastal States, whose coastline or related interests may be affected […]'. Article 211 (7) of the LOSC clearly speaks of a wider range of coastal States that should be warned of possible incidents that vessel-source pollution may cause to their coastline and related interests.[1123]

8.3.1.5 How?

The WRC says nothing about the means of reporting. Nonetheless, given that the WRC is largely modeled on the relevant provisions of the MARPOL, Article V (1) of Protocol I of the MARPOL may be used as guidance. This provision stipulates that the report is to be made:

> by the fastest telecommunications channels available with the highest possible priority to the nearest coastal State.[1124]

Both the MARPOL and the OPRC refer to certain general principles when spelling out the duty to report.[1125] The principles in point are developed through the IMO and are contained in the IMO Resolution A.851 (20), as supplemented by Resolution MEPC.138 (53). Given the WRC is modeled on the MARPOL and the OPRC, these principles could be relevant in the context of the WRC too.

8.3.2 Determination of Hazard, Warning and Locating

Under the WRC, a sunken or stranded ship is automatically considered a shipwreck, but not necessarily a *hazardous* shipwreck. The mere existence of a shipwreck is enough for the duty to report to be triggered. It is not, however, enough for the rights of the coastal State to order wreck removal or have a wreck removed and ask the registered owner to pay for the costs thereby incurred, as will be discussed below. These rights are indeed dependent on the existence of a hazard.

The WRC defines a hazard broad enough so as to include any condition or threat that poses a navigational obstruction or a risk to the marine environment or to the coastline or related interests.[1126] Article 6 of the WRC provides a non-exhaustive list of criteria by which the coastal

[1123] See Kristin Bartenstein on Article 211 of the United Nations Convention on the Law of the Sea in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea; A Commentary* (C.H.Beck, Hart, Nomos 2017) 1442-1443.
[1124] Article V (1) of the Protocol I, MARPOL.
[1125] Article V of the Protocol I, MARPOL and Article 4 (2) of the OPRC.
[1126] Article 1 (5) of the WRC.

State is guided in determining the hazardousness of a shipwreck.[1127] The list includes criteria such as the type, size and construction of the wreck; tidal range and currents in the area; proximity of shipping routes or established traffic lanes; traffic density and frequency; vulnerability of port facilities; acoustic and magnetic profiles of the wreck; and the damage likely to result should the cargo or oil be released into the marine environment. The latter must be read together with Article 194 (2) of the LOSC and the obligation owed towards others to ensure that 'pollution arising from incidents or activities under [coastal State] jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [the LOSC]'.

The WRC is clear in that the coastal State is not bound by criteria contained in Article 6. Rather, it 'should' merely take them into account.[1128] However, what appears to be uncertain is whether or not the coastal State is required to determine the hazardousness of a wreck in the first place. The WRC imposes no explicit obligation on the coastal State in this respect, even though the solution was rather different in the initial draft, which read as follows:

> [w]hen a *[ship or]* wreck beyond the territorial sea of States Parties has been reported or located in accordance with Article IV, the State whose interests are the most directly threatened by the *[ship or]* wreck shall be responsible for determining whether a hazard exists […].[1129]

There seems to be no particular explanation as to why this solution was eventually abandoned. Nonetheless, even though the WRC imposes no explicit obligation on the coastal State to make a determination of a hazard, such an obligation may be implicitly deduced from the title of the provision of Article 6 ('determination of a hazard') and the fact that the provision opens with the expression 'when determining whether a wreck poses a hazard'. More importantly, the obligation to determine a hazard seems to be implied in the coastal State's obligation imposed under Article 7 of the WRC to warn others of a wreck upon becoming aware of it and to locate a wreck if there is a reason to believe that a wreck poses a hazard.

[1127] Article 6 (1) of the WRC.

[1128] Article 6 (1) of the WRC uses the expression 'the following criteria should be taken into account by the Affected State'.

[1129] This was Article V of the draft WRC. See IMO doc, LEG 73/11 of 8 August 1995, 4 and LEG 78/4/2 of 14 August 1998, Annex, 5. Also, during the negotiations of the WRC, the USA was concerned with a situation in which a wreck is located 'at such a distance from land that no coastal State has indicated a direct concern in the matter'. In this respect, the USA made a suggestion to have the WRC Fund, represented by the Director, who would then coordinate the matter with the flag State, or with the State whose nationality the shipowner holds. The USA's proposal gained no support among the governments. See IMO doc, LEG/WG(WR).I/2 of 22 October 1973, 13-14.

In particular, Article 7 (1) of the WRC demands from the coastal State 'upon becoming *aware* of a wreck' to 'warn mariners and the States concerned' of 'the *nature* and *location* of the wreck'.[1130] When the coastal State receives a report of the wreck, it is automatically 'aware' of the wreck, which triggers its obligation towards others. In this respect, the coastal State is not merely obliged to warn others of the existence of a wreck but also of its 'nature', which term clearly suggests that the coastal State is indeed obliged to determine the hazardousness of the wreck.

Moreover, Article 7 (2) of the WRC stipulates that the coastal State is obliged 'to ensure that all practicable steps are taken to establish the precise location of the wreck', if it '*has reason to believe* that a wreck poses a *hazard*'.[1131] Upon receiving a report of the wreck, the coastal State is automatically given the opportunity to determine whether there is a 'reason to believe' that a wreck poses a 'hazard' and in this respect the coastal State would indeed be expected to determine the hazardousness of the reported wreck. It needs to be appreciated that Article 1 (5) of the WRC speaks of a hazard as a navigational obstruction, or a condition or threat that 'may reasonably be expected to result in major harmful consequences to the *marine environment*, or damage to the coastline or related interests of *one or more States'*.[1132] The WRC thus clearly demands the interests of other States to be taken into consideration at the stage of determining a hazard. Moreover, when it comes to a hazard to the coastline and related interests, the interests of other States should be given the same weight as the interests of a particular coastal State which has decision-making powers given that all these interests are included in the very definition of a hazard, i.e. the purpose of the WRC, rather than in the principle of due regard. This could explain why Article 6 of the WRC speaks of the coastal State 'determining whether a wreck poses a hazard', as opposed to the coastal State determining 'whether a wreck poses a hazard to *it'*.[1133]

All this, coupled with the good faith principle and the obligation not to abuse rights, suggests that, upon receiving a report of the wreck, the coastal State cannot turn a blind eye but must take into consideration the interests of others by determining the hazardousness of a wreck in order to fulfill its WRC obligation to warn and locate accordingly. This may explain why indeed

[1130] Emphases added.
[1131] Emphases added.
[1132] Emphases added. This builds on the Preamble according to which the WRC was adopted for the purpose of protection of the marine environment and safety of navigation in general, rather than for the purpose of protecting the coastline and related interests of the coastal State in the scenarios of emerging unfolding casualties of a particularly grave character.
[1133] Emphasis added. See also See Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007' (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly* 49, 79.

the OPRC model was not followed to impose the duty to report on ships passing by. This may also explain why in a given situation the coastal State would not have incentive to ask for the report itself if it is of the view that the wreck creates no hazard to national interests of that particular State.

The WRC obligation to determine a hazard, and to warn and notify others accordingly, inevitably comes as a *quid pro quo* in the bargain in which the coastal State gets the right to order the registered owner to remove a wreck or to have a wreck removed at the expense of the registered owner, rather than at its own expense. The obligation to warn and notify does not seem to be such a burdensome obligation after all, but truly the minimum that would generally be expected. One also needs to appreciate that the WRC in essence follows the directions already imposed under general international law and is analogous to the regime of the territorial sea, where the coastal State has authority over wreck removal on the basis of its territorial sovereignty. The coastal State has a corresponding obligation to warn and notify others of navigational obstructions, which certainly includes sunken and stranded ships. As explained earlier, the obligation to warn and notify is firmly rooted in customary international law to which the Court referred in the *Corfu Channel* Case by holding that:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

While the Court was referring to the concept of ‘using territory’, its judgement was based primarily on two main points: the coastal State’s awareness of a hazard and its exclusive control over such a hazard, which is in essence the logic followed by the WRC too. Nonetheless, as previously discussed, the WRC leaves considerable leeway for coastal States to decide on the exact way of exercising their obligation to determine a hazard as the criteria under Article 6 of the WRC are non-mandatory and there is at any rate no particular formula as to how these criteria are to be weighed.

8.3.3 Marking

If the coastal State determines a wreck to constitute a hazard, the WRC requires the coastal State to ensure that 'all reasonable steps are taken to mark the wreck'.[1134] In this respect, the coastal State is required to ensure that markings conform to the 'internationally accepted system of buoyage in use in the area where the wreck is located'.[1135] This provision needs to be read together with the SOLAS and the international recommendations and guidelines developed through the International Association of Lighthouse Authorities (IALA). Namely, according to Regulation V/13 of the SOLAS, the coastal State is obliged to provide:

> as it deems practical and necessary either individually or in co-operation with other Contracting Governments, such aids to navigation as the volume of traffic justifies and the degree of risk requires.

In this respect, Regulation V/13 of the SOLAS makes an explicit reference to the IALA recommendations and guidelines,[1136] which *inter alia* speak of a system of buoyage and marking. The IALA recommendations and guidelines should thus be considered as an 'internationally accepted system of buoyage' referred to in Article 8 (2) of the WRC. In this respect the WRC does not bring anything new. However, the WRC does not use the same language as the SOLAS does. Namely, according to the WRC, the coastal State is obliged to ensure that reasonable steps are taken to mark the wreck, while according to the SOLAS, the coastal State is given certain discretion in that it is obliged to provide aids to navigation 'as it deems practical and necessary' depending on, for example, the volume of traffic and the degree of risks. At the same time, less or no discretion in relation to a wreck, which is already permanently attached to the seabed and which creates a hazard, seems reasonable.

The WRC obligation to mark a hazardous wreck in the EEZ or the corresponding area has an implication for the liability and compensation issues. In particular, under the IMO liability and compensation conventions, the shipowner may be exonerated from liability if the damage is

[1134] Article 8 (1) of the WRC.
[1135] Article 8 (2) of the WRC.
[1136] Regulation V/13 (2) of the SOLAS stipulates that: '[i]n order to obtain the greatest possible uniformity in aids to navigation, Contracting Governments undertake to take into account the international recommendations and guidelines* when establishing such aids'. In this respect, an explicit reference is made in the footnote to the 'appropriate recommendations and guidelines of IALA and to Maritime buoyage system (SN/Circ.107)'.

caused by the negligence or other wrongful act of the authority responsible for the maintenance of lights or other navigational aids.[1137]

8.3.4 Wreck Removal

The main power assigned to the coastal State under the WRC is the right to order the registered owner to remove a hazardous wreck, or to have a hazardous wreck removed[1138] at the expense of the registered owner,[1139] who is also liable for the costs of locating and marking. The registered owners' duty is in this respect complemented by the obligation of States whose nationality these owners possess to ensure that they comply with their obligation.[1140]

As discussed in chapter 6, in relation to drifting ships that are not yet wrecks proper but may so become, the WRC clarifies that the coastal State has no authority when salvage operations are under way, unless these appear ineffective and the coastal State needs to intervene.[1141] When it comes to sunken and stranded ships, however, the situation is considerably different in that the WRC makes no reference to salvage activity whatsoever. For a ship to be treated as a wreck, and thus to fall fully under coastal State jurisdiction, it is enough to be sunken or stranded.[1142] This essentially means that coastal State powers automatically take preference over any navigational rights and interests associated with the ship.

8.3.4.1 Hazardous Wrecks

Coastal State jurisdiction under the WRC concerns hazardous wrecks, rather than wrecks in general, albeit the definition of a hazard is significantly broad and mostly subject to no particular qualifications. In this respect, it needs to be recalled that the definition of a hazard contained in the WRC takes account of navigational, economic and environmental considerations. In particular, Article 1 (5) of the WRC defines a 'hazard' as any condition or threat that: (i) poses an obstacle to navigation; or (ii) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related

[1137] See Article III (2) of the CLC. Similar provision is contained in Article 3 (3) of the Bunker Convention and Article 10 (1) (c) of the WRC. For the shipowner to be exonerated from liability, these instruments require damage (or, in case of the WRC, maritime casualty) to be caused 'wholly' by the negligence of the competent authority. The HNS Convention, however, requires damage to be caused 'wholly or partly'. See Article 7 (3) of the HNS Convention.
[1138] Article 2 (1) and Article 9 of the WRC.
[1139] Article 10 (1) of the WRC.
[1140] Article 9 (9) of the WRC.
[1141] See chapter 6 of the thesis (6.6.1.1.).
[1142] Article 9 (2) of the WRC.

interests of one or more States. The related interests are defined so as to include various interests of coastal States, including port activities, fisheries and tourism. Hence, the aim of the WRC concerns safety of navigation, the protection of the marine and coastal environment, as well as the protection of the economic interests of the nearby coastal States, even though the Preamble of the WRC suggests that the purpose of the WRC is confined to the safety of navigation and environmental protection.

In principle, the definition of a hazard does not impose any particular threshold, save for the hazard to the marine environment, in relation to which the coastal State may demand wreck removal only if there is a hazard that may reasonably be expected to result in 'major harmful consequences'. The reason why this high threshold is required in relation to the marine environment in general is not entirely clear, albeit some observations may be made on the basis of preparatory documents, which suggest that States were concerned about rather vague environmental claims and thus wanted to 'eliminate minor damage to the marine environment', for which the registered owners and their insurers would ultimately have to pay.[1143]

8.3.4.2 Types of Measures

As the point of departure, if the coastal State determines that a wreck poses a hazard, it is allowed to issue a wreck removal order. However, the coastal State does not automatically have the right to execute such order given that a hazardous wreck is first to be removed by the registered owner. Furthermore, the coastal State is not allowed to use its own ships or its own contractors to exercise the activity of wreck removal. According to Article 9 (4) of the WRC, the shipowner retains the freedom to enter into a contract with any salvor of its personal choice. Hence, the coastal State cannot demand the shipowner to engage a particular salvor of the coastal State's choice. This stands in clear contrast to wreck removal powers that the coastal State has on account of its territorial sovereignty in internal waters, archipelagic waters and the territorial sea, as will be addressed below. It also contrasts with powers of intervention on the basis of which the coastal State is allowed to immediately take certain measures on its own, as explained in chapter 6 of the thesis. At the same time, nothing prevents the registered owner from actually wanting to employ the salvor who works for the coastal State.

[1143] See IMO doc, LEG 78/4/2, Annex, 2. Also, during the 76th session of the Legal Committee, a proposition was made to define environmental hazard as any condition or threat of '[significant] damage to the marine environment, or to the coastline or related interests of one or more States'. See IMO doc, LEG 76/5 of 8 August 1997, 3.

The coastal State is allowed to decide on the type of wreck removal measure and the conditions for its exercise. On its face, the term 'removal' suggests a physical elimination of a wreck from the seabed. However, the WRC defines removal as 'any form of prevention, mitigation or elimination of the hazard created by a wreck'.[1144] This means that the coastal State cannot assume that the complete removal of the ship's hull and cargo from the seabed is automatically allowed in each and every 'wreck removal' scenario. Rather, in a given situation, it may be that only pumping out oil and/or sealing leaks is justifiable under the WRC – in other words, partial removal.

In very deep water oil may congeal in the low temperature,[1145] which may explain why the coastal State would perhaps want to leave the wreck on the seabed, or lower it further down.[1146] At the same time, leaving the wreck on the seabed or lowering it further down would have to be taken with particular care because the WRC requires a hazard to be determined not only in relation to the particular coastal State, but also in relation to the marine environment.[1147]

According to Article 9 (4) of the WRC, the coastal State is provided with the right to stipulate the conditions for wreck removal before the removal starts. This right is subject to a restriction in that conditions may be laid down only to the extent 'necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment'. Nonetheless, both of these purposes are broad enough to give the coastal State considerable power.[1148] Because the coastal State is given the right to set down the conditions for the wreck removal before its start, the coastal State would also be allowed to ask for the wreck removal plan and method to be approved in advance.[1149] It is important to note that choosing the method of wreck removal has a direct impact on wreck removal costs, which are ultimately paid by the registered owner,[1150] and may as such prevent salvage to be commercially feasible for the owner.

[1144] Article 1 (7) of the WRC.
[1145] Markku Suksi, 'The State's Response to Wrecks Causing Environmental Risks' (2019) 522 *MarIus*, 15.
[1146] For more on the conceivable measures see chapter 2 of the thesis (2.3.).
[1147] Article 1 (5) (b) of the WRC.
[1148] Article 9 (4) of the WRC.
[1149] In 1998, during the 78th session of the LEG, a proposal was made to have this right of the coastal State explicitly included in the text of Article 9 (back then Article 7). However, the proposal was not accepted. To the extent that the coastal State wants to assess the safety and environmental risks in a given situation, there seems to be no reason why it should not have the right to ask for the salvage plan and salvage method to be approved in advance, even though the explicit reference to this end was eventually excluded from the text of the Convention. See IMO doc, LEG 78/4/2 of 14 August 1998, Annex, 6.
[1150] Article 10 (1) of the WRC.

Once the wreck removal starts, the coastal State has the right to intervene in an ongoing operation, again to the extent 'necessary to ensure that the removal proceeds effectively in a manner that is consistent with considerations of safety and protection of the marine environment'.[1151] Under the WRC, the coastal State is clearly obliged to give the registered owner a 'reasonable deadline' to complete the wreck removal measures and cannot take any measure on its own before the deadline expires.[1152] There is no guidance as to what a 'reasonable deadline' would be, albeit the WRC makes it clear that the nature of the hazard should be taken into account in this respect. Eventually, the reasonableness of a deadline will have to be assessed on a case-by-case basis and is likely to be influenced by the salvor's view as well as the criteria contained in Article 6 of the WRC.

Both the recognition of a waiting period[1153] and the abovementioned freedom of choosing the salvor of the shipowner's own choice indeed acknowledge that rights and interests associated with the ship are protected. Yet, this does not take away the fact that the coastal State is given the right to take over salvage, order wreck removal, choose wreck removal method, impose certain conditions in this regard, all at the expense of the registered owner. This is a significant (albeit not radical) power given the broad definition of a hazard on the basis of which the coastal State may justify its choices. This may have significant implications for the costs and thus the prospect of salvage being commercially feasible. In this respect, it becomes important to reflect upon the principles of due regard, necessity, proportionality, reasonableness and restrictions embodied in the obligation to notify and consult.

8.3.5 Due Regard, Necessity, Proportionality and Reasonableness

Under the WRC, coastal State jurisdiction clearly enjoys preference over the navigational rights and interests associated with the shipwreck. Nonetheless, the coastal State is obliged to take account of these rights and interests in choosing the type of wreck removal measure. The due regard obligation is in this respect spelled out in Article 2 (3), which stipulates that wreck removal measures:

[1151] Article 9 (5) of the WRC.
[1152] Article 9 (6) and (7) of the WRC.
[1153] It is worthwhile recalling the time when the Intervention Convention was negotiated and an observation made that the coastal State's right of intervention in the *Torrey Canyon* casualty was hindered: 'by an interpretation of admiralty law according to which there should be a waiting period before any party other than the shipowner or the salvors could intervene in cases of a maritime casualty occurred beyond the territorial sea'. See Augustin Blanco Bazan, 'Intervention in the High Seas in Cases of Marine Pollution Casualties' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 265.

> shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned.

If salvage is possible and may achieve the same result as wreck removal, then the latter would not be 'reasonably necessary' and the coastal State would run the risk of being called for not complying with Article 2 (3) of the WRC. Moreover, the coastal State is obliged to take measures only to the extent these are 'proportionate to the hazard'.[1154] While all these principles restrict the choices regarding wreck removal measures, the coastal State is nevertheless offered a considerable leeway given a broad definition of a hazard, which is directly linked to the type of wreck removal method and costs thereby incurred. Just to give an example, removing a shipwreck from the seabed by cutting up *in situ* is less expensive than parbuckling.[1155] However, the former could assumingly create risk for the marine environment and in this respect the coastal State could opt for a more expensive method. This may explain the considerable costs for the wreck removal of the *Costa Concordia.*[1156] At the same time, Article 2 (3) of the WRC would demand that the coastal State takes account of the need to preserve the value of the ship to the maximum extent possible. In this respect, it needs to be highlighted that even though salvage of a sunken or stranded ship may not be commercially feasible, a ship may still have a scrap value.

While given a considerable leeway in its choices, the coastal State is at any rate prevented from abuses through the restrictions embodied in the obligation to notify and consult.

8.3.6 Obligations to Notify and Consult

The obligation to notify and consult, as spelled out in Article 9 (1) of the WRC, demands that the coastal State, once it determines that a wreck constitutes a hazard, immediately informs the flag State and the registered owner accordingly and that it consults the flag State and other States affected by the wreck regarding measures to be taken in relation to the wreck. As discussed in chapter 6, the obligation to consult implies some conference between parties. At the same time, the other State cannot claim veto and the obligation to consult must not be seen

[1154] Article 2 (2) of the WRC.
[1155] For more on the parbuckling method see chapter 2 of the thesis (2.3.).
[1156] Lloyds, 'The Challenges and Implications of Removing Shipwrecks in the 21st Century', 27, available at <https://www.lloyds.com/~/media/lloyds/reports/emerging%20risk%20reports/wreck%20report%20final%20version%20aw.pdf> accessed 31 October 2020. On the *Costa Concordia* wreck removal costs see Gaskell and Forrest (n 1133) 98.

as a mere formality.[1157] At this stage, it is also important to realize that the coastal State has no obligation to consult the State whose nationality the registered owner possesses. The implications of this omission will be discussed below.

8.3.7 Internal Waters, Archipelagic Waters and the Territorial Sea

The WRC does not automatically apply within the area of coastal State's territorial sovereignty (internal waters, archipelagic waters and the territorial sea). Rather, the coastal State needs to explicitly opt for the extended application of the WRC by invoking Article 3 (2) of the WRC and notifying the IMO Secretary-General thereof.[1158] If the coastal State opts for this, it is to some extent given the same rights and incurs the same obligations as beyond this area. However, certain rules contained in the WRC do not apply to the extent these are perceived as intruding into territorial sovereignty.

First, the coastal State is allowed in its territory to take measures other than locating, marking and removing a hazardous wreck in accordance with the Convention.[1159] This means that the coastal State is allowed to take, for instance, certain measures concerning a wreck on other grounds besides obstruction to navigation or damage to the marine environment or coastline and related interests (e.g. the wreck appears unsightly). For wreck removal measures on such other grounds, however, the coastal State cannot rely on the benefits of the liability and compensation part as regulated under Articles 10, 11 and 12 (strict liability of the registered owner, possibly subject to no limitations, backed with compulsory insurance and direct action).

Second, the coastal State is free to require a shipowner to employ the salvor of the coastal State's choice, including the public authorities of that coastal State. This is an important point to be made as many States have their national laws reserving salvage operations for their own contractors.[1160] Hence, this arrangement is here clearly to preserve the coastal State's sovereignty.[1161]

Third, the WRC explicitly lists the provisions that are excluded from its application in case the WRC applies in the territory of the coastal State. The list includes Article 2 (4) (the prohibition of claiming sovereignty or sovereign rights over the high seas), Article 9 (1), (5), (7)-(10)

[1157] See chapter 6 of the thesis (6.2.3.).
[1158] Article 17 of the WRC in relation to Article 3 (4) and (5) of the WRC.
[1159] Article 3 (2) of the LOSC.
[1160] Richard Shaw, 'The Nairobi Wreck Removal Convention' (2007) 13 *The Journal of International Maritime Law* 429, 436.
[1161] Article 4 (4) (b) of the WRC. See also IMO doc, LEG.CONF.16/12 of 24 April 2007, Annex 2.

(wreck removal measures) and Article 15 (mandatory dispute settlement). Regarding Article 9 of the WRC, it is clear that not all the provisions of this article are excluded, but only those that essentially impose restrictions on the coastal State. However, of some doubt is the application of Article 9 (1) in case of a direct action against the provider of the financial security (which is normally the P&I insurer).

In particular, Article 9 (1) requires the coastal State to notify others and consult with the flag State and other States affected by the wreck. According to Article 4 (4) (a) of the WRC, Article 9 (1) of the WRC is excluded from the application of the WRC in the territory of the coastal State. However, Article 3 (2) of the WRC, when referring to the liability and compensation part of the Convention, does not differentiate between different provisions of Article 9. The last sentence suggests that for the purpose of obtaining compensation from the insurer, Article 9 continues to apply in its entirety, i.e. even paragraph 1, because there is no reference to particular provisions of Article 9 as was done in Article 4 (4) (a).[1162] It remains to be seen if this will appear problematic in practice.

When it comes to the extended application, the WRC is notable for what is not included in Article 4 (4) (a), rather than for what is included.[1163] In particular, Article 4 (4) (a) of the WRC makes no reference to Article 2 (2) and (3), i.e. the principles of reasonableness and proportionality. While the principle of reasonableness is indeed a general principle of international law that applies irrespective of the coastal State's sovereignty, as confirmed in the *Anglo-Norwegian Fisheries* Cases,[1164] the extended application of the principle of proportionality is somewhat controversial, as discussed already in chapter 7.[1165]

8.3.8 Wrecks with an Unknown Cause – the Requirement of a Maritime Casualty

The problem of hazardous wrecks was recognized already in the aftermath of the *Torrey Canyon* (1967).[1166] However, it was only in relation to extreme circumstances of unfolding maritime casualties causing particularly severe pollution that States considered wrecks to be in urgent need of international law-making. This is spelled out clearly in the Preamble of the Intervention Convention. General issues of jurisdiction were kept for a later stage to be dealt

[1162] Shaw (n 1160) 411.
[1163] Gaskell and Forrest (n 1133) 110.
[1164] The *Fisheries* Case (UK v. Norway), Judgment of 18 December 1951, ICJ Reports 1951, 116.
[1165] See chapter 7 of the thesis (7.6.).
[1166] See chapter 5 of the thesis (5.6.1.1.).

with, partly because of the awareness within the LEG that general issues of jurisdiction could adequately be discussed only after the conclusion of UNCLOS III.[1167]

UNCLOS III resulted in the adoption of the LOSC, which dedicates considerable attention to safety of navigation and the protection and preservation of the marine environment. In terms of the former, flag States are, for example, obliged to take in relation to ships flying their flag measures that are necessary to ensure safety at sea, including the prevention of collisions,[1168] while in terms of the latter, all States are obliged to protect and preserve the marine environment.[1169] In more specific terms, the LOSC demands from all States to take 'individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source […]'.[1170] The term 'any source' clearly speaks of the LOSC intolerance towards any kind of pollution of the marine environment, irrespective of whether it comes from oil (leaking from a ship) or a ship itself.

The WRC opens with the preamble that stresses the importance of the LOSC and customary international law and makes it clear that 'wrecks, if not removed, may pose a hazard to navigation or the marine environment'. There is no reference to maritime casualties in this respect and this is not surprising as hazardous wrecks may indeed be a source of pollution of the marine environment and a navigational hazard irrespective of their cause, i.e. regardless of whether a ship became a wreck by way of a maritime casualty or in a different way, e.g. intentionally.

Yet, in its main part, the WRC addresses only those wrecks that stem from a maritime casualty. In this respect, it needs to be recalled that a maritime casualty was brought under the WRC merely for the purpose of bringing drifting ships under its scope of application.[1171] The requirement of a maritime casualty is included not to point to an unfolding situation but to serve as a trigger for the coastal State's rights to be exercised. However, even though acting only as a trigger, the requirement of a maritime casualty in fact prevents the WRC to be invoked in relation to hazardous wrecks that stem from an unknown cause or from a different cause than a maritime casualty.

[1167] IMO doc, LEG 69/10/1 of 28 July 1993, para 4. See also Gaskell and Forrest (n 1133) 53.
[1168] Article 94 (3) and (4) of the LOSC.
[1169] Article 192 of the LOSC.
[1170] Article 194 (1) of the LOSC.
[1171] See chapter 6 of the thesis (6.6.1.1.)

By making coastal State jurisdiction conditional upon a maritime casualty, even though such a casualty does not need to be unfolding, the WRC does not necessarily fulfills the general purpose for which it was adopted – the general protection of the marine environment and safety of navigation. In this regard, the WRC may be criticized for not being entirely in line with the IMO's mandate to have safe and secure shipping on clean oceans. While the coastal State is given the right to remove a wreck that creates a pure navigational obstruction and may thus take actions to prevent future maritime casualties and incidents, this is only to a limited extent as the occurrence of a maritime casualty remains the trigger for the coastal State's right to be exercised.

The inclusion of a maritime casualty in the definition of a wreck automatically excludes from the scope of application of the WRC wrecks whose cause of sinking or stranding is unknown. At present, modern technology would probably allow the coastal State to keep track of the cause of a ship transforming into a wreck. However, there are many old wrecks that indeed are hazardous and whose cause may not always be known by the coastal State. These wrecks would not fall under the WRC scope as it cannot be proven that they stem from a casualty.

8.3.9 The Non-Retroactivity of the WRC

At any rate, the WRC has no retroactive application.[1172] This means that many hazardous wrecks that predate the entry into force of the WRC, even though possibly caused by a casualty, do not fall under the WRC. This is a significant point to be made because studies show that there are many pre-WRC hazardous wrecks. According to one study, in 2005 there were at least 8 569 hazardous wrecks worldwide.[1173] An UNCTAD study shows that at the time of the adoption of the WRC, the number of abandoned wrecks was estimated at 1 300 worldwide.[1174] These figures differ due to different parameters used in the analysis but the message they send

[1172] According to Article 28 of the VCLT, '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. No different interpretation appears from the WRC nor is it otherwise established. On the contrary, Article 13 of the WRC clearly stipulates a time bar. One could argue that the non-retroactivity in this respect relates only to the liability and compensation part of the Convention. However, the inclusion of a maritime casualty in the definition of a wreck could suggest the practical non-retroactivity in relation to the jurisdictional part of the Convention too.

[1173] Jacqueline Michael et al, 'Potentially Polluting Wrecks in Marine Waters', a paper prepared for the 2005 International Oil Spill Conference, 5, available at <https://portal.helcom.fi/meetings/SUBMERGED%205-2016-377/Related%20Information/Potentially%20Polluting%20Wrecks%20in%20Marine%20Water_Michel_etal_2005.pdf> accessed 31 October 2019.

[1174] See UNCTAD, 'Review of Maritime Transport 2007', 109.

is rather clear – there are a significant number of wrecks that are indeed hazardous but do not fall under the WRC scope of application.

8.3.10 Point of Departure: Right, rather than Obligation, to Remove Wrecks

The WRC places no obligation on the coastal State to remove a hazardous wreck, even though the history of the negotiations of the WRC reveals a somewhat different approach initially taken. As apparent from the Report of the LEG on the work of its 19th session (1973), States expressed different views in relation to the question of what would be the best solution to the problem of hazardous wrecks. While the general view was that the removal of wrecks has to be dealt with in an effective and expeditious way, different views emerged as to how to achieve this goal.

Some delegations expressed the view that the best solution in this respect would be to place an obligation for the removal of wrecks on person(s) responsible for its being where it was (primarily the responsibility of a shipowner).[1175] However, they also recognized that such a person might not, for whatever reason, comply with this obligation and that the involvement of States would also need to be taken into account. The question was whether such involvement should be based on 'possibility' or on 'necessity'.[1176] In other words, should it stand as a right or as an obligation? Other delegations were of the view that placing an obligation on the shipowner/'responsible person' would not lead to an effective solution of the problem given the fact that in many, if not most, cases, the shipowner would not be the actor who can actually take the actions as required.[1177] In this regard, they felt that the effective and expeditious removal of wrecks could only be better achieved if an obligation for the removal of wrecks would be imposed on States in the first place. This would be either a coastal State in whose area the wreck is located or a coastal State nearest to the wreck.[1178]

The WRC as it stands today places no obligation for the removal of hazardous wrecks on coastal States. This might be seen as a weakness of the Convention, not if observed from the shipowners' or a particular coastal State's point of view, but from the point of view of the international community as a whole. Could this invoke the *right v duty* debate as in relation to places of refuge? It might. However, the circumstances surrounding this debate would be rather different because there is no pressure coming from shipping interests. In any case, this only

[1175] IMO doc, LEG XIX/5 of 29 June 1973, para 56.
[1176] IMO doc, LEG XIX/5 of 29 June 1973, para 56.
[1177] IMO doc, LEG XIX/5 of 29 June 1973, para 57,
[1178] IMO doc, LEG XIX/5 of 29 June 1973, para 57, 60.

confirms the direction of the evolvement of international law in that the starting point is always the right of the coastal State.

8.4 **Relationship of the WRC to the LOSC**

In internal waters, archipelagic waters and the territorial sea, the coastal State is already under general international law provided with jurisdiction over foreign shipwrecks on the basis of its territorial sovereignty. Such jurisdiction is in principle unrestricted, save for the obligation of the coastal State to give due publicity to navigational hazards. In this regard, the WRC brings nothing new to the regime, but rather stands as a fine-tuning of the applicable rules of general international law.[1179] Of some controversy is whether the principle of proportionality finds its place in general international law. This was clearly not the case at the time of the *Torrey Canyon*, when proportionality was demanded only beyond the limits of the territorial sea, for which reason States did not negotiate the extended geographical scope of application of the Intervention Convention.

Beyond the limits of the territorial sea, however, the WRC surely brought something more than a simple fine-tuning of the LOSC. While there is room to argue that sovereign rights within the regime of the EEZ and the continental shelf do entitle coastal States to combat risks posed by hazardous ships for the purpose of protecting their economic interests, at no rate is the coastal State authorized under general international law to ask the registered owner to pay for the costs associated with wreck removal for the purpose of protecting the economic interests of that State. Furthermore, the LOSC does not confer on the coastal State the right to order the removal of a wreck that creates a navigational hazard. On the contrary, safety of navigation is associated with flag State jurisdiction, as reflected in Article 94, which stipulates that it is the flag State's responsibility to take measures necessary 'to ensure safety at sea with regard, *inter alia* […] the prevention of collisions'.[1180] In this regard, the WRC surely brought to the LOSC regime changes that go beyond a simple fine-tuning.

In practical terms, however, if a wreck creates a navigational obstruction, it could also create the risk of vessel-source pollution – at least on account of the fact that another ship may collide with the wreck (e.g. in a busy shipping lane) and release harmful substances into the sea or into

[1179] In fact, during the preparations of what now became the WRC, States were clear in that 'new instrument would not be aimed at the establishment of new rights of coastal States but at the uniform regulation of wreck removal activities'. See IMO doc, LEG 69/11 of 12 October 1993, 19.
[1180] See Article 94 (3) (c) of the LOSC.

the atmosphere.[1181] The regulatory purpose of maritime safety may thus be closely linked to environmental protection, in relation to which the coastal State is in fact given jurisdiction under the LOSC, albeit subject to certain conditions imposed by Article 211 (5). Environmental protection may also serve the purpose of protecting the economic interests of the coastal State. What now remains to be seen is what Article 211 (5) of the LOSC stands for and whether the WRC may be brought under its scope.

Article 211 (5) of the LOSC reads as follows:

> Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards [GAIRAS] established through the competent international organization or general diplomatic conference.

It first needs to be emphasized that the coastal State is not obliged to regulate on matters of vessel-source pollution. Article 211 (5) clearly confers on the coastal State the *right*, rather than the obligation.[1182] However, if the coastal State avails itself of the right to regulate vessel-source pollution, it is obliged to follow GAIRAS as a maximum at which shipping interests may be interfered with in terms of stringency and types of rules and standards.[1183] The notion of GAIRAS in essence brings the norms contained in the relevant IMO treaties under the scope of application of Article 211 (5) and in this respect GAIRAS is also relevant for the question of opposability.

The WRC is an IMO treaty. As of 14 February 2020, 48 States expressed their consent to be parties to this Convention.[1184] Many States parties to the LOSC are therefore still not parties to

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[1181] In this respect, the IMO Secretariat prepared a paper in consultation with the United Nations Division of Ocean Affairs and the Law of the Sea (DOALOS), arguing that: 'any wreck posing a threat to navigation will almost certainly also pose a threat to the environment. This is because even if a ship colliding with a wreck is not carrying oil or another hazardous cargo, it will be carrying fuel oil, which can cause serious environmental damage if it spills into the sea. Furthermore, a wreck may cause other types of environmental damage, such as smothering marine organisms, breaking up coral reefs, and if it is large enough, interfering with spawning and breeding areas. Problems could also be posed by the leaching of TBT [tributyltin] paint and the discharge of harmful organisms in ballast water'. See IMO doc, LEG 86/4/1 of 27 March 2003, para 14. The example of the risk of TBT pollution is the grounding of the *Shen Neng 1* on Douglas Shoal in the Great Barrier Reef in April 2010. See Ngai Te Hapu Inc & Amor v. Bay of Plenty Regional Council, before the Environment Court in the New Zealand, Decision No. [2017] NZEnvC 073.

[1182] Emphasis added.

[1183] For more on the difference between optional maximum associated with coastal State jurisdiction and mandatory minimum associated with flag State jurisdiction see chapter 4 of the thesis (4.2.2.2.).

[1184] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 14 February 2020.

the WRC.[1185] Based on the *pacta tertiis* principle, a treaty produces legally binding effect only on States parties.[1186] In other words, the WRC is in principle irrelevant to third States (States non-parties). However, the notion of GAIRAS (as well as the notion of 'generally accepted international regulations' and many others) represents the so-called 'rules of reference' – a mechanism that enables certain IMO treaties to produce legal effects on States parties to the LOSC, which are not parties to a given IMO treaty, as explained to some extent in chapters 3 and 4. The mechanism in point was interpreted for the first time in the *South China Sea* Arbitration, where the Court held that the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) is incorporated into the provision of Article 94 of the LOSC by virtue of representing 'generally accepted international regulations' concerning measures necessary to ensure maritime safety.[1187] As the Court further articulated, '[i]t follows that a violation of the COLREGs […] constitutes a violation of the [LOSC] itself.'[1188]

8.4.1 Does the WRC Have the Potential to be incorporated into Article 211(5) of the LOSC?

8.4.1.1 Some Preliminary Observations

If the WRC is incorporated into the provision of Article 211 (5) of the LOSC, the coastal State party to the LOSC would be allowed to apply the WRC in relation to ships flying a flag of a State party to the LOSC and registered owners with the nationality of a State party to the LOSC, irrespective of the participation of these States in the WRC. In essence, the issue at stake concerns the third States-effect on which scholars seem to have different views. Griggs argues that the Convention 'will only apply if the Affected State and the flag State are both parties to the Convention.'[1189] Ringbom, on the other hand, argues that:

[1185] As of 14 February 2020, there are 168 parties to the LOSC. See UN Treaties, List of States Parties to the LOSC, available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 14 February 2020.
[1186] The *pacta tertiis* is codified in Article 34 of the VCLT, which stipulates that 'a treaty does not create either obligations or rights for a third State without its consent'.
[1187] The *South China Sea* Arbitration (The Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration, Award of 12 July 2016, para 1083.
[1188] Ibid.
[1189] Patrick Griggs, 'Wreck Removal Convention' (2008) 7 *Shipping & Transport International* 20, 21.

> [i]n view of the jurisdictional provisions of [the LOSC], it seems clear that the new powers of coastal States may be exercised with respect to ships of any nationality in the EEZ, once the Convention gains general acceptance and enters into force.[1190]

In his argumentation, Ringbom relies on Articles 56 and 211 (5) of the LOSC, and thus GAIRAS. The Netherlands seems to take the same approach. From the Note of Amendment ('Nota van Wijziging') relating to the Act of 14 October 2015 (an act that implements the WRC into the Dutch national legislation), it appears that the WRC is considered GAIRAS and in this respect reference is made to Article 211 (5) of the LOSC.[1191] Consequently, the Netherlands takes the view that the WRC applies not only between the parties to the WRC, but also between the parties to the LOSC.

The USA seems to perceive the WRC as having no legally binding effect on third States. From the outset, it needs to be pointed out that the USA is not a State party to the LOSC. However, the USA perceives the LOSC as a reflection of customary international law and thus binding on the USA (save for Part XI concerning deep seabed mining and Part XV regarding settlement of disputes).[1192] Some observations may be made in relation to the USA's concerns (which concerns may at any time be brought to light by other States that are in fact parties to the LOSC, but not to the WRC) and the LEG's response to these. The concerns in hand relate to the language of the relationship clause contained in Article 16 of the WRC, which points at the non-prejudicial effect of the WRC in relation to 'any State'.

During the negotiations of the WRC, the USA proposed that the relationship clause of Article 16 of the WRC would make a clear distinction between States parties to the WRC on the one hand and States non-parties to the WRC on the other hand by expressly using the terms 'parties' rather than 'States'.[1193] However, the proposal of the USA did not find sufficient support among

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[1190] Henrik Ringbom, 'Wrecks in International Law' in Henrik Rak and Peter Wetterstein (eds), *Shipwrecks in International and National Law, Focus on Wreck Removal and Pollution Prevention*, papers from a Seminar held in Kasnas, Finland, 13-17 June 2007 (Institute of Maritime and Commercial Law Åbo Akademi University 2008) 22.

[1191] See 'Nota van Wijziging Ontvangen 9 september 2015', Tweede Kamer, vergaderjaar 2014-2015, 34069, nr. 7.

[1192] Statement by the President Ronald Reagan of 10 March 1983, available at <https://www.reaganlibrary.gov/research/speeches/31083c> accessed 31 October 2019.

[1193] In 2006, at the 92nd session of the LEG, the USA proposed the inclusion of an 'accurate legal statement that Parties are not prejudiced except to the extent provided in the Convention and that non-Parties are not prejudiced at all'. See IMO doc, LEG 92/13 of 3 November 2006, paras 17-18 and LEG 92/4/8 of 15 December 2006, para 30. The USA also suggested Article 16 to read as follows: 'Nothing in this Convention shall prejudice the rights and obligations of *non-States Parties* to this Convention, under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea'. See IMO doc, LEG/CONF.16/6 of 1 March 2007. Emphasis added.

delegations. The WRC relationship clause now points at the non-prejudicial effect of the WRC in relation to 'any State' and hence does not put States in two different categories ('States parties' on the one hand and 'States non-parties' on the other hand) as the USA advocated for. Nevertheless, recognizing that the intention of the USA was to add more clarity to the text of the WRC, the Legal Committee agreed to include in the report its understanding that:

> [t]he wreck removal convention will not bind, and will not be applicable to, non-Parties who have not consented to be bound, in accordance with the Vienna Convention on the Law of Treaties.[1194]

Referring to the LEG's report, the USA made the following statement:

> The ninety-second session of the Legal Committee agreed that the draft convention on wreck removal will not bind and will not be applicable to non-States Parties.[1195]

These two statements, however, do not convey the same message. The statement of the USA suggests the exclusion of the possibility of the WRC being GAIRAS because the term 'non-States Parties' is used without further qualifications. In other words, it suggests that it is only the official participation in the WRC that counts. The statement of the LEG, on the other hand, uses more generic terminology and suggests that the possibility of GAIRAS is not excluded because the term 'non-Parties' is linked to the general principle of consent as codified in the VCLT. This principle does not exclude the possibility of the WRC being considered GAIRAS because the LOSC States parties did indeed give their indirect consent to be bound by GAIRAS by expressly consenting to be a party to the LOSC.[1196] It now remains to be seen what the concept of GAIRAS requires. At this stage, however, one needs to appreciate that suggestions made by the USA may arguably be seen as a manifestation of persistent objection, albeit it is not entirely clear whether this objection came too late. Recalling chapter 1, in order to benefit from a persistent objection rule, a State must express its objection before a certain rule comes to its existence in customary international law.[1197] It is not clear whether the relevant time in this regard relates to the time of the creation of Article 211 (5) of the LOSC or the WRC.

[1194] IMO doc, LEG 92/13 of 3 November 2006, para 4.71.
[1195] IMO doc, LEG/CONF.16/6 of 1 March 2007, para 1 and LEG/CONF.16/7 of 15 March 2007, para 1.
[1196] Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 530.
[1197] See chapter 1 of the thesis (1.5.2.2.).

8.4.1.2 The Meaning of 'Generally Accepted' and 'International'

The basic intention of UNCLOS III with GAIRAS was to demand flag States take account of shipping regulations adopted at the international level and to avoid unilateralism that coastal States may otherwise pursue.[1198] This explains the term 'international' in the full phrase 'generally accepted international rules and standards'. At the same time, GAIRAS requires a certain level of acceptance too, as these rules and standards have to be 'generally accepted', which clearly requires a large majority within the international community to reflect a fair balance between juxtaposed interests. Referring to Article 10 of the 1958 Geneva Convention on the High Seas (HSC) and the difference between the term 'internationally' and 'generally', Molenaar observes:

> In the final version [of Article 10 of HSC] the term 'internationally' has been replaced by 'generally' to clarify that it was the intention to set a level which had been accepted by a large majority of States.[1199]

Hence, while the participation of two or three States in the adoption of a given treaty would be enough for it to qualify as international, it would not be enough to qualify as generally accepted. The exact meaning of the term 'generally accepted' was part of a long debate among scholars and it is still subject to uncertainty as to what exact level of acceptance is required.

The International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution suggests that the term 'generally accepted' was 'intentionally kept vague in order not to upset the delicate balance which the notion incorporates'.[1200] The most important objective of the qualification 'generally accepted' was surely to resolve the traditional conflict between the interests of coastal States in environmental protection on the one hand and the interests of flag States in maintaining freedom of navigation on the other hand, and to strike a fair balance accordingly.[1201] While some scholars, such as Hakapää and Treves, argue that 'generally accepted' is to be linked to customary international law,[1202] the preferable view is that the term 'generally accepted' cannot be equated with customary international law.

[1198] See chapter 3 and 4 of the thesis. See also Laura Boone, 'International Regulation of Polar Shipping' in Erik J Molenaar et al (eds), *The Law of the Sea and the Polar Regions* (Martinus Nijhoff 2013) 202.
[1199] Molenaar (n 1196) 150.
[1200] Franckx (n 1095) 30; Bernard Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 *New York University Journal of International Law and Politics* 109, 155-156.
[1201] Alexander Yankov, 'The Law of the Sea Conference at Crossroads' (1977) 18 *Virginia Journal of International Law* 31, 36. See also Franckx (n 1095) 106.
[1202] Kari Hakapää, *Marine Pollution in International Law* (Suomalainen Tiedeakatemia 1981) 120-121; Tullio Treves, 'Navigation' in Rene-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New the Law of the Sea, Volume II* (Martinus Nijhoff 1991) 874-875; Franckx (n 1095) 23.

Otherwise, there would be no use for having the rules of reference in the LOSC given that States are bound by customary international law at any rate.[1203]

Some scholars take the approach that the entry into force makes an instrument 'generally accepted' since the requirements of entry into force contain a quantitative and functional criteria that should be sufficient for one to think of a general support among States.[1204] This approach, however, is problematic for two main reasons. First, it treats all the provisions of a given treaty equally and as such does not seem to recognize the possibility of a particular provision being generally accepted, despite the fact that the treaty itself did not enter into force due to the lack of a general acceptance associated with other provisions. This approach is problematic also for a second reason, which is the potential to prevent States from becoming parties to a treaty after its entry into force and the possible inadequacies of the entry into force requirements as these are normally tailored for each treaty individually and do not necessarily reflect the balance between the interests of the coastal State on the one hand and navigational interests on the other hand.[1205] The figure of 10 States as required under the WRC is rather low. Moreover, the WRC does not require any percentage of world tonnage in the treaty participation.[1206]

What seems to be more in line with the requirement of GAIRAS would be the approach that lies somewhere between customary international law and the requirement for entry into force

[1203] Franckx (n 1095) 27. For the same view see the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), ITLOS, Advisory Opinion of 2 April 2015, Separate Opinion of Judge Paik, paras 23 and 26. In the words of judge Paik, 'regulations, procedures or practices need not be customary law or treaties of general acceptance. Requiring such a stringent threshold would be contrary to the very objective the rule of reference is intended to achieve. In my view, regulations, procedures or practices established in international legal instruments that are accepted by a sufficient number of States may be regarded as being generally accepted. It may also be relevant that those regulations, procedures or practices are consistently upheld by a series of legal instruments'. While judge Paik was referring to the terms 'regulations', 'procedures' and 'practices', these are all captured under the mechanism of the rules of reference and as such serve the same purpose as 'rules and standards'. The opinion of judge Paik is thus referred to by analogy.

[1204] See for instance Mario Valenzuela, 'IMO: Public International Law and Regulations' in Douglas Johnston and Norman Letalik (eds), *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (Proceedings of the Law of the Sea Institute's Sixteenth Annual Conference 1982) 143-145; Alan Boyle, 'Marine Pollution under the Law of the Sea Convention' (1985) 79 *American Journal of International Law* 347-372, 356.

[1205] See Bartenstein (n 1123) 1435.

[1206] It is worthwhile noting the view submitted by the USA in that '[i]t is important to recognize that the Convention can be read to impose significant duties and responsibilities on flag States and grants new rights to coastal and port States, but not *vice versa*. This imbalance continues to be of concern. We believe the absence of a tonnage requirement in the entry into force article does not reflect the need for international acceptance by flag States of these significant new obligations'. In this respect, the USA's concerns were mainly related to the insurance requirements. The USA argued that '[t]o the extent major flag States have not consented to be bound by the Convention, their ships will not be required to carry the insurance called for in article 12, except as required as a condition of entry into ports of States Parties. We note that all of those delegations that spoke, agreed that this Convention does not apply to States that have not consented to be bound by its terms and reiterated their commitment that as States Parties they will not seek to do so except as a condition of entry into their ports. We will rely on those representations'. See IMO doc, LEG/CONF.16/18 of 17 May 2007, 1.

of a given treaty.[1207] This means that one does not have to prove state practice and *opinio juris*, which is generally known as hard to prove. Yet, the fact that the WRC entered into force would not suffice either. Molenaar takes the view that the right approach should take account of 'widespread and representative participation in the convention', which participation must include States whose interests are 'specifically affected'.[1208] This concept is essentially borrowed from the *North Sea Continental Shelf* Cases[1209] and does seem to bring the notion of GAIRAS closest to its purpose, which is to ensure that the right balance is struck between the shipping interests on the one hand and the coastal State interests on the other hand.

As of 14 February 2020, the WRC has 48 States parties. This figure corresponds to roughly ¼ of the number of the LOSC States parties and is far from the current participation in the SOLAS (165), the MARPOL 73/78 (158) and the COLREGs (160), which are all considered GAIRAS.[1210] The figure of 48 does not seem to suggest general acceptance. At the same time, one needs to appreciate that the Intervention Convention has 89 States parties and the Intervention Protocol has 57 States parties.[1211] These figures are also far from the current participation in the SOLAS, the MARPOL and the COLREGs, but the right of intervention has already firmly found its place in customary international law.[1212] While the expression

[1207] Gregorious Timagenis, *International Control of Marine Pollution* (Oceana Publications 1980) 606-607; Hakapää (n 1202) 121.

[1208] Molenaar (n 1196) 156-157. Molenaar was also part of the ILA Committee that expressed the view that ultimately it is state practice, which plays a central role in determining whether a specific rule or standard is generally accepted or not and in this respect 'quantitative as well as functional majorities appear to be important'. As the ILA Committee further explains, '[t]he determining factor is the subsequent general acceptance of a rule or standard, not the general acceptance of the legal instrument in which this rule or standard is incorporated'. See Franckx (n 1095) 29-30.

[1209] In the *North Sea Continental Shelf* Cases, the Court reasoned as follows: 'With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'. See the *North Sea Continental Shelf* Case (Federal Republic of Germany v. the Netherlands), Judgement of 20 February 1969, ICJ Reports 1969, para 73.

[1210] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 17 December 2019. For more on 'generally accepted' IMO standards see James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 171-172. The IMO itself recognizes that some of its conventions may be considered to fulfil the requirement of general acceptance on account of their world-wide acceptance. See IMO doc, LEG/MISC.8 of 30 January 2014, 15. See also Birnie et al, *International Law and the Environment* (3rd edition, Oxford University Press 2009) 404; Alan Tan, *Vessel-Source Marine Pollution* (Cambridge University Press 2006) 196; Mario Valenzuela, 'Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction' in Davor Vidas and Willy Østreng (eds), *Order for the Oceans at the Turn of the Century* (Kluwer Law International 1999) 488-489.

[1211] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 17 December 2019.

[1212] Article 221 (1) of the LOSC refers to the right of intervention 'pursuant to international law, both customary and conventional'.

'generally accepted' is not to be equated with customary international law, as previously explained, this point nevertheless deserves to be observed as arguing on GAIRAS does not prevent one to argue on customary international law too. A certain rule may coexist in both treaty law and customary international law. Moreover, if a certain rule is already a customary rule of law, it surely is 'generally accepted'.

The absence of a significant number of coastal States from the participation in the WRC may be explained on the basis of the lack of the interest of those States in the wreck removal matters. From the negotiation history of the WRC, it appears that not many States in fact have a problem with hazardous wrecks within their EEZs. In this respect, it is worthwhile recalling that the WRC was pushed by a small number of coastal States that face the English Channel and the southern part of the North Sea (especially Germany, the Netherlands and the UK).[1213] However, it is important to note that the current participation in the WRC does not include Indonesia and the Philippines, [1214] which – together with China – are considered to be what some commentators call the 'new Bermuda Triangle', i.e. the number one region worldwide when it comes to major maritime incidents.[1215]

One must also observe the percentage of world tonnage as one of the functional aspects of the representation of 'specifically affected' States. In 2015, upon its entry into force, the WRC was accepted by only 5.38 % of world tonnage,[1216] which is strikingly low. As of 14 February 2020, however, the WRC is accepted by 73.25 % of world tonnage.[1217] This percentage surely reflects significant support among flag States. Whether it is significant enough to qualify as 'generally accepted' is hard to claim if one compares this figure with the percentage of world tonnage acquired in the MARPOL (99.15 %), the SOLAS (99.18 %) and the COLREGs (99.17 %).[1218] At the same time, 73.16 % surely speaks of the majority of flag States. Bringing again the

[1213] During the preparatory work of the WRC, it was mainly the Netherlands and Germany that brought up examples of incidents that called for the adoption of the WRC. For these examples, see IMO doc, LEG 75/6/1 of 14 February 1997, Annex, 1-3.

[1214] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> accessed 23 October 2018.

[1215] See Allianz Global Corporate & Specialty, 'Shipping Review 2018, An Annual Review of Trends and Developments in Shipping Losses and Safety', 4-5.

[1216] The figure of 5.38 % of the world tonnage is based on world tonnage figures provided by Lloyd's Register/Fairplay, effective as of 31 December 2013. See IMO doc, NWRC.1/Circ.10 of 23 April 2014.

[1217] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 17 December 2019.

[1218] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 17 December 2019.

example of the Intervention Convention, it counts for 75.60 % of world tonnage and the Intervention Protocol for 55.68 %, while the right of intervention undisputedly forms part of customary international law.[1219]

Apart from being significant given their consent to coastal State jurisdiction over matters of shipwrecks, flag States are obliged under the WRC to ensure that ships flying their flag have on board an insurance certificate or a similar financial security.[1220] In addition, they are obliged to make sure that the masters and the operators of ships flying their flag comply with the duty to report a wreck. The main responsibility, however, rests with the registered owners and States whose nationality these possess. In this respect, the WRC is explicit in that these States are obliged to 'take appropriate measures under their national law to ensure that their registered owners comply with [duties under the WRC]'.[1221] It is important to note that some of the major shipowning countries (such as Greece, Japan, Hong Kong (China), Republic of Korea and the USA) do not participate in the WRC.[1222] It remains to be seen whether this figure will change in the future.

8.4.1.3 The Meaning of 'Rules' and 'Standards'

When it comes to the meaning of the term 'rules and standards', it is first of all not clear whether there is any difference between these two. According to Allott, 'all the participants of UNCLOS spent countless hours with their attention concentrated on a number of subtle distinctions' and 'the outcome is a text that depends on such modifiers to express the substance of a specific legal relationship'.[1223] In this respect, some scholars maintain the view that the terms 'rules' and 'standards' are to be distinguished, albeit based on different lines of argumentation.[1224]

[1219] See IMO, Status of Treaties, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> accessed 17 December 2019.

[1220] See Article 12 (2) of the WRC.

[1221] Article 9 (9) of the WRC.

[1222] See IMO, Status of Treaties, Ratifications by States, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> accessed 17 December 2019. For the list of major shipowning countries see UNCTAD, 'Review of Maritime Transport 2019', 36-37.

[1223] Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 *American Journal of international Law* 11.

[1224] Oxman, on the other hand, argues that '[i]t cannot be assumed that the use of different words, in such a huge convention drafted and negotiated by so many different people in disparate groups over many years, necessarily represents an intentional decision to convey a different meaning'. See Bernard Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 *New York University Journal of International Law and Politics* 109, 160, 132, fn 74. Oxman is therefore of the view that the distinction between 'rules' and 'standards' is not apparent and even if it does exist, it seems to be irrelevant. This view finds some support in the fact that the phrase 'rules and standards' was first used in relation to Article 21 (2) of the LOSC, drafted within the Second Committee, which was different from the Third Committee that worked on vessel-source pollution issues. See Francx (n 1095) 21.

Vukas, for example, argues that the distinction should be made on the basis of the legal character of the instrument in which these rules and standards are laid down. In his view, rules are found in legally binding instruments such as conventions, while standards are found in non-legally binding instruments such as guidelines, resolutions and codes.[1225] This view, however, has been subject to criticism by a number of scholars. Hakapää argues that standards should be limited to those contained in legally binding instruments.[1226] Boyle maintains the same view, arguing that 'States should be allowed the freedom to make collective recommendations without their becoming instantly and indirectly a form of binding obligation'.[1227] Indeed, to argue differently would defeat the essential principle of general international law concerning the State's consent to be bound by a certain rule. While it seems controversial for non-legally binding instruments to fall under the scope of the rules of reference, there should be no doubt in relation to legally binding instruments and thereby also not for the WRC. Against this backdrop, the distinction between rules and standards, if any, must be made on a different ground.

In order to distinguish between 'rules' and 'standards', van Reenen uses the structure commonly used in the IMO regulatory conventions of a technical kind, such as the SOLAS and the MARPOL, which are both relevant in the context of vessel-source pollution and which were both in place during UNCLOS III. Van Reenen argues that 'rules' are commonly concerned with public international law issues and are to be found in the main body of these conventions. 'Standards', on the other hand, are concerned with technical norms and are normally found in the annexes or protocols to these conventions.[1228] In this regard, while different in content, these 'rules' and 'standards' in essence form one and the same whole.

The WRC contains no specific technical norms on how a hazardous wreck is to be removed. Hence, the WRC does not follow a typical structure of the MARPOL and the SOLAS.[1229] While an initiative emerged in 1995 (during the 73rd session of the LEG) to have a separate set of guidelines in this respect, the idea was eventually abandoned.[1230] The absence of technical standards on how a hazardous wreck should be removed is ultimately not surprising because

[1225] Budislav Vukas, 'Generally Accepted International Rules and Standards' (1990) 23 *Law of the Sea Institute Proceedings* 405, 414-416.
[1226] Hakapää (n 1202) 120.
[1227] Boyle (n 1204) 356-357.
[1228] Willem van Reenen, 'Rules of Reference in the New Convention on the Law of the Sea, in particular in Connection with the Pollution of the Sea by Oil from Tankers' (1981) 12 *Netherlands Yearbook of International Law* 3, 25.
[1229] Rather, the WRC follows the structure of the IMO liability and compensation conventions.
[1230] IMO doc, LEG 73/11 of 8 August 1995, Annex, 7.

this highly depends on the circumstances of a given case (position of the ship, sensitivity of the area, etc.).

While at the time of UNCLOS III 'rules and standards' relevant for vessel-source pollution were indeed contained in IMO instruments of a technical kind, to argue that a treaty must contain a technical norm (and both 'rules' and 'standards' as one whole) for it to be able to reflect GAIRAS would be too strict and not necessarily in line with the idea that the LOSC is a living instrument, rather than a treaty set in stone. One could perhaps argue that the technical nature of GAIRAS (and hence 'standards') is required because of the need for the precision and legal certainty and predictability. In this respect, it is important to note that if the coastal State avails itself of its right to adopt certain legislation on the basis of Article 211 (5) of the LOSC, then such legislation must 'conform to and give effect to' GAIRAS. This means that GAIRAS requires some level of precision. Oxman explains:

> The duty to respect international standards is typically expressed in connection with a duty (or right) to adopt national laws and regulations governing a particular matter. While a provision need not have a fundamental norm-creating character to be regarded as a standard, it should inform the precise content of those national laws and regulations.[1231]

Even though short of technical standards, the WRC surely contains precise rules that create legal certainty and predictability, and in this respect adequately informs the content of national legislation of the affected States. For that matter, while the WRC does not contain any precise technical 'standards', it nevertheless contains precisely formulated 'rules' that concern the right of the coastal State to order the registered owner to remove a hazardous wreck, or to have a hazardous wreck removed, and the corresponding obligation of other States to respect such a right. Moreover, there is a precise rule that imposes the obligation on States whose nationality the registered owners possess to take the necessary steps to ensure that their registered owners comply with their duties under paragraphs 2 and 3 of Article 9 of the WRC. These States may in this respect simply make a reference in their legislation to require their registered owners to abide by a wreck removal order issued by the competent coastal State. Likewise, there is a precise rule that imposes the obligation on flag States to require the master and the operator of the ship flying their flag to report a wreck to the coastal State.

[1231] Oxman (n 1200) 148.

While Article 211 (5) does use 'and' in the notion 'rules and standards', in the view of this author there is no convincing argument that would exclude the possibility of a treaty norm to be captured under Article 211 (5) if it solely reflects 'rules' rather than both 'rules' and 'standards', for as long as a given rule aims at 'prevention, reduction and control' of vessel-source pollution, as explicitly required under the said provision. The question that immediately arises is whether the provisions on liability and compensation may be captured under Article 211 (5).

As far as the insurance requirement is concerned, while it works as a financial security if things ultimately go wrong, it also ensures that ships are safer and thus less likely to cause pollution.[1232] In that sense, the insurance requirement could indeed be perceived as a rule that aims at prevention, reduction and control of pollution. However, for the reasons already explained in the previous chapter, coastal State powers concerning the compliance with the insurance requirements seem to be limited to port entry, as reflected in paragraphs 1 and 12 of Article 12 of the WRC.[1233]

As far as other liability and compensation provisions are concerned (strict liability of the registered owner for the wreck removal costs, possibly subject to no LLMC limits[1234]), the answer is rather unclear since strictly speaking these provisions do not aim (at least not directly) at prevention, reduction or control of pollution, but rather at prompt and effective compensation through the system that ensures maritime uniformity. In other words, these provisions are not really intended to create State rights and obligations from the law of the sea perspective. This may explain why Griggs argues that the WRC applies only between States parties to the WRC.[1235] Nonetheless, strict liability may also be seen as an incentive for the registered owner

[1232] For the relevance of the insurance requirements in the context of maritime safety and environmental protection see chapter 7 of the thesis (7.2.1.).
[1233] See chapter 7 of the thesis (7.2.1.).
[1234] Strict liability of the registered owner is subject to standard exonerations, as well as to possible maritime limits, depending on whether or not coastal States made a reservation to the LLMC concerning wreck removal claims. See Article 18 (1) of the LLMC.
[1235] Moreover, in the *North Sea Continental Shelf* Cases, in testing the 'fundamentally norm-creating character' of Article 6 (2) of the CSC, the Court observed two main points: (i) form in which the equidistance rule was cast and (ii) structural relation of Article 6 (2) of the CSC to the rest of the treaty. In this respect, the Court concluded that the provision in point lacks the fundamentally norm-creating character based on the following reasoning: 'Considered in *abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to *the relationship of that Article to other provisions* of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. […] Finally, the faculty of making *reservations* to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision

to indeed take necessary measures to prevent a ship from becoming a wreck in the first place. As such, the provision on strict liability does aim (even though perhaps not directly) at prevention, reduction and control of pollution.[1236]

What, however, appears particularly problematic does not have to do with the meaning of GAIRAS per se, but the expression which opens the provision of Article 211 (5) of the LOSC and which reads as follows: '[c]oastal States, *for the purpose of enforcement as provided for in section 6*, may in respect of their exclusive economic zones *adopt* laws and regulations […]'.[1237] Furthermore, the WRC contains a specific provision that could also be seen as a bar for the WRC to be brought under Article 211 (5) of the LOSC. The provision in point is Article 9 (10) of the WRC, which stipulates that 'States Parties give their consent to the Affected State to act under paragraphs 4 to 8, where required'. These two points are now to be discussed in more detail.

8.4.1.4 The Meaning of 'for the Purpose of Enforcement as Provided in Section 6'

One way of looking at the expression 'for the purpose of enforcement as provided for in section 6' is to argue that Article 211 (5) applies only in those cases where the coastal State is at the same time provided with the explicit enforcement powers in section 6 of Part XII of the LOSC. If this is correct, then Article 211 (5) could not be applicable in the present case.

As mentioned earlier in the thesis, coastal State enforcement powers in section 6 of Part XII are addressed under Articles 220 and 221 of the LOSC. Article 221 of the LOSC deals with emergency powers in very specific scenarios of unfolding maritime casualties that are of particularly severe character due to the risk of pollution of 'major harmful consequences', as discussed in chapter 6. As far as Article 220 is concerned, it is mostly relevant in the context of operational discharges. It gives the coastal State very limited enforcement powers in relation to navigating ships, rather than shipwrecks. In particular, Article 220 allows the coastal State to take certain measures in scenarios in which the ship has violated certain laws as a result of which there has been discharge. In this regard, Article 220 does not capture preventive

brought about in consequence of a request made under Article 13 of the Convention – of which there is at present no official indication – it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess'. See the *North Sea Continental Shelf* Case (Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para 72. Emphases added. By way of analogy, the same reasoning could be applicable in relation to the liability and compensation part of the WRC.

[1236] See chapter 3 of the thesis (3.2.1.1.).

[1237] Emphasis added.

measures. While paragraph 3 of the said provision does not make a reference to any discharge (and as such does include preventive measures), the coastal State is allowed only to ask the ship to 'give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred'. Article 220 makes it clear in several instances that it is essentially relevant in the scenarios of discharges that occur while the ship is 'navigating'.[1238] A wreck by its very nature does not have the 'next port of call' nor is it engaged in an actual navigation.

To read that Article 211 (5) is dependent on enforcement powers as spelled out in Articles 220 and 221 could be seen as a rather too strict approach. In the view of this author, there is room to argue that the phrase 'for the purpose of enforcement as provided for in section 6' is a reminder (or some sort of a warning) that enforcement powers in cases of operational discharges are allowed only under the carefully drafted conditions of Article 220, a non-breach of which is of particular importance in the context of ships that are still navigating and may be heavily affected by delays (e.g. if the ship is arrested). This could then mean that the phrase in point does not appear relevant in the wreck removal context. However, the second problem with bringing the WRC rights and obligations under Article 211 (5) of the LOSC concerns the debate whether States parties to the WRC actually provided interpretation of the scope of Article 211 (5) against, rather than in favour of, coastal States by stipulating in Article 9 (10) of the WRC that States Parties 'give their consent to the [coastal] State to act under paragraphs 4 to 8, where required'.

8.4.1.5 The Meaning of Explicit Consent 'Where Required'

It is possible to argue that States parties to the WRC, by giving their explicit consent in Article 9 (10) of the Convention, indicated that jurisdiction over hazardous shipwrecks would under general international law be associated with flag States, rather than coastal States, and that the WRC in essence brings the modification to the LOSC regime in this respect. This may also explain why the USA was concerned about the exact wording of the relationship clause in Article 16 of the WRC, as previously discussed. In fact, the negotiation history of the WRC reveals a significant controversy in this respect and it does seem to suggest that the position of delegates at some point was that coastal States have very limited powers without the consent of flag States.[1239] This aligns with the argument that the prevailing view among States during

[1238] See Article 220 (3), (5) and (6) of the LOSC.
[1239] See IMO doc, LEG 74/5/2/Add.1 of 5 September 1996, 5; LEG 86/4/1 of 27 March 2003, para 15.

UNCLOS III was that pollution measures were more closely associated with shipping interests and flag State jurisdiction (Articles 211 (2) and 217 of the LOSC) than coastal State jurisdiction.[1240] However, at the time of UNCLOS III, States were primarily concerned with pollution from discharges while the ship is still navigating and with pollution from unfolding maritime casualties of a particularly grave character, rather than hazardous shipwrecks.

The explicit consent 'where required' may perhaps be interpreted to relate to coastal State enforcement powers as Article 211 (5) of the LOSC uses the expression '*adopt* laws and regulations',[1241] rather than 'adopt and enforce'. During the negotiations of the WRC, the Netherlands argued that 'it is not the intention for the [WRC] to permit a State *to take action* against wrecks of non-State parties',[1242] which somehow points at enforcement, rather than legislative powers.

It is not clear whether the WRC brings any modification in relation to the LOSC. Even if it does, modification is not as such prohibited, but rather limited in the context of opposability. Article 311 of the LOSC clearly stipulates that modifications of the LOSC apply only between States parties to a treaty that contains modifications, rather than between the LOSC States parties (unless those modifications transform into customary international law). However, the problem with this approach is that there is no reason for including the express consent to this end. It is obvious that States give their consent to modifications (if that is the case) by becoming parties to a certain treaty. Moreover, the express consent is linked to paragraphs 4 to 8 of Article 9 of the WRC, but not to Article 2 (1) of the WRC, which is the most relevant provision when it comes to the rights assigned to coastal States to 'take measures' in accordance with the WRC.

One could perhaps explain the explicit consent 'where required' on the basis of the specificity of the WRC in that paragraphs 4 to 8 of Article 9 address wreck removal measures, but also a very specific relationship between the coastal State on the one hand and the registered owner on the other hand. In this respect, it needs to be recalled from the previous discussion that the WRC obliges the coastal State to consult with the flag State and other States affected by the wreck regarding the wreck removal measures. Such an obligation, however, does not exist in relation to the State whose nationality the registered owner possesses. These points may explain

[1240] Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' (2011) 1 *Lloyd's Maritime and Commercial Law Quarterly*, 97. See also Gaskell and Forrest (n 1054) 378.
[1241] Emphasis added.
[1242] See IMO doc, LEG 89/5 of 17 August 2004, Annex 3, 5. Emphasis added. The position of Brazil, France, the UK and the USA was more of a general kind in that 'State Parties may only take measures allowed under the [WRC] to remove the wrecks of other *States Parties*'. See IMO doc, LEG 89/5/3 of 24 September 2004, 1.

why States felt the need to incorporate their explicit consent in the treaty, rather than pointing to the interpretation of the scope of Article 211 (5) of the LOSC and modification of the LOSC regime.

The fact that the coastal State is not given explicit enforcement powers other than under Articles 220 and 221 does not mean that these powers in the context of wreck removal belong to flag States and that the WRC thus stands as modification to the LOSC regime, which is in this context simply silent. It is important to recall from chapter 3 that the LOSC is truly a living instruments, intended to accommodate modern trends, challenges and evolving needs.[1243] One should thus not be too strict in arguing on the potential of the WRC to be brought under the scope of Article 211 (5) for as long as a certain rule of the WRC enjoys wide-spread acceptance among specifically affected States. This brings the discussion back to the uncertainty as to what exact threshold is required for a treaty rule to be considered 'generally accepted'. While no hard and fast rule exists in this respect, nothing prevents States from claiming that a certain rule of the WRC qualifies as GAIRAS. In the words of Thirlway:

> [t]he problem recalls the old riddle of how many straws make a heap, and the answer surely is the same: the fact that we cannot say precisely how many straws makes a heap does not lead us to deny the possible existence of a heap of straw; nor does it oblige us to say that the heap is constituted by the placing of the first straw, - or, for that matter, the last.[1244]

If the coastal State decides to adopt wreck removal legislation in its EEZ and to apply this legislation in relation to ships flying a flag of the LOSC State party, which is not a party to the WRC, nothing prevents that State from testing in a given situation the opposability of the WRC through the system of mandatory dispute settlement as spelled out in Part XV of the LOSC.[1245] At the same time, it is important to appreciate the involvement of the IMO in the negotiations and adoption of the WRC.

As indicated earlier, the main purpose behind the GAIRAS is to ensure that the right balance is struck between the interests of flag States on the one hand and coastal States on the other hand and in this respect the LOSC essentially relies on the role of the IMO. The WRC was adopted at the general diplomatic conference convened by the IMO and all States with interest in

[1243] Judge Paik refers to the 'rules of reference' as a mechanism aiming at 'ensuring the long-term relevance and validity of the [LOSC].' See the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), ITLOS, Advisory Opinion of 2 April 2015, Separate Opinion of Judge Paik, para 23.
[1244] Hugh Thirlway, *International Customary Law and Codification* (Sijthoff 1972) 83.
[1245] See chapter 3 of the thesis (3.5.).

shipping were given the opportunity to participate in the negotiations. Moreover, it was negotiated and adopted by an active consensus.[1246] The fact that not all the IMO member States ultimately availed themselves of the right to participate in the negotiations and adoption of the WRC may perhaps be explained on the basis of the fact that they did not find themselves particularly affected by this Convention.[1247]

There should be no doubt that the IMO has firmly established its leading role in the adoption of global regulations on shipping matters and, as Molenaar explains, '[s]ecuring IMO approval or adoption […] commonly ensures consent of practically the entire international community of States'.[1248] In a similar way, Chircop points at the critical role of the IMO when referring to the regulatory framework in the Arctic. In his words, the IMO's role 'cannot be overstated' as:

> [d]uring the negotiations of UNCLOS, international navigation rights constituted one of the most sensitive classes of issues requiring delicate balancing between competing interests. The IMO plays a critical role in servicing that balance through its ongoing work of system maintenance. It ensures that international rules and standards continue to evolve in response to commercial, environmental, security and technological forces.[1249]

The negotiation and adoption of the WRC through the IMO may surely strengthen the argument on the potential for the rules contained in the WRC to be perceived as generally accepted. Moreover, one also needs to appreciate a general trend which reveals that the difficulties associated with the interpretation of the notion of GAIRAS are mostly seen as theoretical. As Bartenstein observes, 'several partial investigations hint at a rather liberal practice'.[1250] If at any point in the future a dispute occurs between States parties to the LOSC concerning the application and interpretation of Article 211 (5) of the LOSC in the wreck removal context, borrowing from judge Paik 'the Tribunal should look carefully into the post-UNCLOS legal developments, not because they are binding upon States as either treaty law or customary law, but rather because they are indicative of such regulations, procedures and practice'.[1251] By referring to 'regulations, procedures and practice', judge Paik was essentially referring to

[1246] IMO doc, LEG/CONF.16/DC/3 of 17 May 2007, 4 and LEG/CONF.16/RD/3 of 18 May 2007, 1.
[1247] For the participation of States in the negotiations of the WRC see chapter 5 (5.6.1.).
[1248] Molenaar (n 1196) 528.
[1249] Aldo Chircop, 'The IMO, its Role under UNCLOS and its Polar Shipping Regulation' in Robert Beckman et al (eds), *Governance of Arctic Shipping* (Brill Nijhoff 2017) 138-139.
[1250] Bartenstein on Article 211 (n 1123) 1437.
[1251] See Separate Opinion of Judge Paik in the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), International Tribunal for the Law of the Sea, Advisory Opinion of 2 April 2015, Separate Opinion of Judge Paik, para 27.

different notions captured under the rules of reference and his opinion is thus by analogy relevant for the present discussion.

8.4.2 Implications of the WRC for General International Law

If one takes a strict approach in interpreting the scope of Article 211 (5) of the LOSC and thereby advocates that the WRC cannot be brought thereunder because of the explicit opening of the provision ('for the purpose of enforcement as provided for in section 6'), one still needs to interpret the silence of the LOSC in the wreck removal context. For States non-parties to the WRC the ambiguity remains as to who under general international law has jurisdiction over hazardous shipwrecks, in which scenarios and under which conditions.

While the WRC brought significant powers to coastal States in relation to hazardous wrecks, these powers do not necessarily speak of any modification of the LOSC as it is not clear that, in the absence of the WRC, jurisdiction over hazardous shipwrecks would be associated with a State other than the coastal State.

In the *Barcelona Traction* Case, judge Fitzmaurice explained that international law 'involve[s] for every State an obligation […] to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'.[1252] Wreck removal could be perceived as a new activity in relation to which the WRC stands as a manifestation of a perception among States that jurisdiction over hazardous shipwrecks is to be based on the principles of impact and thus associated with coastal State jurisdiction, rather than jurisdiction of other States. This merely confirms Attard's argument on the 'shift of emphasis', despite the *sui generis* character of the EEZ.[1253] On this point, Proelss also argues that:

> [t]aking into account the functional *sui generis* status of the EEZ, it seems difficult to adhere to the argument that the coastal State cannot be seen as being privileged in some way in respect of the rights and jurisdiction referred to in Art. 56 (1). The opposite view would essentially render marine spatial planning in the EEZ unlawful, a conclusion that would ignore recent developments in State practice.[1254]

Concerning scenarios and conditions for the exercise of coastal State jurisdiction over hazardous wrecks within the EEZ, the WRC could be treated as an interpretation of Article 59

[1252] The *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, 3, Separate opinion of Sir Gerald Fitzmaurice, para 70.
[1253] David Joseph Attard, *The Exclusive Economic Zone in International Law* (Oxford University Press 1987) 75.
[1254] Proelss on Article 56 (n 1080) 432.

of the LOSC (the so-called Casteñeda formula) by the IMO in the exercise of its mandate over shipping matters. M'Gonigle and Zacher already envisaged the pivotal role of the IMO in contributing to the development of the law of the sea regime concerning shipping when arguing at the time of UNCLOS III that:

> there has been some overlap between the activities of IMCO and the U.N. Law of the Sea Conference with respect to environmental rule-making – but largely in the areas of standard-setting and environmental jurisdictions and not on technical shipping regulations. While jurisdictional matters have, as a rule, been thought by governments not to be within IMCO's purview, there is always the tendency to seek short-term gains on specific issues. Indeed it is almost inevitable that the organization will become involved in such matters, for the law of the sea is always developing. However, wherever the need for broad law-of-the-sea revisions is perceived and work undertaken in a U.N. conference, IMCO's more limited authority circumscribes its activities. But when UNCLOS III is terminated, demands will arise again for IMCO to act in the face of ambiguities or omissions in the law of the sea.[1255]

The WRC thus manifests the predictions already made at the time of UNCLOS III. These predictions may also be observed in a broader context of a general trend of continuing 'creeping coastal State jurisdiction', while the 'creep' is backed with the global support at the IMO. This general phenomenon is sometimes referred to as a 'multilateral creeping coastal State jurisdiction'.[1256] It had already emerged in the context of mandatory ship reporting and routing systems (in particular 'areas to be avoided' as regulated in Chapter V of the SOLAS)[1257] and underwater cultural heritage (as regulated under the UNESCO Convention).[1258]

The question still remains as to who may be bound by the WRC beyond the limits of the territorial sea and one must in this respect take account of the fact that a certain rule of the WRC may at any time transform into customary international law,[1259] especially because the WRC does not seem to be such a radical change within the legal regime observed in this thesis. While

[1255] Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 77.
[1256] Erik J Molenaar, 'Participation in the Central Arctic Ocean Fisheries Agreement' in Akiho Shibata et al (eds), *Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors* (Routledge 2019) 140.
[1257] Henrik Ringbom, 'The Changing Role of Flag, Port and Coastal States under International Law' in Johan Schelin (ed), *General Trends in Maritime and Transport Law 1209-2009* (Axel Axelsons Institute of Maritime and Transport Law, University of Stockholm 2009) 8.
[1258] Molenaar (n 1196) 140.
[1259] Article 38 of the VCLT provides that '[n]othing […] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such'.

it does affect the jurisdictional balance between navigational and coastal interests, non-interference in the commercial interests on the side of the ship unless reasonably necessary (waiting period) and party autonomy (the right of the shipowner to enter into a contract with the salvor of its choice) are ultimately all preserved. In this respect, it is worthwhile recalling the transformation of the plea of necessity into the customary right of intervention. At the time of the *Torrey Canyon*, this transformation was surely perceived as a significant change in the jurisdictional balance given the intrusion into shipping interests in favour of coastal States. However, it was tailored for what was strictly necessary and in this respect did not stand as a radical development. The intervention powers ultimately proved uncontroversial to the point that these transformed into customary international law quite rapidly.

As discussed in chapter 6, scholars have different views whether the Intervention Convention merely codified the customary right of intervention or whether such a right was rather 'clarified and crystallized'. Nonetheless, they seem to agree on the point that the right of intervention found its place in customary international law already at the time of the adoption of the treaty.[1260] The fact that the Intervention Convention was negotiated and adopted through the engagement of the IMO surely played a significant contribution in that regard. Yet, state practice and *opinio juris* remain a decisive factor in any discussion on the state of customary law. What could prove problematic in practice is the inclusion of the express consent in the final text of the WRC (Article 9 (10)). In the absence of a clarity as to its meaning, this consent could be interpreted in that the right of the coastal State to take wreck removal measures stands neither as a codification nor as a crystallization of a rule of customary international law. Since the WRC already entered into force, it will be hard to argue that States parties to the treaty abide by a certain rule on the basis of customary international law, rather than solely on the basis of the treaty itself. The potential of a certain rule of the WRC to reflect customary international law could therefore be more of a theoretical kind.

8.5 **Conclusions**

This chapter was predominantly focused on shipwrecks located beyond the limits of the territorial sea since it is this area that triggers the main controversies concerning the content of current international law and the way it has been developing since the *Torrey Canyon*. According to the WRC, the coastal State is given the right to order the removal of a hazardous wreck, or to have such a wreck removed at the expense of the registered owner. The relationship

[1260] See chapter 6 of the thesis (6.2.4.).

of the WRC to the LOSC, however, is not clear. While the LOSC is silent on jurisdiction of the coastal State over hazardous shipwrecks, there is room to argue that coastal States are given certain sovereign rights on account of which they are allowed to combat economic risks posed by shipwrecks within the regime of the EEZ and the continental shelf. If the shipowner wants to engage in salvage, however, the content of these rights becomes controversial as it is not entirely clear whether the regime of freedom of navigation would then apply.

At no rate is the coastal State entitled to invoke its sovereign rights to combat economic risks posed by shipwrecks at the expense of the registered owners. This would arguably be possible only if the coastal State avail itself of jurisdiction over the protection and preservation of the marine environment, albeit subject to conditions imposed by Article 211 (5) of the LOSC, which is linked to the requirement of GAIRAS. This provision is relevant not only in the context of the environmental risk but also in the context of navigational obstructions posed by shipwrecks, provided that there is a direct link between these two. Whether the WRC can be brought under the scope of Article 211 (5) remains debatable and so does the question of opposability. There is, however, room to argue that, as far as the EEZ regime is concerned, the WRC may serve as an interpretation of Article 59 of the LOSC by the IMO in the exercise of its mandate over shipping matters. The involvement of the IMO and the active consensus-based approach in the adoption of the WRC may strengthen the argument (albeit perhaps only in theory) on the potential of the WRC to transform into customary international law, especially because the WRC does not bring any radical changes to the regime.

As far as the area under the coastal State's territorial sovereignty is concerned, under the LOSC and general international law, coastal State jurisdiction over foreign shipwrecks is in principle unqualified, save for the obligation imposed on the coastal State to notify and warn others of navigational hazards brought to its knowledge. The WRC preserves territorial sovereignty of the coastal State by excluding from its extended application provisions that would encroach on such sovereignty. However, the principle of proportionality continues to apply, which may go to show that international law is nowadays developing towards the general acceptance of this principle, irrespective of the maritime zone concerned. Yet, as pointed out in the previous chapter, this principle seems to be unavoidable in the context of liability and compensation issues and it is not entirely clear whether it would be included in the text of the Convention had the liability and compensation part remained absent.

PART IV
CONCLUSIONS

9 Conclusions

9.1 Opening Remarks

Traditionally, ships in peril and shipwrecks have long been a focus of maritime law. Since the 1960s, however, a series of maritime accidents brought to light the relevance of international law concerns in relation to various socio-economic and environmental risks posed by these ships to the nearby coastal States, their people, coastlines, economies, and to the marine environment. Foreign ships were traditionally under jurisdiction of the coastal State only within the area under that State's territorial sovereignty. Beyond this area, seas and oceans were considered high seas and subject to the regime of freedom of navigation and exclusive flag State jurisdiction. As different maritime accidents were increasing and new trends became pressing, the exclusivity of flag State jurisdiction was getting seriously challenged. The catastrophic effects of pollution from the *Torrey Canyon* casualty (1967) marked the turning point in this respect. Borrowing from M'Gonigle and Zacher, '[n]ow the ground was shifting',[1261] the ultimate result of which was the negotiation and adoption of the 1969 Intervention Convention. For the first time coastal States were given the explicit right to exercise certain powers that traditionally belonged exclusively to flag States.

Much has happened since then. International law has continued to evolve at different stages, mostly through the engagement of the IMO and the adoption of the 1973 Intervention Protocol, the 1989 Salvage Convention, the 2003 Guidelines on Places of Refuge and the 2007 Wreck Removal Convention (WRC). Meanwhile, UNCLOS III was convened between 1973 and 1982 to determine the distribution of jurisdiction among States, including over vessel-source pollution. The most significant outcome of the conference was the adoption of the 1982 Law of the Sea Convention (LOSC), commonly referred to as the 'constitution for the oceans'.[1262]

[1261] Michael M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law* (University of California Press 1979) 202-203.
[1262] Remarks by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at <https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses1-6.-Tommy-T.B.-Koh-of-Singapore-President-of-the-Third-United-Nations-Conference-on-the-Law-of-the-Sea-_A-Constitution-for-the-Oceans_.pdf> accessed 31 October 2019.

The legal regime on coastal State jurisdiction over foreign ships in peril and shipwrecks is thus determined by a combination of a number of different international instruments that have been emerging over the last fifty years, each with its own legal focus and underlying dynamic characterized by different tensions between various interests. Nonetheless, these instruments are all intended to function within the same legal regime, in which coastal States are provided with certain decision-making powers to combat socio-economic and environmental risks posed by ships in peril and shipwrecks. Considerable ambiguity characterizes not only each of the key instruments in place, but also their relationship and the way the legal regime actually works as much of the language used in their relevant provisions is often vague and subject to varying interpretations. Of additional concern is the generality of application of certain rules (the question of opposability).

Against this backdrop, the thesis raised the question as to what are the rights and obligations of coastal States in relation to foreign ships in peril and shipwrecks, and how have these evolved since the *Torrey Canyon* disaster. In this respect, the thesis investigated the *what, where, when* and *how* of coastal State jurisdiction, including the relationship between the aforementioned key instruments (e.g.where and how different instruments overlap; where and how one instrument assists the application and interpretation of the other) and how each instrument has developed the law on the basis of different legal controversies and challenges encountered in practice since 1967. As part of this analysis, the thesis examined if and how the post-LOSC developments affect our understanding of the jurisdictional balance between coastal and navigational interests, and what potential these instruments have for developing general international law. To some extent, private (maritime)/public interplay was also observed to assist a better understanding of both the content and the evolving component of the legal regime in point.

In its analysis, the thesis took a perspective of the coastal State and a scenario-based approach. It followed a ship on its journey from the stage of running into peril at sea, including maritime casualty, to the stage of getting shipwrecked by sinking or stranding. The difference between a stage of peril and a wreckage stage was built on the physical state of a ship in that a ship in peril was still afloat, in contrast to a shipwreck, which has touched the seabed. At the same, attention was given to the relevance of the particular maritime zone within which the coastal State is permitted or forbidden to take certain measures against a ship.

This chapter summarizes the main findings of the thesis. It brings together overall arguments and extrapolates key themes, trends and patterns that characterize both the current state of the

legal regime observed and its development since the *Torrey Canyon*. To some extent, the chapter suggests the way forward either in terms of research or in terms of potential developments in international law.

9.2 What are the Rights and Obligations of Coastal States over Ships in Peril and Shipwrecks under International Law and How Have these Evolved since the *Torrey Canyon* Disaster?

9.2.1 Ships in Peril

9.2.1.1 The *What, When* and *Where* of Coastal State Jurisdiction

The *Torrey Canyon,* a Liberian-flagged tanker, was traversing the high seas (approximately 16 nm from the UK's shore) when it ran into a maritime casualty and ultimately produced an environmental catastrophe. At the time of this accident, coastal States were forbidden from impeding the freedom of navigation of foreign ships located beyond their territorial seas, irrespective of whether these ships posed any socio-economic or environmental risks to the interests of these States. As succinctly explained by Blanco-Bazan, the general view among States was 'better to suffer some damage than to invade international waters and interfere with the interests of the flag State and the private parties involved, until the inaction of the latter resulted in a catastrophe of major proportions'.[1263] The plea of necessity was thus the only defense the UK could have possibly invoked to justify its measures of intervention, including bombing of the ship, to protect its national interests from pollution.

The plea of necessity belongs to secondary norms of international law and as such assumes a breach of an international obligation. Moreover, its successful invocation depends on the fulfillment of extremely strict conditions as there must be an *essential* interest of the coastal State in danger, which interest must far outweigh the interests of other States and the danger to which the coastal State is exposed must be 'grave and imminent'. Additionally, the action taken by the coastal State must be the only way to safeguard the interests of that State. As demonstrated in chapter 5, these strict conditions have ensured that the plea of necessity has been rarely successfully invoked before international courts and tribunals.

[1263] Agustin Blanco-Bazan, 'Intervention in the High Seas in Cases of Marine Pollution Casualties' in David Joseph Attard et al (eds), *The IMLI Manual on International Maritime Law, Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 265.

At the same time, one needs to appreciate that the conditions for the plea of necessity were not yet codified when the catastrophe of the *Torrey Canyon* happened. Nonetheless, Liberia did not object to the UK's action of bombing the ship, even though such a measure appeared truly radical in nature. One potential explanation for the absence of Liberia's objection may be found in the fact that the UK did not bomb the ship until salvage proved unsuccessful. Whatever the reason, Liberia implicitly agreed that the conditions required for the plea of necessity had been met.

The legitimacy of coastal States' interests in protection from particularly serious pollution risks posed by casualty ships soon found general acceptance among States. It was realized that these scenarios may happen at any time in the future and may indeed require an urgent response at the stage of prevention that only coastal States may adequately offer given their geographical vicinity to casualties. The coastal State's right of intervention thus found its place in customary international law already at that point. What, however, remained controversial was the question of in what scenarios and under which circumstances should coastal States be allowed to take intervention measures to actually prevent pollution. This question in essence explains why there was a need for the adoption of the first treaty in the field – the Intervention Convention.

The Intervention Convention confers on coastal States the right to take and enforce measures against a foreign ship beyond the limits of their territorial sea, in the scenarios in which a ship is involved in a maritime casualty, defined as a collision of ships, stranding or other incident of navigation, or occurrence on board a ship or external to it, provided, however, that a ship is damaged or in imminent danger thereof. The purpose of the right of intervention is of a protective character – to prevent, mitigate or eliminate pollution by oil and other harmful substances, which may otherwise create damage to the coastline or related interests, *inter alia* the health of the local population, living marine resources, fisheries and tourism. While coastal States are given the right to take preventive measures to avoid damage to their coastline and related interests, the fact that the ship itself must be damaged, or in imminent danger thereof, speaks of the possibility of intervention measures being taken more as a remedial effort than a preventive response, primarily due to the fact that the Intervention Convention requires a very high threshold for the right of intervention to be invoked.

In particular, the coastal State must demonstrate the risk of a particularly severe character – 'major harmful consequences'. Moreover, the interests of the coastal State must be in 'grave and imminent danger' (not to be confused with the situation in which it is the ship, rather than the coastal State, that is in imminent danger of being damaged). In this respect, the Intervention

Convention does not actually depart from the requirements of the plea of necessity. As demonstrated in chapter 6, the term 'imminence' points to the likelihood of a certain risk materializing. While the realization of the risk does not necessarily have to be certain, it does have to be highly probable, rather than simply probable or possible.

The customary right of intervention is nowadays subject to arguably lower threshold given that Article 221 of the LOSC does not require the coastal State to demonstrate 'grave and imminent danger' to its coastline and related interest. However, the coastal State is still obliged to show the risk of 'major harmful consequences'. In other words, while Article 221 abandons the requirement of the likelihood of the risk materializing, it does keep a very high degree of seriousness. Nonetheless, as demonstrated in chapter 6, some probability (rather than a mere possibility) would be required at any rate given the very exceptional character of intervention powers.

Save for a slightly lower threshold imposed, Article 221 of the LOSC largely reflects the right of intervention as regulated under the Intervention Convention as it is confined to maritime casualties and thus requires that a ship be already damaged or in imminent threat thereof. Moreover, it is confined to the risk of pollution, albeit not to any particular type of pollutant. While the WRC was initially adopted to address issues of hazardous shipwrecks, it ultimately included under its scope casualty ships. The WRC accordingly addresses the right of the coastal State to take intervention measures to prevent these ships from becoming shipwrecked. As previously indicated, the right of intervention is again confined to maritime casualties and thus scenarios in which the ship is already damaged or in imminent threat thereof. However, the WRC provided coastal States with powers that go considerably beyond the powers of intervention set out in Article 221 of the LOSC. First, it abandoned the threshold for the right of intervention to be invoked (save for a few exceptions) as the coastal State is not required to demonstrate the risk of major harmful consequences. Second, the WRC expanded the purpose for which coastal States are given this right beyond the territorial sea as the right of intervention may now be invoked solely for the purpose of safety of navigation.

A ship that creates a hazard to navigation could at the same time create a threat to the environment, if for no other reason than because of the risk of collision which creates the consequential risk of pollution. Nonetheless, by keeping the safety of navigation a risk on its own, the WRC makes it easier for the coastal State to invoke the right of intervention as the coastal State would not need to demonstrate the direct connection between safety and environmental concerns.

The WRC applies to casualty ships only to the extent these may 'reasonably' be expected to transform into shipwrecks if 'effective measures to assist the ship […] are not already being taken'.[1264] The expression 'measures to assist the ship […] are not already being taken' suggests that salvage operations take the casualty ship outside the scope of application of the WRC. However, the term 'effective' preserves the right of the coastal State to determine whether or not salvage operations are producing satisfactory results. In this respect, the WRC essentially preserves the right of the coastal State to intervene into a maritime casualty and take control over salvage.

In waters under territorial sovereignty, coastal States are in principle free to act as they determine. However, ships in peril continue to enjoy the customary right of innocent transit and archipelagic sea lanes passage, which means that the coastal State is prohibited from taking and enforcing any measures of intervention in this respect. As demonstrated in chapter 7, these rights are relevant only for the scenarios of distress and *force majeure*. Once the ship reaches the stage of a maritime casualty, the situation is different. The coastal State is then allowed to intervene, subject to arguably less strict conditions than beyond the limits of its territorial sea. For that matter, the coastal State may, for example, take intervention measures if the risk of the ship being damaged is probable, but not necessarily imminent (highly probable), or if the risk of pollution is serious, but not necessarily of 'major harmful consequences'.

The current international law does not limit the right of intervention to any particular type of measures that the coastal State is entitled to take on its account. The coastal State is therefore given considerable leeway in its choices. In fact, even the most radical measure of destroying the ship is in principle permitted. Moreover, the coastal State is allowed to take not only measures that would affect a particular ship in peril, but also measures that would affect nearby ships. The right of intervention is also broad enough to enable the coastal State to instruct the ship to be towed further out to open sea or to be towed closer to the shore, i.e. to a place of refuge. The latter may cause significant dilemmas and tensions in practice.

In this respect, one needs to appreciate that salvage may at times be hard to perform in an open sea environment. If cargo needs to be lifted up or transferred to another ship, the lack of adequate equipment or simply rough weather and sea conditions may make the task challenging or even impossible. In these and similar circumstances, the ship may want to proceed to a place of refuge in order to undertake the assistance safely and prevent damage to the ship and its

[1264] Article 1 (4) (d) of the WRC.

cargo. This in turn may prevent damage to the environment and ensure safety of navigation, which is in the general interest of everyone, including the coastal State which is in a given situation assigned with decision-making powers. However, providing a place of refuge to a casualty ship may also put the coastal State at risk in terms of both socio-economic and environmental consequences. This may lead the coastal State to adopt the so-called 'not-in-my-backyard' approach and instead of bringing the ship closer to the shore, order it to be towed further out to open sea.

While there is a long-established rule of customary international law which imposes on all States an obligation to provide assistance to human lives in distress at sea, this obligation, as demonstrated in chapter 7, does not imply that ships themselves enjoy the right of access to a place of refuge. Human lives may nowadays be saved by simply airlifting people from a ship to a shore or transferring them to another ship. Against this backdrop, the coastal State *prima facie* has the right to deny refuge on the basis of its territorial sovereignty. However, the coastal State is at any rate obliged to act on the basis of the principles of reasonableness and good faith and not to abuse its rights. Moreover, the coastal State owes certain obligations to its neighbors and the international community as a whole on account of environmental considerations and Part XII of the LOSC, which demands, *inter alia*, that coastal States take measures necessary to ensure that activities under their jurisdiction or control do not cause or spread pollution to other States and the marine environment (Article 194 (2)). Furthermore, they are expected not to transfer damage or hazard from one area to another, or transform one type of pollution into another (Article 195).

Part XII of the LOSC does not impose any obligation of result. All that coastal States are required to do is to exercise a certain level of vigilance (due diligence) by taking into consideration the interests of other States and the international community as a whole. While building upon Part XII of the LOSC, the Salvage Convention demands that coastal States, whenever regulating or deciding upon matters of places of refuge, cooperate with salvors and other interested parties to ensure the efficient and successful performance of salvage for the purpose of, *inter alia*, preventing damage to the environment in general. Furthermore, the WRC requires coastal States to take account of the hazard to safety of navigation, the marine environment, and the coastline and related interests of 'one or more States'.[1265] Even though these obligations do not demand the coastal State to provide refuge to a ship in need of assistance, they nevertheless require that such a request not be disregarded by the coastal State

[1265] Article 1 (5) (b) of the WRC.

and that a certain assessment of the seriousness of the situation be undertaken. The coastal State cannot simply push the ship further out to open sea without giving proper consideration to the overall risk of so doing.

If a ship runs into a maritime casualty and starts to leak oil, the coastal State may have reasonable grounds to deny entry to a place of refuge to such a ship. No State is expected to minimize damage to the marine environment at the costs of causing damage to its people, coastline and industry. In the view of this author, if the interests of the coastal State are in a given situation juxtaposed to the interests of others, it is the former that should be given preference due to doctrine of territorial sovereignty. However, this does imply that every maritime casualty deserves to be treated equally. Depending on the circumstances of a given situation (e.g. the stability of the ship, the engagement of professional salvors, prevailing weather and sea conditions), the coastal State may reasonably be expected to honor a place of refuge even though the ship has been involved in a casualty. In fact, not every maritime casualty, let alone peril at sea, is perceived by coastal States as a sufficient reason to deny refuge and keep territorial sovereignty intact. As demonstrated in chapter 7, the incidents of the *Modern Express* (2016) and the *MSC Nikita* (2009) may serve as examples to show that States do honor refuge to ships that remain in stable conditions and under control.

At any rate, in the scenarios of distress and *force majeure*, ships enjoy the right of innocent passage, which allows them to stop and anchor, and to take salvage assistance if needed, without the coastal State's intervention. Moreover, in these scenarios, if a ship runs into peril at sea but nevertheless remains in stable and seaworthy conditions in which it does not create any serious risk to the interests of the coastal State, providing a shelter to such ship closer to the shore (port or internal waters) should be considered reasonable.

Ultimately, however, each request for a place of refuge falls under the coastal State's discretion and the reasonableness of its decision will turn upon the facts of a given situation. While there is no hard and fast rule as to how the coastal State is expected to act in each possible scenario, it seems reasonable to expect the coastal State to weigh the conditions of the ship (the stage of the incident, seaworthiness, engagement of salvors etc.) against the type of risks involved, probability of these risks materializing, the degree (seriousness) of harm to the outside interests, the availability of sheltered facilities and financial security. To some extent, the coastal State may in this respect be assisted by the IMO Guidelines on Places of Refuge.

As far as the availability of financial security is concerned, the coastal State should not be fully driven in its decision by the absence of an adequate financial guarantee given its obligations to

take account of the interests of its neighbors and the international community as a whole in the protection and preservation of the marine environment. In this respect, the coastal State could consult and cooperate with neighboring States and agree to honor refuge if provided with the assurance from these States that the costs and potential damage and loss will be shared.

A different question is whether, and to what extent, the existing IMO liability and compensation conventions speak of reasonableness in terms of the stringency of conditions imposed by the coastal State in relation to financial security. While the coastal State may in a given situation be satisfied with the insurance certificates issued on the basis of the current IMO liability and compensation conventions, these conventions are not tailored for the places of refuge problem. As demonstrated in chapter 7, they suffer from certain weaknesses associated with the limited types of claims covered and compensable amount guaranteed. Depending on the circumstances, the coastal State may in a given situation reasonably subject access to refuge to conditions that are more stringent than the conditions spelled out in the IMO liability and compensation conventions. At the same time, as pointed out earlier, nothing prevents the coastal State from coordinating the request for a place of refuge with the nearby States so as to honor refuge on the basis of the agreement that costs and potential damages will eventually be shared. In this respect, it needs to be appreciated that the longer a damaged ship is forced to stay at the mercy of bad weather and rough sea conditions, the greater the risk of the ship's condition deteriorating and the greater the risk of pollution. While the *Castor* managed to endure strong winds and rough sea conditions for 40 days, a similar *Castor*-like situation may indeed produce an actual maritime catastrophe.

9.2.1.2 The *How* of Coastal State Jurisdiction

Ever since the *Torrey Canyon* accident, coastal States powers have been gradually increasing in terms of the *what*, *when* and *where* of coastal State jurisdiction. The *how*, on the other hand, remained unchanged – at least when it comes to the area beyond the territorial sea.

Coastal States are continuously required to abide by the general principles of international law such as the principles of reasonableness, good faith and due regard, in order to ensure that proper account is given to the interests of others affected by a given situation. While these principles fall short of any specific meaning, some guidance may nevertheless be found in jurisprudence. Moreover, the reasonableness of coastal States' actions or inactions may to some extent be informed by the last two IMO instruments developed in the field – the Guidelines on Places of Refuge and the WRC, both of which contain a list of risks and factors to be weighed

in a given situation for the general benefit of ensuring the protection of the marine environment and safety of navigation.

Additionally, coastal States are required to take only those measures that are justified on the basis of the principle of proportionality, which requires a certain balancing act to be performed by the coastal State in order to take proper account of the interests on the side of the ship in relation to which a given measure is to be taken. To determine whether or not a certain measure satisfies the proportionality test, the Intervention Convention gives some guidance and provides an open list of criteria to be taken into account. The WRC also requires the principle of proportionality to be followed, albeit it does not provide any guidance in this respect. Given that the WRC was largely modeled on the Intervention Convention, criteria provided in the latter may to some extent inform the former. At the same time, the principle of proportionality must in addition be observed in light of the broader scope of risks covered under the WRC.

While the WRC was adopted primarily for maritime zones beyond the area of territorial sovereignty, it contains an opt-in provision that enables States to extend the application of this Convention to waters under their territories. Despite a number of provisions being non-applicable in the waters under territorial sovereignty, the principle of proportionality continues to apply, which is a significant departure from the *Torrey Canyon* era. When the Intervention Convention was negotiated, the suggestion of the extended application of this Convention did not find any success among delegates. One of the principal reasons for this was precisely that States saw the proportionality principle as encroaching too much on territorial sovereignty. Whether the proportionality principle finds its place in general international law is not entirely clear. There is surely room to argue that the general perception of the principle of proportionality has shifted over time, especially given some general trends in jurisprudence. However, one also needs to appreciate that the WRC is a liability and compensation convention. In this respect, the proportionality principle is generally unavoidable as the costs for measures taken by the coastal State are ultimately paid by the registered owners.

In the exercise of their right of intervention beyond the limits of their territorial seas, coastal States are required to notify and consult potentially affected actors, including shipowners, flag States, and neighboring States. In practice, the coastal State may find itself in a position which requires immediate action given the speed with which oil or other harmful substances may spread. In these circumstances, the Intervention Convention explicitly allows the coastal State the option '*not to'* notify and consult. Under the WRC, the coastal State in these scenarios does not have an obligation to consult. However, it does have an obligation to notify the flag State

and the registered owner accordingly. The reason why the obligation to notify is not spelled out in the Intervention Convention could be explained in light of the technological advances that have occurred since the late 1960s and early 1970s. It is nowadays much easier to notify interested parties by way of a simple e-mail communication. Against this backdrop, it seems reasonable to argue that notification would at the present time be required simply on the basis of the good faith principle, irrespective of what is the applicable law.

The obligation to notify and consult also needs to be observed in the context of what was previously discussed in relation to the threshold for the right of intervention to be invoked. The WRC brought significant changes in terms of abandoning such a threshold. However, in scenarios of extreme urgency, in which no consultations are taking place, the WRC somewhat reintroduces the threshold of 'major harmful consequences' by pointing at 'the hazard [which] becomes particularly severe'.[1266] Hence, to safeguard the rights and interests of others, and prevent possible abuse of rights by the coastal State, especially unnecessary intrusion into navigation, the WRC requires either consultations without the threshold, or threshold without the consultations. Preventing the potential abuse of rights is indeed a laudable aim. Nonetheless, one may question whether the reintroduction of the threshold actually refutes the purpose of preventing a ship from becoming a wreck proper. The fact that the situation is not particularly severe does not necessarily mean that the circumstances do not merit immediate action to be taken in order to prevent sinking or stranding of the ship.

In waters under territorial sovereignty, no obligation to consult and notify is explicitly imposed on coastal States, albeit in a given situation the coastal State may be expected to make inquiries into the matter on the basis of the principle of good faith.

9.2.2 The Significance of the Physical State of the Ship

Neither the Intervention Convention nor Article 221 of the LOSC makes any distinction between a ship that is still afloat and a sunken or stranded ship, which has touched the seabed (treated in this study as a shipwreck). During the negotiations of the Salvage Convention, despite several attempts to distinguish between a ship and a wreck, States could not draw the line. The WRC, on the other hand, does make a distinction.

It should be noted that both drifting ships and shipwrecks fall within the scope of the WRC. However, as far as drifting ships are concerned, the coastal State has no authority when salvage

[1266] Article 9 (6) (c) of the WRC.

operations are under way, unless these appear ineffective. While the assessment of effectiveness is ultimately in the hands of the coastal State, it must be based on the principle of reasonableness and the coastal State cannot assume in advance that salvage would be ineffective just because the coastal State expects sinking or stranding of the ship. If salvors are of the view that salvage may still produce success, the coastal State would need to have a sound argument to justify its intervention against the salvor's assessment. This restriction speaks of navigational interests being strongly safeguarded under the WRC, at least when it comes to ships in peril that are still afloat.

As far as sunken and stranded ships are concerned, the situation is different. The WRC makes no reference to salvage activity whatsoever. As demonstrated in chapter 8, neither sinking nor stranding takes away the possibility that the ship could be brought back to service upon successful completion of salvage. However, under the WRC, for a ship to be treated as a wreck, and thus to fall fully under coastal State jurisdiction, it is enough to be sunken or stranded. While the coastal State is at any time obliged to act reasonably and to have due regard to the rights and interests of other States, including flag States, and private persons, such as salvors and shipowners, the absence of any reference to salvage in the definition of a shipwreck gives a clear preference to the interests of coastal States over the interests of shipping.

Hence, the idea of the freedom of navigation is somewhat fading with a ship being sunken or stranded as salvage is in principle given preference over wreck removal (but not over the exceptional right of intervention) if the ship is still afloat. Once the ship has touched the bottom, the preference is reversed. In this respect, it would be interesting to investigate state practice and explore the scenarios and conditions under which flag States require ships to be removed from their registries – i.e. whether something more than sinking or stranding is required for that matter.

9.2.3 Shipwrecks

That sunken and stranded ships may pose certain risks in the scenarios other than those of emerging and unfolding casualties, as regulated under the Intervention Convention and Article 221 of the LOSC, was already realized during the negotiations of these instruments. Nonetheless, both remained silent on the issue at stake, which explains why there was a need for the adoption of the WRC.

While the WRC is again tailored for maritime casualties, the requirement of a maritime casualty is included not to point to an unfolding situation but to point to a cause of a wreck and thus to

serve as a trigger for the coastal State's rights to be exercised at some point. In this respect, the WRC covers shipwrecks that stem from a casualty but, for example, start to leak oil (or start to pose a risk thereof) after some time or even years. The WRC provides coastal States with significant powers as it gives them the right to order or take measures in relation to shipwrecks for the purpose of ensuring safety of navigation, or to prevent damage to the marine environment, coastline or related interests, all at the expense of the registered owners. At the same time, coastal States are under the obligation to warn mariners and other States of the nature and location of shipwrecks brought to their knowledge, and to ensure that all reasonable steps are taken to mark these wrecks, if proven to be hazardous.

As demonstrated in chapter 8, the obligation to warn and notify others of hazardous shipwrecks that are located within the area of territorial sovereignty is firmly rooted in customary international law, as confirmed in the *Corfu Channel* Case. It finds its *raison d'etre* in the coastal State's awareness of a hazard and its exclusive control over it. The WRC now extends this obligation to the area beyond territorial sovereignty, which naturally comes as a *quid pro quo* in the context of such significant powers as vested in coastal States under the WRC. However, it is debatable to what extent the WRC actually complements the jurisdictional balance struck in the LOSC. This question is relevant not only in the context of the evolving component of international law but also in the context of opposability and the related question as to who may ultimately be bound by changes brought under the WRC.

While the LOSC is silent on jurisdiction of the coastal State over hazardous shipwrecks, there is room to argue that coastal States are given certain sovereign rights on account of which they are allowed to combat economic risks posed by shipwrecks within the regime of the EEZ and the continental shelf. However, of some controversy is the content of the coastal State powers if the shipowner wants to engage in salvage. Given that neither sinking nor stranding brings an end to the various navigational rights and interests associated with the ship, it is not immediately apparent whether these scenarios would fall under the regime of the freedom of navigation or under sovereign rights of the coastal State.

On the other hand, irrespective of any navigational rights and interests associated with a ship, the coastal State is explicitly provided with jurisdiction in relation to matters of vessel-source pollution on the basis of Article 211 (5), which is linked to the requirement of 'generally accepted international rules and standards' (GAIRAS). While this provision deals with the environmental risk, it is at the same time relevant in the context of navigational obstructions

and economic concerns of the coastal State, provided that the coastal State can demonstrate a direct link to the environmental risk.

It is debatable whether the WRC finds its basis in Article 211 (5) of the LOSC, mostly because of the uncertainties associated with the opening of the provision of Article 211 (5), which uses the expression 'for the purpose of enforcement as provided for in section 6, [coastal States] may in respect of their exclusive economic zones adopt laws and regulations for […]' and the express consent contained in Article 9 (10) of the WRC. Regarding the latter, it is not entirely clear whether State parties to the WRC provided the interpretation of the scope of Article 211 (5) against, rather than in favor of, coastal States by stipulating in Article 9 of the WRC that States Parties 'give their consent to the Affected State to act under paragraphs 4 to 8, where required', thereby implying that the WRC cannot be incorporated into the provision of Article 211 (5) as otherwise no consent would be needed.

As far as the expression 'for the purpose of enforcement as provided for in section 6' is concerned, as demonstrated in chapter 8, a strict interpretation would prevent the WRC to potentially be incorporated into the provision of Article 211 (5). However, there is room to argue differently, especially because the LOSC is commonly perceived as a truly 'living instrument' flexible enough to accommodate contemporary trends and needs. It was never intended to be a treaty set in stone that would 'freeze' its provisions in the UNCLOS III era.[1267] In the words of Judge Paik, 'the Tribunal should look carefully into the post-UNCLOS legal developments, not because they are binding upon States as either treaty law or customary law, but rather because they are indicative of ['rules of reference' under the LOSC]'.[1268] If one takes the view that the WRC may be brought under the scope of Article 211 (5) of the LOSC, to answer the question of opposability one still needs to prove the general acceptance of the WRC in this respect.

As of 14 February 2020, the WRC has 48 States parties, a figure which does not seem to suggest general acceptance among States. It is important to note that current participation in the WRC does not include Indonesia and the Philippines, which together with China are considered to be

[1267] Henrik Ringbom, 'Introduction' in Henrik Ringbom (ed), *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 14. See also Thomas A. Mensah in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Brill Nijhoff 2000) ix-x. Gavouneli explains that the LOSC 'has proven to be solid yet flexible, constant yet adjustable, massive yet subtle – old and yet so new […]'. See Maria Gavouneli, *Functional Jurisdicion in the Law of the Sea* (Martinus Nijhoff 2007) 178.

[1268] The *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), ITLOS, Advisory Opinion of 2 April 2015, Separate Opinion of Judge Paik, para 27.

what some commentators call the 'new Bermuda Triangle', i.e. the number one region worldwide when it comes to major maritime incidents. [1269] On the other hand, the participation of flag States is significant as it accounts for 73.25 % of world tonnage. Whether this is significant enough to be treated as 'generally accepted' is debatable. As far as shipowning countries are concerned, it is important to note that some of the key States (such as Greece, Japan, Hong Kong (China), Republic of Korea and the USA) do not participate in the WRC yet.

There is no hard and fast rule as to what exact threshold is required for a treaty rule to be considered 'generally accepted'. At the same time, nothing prevents States from claiming that a certain rule of the WRC indeed qualifies as GAIRAS and to subject these claims to the scrutiny of the international community. If the WRC may indeed be incorporated into the provision of Article 211 (5), then the opposability of its rules becomes relevant for all States parties to the LOSC, irrespective of their participation in the WRC. If, however, one takes the view that the WRC cannot be brought under the scope of Article 211 (5), there is room to argue that the WRC may nevertheless have an impact on the developments of general international law, as will be addressed below.

9.2.4 The Significance of Maritime Zones

As previously demonstrated, rights that coastal States enjoy in maritime zones beyond the territorial sea are constantly tailored for specific scenarios (those of maritime casualties, whether unfolding or not) and made subject to particular purposes, both of which avoid territorial appropriations by coastal States. At no rate are coastal States allowed to impose national contractors for salvage and wreck removal (and thus to earn the profit associated therewith) in maritime zones beyond their territorial sovereignty. Moreover, restrictions imposed on coastal States beyond the limits of the territorial sea are still more stringent than in the area under territorial sovereignty. These are thus all patterns that remained relevant even fifty years since the *Torrey Canyon* and the adoption of the Intervention Convention. However, a new trend which is apparent is the applicability of the principle of proportionality in maritime zones under territorial sovereignty.

[1269] Allianz Global Corporate & Specialty, 'Shipping Review 2018, An Annual Review of Trends and Developments in Shipping Losses and Safety', 4-5.

9.3 General Observations: Impact of Post-LOSC Developments on General International Law and on the Jurisdictional Balance between Coastal and Navigational Interests

9.3.1 Maritime Zones beyond Marine Areas under Territorial Sovereignty

The LOSC is commonly perceived as a framework 'within which all activities in the oceans and the seas must be carried out'[1270] and is notable for the package deal that came along to strike a fair balance between, *inter alia*, coastal States on the one hand and navigational interests on the other hand. Beyond the limits of the territorial sea, the WRC surely brought something more than a simple fine-tuning of the LOSC and thereby affected the jurisdictional balance struck therein. It imposed significant obligations and costs on shipping interests and provided coastal States with significant powers to intrude into the interests of navigation to combat not only environmental but also navigational risks caused by drifting ships and shipwrecks.

As far as environmental risks associated with shipwrecks are concerned, the WRC could perhaps be seen as a treaty that finds its basis in Article 211 (5) of the LOSC. However, there is also room to argue that the WRC cannot be brought under the scope of Article 211 (5) of the LOSC. In this case, for those States that are not parties to the WRC, there is still ambiguity under general international law as to who has jurisdiction over hazardous shipwrecks, in which scenarios and under which circumstances. In this respect, one needs to observe the reasoning of Judge Fitzmaurice in the *Barcelona Traction* Case, in which he explained that international law 'involve for every State an obligation […] to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'.[1271] Wreck removal could be perceived as a new activity (not envisaged under the LOSC) in relation to which the WRC stands as a manifestation of a general perception among States that jurisdiction over hazardous shipwrecks is to be based on the principles of impact and thus more appropriately exercisable by coastal States than flag States. This also confirms Attard's argument on the 'shift of emphasis', despite the *sui generis* character of the EEZ.[1272]

Moreover, regarding hazardous shipwrecks, the WRC could also be seen as the interpretation of Article 59 of the LOSC by the IMO in the exercise of its mandate over shipping matters. M'Gonigle and Zacher already envisaged the pivotal role of the IMO in contributing to the

[1270] The Preamble to UNGA Resolution 70/235 of 23 December 2015.
[1271] The *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, 3, Separate opinion of Sir Fitzmaurice, para 70.
[1272] David Joseph Attard, *The Exclusive Economic Zone in International Law* (Oxford University Press 1987) 75.

development of the law of the sea regime concerning shipping when arguing at the time of UNCLOS III that:

> there has been some overlap between the activities of IMCO and the U.N. Law of the Sea Conference with respect to environmental rule-making – but largely in the areas of standard-setting and environmental jurisdictions and not on technical shipping regulations. While jurisdictional matters have, as a rule, been thought by governments not to be within IMCO's purview, there is always the tendency to seek short-term gains on specific issues. Indeed it is almost inevitable that the organization will become involved in such matters, for the law of the sea is always developing. However, wherever the need for broad law-of-the-sea revisions is perceived and work undertaken in a U.N. conference, IMCO's more limited authority circumscribes its activities. But when UNCLOS III is terminated, demands will arise again for IMCO to act in the face of ambiguities or omissions in the law of the sea.[1273]

Against this backdrop, the WRC is but a manifestation of the predictions already made at the time of UNCLOS III. In fact, these predictions already seem to be part of a general trend in the context of continuing 'creeping coastal State jurisdiction', which 'creep' is now happening with global support due to the engagement of the IMO. Molenaar calls it a 'multilateral creeping coastal State jurisdiction'.[1274] This phenomenon has already emerged in the context of the developments of regulation of mandatory ship reporting and routing systems (in particular 'areas to be avoided') as reflected in Chapter V of the SOLAS,[1275] and in the underwater cultural heritage context as reflected in the UNESCO Convention.[1276]

Even though the participation of States in the WRC is still rather low, nothing prevents a certain rule of the WRC from transforming into customary international law. The fact that the WRC was negotiated and adopted within the IMO forum on the basis of the active consensus among participants and the fact that every State got the chance to participate in these negotiations could surely play a significant contribution in that regard. However, the inclusion of the express consent in the final text of the WRC (Article 9 (10)) could be interpreted so as to show that at the time of the adoption of the WRC, the right of the coastal State to take wreck removal

[1273] M'Gonigle and Zacher (n 1261) 77.
[1274] Erik J Molenaar, 'Participation in the Central Arctic Ocean Fisheries Agreement' in Akiho Shibata et al (eds), *Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors* (Routledge 2019) 140.
[1275] Henrik Ringbom, 'The Changing Role of Flag, Port and Coastal States under International Law' in Johan Schelin (ed), *General Trends in Maritime and Transport Law 1209-2009* (Axel Axelsons Institute of Maritime and Transport Law, University of Stockholm 2009) 8.
[1276] Molenaar (n 1274) 140.

measures came neither as a codification nor as a crystallization of a rule of customary international law. This could cause practical problems in trying to prove the existence of such a rule of customary international law at least in terms of *opinio juris* of States that are parties to the WRC. Namely, given that the WRC already entered into force, it would be hard to argue that States parties to this treaty abide by a certain rule on the basis of customary international law, rather than solely on the basis of the treaty itself.[1277]

9.3.2 Marine Areas under Territorial Sovereignty

Ever since the *Torrey Canyon*, jurisdictional challenges in the field of maritime perils and shipwrecks have mostly been concerned with the area beyond territorial sovereignty and related encroachment upon the freedom of navigation by the expansion of coastal State jurisdiction. However, on two instances a reverse challenge was presented; one with success and the other one without. To be more precise, coastal States were successfully put in confrontation with the extended, albeit optional, application of the WRC to waters landward of the outer limit of the territorial sea through the continuance of the application of the principle of proportionality. At the time of the adoption of the Intervention Convention, as demonstrated in chapter 5, such a proposal failed to get the necessary support among States. It remains to be seen in practice how many States will actually incorporate this principle into their national legislation.

As discussed in chapters 5 and 7, the rather 'unsuccessful' challenge concerns the problem of places of refuge and the failed CMI proposal concerning the adoption of a legally binding instrument that would impose on coastal States an obligation to provide refuge to ships in need of assistance. Given the absence of global support at the IMO, the CMI proposal, and thus the problem of places of refuge, never made it to the stage of negotiating a specific treaty on coastal States rights and obligations. States did however agree upon the principles embodied in the IMO Guidelines on Places of Refuge. The reason why coastal States managed to successfully resist the challenge may be explained partly on the basis of the 'weaknesses' that characterize the current IMO liability and compensation regime and partly due to the rather radical approach taken in the very proposal, which is essentially centered on the presumed, albeit rebuttable, obligation on the side of the coastal State.

In the view of this author, it is inevitable that the starting point be the coastal State's right, rather than obligation. Bringing a ship to a place of refuge is in essence only one type of the

[1277] See observations on this point in chapter 1 – methodology/customary international law (1.5.2.2.).

conceivable measures of response to incidents and accidents at sea. As such, it should be seen in the same way as in fact towing a ship further to open sea. Extrapolating places of refuge from some sort of a lower level (types of measures) to a higher level (rule of response) would diminish the core principle of territorial sovereignty without a sound justification for it. The fact that there were different opinions even in the case of the *Prestige* clearly speaks of the problem of such extrapolation. At any rate, the direction of legal developments in the field of maritime incidents firmly and persistently speaks of the coastal State's rights as the point of departure and of a gradual expansion, rather than restriction, of coastal State jurisdiction. The WRC being the most recently adopted treaty in the field serves as a good example in this respect. Against this backdrop, the CMI proposal will hardly see any success in the future, at least when it comes to the suggested presumed obligation as the point of departure, i.e. a shift in the burden of proof. At the same time, as demonstrated in chapter 7, there is no need for any such radical change. The emphasis should rather be on a due diligence regime – something the EU example may help with.

While building a due diligence regime does not appear so radical, and in fact does not diverge from the direction of the developments in the field, it may nevertheless encounter opposition from some, especially developing, States. In this regard, it needs to be observed that the EU legislation combats the problem of places of refuge by imposing on EU Member States an obligation to be prepared in advance through the pre-designation of places of refuge and drawing up relevant plans. Such an obligation is missing on the global level, which may partly be explained on the basis of the fact that such an obligation would cause financial costs and technical burdens that some States perhaps could not afford (e.g. building special port facilities and investing in adequately trained personnel).

9.4 **Closing Remarks and Identified Shortcomings**

Since the *Torrey Canyon* accident, international law considerations have been gradually but firmly overtaking a significant portion of what used to be perceived as a pure maritime law matter. In this process, the developments of international law have been characterized by a gradual shift of decision-making powers from flag States towards coastal States. To combat different socio-economic and environmental risks posed by ships in peril and shipwrecks, coastal States have been steadily expanding their jurisdiction at sea, albeit only in the scenarios of maritime casualties (whether unfolding or unfolded), subject to conditions the stringency of which ultimately remained dependent on the maritime zone concerned.

In principle, each new instrument observed in this thesis has been building on previous ones and went a step, or a few, further by strengthening coastal State jurisdiction through a lower threshold or broader purposes. The fact that the current legal regime does not consist of one single instrument but rather a number of different instruments does not appear problematic as these instruments indeed complement each other on most occasions. Inconsistencies are rare. For example, when it comes to shipwrecks, the duty to report under the WRC rests with the master and the operator of a wreck, and does not apply to the master and/or the operator of ships passing by. In contrast, the OPRC imposes the duty to report not only on ships involved in an incident but also on ships passing by.

Yet, the regime in point is not without its shortcomings. When it comes to the places of refuge problem, while the IMO Guidelines assist coastal States in making informed decisions, the lack of a specific obligation to draw up plans and to be prepared in advance for places of refuge requests still speaks of a rather theoretical debate on the potential for the breach of the due diligence obligations under Part XII of the LOSC. As a result, delays in the decision-making may continue to be problematic in practice.

Furthermore, many hazardous shipwrecks are left outside the scope of application of the WRC due to the linkage to a maritime casualty. In terms of the latter, while a casualty must not necessarily be unfolding, it at any rate serves as a trigger, which automatically excludes wrecks that are hazardous but whose cause is in fact unknown. In addition, the WRC has no retroactive application, which means that many hazardous wrecks that predate the entry into force of the WRC do not fall under the WRC, despite the fact that some studies show a considerable number of hazardous wrecks that indeed predate the WRC. These shortcomings all suggest that more needs to be done if the IMO goal concerning 'clean oceans' is to be achieved in this particular field of law.

Ultimately, it needs to be observed that, given the comprehensiveness of the rules that have developed in primary norms of international law, the plea of necessity has lost its relevance to a great extent. Yet, not entirely. Warships and other ships owned or operated by States, and used for governmental non-commercial services, are left outside the scope of the regime observed in this thesis due to sovereign immunity enjoyed.[1278] In relation to those ships, the plea of necessity remains a relevant legal defense.[1279]

[1278] Article 4 (2) of the WRC, however, enables States to extend the application of the Convention to these ships.
[1279] In addition, one can hardly, if at all, predict all the possible risks associated with maritime casualties and shipwrecks that might appear in the future. For those cases, the plea of necessity retains its legal relevance.

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