



Publications on Ocean Development

Volume 51

*A Series of Studies on  
the International, Legal, Institutional and Policy Aspects  
of Ocean Development*

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# Places of Refuge for Ships

Emerging Environmental Concerns of  
a Maritime Custom

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*The titles published in this series are listed at the end of this volume.*

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## Chapter 2

# The IMO Guidelines on Places of Refuge for Ships in Need of Assistance

Aldo Chircop\*

### INTRODUCTION

This chapter discusses and reviews the International Maritime Organization (IMO) Guidelines on Places of Refuge for Ships in Need of Assistance (IMO Guidelines). The IMO Guidelines were adopted on 5 December 2003 through a resolution of the IMO Assembly, the highest-ranking body of the organisation.<sup>1</sup> IMO has been considering places of refuge for ships since 2000 as a result of concern expressed by member states at the increasing number of instances of

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\* This chapter is based on an earlier work of the author entitled "Living with Ships in Distress: A New IMO Decision-Making Framework for the Requesting and Granting of Refuge", 3(1) *WMU Journal of Maritime Affairs*, 2004, 31–49. The permission of the *WMU Journal of Maritime Affairs* to use the article is gratefully acknowledged.

<sup>1</sup> Guidelines on Places of Refuge for Ships in Need of Assistance, IMO Assembly Resolution A.949(23), adopted on 5 December 2003, IMO Doc. A.23/RES.949, 5 March 2004 (hereafter IMO Guidelines).

coastal state authority refusals to grant refuge to ships in distress. The incidents of the 'Erika' in 1999 and 'Castor' in 2001 played a special role in this regard. During initial consideration, the matter was delegated to the Maritime Safety Committee's (MSC) Sub-Committee on Safety of Navigation (NAV), where work on the IMO Guidelines was initiated and conducted, until it was completed in its 49th Session in 2003 and recommended for Assembly adoption.<sup>2</sup> Before adoption by the Assembly, the Guidelines were also reviewed, in whole or in part, by the MSC,<sup>3</sup> Marine Environment Protection Committee (MEPC)<sup>4</sup> and Legal Committee.<sup>5</sup> Although guidelines have been adopted, the topic remains an ongoing concern in the organisation.<sup>6</sup>

The debates leading to their adoption raised many sensitive political, legal and management concerns. Initially it was thought that three sets of guidelines were needed for, namely, (a) coastal states, (b) risk assessment and (c) masters on board ships.<sup>7</sup> The final outcome is a single-document set of guidelines with carefully crafted text that eschews peremptory language, such as rights and obligations. In recognising 'the need to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal state to protect its coastline', the IMO Guidelines propose a checklist of actions within a common framework for, on the one hand, the decision-makers on board the ship (masters) and those providing assistance to it (salvors), and, on the other hand, for coastal state authorities that have to decide on acceding to or refusing the request for refuge.<sup>8</sup>

<sup>2</sup> Assembly 23rd Session, Draft Assembly Resolutions Finalized by NAV 49, IMO Doc. A 23/17/Add. 1, 17 July 2003.

<sup>3</sup> Report of the Maritime Safety Committee on its Seventy-Sixth Session, IMO Doc. MSC 76/23, 16 December 2002, 60–61; Report of the Maritime Safety Committee on its Seventy-Seventh Session, IMO Doc. MSC 77/26, 10 June 2003, 65–71.

<sup>4</sup> Report of the Marine Environment Protection Committee on its Forty-Eighth Session, IMO Doc. MEPC 48/21, 24 October 2002, 38–40.

<sup>5</sup> Report of the Legal Committee on the Work of its Eighty-Seventh Session, IMO Doc. LEG 87/17, 23 October 2003, 22.

<sup>6</sup> Assembly Resolution A.949(23) 'requests the Maritime Safety Committee, the Marine Environment Protection Committee and the Legal Committee to keep the annexed Guidelines under review and amend them as appropriate'. IMO Guidelines, *supra* note 1, Preamble, 2.

<sup>7</sup> Report of the Maritime Safety Committee in its Seventy-Fourth Session, IMO Doc. MSC 74/24, 13 June 2001, 19–23.

<sup>8</sup> IMO Guidelines, *supra* note 1, Preamble, 1.

## PURPOSE

In principle and as a matter of necessity, a ship in distress should be allowed access to sheltered waters to enable it to undertake temporary repairs under controlled conditions and thereby avoid or minimise a serious problem. At the same time, communities adjacent to the area where a ship is given refuge may object to the presence of that ship. As a result, port authority and/or maritime administration decision-makers and their political masters can face a dilemma in having to choose between two risks: the risk of adverse consequences for the ship if it is taken out to sea and the possible impact on the coastal state if the ship breaks up in transit; and the risk of the ship breaking up in a port or close to the coast and the environmental, economic and social consequences. Professional risk assessment is called for, and the IMO Guidelines provide a framework for a decision rationalisation process.

The IMO Guidelines provide a common framework for complementary effective responses by the key actors involved. To note, the Guidelines detach the rescue of persons from the issue of refuge to the ship itself. Historically, the two issues were intertwined. Today the rescue of persons is regulated by the *International Convention on Maritime Search and Rescue*, 1979 (SAR Convention)<sup>9</sup> and the *International Aeronautical and Maritime Search and Rescue Manual* (IAMSAR Manual),<sup>10</sup> and need not be addressed again in the Guidelines. Instead, the Guidelines address the condition of the ship according to (1) whether it simply needs assistance and does not require evacuation of the crew, or (2) is actually in a state of distress and has already had the crew evacuated.

The coastal state may still refuse refuge because the Guidelines, *per se*, do not create a legal obligation to provide refuge (or for that matter, a legal right to refuse refuge). The legality of the provision or denial of refuge is determined at international customary and/or conventional law, which is discussed elsewhere in this book. The Guidelines do, however, provide room for discretionary decision-making by the coastal state. At a minimum, the deciding state can be expected by other interested states to demonstrate that its decision was justifiable and defensible with reference to the criteria in the Guidelines. In effect, the Guidelines can be viewed as a new international standard for the decision-making processes involved. That standard is not legal at this time, and consequently the Guidelines cannot be expected to be enforceable as a legal instrument. However, the coastal state still owes duties towards other states. If

<sup>9</sup> *International Convention on Maritime Search and Rescue*, London, 27 April 1979, 1405 U.N.T.S. 97 (hereafter SAR Convention).

<sup>10</sup> *IAMSAR Manual: International Aeronautical and Maritime Search and Rescue Manual*, 3 Vols. (London/Montreal, IMO/ICAO, 2003).

the coastal state does not appear as having exercised due diligence in preventing damage or loss arising from its actions, it could open itself to potential international claims by neighbouring coastal states<sup>11</sup> and the flag state.<sup>12</sup> In that scenario, it is conceivable that non-compliance with the Guidelines may constitute additional evidentiary weight against a state that acts in a wrongful manner and thereby causes loss or damage to other states.

#### KEY DEFINITIONS

The Guidelines avoid reference to ships in distress, focussing instead on 'ships in need of assistance'. The effect of this is to broaden the application to a wider range of ships that are not in a technical state of distress, but need assistance nonetheless. Such ships are defined as 'a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard'.<sup>13</sup> Situations can be envisaged where the master takes the vessel into an unscheduled location as a general average act. Also, this definition serves to focus the application of the Guidelines in relation to ships in situations other than those that require the rescue of the crew.

There is a delimitation of the respective areas of application between the IMO Guidelines and the SAR Convention, which defines 'distress phase' as a situation 'wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance' (emphasis added).<sup>14</sup> The SAR Convention is silent on refuge for the ship. The

<sup>11</sup> For instance, there is a legal duty not to transfer damage or hazards from one area to another; *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, UN/Doc. A/CONF.62/122, 7 October 1982 (hereafter LOS Convention), Art. 195. See Places of Refuge: Summary of Responses to the CMI's Second Questionnaire, IMO Doc. IMO/LEG 87/7/2, 16 September 2003, where most respondents stated that governments would not incur liability for granting a place of refuge and any damage that ensues. However, some respondents considered the possibility of liability where the government or authority concerned acts negligently and damage results.

<sup>12</sup> On behalf of the shipowner. In *The MV Toledo* it was conceivable that Singapore as the flag state could potentially have had a claim against the coastal state for loss resulting from the refusal to grant refuge. In arguing against standing for the insurers, defence counsel noted that Singapore had not instituted the claim. *ACT Shipping (OTE) Ltd. v. Minister of the Marine, Ireland and the Attorney-General (The MV Toledo)*, (1995) 2 ILRM 30.

<sup>13</sup> IMO Guidelines, *supra* note 1, para. 1.18.

<sup>14</sup> SAR Convention, *supra* note 9, Annex, Chap. 1.3.11. In MSC discussions, it was pointed out that the term 'distress' should be defined in the Guidelines in the same way

Guidelines provide that the SAR Convention applies when safety of life is involved, whereas the Guidelines apply when a ship needs assistance and safety of life is not involved.<sup>15</sup> Thus it is important to consider the Guidelines and the SAR Convention as complementary instruments providing operational guidance when a ship and its crew need assistance.

'Place of refuge' is defined as a 'place where a ship in need of assistance can take action to enable it to stabilise its condition and reduce the hazards to navigation, and to protect human life and the environment'.<sup>16</sup> It is interesting to note that this definition does not qualify the type of action in terms of whether it constitutes a temporary or permanent solution.<sup>17</sup> That the place should be one where the ship can take corrective action suggests that the appropriateness of the place is relative to the type of action the ship needs to take. Thus, if a ship requires ship repair facilities, a port with such facilities may be the appropriate place.

#### EXPECTED ACTIONS

##### *Actions by the Master and Salvor*

The master and/or the salvor are first expected to appraise the situation and undertake a risk assessment by weighing four potential courses of action, namely, (1) if the ship stays in its current location, or (2) continues its voyage, or (3) reaches a place of refuge, or (4) is taken out to sea. In doing so, for each course of action the master and salvor should identify the type of assistance that the ship needs and contact the coastal state's maritime assistance service (MAS). In another resolution proposed by NAV 49, the IMO Assembly recommended to member states the establishment of such an institution as a focal point for communication in such emergencies.<sup>18</sup> While the master and salvor should inform MAS of the actions they plan to take, MAS should inform those persons of the facilities it can make available, whether it provides assistance or authorises navigation to a place of refuge.

as in the SAR Convention. Report of the Maritime Safety Committee on its Seventy-Seventh Session, IMO Doc. MSC 77/26, 10 June 2003, 66.

<sup>15</sup> IMO Guidelines, *supra* note 1, para. 1.1.

<sup>16</sup> *Ibid.*, para. 1.19.

<sup>17</sup> It may be argued that the taking of action to enable the ship to stabilise its situation is an indication of a temporary measure pending a final solution to the problem.

<sup>18</sup> Consideration of the Reports and Recommendations of the Maritime Safety Committee (Note by the Secretary-General), IMO Doc. A.23/17/Add.1, 17 July 2003.

A potential practical difficulty at this stage is the following expectation: 'Subject, where necessary, to the coastal state's prior consent, the shipmaster and the shipping company concerned should take any necessary response actions, such as signing a salvage or towage agreement or the provision of any other service for the purpose of dealing with the ship's situation'.<sup>19</sup> First, it is not clear in what situations the coastal state's prior consent is necessary and who determines that there is a necessity. Second, the prerogative to seek towage or salvage assistance has historically been that of the master, as agent of the shipowner. Salvage is in essence a commercial service. There is a danger in imposing a new level of consent before such commercial services can be contracted, especially if time is of the essence. The dangers of delay are well illustrated by the 'Amoco Cadiz' casualty when the captain of that ship wasted valuable time trying to contact the home office while the ship required urgent salvage assistance.<sup>20</sup> The safety of the ship is first and foremost the master's responsibility. Precious time could be wasted in dialogue with a bureaucracy that has the power to impose 'practical requirements'. The situation could become more complex where a ship in difficulty is located such as to engage more than one MAS agency. This situation can be expected to occur in semi-enclosed seas where a navigating ship may be close to more than one coastal state, such as in the Baltic, North Sea and Mediterranean where several coastal states are in close geographical proximity. The master could be in a difficult position. Because the text of the Guidelines is not peremptory, the master could ignore this requirement and simply contract the salvage service. However, the burden of proof for not seeking the coastal state's consent would then rest on him or her, and an anxious coastal state could use this as a pretext to deny refuge.

#### *Actions by Coastal States*

For coastal states, the Guidelines re-assert their prerogative to require the ship to take appropriate and timely action to pre-empt a situation of danger, and failure to do so or in urgent circumstances, the coastal state can intervene. The legal reality is much more complex than the Guidelines seem to reflect. Barring a dramatic change in the law of the sea or unilateral state action, there contin-

<sup>19</sup> IMO Guidelines, *supra* note 1, para. 2.7.

<sup>20</sup> See Republic of Liberia, *Decision of the Commissioner of Maritime Affairs, R.L. and Final and Interim reports of the Formal Investigation by the Marine Board of Investigation in the Matter of the Loss by Grounding of the VLCC Amoco Cadiz O.N. 4773, 16 March 1978* (Monrovia, Bureau of Maritime Affairs, 30 December 1980), FR-9 and 10.

ues to be a right of international navigation through archipelagic waters, the territorial sea, straits used for international navigation, the exclusive economic zone (EEZ) and on the high seas, subject to certain restrictions. The coastal state has a right, *inter alia*, to exercise jurisdiction for marine environment protection purposes in archipelagic waters, the territorial sea, international straits and the EEZ.<sup>21</sup> In practice, where the line is to be drawn between the pursuit of the right of international navigation and the exercise of coastal state jurisdiction is not always a clear matter in the law of the sea, let alone in the Guidelines. In principle, ships in distress do enjoy additional protection in the exercise of innocent, archipelagic sealanes and transit passage, and this means that stopping and anchoring during passage by ships in distress is not a violation of the normal requirement that passage be continuous and expeditious.<sup>22</sup>

The coastal state's decision will depend on an assessment of the facts as reported by the ship and salvor, and as assessed or perceived by the coastal state. What is essential is that there be accurate reporting of a situation on board a ship to enable the coastal state to assess what action is appropriate in accordance with its law of the sea rights and responsibilities. The role of a national MAS agency will be important. Many states have multiple domestic jurisdictions with legal mandates to decide on whether or not to grant refuge. These jurisdictions can be national, provincial/regional and municipal. Port authorities may operate at any of these levels, and in other situations can be fully autonomous. At the national level, different governmental institutions, such as those responsible for transport, environment and civil defence, among others, may also be part of the decision-making process. In the past, difficulties encountered included (1) timely communication between internal levels of decision-making, (2) disagreement between national and local levels of decision-making, and (3) potential lack of leadership and indecisive decision-making in a crisis situation. Following their own particular maritime casualty experiences, France and the United Kingdom opted for a central and high-ranking institution or office with a mandate that enables swift decision-making. (See Chapters 6 and 16.) This approach influenced the MAS recommendation.

The IMO Guidelines do not specifically recommend the designation of pre-approved places of refuge as a matter of general policy.<sup>23</sup> The decision as to whether to establish a pre-approved list or simply designate places on an *ad hoc*

<sup>21</sup> LOS Convention, *supra* note 11: archipelagic waters, Part IV; territorial sea, Part 2 (Section 3); straits used for international navigation, Part III; and EEZ, Part IV. Further marine environmental jurisdictional provisions are provided in Part XII on the protection and preservation of the marine environment.

<sup>22</sup> *Ibid.*, Articles 18(2), 39(1)(c) and 52.

<sup>23</sup> See Report of the Maritime Safety Committee on its Seventy-Seventh Session, IMO Doc. MSC 77/26, 10 June 2003, 67.

basis (i.e., on a ship-by-ship basis) lies with the coastal state. Rather, the IMO Guidelines recommend that the coastal state develop procedures that would enable an efficient and objective risk assessment. As in the case of the master and salvor, the state is expected to carefully consider its decision by consulting a non-exhaustive checklist of risks and response needs.

The IMO Guidelines not only require co-operation in data collection and information exchange, but also, and most importantly, require an expert analysis of the situation, i.e., a situational and intelligent interpretation of the data.<sup>24</sup> In the case of the 'Castor', most of the seven Mediterranean coastal states that refused refuge did not properly inform themselves of the situation of the ship. Thus the Guidelines recommend that an expert team board the ship, if appropriate, as part of the analysis of the risks of leaving the ship at sea or allowing it to refue. Specific points have to be addressed with reference to safety of life at sea, safety of persons and the urban/industrial environment at the place of refuge, pollution risks, potential disruption of activities at the place of refuge, consequences of denial of refuge and impact on neighbours, and preservation of the ship.<sup>25</sup> Although the factors to be considered in the analysis cannot be exhaustive, it would have been useful for the Guidelines to also specify consideration of other uses and users of the marine environment such as aquaculture, fisheries, tourism and coastal amenities. Focus on pollution risks alone hardly does justice to the variety and socio-economic importance of uses other than transportation. This is one of the dangers to be expected from a discussion of places of refuge outside an integrated coastal and ocean management context.

The specific reference to the saving of property as a commercial consideration deserves additional attention. As noted elsewhere in this book, the saving of the ship or cargo did not feature prominently during the early discussions in IMO. During the debate in MSC it was agreed that the saving of property ought to be given due weight<sup>26</sup> because after all the loss of cargo threatens human safety and the environment. This concern now appears in the IMO Guidelines as 'due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance'.<sup>27</sup>

<sup>24</sup> IMO Guidelines, *supra* note 1, para. 3.10.

<sup>25</sup> *Ibid.*, para. 3.11.

<sup>26</sup> Discussion in MSC 77, as reported in Consideration and Adoption of Amendments to Mandatory Instruments (Note by the Secretariat), IMO Doc. MEPC 49/5/1, 17 June 2003.

<sup>27</sup> IMO Guidelines, *supra* note 1, para. 3.11. Places of Refuge: Submitted by the International Association of Ports and Harbours (IAPH) IMO Doc. LEG 84/7/1, 19 March 2002, accorded lower priority to commercial considerations, both in relation to the port's operation and preservation of the integrity of the ship's hull or structure. See also the Proposal by the International Union of Marine Insurers, in IMO Doc. MSC 77/8/2, 14 February 2003, which included a specific recommendation on the preservation of the ship and cargo when considering the granting of refuge.

Following the above decision-support process, the IMO Guidelines state: 'When permission to access a place of refuge is requested, there is no obligation for the coastal state to grant it, but the coastal state should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.'<sup>28</sup> Perhaps more than any other modern multilateral instrument, this compromise text suggests that the traditional right of refuge has been made subject to the paramount principle of coastal state protection. Although, as noted above, the IMO Guidelines are not a legal instrument, they are designed to influence state practice. Similarly, a footnote in an appendix of legal instruments to the Guidelines provides that there is 'at present no international requirement for a state to provide a place of refuge for vessels in need of assistance'.<sup>29</sup> Given the long history of the refuge custom discussed in Chapter 8 in this book, this finding is surprising and questionable. But then the discussion at IMO does not appear to have considered in depth, if at all, the customary law of refuge for ships. The records of IMO discussions on the subject before 2003 hardly reveal any reference to the custom. What is more precise to state is that there is no international multilateral conventional law requirement to provide a place of refuge; however, historically there have been several regional and bilateral treaties that conferred such a right and an extensive state practice, well-recognised by numerous international jurists, in support of a custom. Indeed, many bilateral treaties of friendship, commerce and navigation, which frequently contained provision of refuge for ships in distress on the basis of reciprocity are still in force today. This topic is discussed in detail in Chapter 8 in this book.<sup>30</sup>

Traditionally and out of necessity, a ship entered an unscheduled port or anchored in unexpected inshore waters without a preliminary requirement to request consent. The situation of necessity was justification in itself. The right of refuge was in a sense incidental to or an extension of the fundamental right of international navigation. Thus, in the codification of the regime of innocent passage at the First (1958) and Third United Nations Conferences on the Law of the Sea (1973–1982), the negotiators felt no necessity to require the coastal state's consent in creating an exception in the definition of continuous and expeditious passage.<sup>31</sup> At the same time, the IMO Guidelines, together with the

<sup>28</sup> IMO Guidelines, *supra* note 1, para. 3.12.

<sup>29</sup> *Ibid.*, Appendix 1.

<sup>30</sup> See Aldo Chircop, 'Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?', 33 *Ocean Development and International Law* (2002), 207–226, where the author provides references to several leading international law works.

<sup>31</sup> 'Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'. LOS Convention, *supra* note 11,

state practice they will influence, can be expected to evidence the contemporary *opinio* of the international maritime community by (1) treating the traditional right more in terms of a privilege, (2) subordinating it to the rights and interests of the coastal state, and (3) significantly controlling its enjoyment through the procedure established in the Guidelines and to the satisfaction of the coastal state. Where the coastal state allows refuge, it may impose practical requirements, and where the place of refuge is a port, there will be a requirement for a guarantor (normally the protection and indemnity insurer) to step in to cover fees (e.g., port dues), services (e.g., pilotage, towage and mooring) and expenses (e.g., safety measures that may result in costs to the port).<sup>32</sup>

#### CONCLUSION

The objectives stated in the Preamble of Assembly Resolution A.949(23) adopting the IMO Guidelines are ambitious, especially in attempting to balance the decision-making considerations of shipowners and salvors on the one hand, and coastal states concerns on the other. That balance is weighted in favour of the coastal state, which retains the ultimate discretionary authority to refuse refuge. However, for those states that may simply have refused refuge to ships without a single glance in the past, there is now the basis for a new international expectation in their regard. The significance of the Guidelines for ship and salvage operational purposes and coastal and/or port authority decision-making should not be underestimated. They may not be a legal instrument, but IMO Assembly Resolution A.949(23) is clear in inviting 'Governments to take these Guidelines into account when determining and responding to requests for places of refuge from ships in need of assistance'.<sup>33</sup> It is conceivable that if significant and consistent state practice in compliance with the IMO Guidelines occurs in due course, the expectations generated by the Guidelines may achieve legal significance.

Art. 18(2). Similar text is to be found in Art. 39(1)(c) on transit passage through international straits.

<sup>32</sup> IMO Guidelines, *supra* note 1, para. 3.14.

<sup>33</sup> *Ibid.*, Preamble, 2.

#### ANNEX

### GUIDELINES ON PLACES OF REFUGE FOR SHIPS IN NEED OF ASSISTANCE

#### IMO Assembly Resolution A.949(23) 5 December 2003

##### THE ASSEMBLY,

RECALLING Article 15(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECALLING ALSO the obligations and procedures for the master to come to the assistance of persons in distress at sea, established by regulation V/33 of the International Convention for the Safety of Life at Sea, 1974, as amended,

RECALLING FURTHER that the International Convention on Maritime Search and Rescue, 1979, as amended, establishes a comprehensive system for the rescue of persons in distress at sea which does not address the issue of ships in need of assistance,

CONSCIOUS OF THE POSSIBILITY that ships at sea may find themselves in need of assistance relating to the safety of life and the protection of the marine environment,

RECOGNIZING the importance of and need for providing guidance for the masters and/or salvors of ships in need of assistance,

RECOGNIZING ALSO the need to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal State to protect its coastline,

RECOGNIZING FURTHER that the provision of a common framework to assist coastal States to determine places of refuge for ships in need of assistance and respond effectively to requests for such places of refuge would materially enhance maritime safety and the protection of the marine environment.

HAVING CONSIDERED the recommendations made by the Maritime Safety Committee at its seventy-sixth and seventy-seventh sessions, by the Marine Environment Protection Committee at its forty-eighth session, by the Legal Committee at its eighty-seventh session and by the Sub-Committee on Safety of Navigation at its forty-ninth session,

1. ADOPTS the Guidelines on places of refuge for ships in need of assistance, the text of which is set out in the annex to the present resolution;
2. INVITES Governments to take these Guidelines into account when determining and responding to requests for places of refuge from ships in need of assistance;
3. REQUESTS the Maritime Safety Committee, the Marine Environment Protection Committee and the Legal Committee to keep the annexed Guidelines under review and amend them as appropriate;
4. REQUESTS the Legal Committee to consider, as a matter of priority, the said Guidelines from its own perspective, including the provision of financial security to cover coastal State expenses and/or compensation issues, and to take action as it may deem appropriate.

## ANNEX

### GUIDELINES ON PLACES OF REFUGE FOR SHIPS IN NEED OF ASSISTANCE

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## 1. GENERAL

### Introduction

#### *Objectives of providing a place of refuge*

- 1.1 Where the safety of life is involved, the provisions of the SAR Convention should be followed. Where a ship is in need of assistance but safety of life is not involved, these guidelines should be followed.
- 1.2 The issue of "places of refuge" is not a purely theoretical or doctrinal debate but the solution to a practical problem: What to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?
- 1.3 When a 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. Such an operation is best carried out in a place of refuge.
- 1.4 However, 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.
- 1.5 While coastal States may be reluctant to accept damaged or disabled ships into their area of responsibility due primarily to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions.
- 1.6 In some circumstances, 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.
- 1.7 Therefore, 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.

### Background

- 1.8 There are circumstances under which it may be desirable to carry out a cargo transfer operation or other operations to prevent or minimize damage or pollution. For this purpose, it will usually be advantageous to take the ship to a place of refuge.
- 1.9 Taking such a ship to a place of refuge would also have the advantage of limiting the extent of coastline threatened by damage or pollution, but the specific area chosen may be more severely threatened. Consideration must also be given to the possibility of taking the affected ship to a port or terminal where the transfer or repair work could be done relatively easily. For this reason the decision on the choice and use of a place of refuge will have to be carefully considered.
- 1.10 The use of places of refuge could encounter local opposition and involve political decisions. The coastal States should recognize that a properly argued technical case, based on a clear description of the state of the casualty, would be of great value in any negotiations which may take place.
- 1.11 At the international level, the Conventions listed in Appendix 1, as may be amended, constitute, *inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances.

### Purpose of the Guidelines

- 1.12 The purpose of these Guidelines is to provide Member Governments, shipmasters, companies<sup>1</sup> (particularly in connection with the ISM Code and procedures arising therefrom), and salvors with a framework enabling them to respond effectively and in such a way that, in any given situation, the efforts of the shipmaster and shipping company concerned and the efforts of the government authorities involved are complementary. In particular, an attempt has been made to arrive at a common framework for assessing the situation of ships in need of assistance.
- 1.13 **These Guidelines do not address the issue of operations for the rescue of persons at sea**, inasmuch as the practical difficulties that have given rise to the examination of the issue of places of refuge relate to problems other than those of rescue. Two situations can arise:

<sup>1</sup> As defined in the ISM Code.

- the ship, according to the master's assessment, is in need of assistance but not in a distress situation (about to sink, fire developing, etc.) that requires the evacuation of those on board; or
- those on board have already been rescued, with the possible exception of those who have stayed on board or have been placed on board in an attempt to deal with the situation of the ship.

1.14 **If, however, in an evolving situation, the persons on board find themselves in distress, the rules applicable to rescue operations under the SAR Convention, the IAMSAR Manual and documents arising therefrom have priority over the present Guidelines (and procedures arising herefrom).**

1.15 In any case the competent MRCC should be informed about any situation which may develop into a SAR incident.

1.16 Even though a "rescue" operation, as defined in the International Convention on Maritime Search and Rescue (SAR) is not the case, the safety of persons must nevertheless be constantly borne in mind in the application of these Guidelines, particularly in two respects:

- if the ship poses a risk (explosion, serious pollution, etc.) to the life of persons in the vicinity (crews of salvage vessels, port workers, inhabitants of the coastal area, etc.);
- if persons voluntarily stay (master, etc.) or go (fire-fighters and other experts, personnel of marine salvage or towage companies, etc.) on board to attempt to overcome the difficulties experienced by the ship.

1.17 These Guidelines do not address the issue of liability and compensation for damage resulting from a decision to grant or deny a ship a place of refuge.

## Definitions

1.18 **Ship in need of assistance** means a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard.

1.19 **Place of refuge** means 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.

1.20 **MAS** means a maritime assistance service, as defined in resolution A.950(23), responsible for receiving reports in the event of incidents and serving as the point of contact between the shipmaster and the authorities of the coastal State in the event of an incident.

## 2. GUIDELINES FOR ACTION REQUIRED OF MASTERS AND/OR SALVORS OF SHIPS IN NEED OF A PLACE OF REFUGE

### Appraisal of the situation

2.1 The master should, where necessary with the assistance of the company and/or the salvor, identify the reasons for his/her ship's need of assistance. (Refer to paragraph 1 of Appendix 2.)

### Identification of hazards and assessment of associated risks

2.2 Having made the appraisal referred to in paragraph 2.1 above, the master, where necessary with the assistance of the company and/or the salvor, should estimate the consequences of the potential casualty, in the following hypothetical situations, taking into account both the casualty assessment factors in their possession and also the cargo and bunkers on board:

- if the ship remains in the same position;
- if the ship continues on its voyage;
- if the ship reaches a place of refuge; or
- if the ship is taken out to sea.

### Identification of the required actions

2.3 The master and/or the salvor should identify the assistance they require from the coastal State in order to overcome the inherent danger of the situation. (Refer to paragraph 3 of Appendix 2.)

### Contacting the authority of the coastal State

2.4 The master and/or the salvor should make contact with the coastal State in order to transmit to it the particulars referred to in paragraphs 2.1 to 2.3 above. They must in any case transmit to the coastal State the particulars required under the international conventions in force. Such contact should be made through the coastal State's Maritime Assistance Service (MAS), as referred to in resolution A.950(23).

### **Establishment of responsibilities and communications with all parties involved**

- 2.5 The master and/or the salvor should notify the MAS of the actions that are intended to be taken and within what period of time.
- 2.6 The MAS should notify the master and/or the salvor of the facilities that it can make available with a view to assistance or admittance of the ship to a place of refuge, if required.

### **Response actions**

- 2.7 Subject, where necessary, to the coastal State's prior consent, the ship-master and the shipping company concerned should take any necessary response actions, such as signing a salvage or towage agreement or the provision of any other service for the purpose of dealing with the ship's situation.
- 2.8 The master, the company and, where applicable, the salvor of the ship should comply with the practical requirements resulting from the coastal State's decision-making process referred to in paragraphs 3.12 to 3.14.

### **Reporting procedures**

- 2.9 The reporting procedures should be in accordance with the procedures laid down in the safety management system of the ship concerned under the ISM Code or resolution A.852(20) on Guidelines for a structure of an integrated system of contingency planning for shipboard emergencies, as appropriate.

## **3. GUIDELINES FOR ACTIONS EXPECTED OF COASTAL STATES**

- 3.1 Under international law, a coastal State may require the ship's master or company to take appropriate action within a prescribed time limit with a view to halting a threat of danger. In cases of failure or urgency, the coastal State can exercise its authority in taking responsive action appropriate to the threat.
- 3.2 It is therefore important that coastal States establish procedures to address these issues, even if no established damage and/or pollution has occurred.

- 3.3 Coastal States should, in particular, establish a Maritime Assistance Service (MAS).<sup>2</sup>

### **Assessment of places of refuge**

#### ***Generic assessment and preparatory measures***

- 3.4 It is recommended that coastal States endeavour to establish procedures consistent with these Guidelines by which to receive and act on requests for assistance with a view to authorizing, where appropriate, the use of a suitable place of refuge.
- 3.5 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.
- 3.6 The aforementioned analysis, which should take the form of contingency plans, is to be in preparation for the analysis provided for below when an incident occurs.
- 3.7 The maritime authorities, port authorities, authorities responsible for shoreside safety and generally all governmental authorities concerned should ensure that an appropriate system for information-sharing exists and should establish communications and alert procedures (identification of contact persons, telephone numbers, etc.), as appropriate.
- 3.8 The aforementioned authorities should plan the modalities for a joint assessment of the situation.

### **Event-specific assessment**

#### ***Analysis factors***

- 3.9 This analysis should include the following points:
- seaworthiness of the ship concerned, in particular buoyancy, stability, availability of means of propulsion and power generation, docking ability, etc.;

<sup>2</sup> Unless neighbouring States make the necessary arrangements to establish a joint service.

- nature and condition of cargo, stores, bunkers, in particular hazardous goods;
- distance and estimated transit time to a place of refuge;
- whether the master is still on board;
- the number of other crew and/or salvors and other persons on board and an assessment of human factors, including fatigue;
- the legal authority of the country concerned to require action of the ship in need of assistance;
- whether the ship concerned is insured or not insured;
- if the ship is insured, identification of the insurer, and the limits of liability available;
- agreement by the master and company of the ship to the proposals of the coastal State/salvor to proceed or be brought to a place of refuge;
- provisions of the financial security required;
- commercial salvage contracts already concluded by the master or company of the ship;
- information on the intention of the master and/or salvor;
- designation of a representative of the company at the coastal State concerned;
- risk evaluation factors identified in Appendix 2; and
- any measures already taken.

### **Expert analysis**

- 3.10 An inspection team designated by the coastal State should board the ship, when appropriate and if time allows, for the purpose of gathering evaluation data. The team should be composed of persons with expertise appropriate to the situation.
- 3.11 The analysis should include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment. Such comparison should cover each of the following points:
- safeguarding of human life at sea;
  - safety of persons at the place of refuge and its industrial and urban environment (risk of fire or explosion, toxic risk, etc.);
  - risk of pollution;

- if the place of refuge is a port, risk of disruption to the port's operation (channels, docks, equipment, other installations);
- evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring States; and
- due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance.

After the final analysis has been completed, the maritime authority should ensure that the other authorities concerned are appropriately informed.

### **Decision-making process for the use of a place of refuge**

- 3.12 When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.
- 3.13 In the light of the outcome of the assessment provided for above, the coastal State should decide to allow or refuse admittance, coupled, where necessary, with practical requirements.
- 3.14 The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc.

## APPENDIX 1

## APPLICABLE INTERNATIONAL CONVENTIONS

At the international level, the following Conventions and Protocols are in force and constitute, *inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances:<sup>3</sup>

- United Nations Convention on the Law of the Sea (UNCLOS), in particular article 221 thereof;<sup>4</sup>
- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention), 1969, as amended;
- Protocol relating to Intervention on the High Seas in Cases of Pollution by substances other than Oil, 1973;
- International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), as amended, in particular chapter V thereof;
- International Convention on Salvage, 1989 (the Salvage Convention);<sup>5</sup>

<sup>3</sup> It 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.

<sup>4</sup> "1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, 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 such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For 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."

<sup>5</sup> Parties to the International Convention on Salvage, 1989 (Salvage 1989), are obliged under article 11 of the Convention when considering a request for a place of refuge, to take into account the need for co-operation between salvors, other interested parties and public authorities to ensure the efficient and successful performance of salvage operations. Article 11 of the Salvage Convention states:

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for 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.

- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (the OPRC Convention);
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- International Convention on Maritime Search and Rescue, 1979 (SAR 1979), as amended;
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;
- Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971;
- Convention on Limitation of Liability for Maritime Claims (LLMC), 1976;
- International Convention on Civil Liability for Oil Pollution Damage (CLO), 1969;
- International Convention on Civil Liability for Oil Pollution Damage (CLO), 1992;
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992.

## APPENDIX 2

### GUIDELINES FOR THE EVALUATION OF RISKS ASSOCIATED WITH THE PROVISION OF PLACES OF REFUGE

When conducting the analysis described in paragraphs 3.4 to 3.8, in addition to the factors described in paragraph 3.9, the following should be considered.

#### 1. Identification of events, such as:

- fire
- explosion
- damage to the ship, including mechanical and/or structural failure
- collision
- pollution
- impaired vessel stability
- grounding.

#### 2. Assessment of risks related to the identified event taking into account:

- 2.1 Environmental and social factors, such as:
  - safety of those on board
  - threat to public safety
  - What is the nearest distance to populated areas?
    - pollution caused by the ship
    - designated environmental areas
  - Are the place of refuge and its approaches located in sensitive areas such as areas of high ecological value which might be affected by possible pollution?
    - Is there, on environmental grounds, a better choice of place of refuge close by?
      - sensitive habitats and species
      - fisheries
  - Are there any offshore and fishing or shellfishing activities in the transit area or in the approaches to the place of refuge or vicinity which can be endangered by the incoming ship in need of assistance?
    - economic/industrial facilities
  - What is the nearest distance to industrial areas?
    - amenity resources and tourism
    - facilities available
  - Are there any specialist vessels and aircraft and other necessary

means for carrying out the required operations or for providing necessary assistance?

Are there transfer facilities, such as pumps, hoses, barges, pontoons?

Are there reception facilities for harmful and dangerous cargoes?

Are there repair facilities, such as dockyards, workshops, cranes?

#### 2.2 Natural conditions, such as:

Prevailing winds in the area.

Is the place of refuge safely guarded against heavy winds and rough seas?

Tides and tidal currents.

- weather and sea conditions

- Local meteorological statistics and number of days of inoperability or inaccessibility of the place of refuge.

- bathymetry

- Minimum and maximum water depths in the place of refuge and its approaches.

The maximum draught of the ship to be admitted. Information on the condition of the bottom, i.e., hard, soft, sandy, regarding the possibility to ground a problem vessel in the haven or its approaches.

- seasonal effects including ice

- navigational characteristics

In the case of a non-sheltered place of refuge, can salvage and lightering operations be safely conducted?

Is there sufficient space to manoeuvre the ship, even without propulsion?

What are the dimensional restrictions of the ship, such as length, width and draught?

Risk of stranding the ship, which may obstruct channels, approaches or vessel navigation.

Description of anchorage and mooring facilities in the place of refuge.

- operational conditions, particularly in the case of a port.

Is pilotage compulsory and are pilots available?

Are tugs available? State their number and horsepower.

Are there any restrictions? If so, whether the ship will be allowed in the place of refuge, e.g. escape of poisonous gases, danger of explosion, etc.

Is a bank guarantee or other financial security acceptable to the

coastal State imposed on the ship before admission is granted into the place of refuge?

- 2.3 Contingency planning, such as:
- competent MAS
  - roles and responsibilities of authorities and responders
- Fire fighting capability
- response equipment needs and availability
  - response techniques
- Is there a possibility of containing any pollution within a compact area?
- international co-operation
  - Is there a disaster relief plan in the area?
  - evacuation facilities

- 2.4 Foreseeable consequences (including in the media) of the different scenarios envisaged with regard to safety of persons and pollution, fire, toxic and explosion risks.

### 3. Emergency response and follow-up action, such as:

- lightering
- pollution combating
- towage
- stowage
- salvage
- storage.

## Chapter 3 The Integrated Coastal and Ocean Management Framework

Olof Linden

### INTRODUCTION

From an ecological standpoint, the transition zone between land and sea represents one of the most difficult environments for life on the surface of this planet. The environmental conditions are relatively stable on land and, particularly, in the ocean, but in the coastal zone they vary drastically due to tidal fluctuations, temperature variations, rain (fresh water) and the drying sun. These cycles of change characterise the life that has evolved in the coastal zone. As a consequence, the diversity of life forms is particularly high considering the relatively small geographical extension of the coastal zones, in total estimated to about four percent of the surface of the planet. In fact, several of the ecosystems in the coastal zone are some of the most diverse (in terms of species and taxonomical groups) on the planet. Coral reefs are by far the most species-rich marine environment. Shallow reefs are also the habitat of more vertebrates than any other environment on the planet. In addition to high figures for biodiversity, coastal zones are also highly productive as a result of