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PLACES OF REFUGE FOR SHIPS

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PLACES OF REFUGE FOR SHIPS: EMERGING ENVIRONMENTAL CONCERNS OF A MARITIME CUSTOM (Aldo Chircop & Olof Linden eds., Martinus Nijhoff Publishers 2006).

I. INTRODUCTION

The damaged tankers *Erika* and *Prestige*, denied access to ports or other places of refuge, sank in 1999 and 2001, respectively.¹ They spilled their cargoes of oil, wreaking much environmental damage on French and Spanish coastlines and damaging the fishing and tourist industries. Another ship in distress, the *Castor*, was towed around the Mediterranean for over a month in 2001, having been denied entry by numerous states, before its cargo of gasoline was safely offloaded at sea.² Denying refuge to a damaged tanker may alleviate understandable anxieties of local authorities, but this course of action may also render salvage operations impossible and contribute to an environmental catastrophe that could have been avoided.

When foreign flag vessels in distress seek access to places of refuge, complex problems arise. The issue of access to places of refuge illustrates how difficult it is to arrive at a new legal consensus when changes in technology and social attitudes challenge traditional legal understandings – in this case, the customary international law right of refuge in internal waters.³ Competing legal perspectives,

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1. Gwendoline Gonsaeles, *The Impact of EC Decision-Making on the International Regime for Oil Pollution Damage: The Supplementary Fund Example*, in MARINE RESOURCE DAMAGE ASSESSMENT: LIABILITY AND COMPENSATION FOR ENVIRONMENTAL DAMAGE 100 (Frank Maes ed., 2005).

2. Int'l Maritime Org. [IMO], "Places of Refuge" – Addressing the Problem of Providing Places of Refuge to Vessels in Distress, http://www.imo.org/Safety/mainframe.asp?topic_id=746 (last visited Sept. 15, 2008).

3. By contrast, many authorities deny the existence of a general customary international law right of entry into port for foreign flag vessels that are not in distress. See, e.g., A.V. Lowe, *Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 597-98 (1977). Some authorities limit the concept of "vessels in distress" to those in which a vessel is in difficulty and human life is at risk, using the terminology "vessels in need of assistance" to refer to situations in which a vessel is in difficulty but there is no risk to human life. See, e.g., PLACES OF REFUGE FOR SHIPS: EMERGING ENVIRONMENTAL CONCERNS OF A MARITIME CUSTOM 348 (Aldo Chircop & Olof Linden eds., 2006) [hereinafter PLACES OF REFUGE FOR SHIPS]; see also *infra* text accompanying note 15. This essay, in accordance with much standard commentary, refers to "vessels in distress" as encompassing situations

reflecting the concerns of various affected constituencies, vie for prominence. The appropriate recourse is to some expert process in which these various concerns can be evaluated in light of specific risk factors involved in each particular catastrophe. What process should be used? Can all significant constituencies – ship owners, cargo owners, their insurers, salvage interests, ports and coastal communities, environmental and “international community” interests – participate? What are the prospects for developing a legal process that operates quickly and efficiently, that permits input from experts, and that accommodates essential interdisciplinary perspectives?

This essay first provides an overview of *Places of Refuge for Ships*, a book that contains essential information and perspectives for lawyers and policy makers. Part III then briefly explores why the issue of places of refuge is daunting. The reasons for the complexity of this issue set the scene for Part IV, which proposes a process-oriented approach to assess and manage risks where vessels in distress seek access to places of refuge.

II. OVERVIEW OF *PLACES OF REFUGE FOR SHIPS*

Places of Refuge for Ships addresses its topic through a multidisciplinary lens. Part I of the book highlights management perspectives on problems associated with places of refuge. Part I's first chapter, written by one of the book's co-editors, Aldo Chircop of Dalhousie Law School, examines the International Maritime Organization's influential, though legally nonbinding, 2003 Guidelines on Places of Refuge for Ships in Need of Assistance.⁴ The second chapter, prepared by the other co-editor, Olof Linden of the World Maritime University in Sweden, explores coastal and ocean management, developing the important theme that the problem of places of refuge should be addressed through an integrated interdisciplinary approach, rather than through resort to rules that regulate marine activities based primarily on a vessel's nationality or location. Part I also contains four other chapters, on the environmental component of the IMO Guidelines (William Ritchie), risk assessment and decision making by maritime administrations (Jens-Uwe Schröder), port perspectives (Rosa Mari Darbra Roman), and the roles of the media in covering maritime disasters (Mark Clark).

Part II, on legal and policy analysis, contains the bulk of the book's treatment of international law. Aldo Chircop has contributed two solid chapters, one on the customary law of refuge for ships in distress and another on international environmental law considerations. Part II also includes chapters on refuge and salvage (Proshanto K. Mukherjee), compensation for damage (Gauthard Mark Gauci), insurance (Patrick Donner), and recovery in general average⁵ in cases of refuge (Hugh Kindred), which serve as useful introductions to these topics.

in which human life either is or is not at risk.

4. IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Assemb. Res. A.949 (23) (Dec. 5, 2003) [hereinafter IMO Guidelines].

5. General average is the maritime law mechanism for sharing proportionately the losses and expenses that a ship's master has deliberately incurred to avoid or minimize damage when a ship has encountered danger. See *PLACES OF REFUGE FOR SHIPS*, *supra* note 3, at 347-48.

The third and final Part of *Places of Refuge* evaluates various national approaches concerning places of refuge, with a particular focus on process in federal states. It contains chapters on Australia (Sam Bateman and Angela Shairp), Belgium (Eric Van Hooydonk), Canada (Philip John), Denmark (John Liljedahl), Germany (Uwe Jenisch), the United Kingdom (Toby Stone), and the United States (Paul Albertson).

The problem of refuge has no easy answers. The challenge thus becomes to devise procedures that allow stakeholders to be heard and risks to be effectively assessed and managed in the face of often conflicting values and incentives. In order to understand this challenge, it is important to appreciate why the issue of places of refuge is complex.

III. THE COMPLEXITY OF THE ISSUE OF PLACES OF REFUGE

The law concerning places of refuge, and more generally concerning ships in distress, is undoubtedly complex. It has been so for years, and has recently become more so, for several reasons. First, decisions about ships seeking refuge reflect a range of increasingly conflicting values. Second, multiple stakeholders hold these conflicting positions intensely. The matter of vessels seeking refuge is salient and politically sensitive. Third, it is difficult, *ex ante*, to devise a clear rule concerning how cases involving vessels in distress seeking places of refuge should be resolved. The treatment of such vessels depends on many variables: the condition of the ship, its location, its cargo, its insurance coverage, the availability and capabilities of ports and salvors, and weather.

First, decisions about places of refuge implicate many different values. The resulting complexity is not entirely new. Rules applicable to ships in distress have historically derived from different fields of international law. Trade law, humanitarian law, the law of armed conflict, admiralty law, the law of the sea, and (a newer development) international environmental law are all relevant. Different fields of law prioritize different (and sometimes competing) concerns: the integrity of ships and their cargoes, the sanctity of lives put in peril when ships are in distress, the navigational freedom and immunity of warships, a coastal state's ability to protect itself and to apply its laws when an appropriate jurisdictional nexus exists, and the global importance of sustainability and non-degradation of the environment. *Places of Refuge* ably explores many of these legal traditions.

Value conflicts related to places of refuge have intensified in recent decades. The predominant humanitarian rationale for a right of access of vessels in distress to a place of refuge – a right often asserted as existing in customary international law⁶ – has been undermined. This is so because of changes in technology. These

6. See PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 191-92, 221-22. Pages 191-92 assess the contours of the refuge custom at the end of the nineteenth century, including what perils triggered a right of refuge, what types of vessels enjoyed the right, special rules concerning warships, where refuge could be enjoyed, the right of free departure, and other rights and privileges related to refuge (e.g., concerning repairs, re-supply, unloading cargo, exemption from customs duties, and the right to consular assistance). Pages 221-22, discussing the current views of the Comité Maritime International

changes have helped to minimize the danger to humans, but have increased the risk of damage from ships. Traditionally, access to places of refuge was often necessary in order to save the lives of people on board a ship in distress. Refuge thus linked to a broader duty of assistance that also found expression in the international law rule that vessels have a duty to render assistance to those in danger of being lost at sea.⁷ Today, however, technology permits precise location of ships in distress, and passengers and crew members on board such ships often can be offloaded by helicopter or ship. Yet the need to insure the safety of the crew and passengers on board a vessel in distress never completely explained the customary international law rule allowing access to ports or places of refuge in situations of distress, for the rule also supported the interests of ship and cargo owners and the value of open commerce. These latter rationales remain, but they have come into increasing tension with environmental values.

Modern ships pose dangers that older vessels did not. Spills of oil or hazardous cargoes from tankers may devastate the marine environment or threaten the health and safety of coastal communities. These risks have been addressed through a variety of initiatives directed at vessel safety and restricting access of vessels to Particularly Sensitive Sea Areas.⁸ Yet these preventive measures are not the only ways to respond to increased environmental risks. The Law of the Sea Convention and other treaties also incorporate protective jurisdictional principles, allowing coastal states to counteract environmental threats from marine casualties.⁹ These protective principles provide a conceptual basis for qualifying the traditional customary right of access to places of refuge.¹⁰ State practice has moved toward

and its national delegations, refer to a customary international law right of refuge, but note that many states no longer regard the right as absolute. *See also infra* text accompanying note 12.

7. *See, e.g.*, International Convention on Salvage art. 10, Apr. 28, 1989, S. TREATY DOC. NO. 102-12 (1991), 1953 U.N.T.S. 193; United Nations Convention on the Law of the Sea art. 98, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter *Law of the Sea Convention*]; International Convention on Maritime Search and Rescue Annex ¶ 2.1.10, Apr. 27, 1979, T.I.A.S. No. 11,093, 405 U.N.T.S. 97.

8. On-board vessel safety devices and procedures have traditionally been mandated by requirements of the International Convention on the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 3. *See Law of the Sea Convention, supra* note 7, art. 94. The European Union has pushed for a range of other initiatives, including the phasing out of single hull tankers, the enhancement of flag state control, port state inspections of substandard vessels, coastal state control over foreign vessels in transit, and the designation of Particularly Sensitive Sea Areas. *See generally* Veronica Frank, *Consequences of the Prestige Sinking for European and International Law*, 20 INT'L J. MARINE & COASTAL L. 1 (2005).

9. Law of the Sea Convention, *supra* note 7, arts. 211, 221; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, 970 U.N.T.S. 211. Aldo Chircop argues that "[t]he historical practice shows that the right to refuge has frequently been subjected to conditions," e.g., limiting the movement of ships because of health quarantines. *See PLACES OF REFUGE FOR SHIPS, supra* note 3, at 224. Denying a ship access to a place of refuge altogether, because it may pose risks to a coastline, is of course a more severe limitation than allowing the ship access but imposing a quarantine or other condition on it.

10. These protective principles are, however, counterbalanced by other legal principles designed to protect the marine environment, obligations that could weigh against a coastal state refusing refuge. *See Law of the Sea Convention, supra* note 7, arts. 192 ("States have the obligation to protect and preserve the marine environment."), 194(2) ("States shall take all measures necessary to ensure that ... pollution arising from incidents or activities under their jurisdiction or control does not spread beyond

requiring notice and consent for entry into a place of refuge, something that historically was not necessary except with respect to warships in distress.¹¹ Recent authorities maintain that a ship in distress does not have an absolute right of access to a place of refuge. For example, the Irish High Court of Admiralty concluded that “[i]f safety of life is not a factor, then there is a widely recognised 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 the request by a vessel in distress for access to a place of refuge.¹² According to Aldo Chircop, “the right, according to customary international law, for a vessel in distress to be granted a place of refuge no longer appears to be recognised by many States as an absolute right.”¹³

Second, decisions about whether or on what conditions to grant access to places of refuge are difficult not only because such decisions require mediating value conflicts, but because different constituencies care deeply about the decisions. Debates in Europe following the 2001 *Prestige* incident have been particularly intense. Ship owners and cargo owners are vitally interested in assuring a place of refuge for a vessel in distress. Concerns for the safety of those on board the vessel – salvors, if not passengers and crew – and for the environment also may push toward granting access to a place of refuge. However, coastal fishing, tourist, and residential communities, which fear devastating contamination should an oil tanker break apart near them, may strongly oppose granting access to places of refuge.

Third, the issue of granting access to places of refuge is complex because whatever decision is made with respect to access of a particular vessel to a place of refuge – granting unrestricted access, or denying access, or conditioning access on meeting financial security or other conditions – along with associated decisions regarding salvage, may provide little guidance for future cases. Ships seeking refuge pose highly fact-specific dangers. It will be hard to generalize about the risks particular communities face and about how best to manage those risks.

IV. PROCESS AND THE ASSESSMENT AND MANAGEMENT OF RISKS

The diverse practice of states, some of which have granted refuge and some of which have turned away ships seeking refuge, has suggested to some the “need to elaborate clear rules.”¹⁴ Yet any bright-line substantive rule – say, one allowing an absolute right of access to vessels in distress – will be insufficiently nuanced.

the areas where they exercise sovereign rights”), 195 (“In 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.”), 225 (in exercising “their power of enforcement against foreign vessels, States shall not ... expose the marine environment to an unreasonable risk”). Commentators have suggested that a treaty could help to limit the liability of a coastal state that, in the face of such broadly worded principles, makes a difficult decision either granting or refusing access to a vessel seeking refuge. See *infra* note 42.

11. See, e.g., PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 225.

12. ACT Shipping (PTE) Ltd. v. Minister for the Marine, [1995] 2 I.L.R.M. 30, 48.

13. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 221.

14. Frank, *supra* note 8, at 54.

Environmental risks will vary with the situation; most often, the risk of environmental degradation will be lower if a vessel is towed into a place of refuge than if it remains offshore, but the reverse may sometimes be true. Risks to human life will vary from situation to situation. Risks to a port should a vessel in distress be allowed entry will vary depending on the insurance coverage that the vessel carries and the capabilities of port and salvage facilities. The complexities associated with refuge situations suggest that the primary need is for an expert, balanced process to assess and manage the risks involved in refuge situations. The main utility of international law in this situation may be to promote a sensible risk management process, rather than to provide a bright-line rule or even to articulate values that already are generally shared (e.g., the preservation of human life and the need to protect the environment). "Rules" that can help establish such a process are certainly to be encouraged. But the central issue is, what process can best determine whether (and on what conditions) to grant access to places of refuge?

It was perhaps inevitable that a multifaceted "balancing" approach would be articulated to address the problem of access to places of refuge. The IMO has developed one notable balancing approach, in its nonbinding 2003 Guidelines on Places of Refuge for Ships in Need of Assistance. The Guidelines are intended to assist states trying to respond to a "ship in need of assistance," 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."¹⁵ The Guidelines do not address the rescue of persons lost at sea, but they contain provisions both for masters and salvors with respect to a ship seeking access to a place of refuge and for coastal states evaluating whether to grant refuge. According to the Guidelines, coastal states should establish a Maritime Assistance Service and develop contingency plans.¹⁶ The Guidelines also call for event-specific assessment – determining the events causing the need for assistance, assessing risks related to the identified events (including environmental and social factors, natural conditions, coastal state contingency planning, the nature and condition of the ship and its cargo and crew, available insurance, and required financial security), and identifying available emergency and follow-up responses (including salvage).¹⁷ The Guidelines take the position 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."¹⁸ The focus of the Guidelines (and, implicitly, the focus of any appropriate process to address vessels seeking access to places of refuge) is on risk assessment and risk management, and on incorporating multidisciplinary perspectives.

Although the IMO Guidelines are legally nonbinding "soft law," they appear likely to influence national and regional practice. Indeed, the European Parliament

15. IMO Guidelines, *supra* note 4, ¶ 1.18.

16. *Id.* ¶¶ 3.3-3.6.

17. *Id.* ¶ 3.9. *See also id.* app. 2 ¶¶ 2.1-2.4.

18. *Id.* ¶ 3.12.

and the Council of the European Union have required EU member states to draw up plans to accommodate major commercial ships in distress, and, in doing so, to take into account the IMO Guidelines.¹⁹ Member states' plans must "contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority"²⁰ – language that certainly does not recognize an absolute right to refuge.²¹ As Aldo Chircop cautiously concludes, "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."²²

One should ask whether decision makers who articulate or implement balancing approaches are considering all the proper factors. The IMO Guidelines compile factors to be weighed in a non-exhaustive list.²³ If other factors are known in advance, they should be listed, to insure that decision makers will take them into account. Some additional factors could well have been added to the IMO Guidelines list that coastal states are encouraged to consider in determining whether to allow a ship in distress access to a place of refuge. For example, it could be useful to name oil spill trajectory models as a tool to complement expert analyses of the "risk of pollution."²⁴ In addition, the IMO Guidelines list several maritime and environmental treaties as constituting "*inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances,"²⁵ but they fail to note several relevant multilateral treaties.²⁶ One can appreciate why the IMO Guidelines are imperfect: the issue of places of refuge had been discussed only for a relatively short time when the Guidelines were developed, and they "represent the lowest common denominator among IMO member states."²⁷ Yet it would be desirable to list all potentially relevant factors, in order to increase the likelihood that decision makers will consider all appropriate information when they evaluate the risks associated with requests for access to places of refuge.

How should a balancing approach that stresses risk assessment and risk management be implemented? Several contributors to *Places of Refuge* note the

19. Council Directive 2002/59, pmbl. ¶ (5), 2002 O.J. (L 208) 10 (EC).

20. *Id.* art. 20. See also *id.* art. 18(1)(b) (member states may prohibit foreign vessels from, *inter alia*, entering their ports in cases of "exceptionally bad weather or sea conditions," if such entry would endanger the environment or human life).

21. Regional treaties may also facilitate the use of a balancing approach to determine access to places of refuge. *E.g.*, Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea art. 16, Jan. 25, 2002, available at http://195.97.36.231/acrobatfiles/02IG14_Final_Act_Eng.pdf (requiring the development of "strategies" concerning places of refuge for ships that pose environmental threats).

22. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 44.

23. IMO Guidelines, *supra* note 4, ¶ 3.9.

24. See *id.* ¶ 3.11 (failing to particularize the considerations involved in determining risk of pollution).

25. See *id.* app. 1. See also PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 89-90.

26. See *id.* at 233 (listing five such treaties).

27. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 100; see also *id.* at 141-43 (listing standards used to implement an environmental management system).

importance of having a process that is transparent and that takes into account the perspectives of all stakeholders – ports, coastal communities, flag states, salvage interests, and ship and cargo owners (or their insurers) – as well as environmental concerns. This process should reflect an integrated coastal and ocean management framework, a topic explored in Chapter 3 of the book. It is important to accord considerable weight to the views of experts, rather than to give final decision-making authority to, say, a port commissioner who may focus too heavily on risks to one port rather than fully consider all environmental risks should a ship in distress not be granted refuge. In short, “[a]ny decision on whether to grant or refuse a place of refuge should be based on risk assessment, not on risk aversion.”²⁸ The assessment of risks also must be carried out efficiently. When a ship in need of assistance seeks access to a place of refuge, there often is not time for prolonged deliberation about the best course of action. Complex situations must be evaluated and decisions must be reached quickly. Among the states whose procedures are surveyed in this book, the United Kingdom has adopted a system – administered through the Secretary of State’s Representative for Maritime Salvage and Intervention and through the Maritime and Coastguard Agency – that usefully provides for input from experts and allows centralized decisions concerning maritime disasters and questions of refuge.²⁹

An optimum risk assessment and risk management process also requires clear lines of decision-making authority. Mechanisms to address requests for refuge have developed primarily at the national level. Problems of governmental relations in federal states, however, have compounded the difficulties in fashioning sensible procedures for evaluating requests for refuge. In those states, control over port and coastal activities often has resided with local or other sub-state components of government. Several of the states whose practices are analyzed in *Places of Refuge* – Australia, Belgium, Canada, Germany, and the United States – are federal states.³⁰ The challenges facing federal states may not be insurmountable, but they are significant. Sam Bateman and Angela Shairp, writing about Australia, conclude that “[t]he politics of a federal jurisdiction mean that while the central government may have the power to override decisions at a state level, it will be circumspect in exercising that power. Inevitably this means that requests for refuge will be treated in an ad hoc manner.”³¹ Germany lacks a centralized coast guard under federal command, and “the German model is fragmented,”³² presenting federal-Länder communications and coordination difficulties. “[T]he Belgian experience confirms that the devolution of maritime powers in a federal state may lead to legal uncertainty as to the competence of authorities involved, as well as to gaps in the statutory regime.”³³ In Canada, “[t]he possibility of ...

28. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 346.

29. *See id.* at 429-53.

30. How authority is divided among the component parts of federal states varies considerably. *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW § 11.2 (2d ed. 2006).

31. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 389.

32. *Id.* at 486.

33. *Id.* at 427.

discussion on places of refuge being complicated by overlapping and intervening jurisdictions is quite likely;" the need is to "streamlin[e] and harmonis[e] federal and provincial responsibilities."³⁴ The United States, whose federal-state system often confuses and exasperates other countries concerned with U.S. implementation of international law, has enacted federal laws for contingency planning and responding to oil spill emergencies. The 1990 U.S. Oil Pollution Act, a response to the *Exxon Valdez* spill in Alaskan waters, and other federal environmental legislation set out the procedure.³⁵ Yet, this U.S. regime is not fully unified, for the OPA permits component states of the United States to maintain different limits of liability for damage caused by oil pollution.³⁶ The structure and politics of federal states can make it difficult to fashion efficient procedures to address threats of oil spills and requests for refuge.

The need for coordinated regional international approaches to requests for refuge also complicates efforts to design optimum procedures. When a ship in distress seeks refuge, regional consultation and coordinated regional response mechanisms may be necessary to provide the most effective emergency or salvage services or to determine which of several neighboring states can best offer an appropriate place of refuge. States have made some progress at regional coordination. The 1983 Bonn Agreement *Counter-Pollution Manual*³⁷ and the Baltic Marine Environment Protection (Helsinki) Commission³⁸ provide for regional cooperation on anti-pollution matters in general, and on places of refuge in particular. Canada engages in bilateral planning efforts with the United States, Denmark (concerning Greenland), and France (concerning St. Pierre and Miquelon).³⁹ U.S. authorities have also agreed to regional plans designed to coordinate responses to marine disasters.⁴⁰

34. *Id.* at 512.

35. For an overview of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) [hereinafter OPA], see John E. Noyes, *U.S. Oil Pollution Act of 1990*, 7 INT'L J. ESTUARINE & COASTAL LAW 43 (1992). For a discussion of U.S. legislation related to marine pollution, see John E. Noyes, *Case Study of the United States of America*, in VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION 357 (Erik Franckx ed., 2001).

36. OPA, *supra* note 19, 33 U.S.C. § 2718 (2006).

37. BONN AGREEMENT COUNTER POLLUTION MANUAL ¶¶ 1.1.1-1.1.2. (Oct. 26, 2007), http://www.bonnagreement.org/eng/html/counter-pollution_manual/welcome.html. The *Manual* was prepared pursuant to the Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, 973 U.N.T.S. 3. The Agreement was extended to apply to other harmful substances on Sept. 13, 1983. See Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, Sept. 13, 1983, 1605 U.N.T.S. 39. See also PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 444.

38. The Commission was established pursuant to the Convention on the Protection of the Marine Environment of the Baltic Sea Area, Apr. 29, 1992, 2099 U.N.T.S. 195 (commonly known as the Helsinki Convention). See PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 476-77.

39. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 522-24.

40. See *id.* at 522-23. The United States has acted unilaterally with respect to many issues related to ships in distress and oil pollution. For example, with passage of the OPA the United States demonstrated its unwillingness to join widely accepted treaties that provide for liability for damages caused by vessel-source oil spills. These include the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, and the Convention on the Establishment of an

Whether places of refuge should be the subject of a global treaty is controversial. Nonbinding international instruments (such as the IMO Guidelines) and regional, sub-regional, or national institutions or arrangements may better carry out at least some of the various functions relevant to places of refuge – specifying policies and norms, providing information and analysis, and undertaking or supervising salvage and rescue operations.⁴¹ It is not apparent that a global convention holds a comparative advantage over arrangements arrived at regionally with respect to such issues as: what principles should govern access to places of refuge; who should make decisions about refuge; how national responses should be coordinated; and which potential places of refuge should be designated in advance. Nevertheless, a global convention could usefully mandate and spur the adoption of appropriate expert national and regional procedural arrangements, and could offer other potential benefits as well.⁴² Still, the need for effective national and regional processes will remain paramount with respect to the threshold decision of whether to afford a ship refuge.

V. CONCLUSION

Efforts to prevent environmental disasters, particularly devastating oil spills from tankers, have taken various directions, including vessel safety mandates, traffic control measures, and increased state inspections and control of vessels.⁴³ Yet preventive measures will not be perfect. The dilemma of whether to accord access to places of refuge may still arise when a vessel is in distress and an oil spill appears imminent.

Places of Refuge reveals just how complex the topic of the book is. The complexities stem from the multiple areas of international law related to the topic and from the multiple values and interests implicated when a ship finds itself in need of assistance. The humanitarian rationale for granting a right of access to vessels in distress has increasingly been undermined by technological developments that allow passengers and crew members to be rescued at sea. The

International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, and their Protocols and Amendments.

41. See generally Lee A. Kimball, *Whither International Institutional Arrangements to Support Ocean Law?*, 36 COLUM. J. TRANSNAT'L L. 307, 307 (1997) (discussing how the contemporary reality of ocean space presents institutional challenges that could be better approached by devolving certain responsibilities from the global to the regional level).

42. Uniform global standards might facilitate standardized salvage contracts or ship insurance, for example by specifying standards for financial security from ships seeking refuge. A global treaty addressing places of refuge could also clarify numerous uncertainties about liability for damage, particularly on the part of states that either grant or deny access to places of refuge. Some commentators and the Comité Maritime International have indeed proposed a convention on the subject, or more broadly on the management of casualties at sea. See, e.g., Eric Van Hooydonk, *The Obligation to Offer a Place of Refuge to a Ship in Distress*, in CONTEMPORARY REGULATION OF MARINE LIVING RESOURCES AND POLLUTION 85, 127-28 (Erik Franckx ed., 2007); *Report on Places of Refuge Submitted by Comité Maritime International to the IMO Legal Committee*, 2004 COMITÉ MAR. INT'L Y.B. 389, available at <http://www.comitemaritime.org/year/2004/pdf/files/YBK04-1.pdf>; Comité Mar. Int'l, *Draft Instrument on Places of Refuge*, available at http://www.comitemaritime.org/worip/pdf/Places_RefugeWP.pdf. The IMO to date has declined to call for such a convention.

43. See Frank, *supra* note 8, at 1, 4; *supra* note 8 and accompanying text.

advent of modern tankers has also created new risks to the safety of coastal communities and to the marine environment, and international law has correspondingly incorporated protective principles that states may raise in opposition to requests for refuge. These developments have created a strong impetus for qualifying the traditional rule, stemming from bilateral treaties and customary international law, that a ship in distress had a right of access to a place of refuge.

Decisions about granting access to places of refuge and about financial security for ships entering places of refuge are necessarily highly contextual. The case for use of a transparent, streamlined, expert process to assess and manage risk factors from a multidisciplinary perspective is a strong one. Yet problems of political relations in federal states and the need for regional coordination challenge efforts to devise effective mechanisms to review requests for refuge. *Places of Refuge* provides some reason for encouragement, for it reveals that talented professionals are seeking ways to meet these challenges. Policy makers should study the book's thoughtful analyses of rules and procedural mechanisms related to places of refuge.

