

# PLACES OF REFUGE: The Problem & Possible Solutions

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## THE HISTORY

What with all the controversy over the case of the Prestige, one might be forgiven for thinking that it triggered focus on the issue of places of refuge; but for those of us in P&I it's a problem we've been wrestling with for many years. It is a complex issue, not only involving Salvage and hostility of the public who have made their homes and their livelihoods in the areas where refuge is to be granted, but also involving fine judgements over the nature of the pollutants on board and the damage which they might do if released in the refugee area, or perhaps over a period of time from the bottom of the sea.

Historically I believe it is true to say that coastal communities looked forward, with a sense of anticipation, to casualties occurring nearby. Wrecks were seen as a useful opportunity of securing a windfall, as a result of the opportunity to plunder cargo, ship's equipment and even the very material from which ships were constructed! That all changed, firstly with the growing prosperity of those communities; then as more cargoes were comprised of raw materials and, finally, with the revolution in media technology, which revealed to the public the spectre of oily seas and oiled wildlife.

## THE TORREY CANYON

Modern history of the issue arguably dates back into the '60s and the case of the TORREY CANYON, one of the biggest crude oil carriers of her time, which grounded off the South West coast of Britain in 1967, spilling her crude oil cargo, much of which contaminated a coastline rich with diversity of wildlife. Emotive TV film of blackened seabirds resulted in serious government embarrassment. That, in turn, led to inept methods of preventing further pollution, such as the bombing and setting fire of the wreck. All that did, of course, was to burn off the relatively light ends of the oil, which was going to evaporate anyway, leaving the heavy ends incapable of burning, because of contact with the sea, and floating inexorably towards the coast. That was probably the first notable example of government incompetence leading to worse pollution than would have occurred if it had done nothing.

Since then there has been an increasing recognition that oil is a natural substance which, if it is released into the environment, simply leads to a temporary imbalance and then a rebalancing of flora and fauna in the region. I can vouch for the fact that the coastline affected by the pollution from the TORREY CANYON has recovered. None of that, of course, is to understate the

potentially devastating short term effects of pollution, particularly on the livelihoods of fishermen whose work usually has to be suspended for a period; nor should I understate the much longer term damage which can be done by much more toxic and persistent pollutants.

Fortunately, governments in the more sophisticated States have gained the knowledge enabling them to distinguish between the various potential pollution threats; but 20 years ago the degree of knowledge was much less and pressure from environmentalists, who were taking advantage of media thirst for disaster stories, less discriminating. So it was in those countries that governments saw the solution to the pollution threat as being the sinking of distressed shipping out to sea, far from the lenses of the news photographers.

#### The CHRISTOS BITAS and the ANDROS PATRIA

The first most notable examples of that reaction occurred in October 1978; firstly when the tanker CHRISTOS BITAS grounded temporarily off the British coast, tearing out her bottom. Although it was possible to save much of the crude oil cargo by transshipment, she still contained a considerable amount of fuel. Governments in the area did not want the ship brought into port and she was therefore towed out to sea and sunk by the salvor. The second case was the ANDROS PATRIA, again loaded with crude oil. She suffered a fire in the Bay of Biscay and although the salvors soon brought the situation under control, again none of the governments in the area will allow the vessel refuge, so she was towed into deep water and sunk, this time with her cargo.

Incidentally, these were the cases which led to a fundamental change in the traditional "no cure no pay" salvage contract. In 1980 a Lloyd's Open Form of salvage agreement introduced a safety net by which the salvor would be paid his expenses, plus a 15% uplift, in respect of tankers which could not be saved. Until that time it had been accepted that if a ship could not be brought to a place of safety, then it was effectively the salvor's bad luck. Introduction of the safety net was effectively a recognition, both that the risk of environmental damage could be disproportionate, and that that governments had to be expected to deny refuge.

Over the next 20 years there were sporadic examples of governments denying refuge to ships which could have been saved with minimal pollution risk, of which some of the most notable were:

1989	KHARK 5
1992	PROTOKLITAS
1994	YA MAWLAYA
1997	SMIRDAN

#### THE SEA EMPRESS

During that period another tanker casualty occurred: the grounding of and pollution from the crude oil cargo of the SEA EMPRESS, again in Britain, in 1996. The case did not involve any issue of refuge, but it did give rise to a great deal of concern, on the part of government, over what it felt was an absence of clear authority enabling it to take control of a salvage operation when the public interest was involved. Very sensibly, the British Government appointed a well known Appeal Court Judge, Lord Donaldson, to carry out an independent judicial inquiry into the issue. His report was issued in 1999 and can be found at the following website:

[http://www.dft.gov.uk/stellent/groups/dft\\_shipping/documents/page/dft\\_shipping\\_505250.hcsp](http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/page/dft_shipping_505250.hcsp)

## THE DONALDSON REPORT ON COMMAND AND CONTROL OF SALVAGE

Donaldson confirmed that the public interest must have priority and that government would have to be in control of salvage operations in British waters. That was not, of course, a surprising result; but Donaldson also made a recommendation which demonstrated the extraordinary extent of his vision and grasp of the reasons why governments find themselves in so much difficulty when faced with the need to make decisions having potentially devastating political impact. He proposed that the Secretary of State for Shipping should be represented in any casualty by a permanently appointed representative, known the Secretary of State's Representative (SOSREP), who would have the power to take decisions such as the granting of refuge. Most important of all, Donaldson insisted that the Secretary of State should have no right to interfere with SOSREP's decisions. Putting it in Donaldson's words: the Secretary of State should only have the right to "back or sack" SOSREP!

## THE ERIKA

Then came case of the ERIKA in December 1999. The tanker suffered structural failure during a storm and broke up, releasing a large quantity of fuel oil cargo. That was a very high-profile casualty, because of the extensive pollution which was caused to considerable lengths of the French coastline. There were suggestions of a reluctance, on the part of the French authorities, to give the ship refuge, but their position did not ultimately need to be tested, because she broke up before she approached the coastline. Nevertheless, it was a reminder of the need for systems to provide refuge.

## THE CASTOR

Then followed one of the most shocking cases of all. At the end of January 2000, the Greek tanker CASTOR, sustained a crack across her main deck during a period of heavy weather in the Western Mediterranean. The ship was loaded with a full cargo of gasoline: one of the least polluting oil products and one which normally evaporates very quickly after being spilled, leaving minimal residue. There was and admittedly a substantial quantity of heavy fuel on board, but the fuel was not stowed in the vicinity of the part of the hull which was failing.

The salvor quickly brought the situation under control and positioned the ship so as to minimise the stresses on her. Meanwhile, he was applying to State after State in the vicinity for refuge, but without meeting with any success. The Spanish authorities sent their own officials to inspect the ship, but despite the assurances of the salvor, they declined even to allow her within their territorial waters in order to obtain at least some shelter, so that both the cargo and the fuel could be transhipped. There then followed a bizarre episode, with the salvor towing the ship eastwards across the Mediterranean, applying unsuccessfully to each coastal State on the way for refuge. The ship survived further stormy weather and although never allowed into any nation's territorial waters, she finally reached a position off Tunisia where the weather was good enough to undertake successfully the necessary transhipment operation.

## THE EUROPEAN COMMUNITY RESPONSE

Later in 2000, in a reaction to the ERIKA casualty, but presumably also to some extent influenced by the CASTOR, the European Commission published a Directive requiring Member States to designate Places of Refuge. The Directive did not, however, indicate when each State's system needed to be in place.

With the British Government had been appointed its SOSREP the previous year, it promptly gave him the authority to give access to a number of places of refuge around the coasts of the United Kingdom and so promptly complied with the directive. Interestingly, the government did not publicise this news particularly widely and, when asked to identify the places it declined, and indicated informally that it was fearful of adverse reaction from the communities involved.

The reaction of other European Governments was mixed. Some complied with the Directive promptly (and quietly, rather like the British Government!). Others did very little. What is unclear is whether even those who designated the Places of Refuge put in place systems, like the British, to ensure that decisions to make refuge available in those places were taken out of the hands of the politicians.

In view of what was to follow i.e. the case of the PRESTIGE, it is interesting to observe the behaviour of the Spanish. I have been unable to find any public

record of Spain complying with the Directive; but it has become clear that the Spanish recognised the need to have some sort of system in place. It is now known that the authorities did conduct an exercise, involving a theoretical collision between a loaded tanker and a dry cargo ship (in the very same area where the PRESTIGE was to come to grief), in which the tanker was actually given refuge in La Corunna. The exercise followed a plan which quite properly involved the assessment of damage as a precursor to the decision being made as to whether to give refuge.

Other evidence that Spain was taking the issue seriously is represented by its delegation to the IMO pressing for international action. Unfortunately, however, the Spanish do not seem to have been able to press home the point and the IMO seemed unable or unwilling to progress matters expeditiously.

So by 2002 we have arrived at a position where there is patchy implementation of the EC directive and little if any, co-ordination between States, in anticipation of a casualty threatening more than one State.

## THE PRESTIGE

Then in December 2002, to test the very same two States, Spain and France, who had received such stark warnings over the previous few years, came the case of the PRESTIGE, a case which involves Bilbrough and which I have been living with throughout the last ten months. The PRESTIGE was another tanker carrying a cargo of fuel oil and suffering structural damage in stormy weather, this time off the north western corner of Spain. Interestingly (in the context of the debate over single hull versus double hull tankers), the structural damage involved a fracture and a degree of collapse of the hull plating in a ballast tank. In other words, the ship was effectively double hulled in the position where the fracture occurred; but the force of the weather nevertheless later led to the ship's centre tanks being penetrated.

The initial ingress of water into the starboard ballast tank was very substantial indeed and caused the ship to list sharply to that side. The list, combined with the ship's heavy rolling in the storm caused the engine to stop. It also resulted in an unusually high hydraulic pressure of the cargo on the decks above it. That led, in turn, to leakage of cargo from a number of deck openings (usually used to give access to tank washing machines) whose securing plates failed under such high pressure. That initial spillage did not last long, because the Captain had started ballasting the port side tank, so eliminating the list. At that early stage none of the cargo tanks had suffered any damage to their structures and were therefore not leaking oil, so the Captain recognised the need to protect the ship's damaged starboard side.

At that stage a disaster could quite readily have been averted. A first class salvage company had been retained and they agreed with the ship's owners that she simply needed to be taken to a place of shelter from the storm, so that the cargo could be transhipped and the vessel herself then taken away for repair.

Although the Spanish government had an official on board the ship from a fairly early stage, it's not yet clear whether he had properly assessed the damage and recognised that the ship was not mortally wounded, and that the cargo tanks remained structurally sound. What I suspect is that senior government officials quite irrationally and wrongly convinced themselves that the pollution which had already occurred (and which I've explained had not been caused by any tank structure failure) was a sign that the ship was breaking up. Their quite inexplicable decision then to order the ship out to sea, with the use of engines, exposed the weakened area to the worst of the weather, so that on the morning of the day after the casualty sections of hull and deck plating were being torn off and the bulkheads containing the oil cargo began to fail.

It is a testimony to the strength of the ship that she survived almost six days in the exposed ocean before she finally broke up and sank, releasing substantial further quantities of oil which caused massive damage to very substantial lengths of both the Spanish and French coastlines. The fact that the ship survived so long is obviously confirmation of the view reached by the ship's Captain and the salvage company at the outset: that the ship was not going to break up immediately, and that substantial pollution could be prevented, if she was allowed into a sheltered area.

The Spanish government continues to deny that they ought to have granted refuge, but their position is plainly neither accepted by the Spanish media, nor coastal communities whose livelihoods were seriously affected, nor environmental groups. Nor, of course, is it accepted by the international shipping community. The European Commission has been somewhat muted on the issue, but perhaps that's not terribly surprising, because the Commissioner responsible for shipping is the sister of the Spanish Foreign Minister and is believed to have political ambitions in Spain. Most encouraging, however, has been the work of the European Parliament, who undertook an inquiry into the case, inviting all of the participants to give evidence. The Parliament's Transport Committee, in its report, stated firmly that the refuge issue had to be addressed by the Community as a matter of very great urgency indeed. Even more encouraging still was the Committee's clear recognition of the danger of permitting politicians to take such difficult decisions over refuge and they highlighted the British SOSREP arrangement, to which I have referred earlier.

A deadline has now been imposed on European States for each of them to nominate places of refuge around their coastlines and this is plainly causing difficulty. I was disturbed recently to read reports that the Danish Government had listed a series of such places and then deleted some of them, apparently

because of the concerns of coastal communities. The British Government has taken the position that it is unnecessary to name such places, because each case of a need for refuge presents different requirements and any part of our coastline should be regarded as a potential refuge. Although that is logically correct, I suspect the government also recognises how convenient it will be, from a public relations perspective, if no particular community is able to recognise itself as being potentially at risk. Accordingly, I think the British position is correct, but I fear that it will not overcome the European bureaucracy. Incidentally, despite the British government's public position, I think we can be sure that it will nevertheless have identified certain locations which are the most likely to be used and positioned equipment so that it is most conveniently accessible for use at those locations.

## THE IMO RESPONSE

Rather belatedly, the IMO has also increased its rate of activity on the issue, although it's fair to say that it had already been preparing some proposals shortly before the PRESTIGE case. In February 2003 the organisation's Legal Committee published a draft Assembly Resolution setting out guidelines, intended to be used internationally by States, when responding to requests for refuge.

The draft Resolution (which can be found at [www.imo.org](http://www.imo.org)) is very encouraging in a number of respects, because before even rehearsing the guidelines, it makes some very clear and firm background statements. In noting some of the highlights, I will note in italics how they might have been relevant, if they had been applied in the case of the PRESTIGE:

1. that the best means of preventing pollution from a deteriorating vessel is to tranship her cargo (*there is doubt about whether the Spanish government wanted to acknowledge this point and particularly the fact that the cargo on board the PRESTIGE was very persistent*).
2. that a balance needs to be struck between the advantage for both ship and environment of giving refuge, and the risk to the environment of having the ship near the coast (*in view of the massive and extensive damage done by the Prestige's cargo as she was towed to sea and finally broke up, it is plain that the decision taken was very unbalanced!*).
3. that any cargo transhipment operation will usually be best undertaken in a place of refuge (*for reasons which have yet to be clarified, the Spanish government appears only to have considered the plainly undesirable option of transhipping at sea*).

4. that taking the ship to a place of refuge will usually limit the extent of coastline at risk (*this point is amply illustrated by the case of the PRESTIGE*).
5. that the giving of refuge is likely to meet with local opposition, so there must be a properly argued technical case available in order to deal with that sort of political difficulty (*the Spanish government appears not to have recognised the technical case and so the extent of local opposition was not seriously tested. Public opinion in Galicia now clearly recognises the technical case which actually existed*).

The guidelines and their appendices set out very helpfully, and in some considerable detail, the matters which will need to be taken into account and the issues to be resolved when making a decision over the granting of refuge. What is not clarified, however, is who will have the responsibility for nominating the place where refuge is to be given. Nor is there any guidance as to whether decisions need to be taken, by governments, to designate places of refuge in advance, as part of their contingency planning. Perhaps, like the British Government and unlike the EC, the IMO recognises the potentially explosive nature of this issue and is content to leave individual governments to judge how they go about dealing with it.

The guidelines acknowledge the responsibility of the Master and salvors for assessing conditions and taking decisions on board, but they also set out a requirement that the results of the assessments and the decisions taken be communicated to the authorities. The implication seems to be that it is for the Master and particularly for the salvors to decide where they need refuge and for the government concerned to say whether it is prepared to agree, and perhaps even to make a counter-proposal. All of that seems perfectly reasonable to me, because salvors are the acknowledged experts in this area. (*N.B. in the case of the PRESTIGE, the salvors argued a case for refuge and it was refused.*)

Another area where the guidelines are unclear is on the crucial issue of who is to take the decision, on behalf of government, to grant refuge and to make any proposals countering those made by the Master or the salvors. The guidelines do urge the establishment, by each State, of a Maritime Assistance Service (MAS), but its purpose seems to be limited to acting as liaison between ship and government, and as a casualty monitoring service. It seems this body is not designed to have any decision-making function. It is perhaps inevitable that a government body such as the IMO is unlikely to have the courage to recommend that governments delegate responsibility for the taking of decisions to grant refuge in the manner of the British; but the absence of such a recommendation is, in my view, the most serious defect in these guidelines, because there must be an issue as to whether government officials are fit persons to take decisions with such potentially political impact. A clue to the reason for this omission may

be gained from a report, in the 4<sup>th</sup> September 2003 edition of Lloyd's List, which quotes the International Salvage Union as follows:

*"While believing the UK's Sosrep approach is probably the most effective approach, it (the ISU) acknowledges cultural issues and political dynamics prevent a pan-European or global adoption of the model. But they maintain the fundamentals of the Sosrep system can be tailored to the specific circumstances of any given coastal state, especially the principle that real understanding of salvage must sit close to the decision-makers."*

Nevertheless, the guidelines do represent an important step forward and I hope that after a reasonable period of further consideration and improvement, they will be and ratified and given effect by governments.

None of that, of course, guarantees that we will not see another case like the PRESTIGE; after all, the Spanish government had already been warned. What introduction of the guidelines should achieve is a more thoughtful contingency planning by governments legislating to give them effect.

## AUSTRALIA AND THE USA

In view of all this anguish and activity in Europe, it's obviously of interest to know what steps other States have taken or are taking to protect themselves from a Prestige-style disaster. Some, for example Australia, whose very active safety agency, known as AMSA, has even been in touch with the Clubs with a view to ensuring co-operation in the event of a casualty involving one of us, seem fairly well prepared. Others are doing very little, presumably either out of ignorance, or alternatively awaiting the results of deliberations in the IMO.

Despite the openness of government in your Country, I have not found it particularly easy to establish whether the United States has sufficiently effective arrangements in place and if not, what is being done about it.

Although the authority is not set out explicitly, the power to allow access to the Nation's waters to any ship, whether in distress or not, apparently lies with the Coast Guard. What I have not been able to find are any published procedures for the determination of whether refuge should be given. There are regulations which empower the Coast Guard Captain of the Port (COTP) to waive normal entry requirements for the purposes of safety and environmental protection, although it's not clear whether the same exceptions will apply to the new counter-terrorism security arrangements.

The Coast Guard's Marine Safety Manual authorises a District Commander or COTP to prohibit a vessel from operating in the navigable waters of the US, if it is determined that the vessel's ".....serious repair problems create reason to

believe that the she may be unsafe, or pose a threat to the marine environment". Provisional entry may nevertheless be allowed if the owner/operator proves that the vessel is not unsafe or does not pose a threat to the marine environment and that such entry is necessary for the safety of the vessel or the persons on board.

Meanwhile, the Coast Guard, and the State Department's web sites, show that they're following developments at the IMO very carefully, and are consulting interested groups in the USA, with a view to exercising their influence as the international debate proceeds.

So in the absence of the sort of arrangements which are now in place in Britain, should we expect a case such as the PRESTIGE to happen in the USA? I doubt it, for two reasons. Firstly, because of the extensive contingency planning undertaken by the Coast Guard, and its enthusiasm for engaging in exercises with commercial shipping. That must surely have led to a recognition of the need for an assessment of the various different refuge options in each Coast Guard district and probably within the ports themselves. Much more important, however, is the structure of government in the USA, with State governments having so much greater responsibility for local issues than the Federal government. What I hope is that, with the Coast Guard being a Federal agency and already having established a reputation for professionalism, it will be capable of balancing the difficult considerations with which it will be faced in any major pollution case where refuge is an issue, and of not being intimidated by the spectacle of leaking oil.