



Document title	Draft revised HELCOM Recommendation 31E/5 on mutual plan for places of refuge
Code	4-4
Category	DEC
Agenda Item	4 – Matters arising from the subsidiary bodies
Submission date	18.12.2013
Submitted by	Executive Secretary
Reference	HELCOM HOD 41/2013, Paragraph 3.52 (LD 147)

Background

HELCOM RESPONSE 17/2013 considered the proposal for a revision of HELCOM Recommendation 31E/5 on mutual plan for places of refuge according to the decisions made at HELCOM RESPONSE 16/2012, and endorsed the revised Recommendation for adoption by HELCOM HOD (Paragraph 6.15 of the Minutes).

HELCOM HOD 41/2013 approved the proposal for a revision of HELCOM Recommendation 31E/5 "Mutual plan for places of refuge in the Baltic Sea area" to be forwarded to HELCOM 35/2014 for adoption.

This document includes the revisions to HELCOM Recommendation 31E/5 as proposed by HELCOM Response Group.

The proposed revision concerns one single sentence of the Recommendation as included below (strikethrough indicating proposed deletion, highlight indicating proposed insertion).

“ ...

AGREES to reconsider the issue of cost sharing ~~in 2012~~, **if needed**,

...”

Action required

The Meeting is invited to adopt the revised Recommendation as attached.

[DRAFT] REVISED HELCOM RECOMMENDATION 31E/5 "MUTUAL PLAN FOR PLACES OF REFUGE IN THE BALTIC SEA AREA"

HELCOM RECOMMENDATION 31E/5

Adopted 20 May 2010, amended [xx yyyy 2014],
having regard to Article 20, Paragraph 1 b)
of the Helsinki Convention

MUTUAL PLAN FOR PLACES OF REFUGE IN THE BALTIC SEA AREA

THE COMMISSION,

NOTING the increasing maritime traffic and especially transportation of oil products in the Baltic Sea and the expected future significant growth of shipping activities in general, including shipment of hazardous and noxious substances and container traffic,

BEING AWARE of the increasing risk of a pollution incident at sea,

RECALLING the provisions of Regulation 12 of Annex VI to the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, (Helsinki Convention), concerning the obligation of the Contracting Parties to draw up plans to accommodate ships in distress and to exchange details on such plans,

RECALLING FURTHER HELCOM Recommendation 28E/12 recognizing the significance of sub-regional approach to pollution preparedness and response and that adequate response capacities should be available for places of refuge based on risk assessment in a sub-regional context,

RECALLING ESPECIALLY the HELCOM Baltic Sea Action Plan, in which the Contracting Parties decided to develop by 2009 and implement by 2010 a mutual plan for places of refuge, which is to ensure that a ship in need of assistance is accommodated in the most appropriate place of refuge without undue delay and irrespective of countries' borders,

RECALLING ALSO IMO Resolution A.949(23) "Guidelines on places of refuge for ships in need of assistance" providing a common framework for responding effectively to and assessing the situation of ships in need of assistance as well as EC Directive 2009/17/EC amending Directive 2002/59 establishing a Community Vessel Traffic Monitoring and Information system, and other relevant regulations,

ACKNOWLEDGING that there may be specific circumstances under which granting to a ship a place of refuge in a response zone of another country than the one in which a situation of need of assistance originally started would be much safer for both the ship and the environment,

ACKNOWLEDGING ALSO that the way the Contracting States implement requirements on places of refuge according to regulations of the Helsinki Convention and for those Contracting States who are members of EU also of the relevant EU Directive¹, varies,

BEING AWARE that there might be damage costs related to a place of refuge situation and that some of those costs might not be covered by the international liability and compensation schemes,

¹ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC

STRESSING the Polluter Pays Principle underlining that the polluting party should bear the cost of pollution if such damage costs occur,

WELCOMING the entry into force of the Bunkers Convention,

RECOGNIZING the urgent need for a sufficient liability and compensation regime for damage in relation to carriage of hazardous and noxious substances by sea, and therefore

WELCOMING the adoption of the Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996,

WELCOMING FURTHER the initiative brought forward to the 96th session of the IMO's Legal Committee with the aim of further amending the limits of the International Convention on Limitation of Liability for Maritime Claims (LLMC Protocol 96),

BEING AWARE that this Recommendation can only be fully implemented when a harmonized compensation and liability regime for damage costs in relation to places of refuge in the whole Baltic Sea area is created,

RECOGNIZING the need for harmonized approach in the Baltic Sea to the powers coastal states can execute over ships in need of assistance according to the international legislation,

WITHOUT PREJUDICE to international agreements and legislation of the European Community,

RECOMMENDS the Contracting States to co-operate when providing a place of refuge for a ship in need of assistance in order to avoid unnecessary risk for the ship and the environment,

RECOMMENDS FURTHER the Contracting States to designate preferably one and maximum two-competent authorities which have the power to take independent decisions concerning the accommodation of ships in need of assistance in order to facilitate rapid actions within this mutual plan for places of refuge,

RECOMMENDS FURTHERMORE to ensure that upon request by one Contracting State (Requesting Party) a neighboring Contracting State (Requested Party) will consider accommodating a ship in need of assistance in its waters even if an incident involving such a ship started outside its response zone.

Such a request should only be submitted by a Contracting State if national options have been fully explored leading to a conclusion that due to different circumstances there is no suitable place of refuge in its own area and granting a shelter in a neighboring Contracting State is the only solution to ensure ship, coastal and traffic safety and avoid or limit pollution.

The non-exclusive list of these circumstances includes:

- lack of an adequate shelter area in the vicinity of an incident (e.g. too small or full port, shallow waters);
- unfavorable weather conditions making it impossible to use a place of refuge in the Requesting Party (e.g. pack ice ridges, storm);
- urgent and case specific environmental concerns, e.g. related to the protection needs of endangered and threatened species and habitats, vicinity of the Baltic Sea Protected Area and/or NATURA 2000;
- difficult navigational and/or traffic conditions creating additional hazards.

Financial considerations, commercial reasons or lack of response resources should not be regarded as a sufficient reason to request a place of refuge from another Contracting State. Lack of response resources should be met within the regular HELCOM co-operation based on the HELCOM Response Manual and HELCOM Recommendations in the field of response to pollution at sea.

The Requesting Party when contacting the Requested Party should provide all information on their reasons for not accommodating the vessel in their own area.

The circumstances listed above equally apply to consideration by the Requested Party whether to receive a ship in its waters, including conditions for the intended journey.

In case the Requested Party is not in a position to offer a place of refuge the underlying reasons for this decision should be communicated to the Requesting Party,

RECOMMENDS ALSO that the information as included in HELCOM Response Manual should be exchanged between the Requesting Party and the Requested Party,

RECOMMENDS FURTHER the Contracting States to exchange information on designated places of refuge, including their location, e.g. to be made available within sub-regional co-operation,

RECOMMENDS FURTHERMORE the Contracting States to take the necessary steps to make the Mutual Plan for Places of Refuge operational and implemented within/through sub-regional agreements on joint response to pollution at sea,

RECOMMENDS the Governments of the Contracting States, who have not yet done so, to ratify as soon as possible:

- the 2003 Protocol establishing the International Oil Pollution Compensation Supplementary Fund (Fund Protocol 2003);
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2002 (Bunker Oil Convention);
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention) and its Protocol;
- the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (LLMC Protocol 96);
- the Nairobi Convention on Removal of Wrecks, 2007;

and to denunciate the International Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 76),

RECOMMENDS FURTHER the Contracting States to make a reservation under LLMC Protocol 96 as to the claims in respect of raising, removal and destruction of a sunken, stranded, wrecked or abandoned ship as well as to the claims in respect of removal, destruction and rendering harmless of the cargo of the ship so as higher liability limits than in LLMC Protocol 96 could be imposed on a shipowner in respect of these claims,

TAKING INTO ACCOUNT the provisions of the Helsinki Convention stipulating that if the action was taken by one Contracting Party at the express request of another Contracting Party, the Requesting Party shall reimburse to the assisting Party (Requested Party) the costs of action of the assisting Party,

RECOMMENDS the Contracting States to in advance bilaterally discuss ways of fair sharing of the operation costs by state authorities in a place of refuge situation not met by the international compensation regime and without prejudice to Polluter Pays Principle,

AGREES to reconsider the issue of cost sharing ~~in 2012~~, **if needed**,

AGREES ALSO to follow the guidelines attached to this Recommendation when executing powers of the coastal states with regard to ships in need of assistance,

REQUESTS the Contracting Parties to report on implementation of this Recommendation within two years after its adoption.

Places of refuge - Towards a common understanding of the rights of the Coastal State to take action with respect to a ship in need of assistance

1. Introduction

The aim of this document is to outline the rights of a Coastal State to take action with respect to a ship in need of assistance in a place of refuge –situation on the basis of international law². The intention is not to discuss the liability issues that might arise for a Coastal State taking actions.

The UN Convention on the Law of the Sea, 1982 (UNCLOS) is the basic international instrument regulating issues regarding the Coastal State's rights and obligations in respect of ships. The Convention includes provisions regulating on one hand the "freedom of navigation" and on the other hand the rights of a Coastal State to take action with respect to ships, which can pose a danger to the environment – the provisions form a sort of balance between those two interests. Compared to port State jurisdiction the coastal States' jurisdiction over foreign ships is subject to relatively stringent and precise limitations in UNCLOS. In respect of shipping UNCLOS is complemented by rules and regulations agreed in IMO.

2. UNCLOS - different rights according to the geographical area

Article 194 of UNCLOS includes provisions on measures to prevent, reduce and control pollution of the marine environment. States shall take, individually or jointly as appropriate, all measures consistent with the Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source and they shall endeavour to harmonize their policies in this connection. States shall also in so doing ensure that the activities do not cause damage by pollution to other States and their environment and that pollution arising from incidents under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention. The Article lists as one "source" the pollution from vessels, in particular measures for preventing accidents and dealing with emergencies.

Territorial Sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles (UNCLOS Article 3). In the outset the Coastal State has a far reaching prescriptive and enforcement jurisdiction with respect to the territorial sea. But this jurisdiction is limited by the doctrine of ships' right of innocent passage through the territorial sea".

UNCLOS articles 13 to 21 include provisions on innocent passage in the territorial sea. Subject to the Convention, ships of all States have the right of innocent passage through the territorial sea. According to Article 18(2), the passage shall be continuous and expeditious. It can however include stopping and anchoring, but only in so far they are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress.

The jurisdiction of coastal States to regulate ships in innocent passage is laid down in **UNCLOS Article 21**. The coastal State may adopt laws and regulations, in conformity with

² The document is based on the following literature in addition to the relevant International Conventions:
Colin de la Rue & Charles B. Andersson: *Shipping and the environment* (1998)
Erik Rosaeg&Henrik Ringbom: *Liability and Compensation with Regard to Places of Refuge* (2004)
Henrik Ringbom: *The EU Maritime Safety Policy and International Law* (2008)

the provisions of UNCLOS and other rules of international law, relating to innocent passage through the territorial sea, in respect of e.g. the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof. These laws and regulations shall not apply to design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards.

UNCLOS **Article 25(1)** includes provisions in respect of enforcement. With respect to ships in innocent passage, UNCLOS makes a distinction between the enforcement of rules relating to pollution and other rules. Enforcement of pollution rules is regulated in considerable detail. The more detailed regime is laid down in **Article 220(2)**. If a coastal State has “clear grounds” for believing that a ship navigating in the territorial sea has violated the national or international rules on the prevention, reduction and control of pollution, the authorities of the coastal State have the right - physically to inspect the ships, which includes the right to stop the vessel and board it. The actions must however be without prejudice to the provisions on innocent passage.

According to **Article 45** the regime of innocent passage shall also apply in straits used for international navigation.

The Exclusive Economic Zone (EEZ)

UNCLOS Part V includes the provisions with respect to the EEZ. This area can extend up to 200 nautical miles from the baseline. According to **Article 56(1)(b)** the coastal State has jurisdiction in accordance with the Convention with regard to the protection and preservation of the marine environment. **Article 56(2)** puts an obligation on the coastal State when exercising its rights and performing its duties to “have due regard to the right and duties of other States and shall act in a manner compatible with the provisions of this Convention”. **Article 58(1)** confirms on the other hand the freedom of navigation of all States in the EEZ.

The EEZ represents a jurisdictional hybrid whereby all States are given freedom of navigation, while coastal States are given certain jurisdiction to regulate and enforce shipping-related laws in the zone. **Article 211(5)** includes more specific rules on the regulatory powers of a coastal State with respect to preventing, reducing and controlling ships source pollution. Coastal States’ jurisdiction to prescribe environmental rules and standards over foreign ships in the EEZ is limited to such rules and standards which are already adopted and generally accepted at international level.

Article 211(6) forms an exception to the main rule and opens up the possibility for coastal States, in the case when already agreed international rules and standards are inadequate to meet special circumstances, to adopt “special protection measures” or other “additional” measures for particular, clearly defined areas of their EEZs under certain given criteria, the most stringent being that the IMO agrees to the adoption of such measures.

With respect to the enforcement regimes under UNCLOS, **Article 220 paragraphs 3 to 6** are decisive in respect of shipping. The provisions give very restricted room for action. The intensity of the enforcement varies with the severity of the damage caused or likely to be caused. In the case of violation of “applicable international rules and standards” in the EEZ, the coastal State may only require the ships to provide certain basic information about its identity and route (**Article 220(3)**).

Where the violation or suspected violation results in a “substantial discharge causing or threatening significant pollution”, the powers of the coastal State extend to undertaking a physical inspection of the ships in respect of matters relating to the violation (**Article 220(5)**).

If there is “clear objective evidence” that the discharge is causing or threatening to cause “major damage to the coastline or related interests of the coastal State” or to the resources in its coastal zones, the State may “if evidence so warrants” institute proceedings including detention of the ship (**Article 220(6)**). The same constraints on enforcement apply in the case of violations of rules adopted for special areas under Article 211(6). The restricted authority given to the coastal State in the EEZ reflects the principle compromise in UNCLOS with respect to maritime transport in the EEZ.

The core provisions in relation to places of refuge are contained in **Article 221** “*measures to avoid pollution arising from maritime casualties*”. The Article is based on the 1969 International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Damage (the Intervention Convention). The Intervention Convention has been extended through the Protocol of 1973 to the Convention to other forms of pollution than oil. Although the Intervention Convention refers only to the high seas, it is generally accepted that these instruments also apply to enforcement measures in the EEZ. In this respect it has also been assumed that Article 221 would overrule Article 220(6), which seems to lay down a more restrictive approach to the enforcement measures.

According to **Article 221(1)** “Nothing 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 treat 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. Article 221(2) defines what is meant by “maritime casualty”: “For the purpose 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”. The definition is very broad and covers also ships in need of assistance in a place of refuge – situation.

In conclusion: UNCLOS is very cautious with respect to the powers of a coastal State to take action against a foreign ship in the EEZ before an accident or discharge has already taken place. But in the case when the harmful event has occurred or is likely to occur, the Convention provides both Article 220 and 221 as basis for actions. In a place of refuge – situation **Article 221** would seem to be the most relevant basis for action.

3. The Intervention Convention 1969/1973

The Intervention Convention is in addition to the rules in UNCLOS relevant in a place of refuge –situation. The Convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil and other harmful substances or the threat thereof, following upon a maritime casualty.

The coastal State is, however, empowered to take only such action as is necessary, and after due consultations with appropriate interests including, in particular, the flag State or States of the ship or ships involved, the owners of the ships or cargoes in question and, where circumstances permit, independent experts appointed for this purpose.

The Convention applies to all seagoing vessels except warships or other vessels owned or operated by a State and used on Government non-commercial service.

Since the Convention and the Protocol were agreed prior to the UNCLOS (1982), it is generally accepted that the Convention and the Protocol also cover maritime casualties which occur on the EEZ.

4. The International Convention on Salvage, 1989

While keeping the traditional philosophy of “no cure no pay”, the 1989 Convention seeks to enhance the protection of the environment by provisions for an enhanced salvage award to take into account the skill and efforts of the salvors in preventing or minimizing damage to the environment. Damage to the environment is defined as “substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.”

The Convention regulates the salvage contract between the salvor and the ship. In view of specifically environmental concerns, the right of public authorities to control the salvage operation and give directions for it, is explicitly confirmed in the Convention. **Article 5** of the Salvage Convention regulates salvage operations controlled by Public authorities. The Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

Article 9 of the Convention regulates the rights of coastal States. Nothing in the Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

Article 9 is closely linked to Article 221 of UNCLOS and the Intervention Convention 1969/73.

5. Activities at IMO

IMO has, at its Assembly Meeting in November 2003, 23 session, 24 November – 5. December, adopted two Assembly Resolutions, including a set of Guidelines, on places of refuge for ships in need of assistance.

These guidelines are intended for use when a ship is in need of assistance but the safety of life is not involved. Where the safety of life is involved, the provisions of the SAR Convention should continue to be followed.

The guidelines recognize that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge. 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.

According to IMO it would be highly desirable if, taking the IMO Guidelines into account, coastal States designated places of refuge for use when confronted with situations involving ships (laden tankers, in particular) in need of assistance off their coasts and, accordingly, drew up relevant emergency plans, instead of being unprepared to face such situations and, because of that, risking the wrong decision being made by improvising or, in the heat of the moment, acting under pressure from groups representing various interests.

6. A common understanding in the Baltic Sea in respect of the rights of a coastal State in a place of refuge- situation

A common understanding in respect of the measures which can be taken by a coastal State, especially in the EEZ, in relation to a ship in need of assistance in a place of refuge – situation would be of great value with a view to enhance the protection of the Baltic Sea. With a common understanding it would also be possible to avoid “place of refuge shopping” from the side of the ship, which could contain considerably risks for the environment.

A common understanding could be based on the following elements:

- 1) the measures in the EEZ by a Baltic Sea coastal State would be based on Article 221 of UNCLOS and the Intervention Convention 1969/1973;
- 2) a ship in need of assistance in a place of refuge-situation would be covered by the notion “maritime casualty” in Article 221 of UNCLOS; and
- 3) the ship can be detained and ordered to a place of refuge, which is decided in cooperation with the coastal States concerned and taking into account Article 194 of UNCLOS.