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Europeanization of International Law

In the Context of Shipping

Master thesis
20 points

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Field of study:
The Law of the Sea

Semester 07/08

Contents

Summary

The international character that surrounds the shipping industry has traditionally meant that rules regarding the public law of the sea or the private maritime law are internationally regulated through regulations, state practice, international conventions or international customary law. Since the 1970s, there has been an increasing concern for both the marine environment and the safety onboard ships and this international concern has been reflected in conventions issued and adopted by the United Nation's maritime organ: The International Maritime Organisation (IMO). The IMO has issued and adopted some 40 international conventions. The first great convention was the Safety of Life at Sea (SOLAS) Conventions, which has been amended a number of times since 1974, *inter alia* with the International Safety Management (ISM) Code, which sets up safety standards for vessels. In the beginning of the 21st Century, three accidents with oil tankers took place within European waters and brought with them devastating environmental consequences in the stricken regions. However, the environmental disasters could have been avoided, or at least reduced, if the coastal states involved would have provided the tankers a place of refuge were the cargo could be unloaded. After the first accident, the EU started developing an excessive maritime legal framework regionally, in preference to waiting for the rest of the international community to issue regulations internationally through the IMO. One of the key initiatives in the European Union's regional strategy was the establishment of the European Maritime Safety Agency (EMSA). Despite the fact that all 27 member states of the EU are part of the IMO, the EMSA has been given those tasks the IMO traditionally issue. The oil tanker accidents in Europe proved that there is a conflict of interest between the traditional place of refuge custom at sea and the protection of the marine environment. The main question that is evaluated in this thesis is whether shipping related issues should be dealt with regionally or internationally. My conclusion is the latter of the two options; the EU is setting up regional regulations and directives too hastily instead of waiting for international consensus.

Keywords: IMO, EU, ERIKA-Packages, Tankers, Place of Refuge

Preface

On 1 September 2007, I only knew that I had to write my graduate thesis on the Faculty of Law in the field of maritime law, which I at that time had very limited knowledge of, nevertheless, after having met my tutor, Professor Lars-Göran Malmberg in one hour only, he had succeeded in awaking my curiosity regarding the relationship between the IMO and the EMSA. My tutor also recommended me to take one of his courses in maritime law, which indeed helped my understanding for the subject: Thank You, Professor Malmberg. During the semester, I have discovered that not only the subject I am evaluating in this thesis, but also many other parts of maritime law are very exciting. Since I always have preferred international law over national law, it seems that I finally have found the most exciting part of the law. I would also like to thank the librarian on the World Maritime University, Cecilia Denne, for all the help she has given me. Without the access to material from the WMU library, it would have been hard to complete the task. Finally yet importantly, I would like to thank my dear friend and colleague, Khatereh Razazi, who proofread this thesis, and my family for their support.

Abbreviations

DWT	Deadweight tonnage
E.C.J.	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Agency
Euratom	Atomic Energy Community
I.C.J.	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
IMO	International Maritime Organisation
ISM Code	International Safety Management Code
LLMC	Convention on Limitations of Liability for Maritime Claims, 1976
MARPOL Convention	International Convention for the Prevention of Pollution from Ships 73/78
SAR Convention	International Convention on Maritime Search and Rescue, 1979
SEA	Single European Act
SOLAS Convention	Safety of Life at Sea Convention, 1974 as amended
TEU	Treaty on the European Union
UNCLOS	United Nations Convention on the Law of the Sea, 1982

1 Introduction

Shipping. The sound of the word is exciting and international. In addition, the shipping industry might be the most international field in the world: During one voyage only, a ship can come to enter several states' territories, both at sea and on land. Furthermore, the ship owners can be of one nationality, the cargo owner of another, the flag state of the ship can be yet another nationality and the officers and crew are not always fellow citizens. Since most of the international trades of goods are transported by the sea, shipping is of great importance not only to the international trade both also to the international community as whole. In Europe only, or in the 27 member states of the European Union to be politically correct, there are over 600 significant ports and over 90% of European Union's external trade and about 35% of the internal trade are transported by the sea.[1] Moreover, over 1 billion tonnes of freight each year are loaded and unloaded in EU ports.[2]

Maritime law is an area, which due to its highly international character, traditionally has belonged to the field of international law. The last few years, unfortunate accidents with oil tankers have been devastating for waters and coastlines within the boarders of the EU. After the first accident, the EU responded fast with new, tougher maritime regulations. One of the regulations aimed at the establishment of a new body within the EU that should handle maritime questions, the European Maritime Safety Agency (EMSA). The creating of the EMSA calls for a number of questions. However, the primary question is whether it is needed or not since there already exists an international body, which deals with international maritime issues; the International Maritime Organisation (IMO) and all the member states of the EU are parties to the United Nations organisation IMO.

Is there a call for regional legislation regarding maritime issues or should these questions only be dealt with internationally? Naturally, the development of international law takes time, since there are so many different actors on the arena. Is it well-founded to make up regional rules because the member states of the EU are too impatient to wait for the rest of the international community? When such a large amount of the European Union's external trade is transported by the sea, one can assume that many of those vessels are non-European vessels. Should non-European ships have to observe regional rules before entering European waters instead of only have to observe valid international laws? With the ERIKA-Packages I and II, the EU has answered the question: Yes, regional rules have to be observed before entering EU waters.

[1] EMSA, 2006, p. 1, ISBN 92-95032-04-7
[2] http://www.emsa.europa.eu

1.1 Statement of Purpose

The purpose of this thesis is both to present and evaluate the legal framework that was issued by the European Union after the *Erika* accident in 1999 as well as valid international regulations guarding similar matters. Following questions will be evaluated in the analysis:

1. *Do the ERIKA-Packages I and II bring the EU one step closer to a "United States of Europe"?*
2. *Did the European countries involved in the three recent oil tanker accidents change customary law?*
3. *Can the new EU directives and regulations in the maritime field constitute a threat to the principle of freedom of navigation?*
4. *Should maritime law be dealt with regionally or internationally?*

1.2 Method and Material

This thesis aims to describe and thereafter evaluate the current legal status within the EU in the field of maritime law, since the EU during the last few years has set up regional rules regarding matters that traditionally has been agreed upon internationally. The first six chapters include descriptive presentations of facts that will help the reader understand the subsequent analysis in chapter seven. The only exception of objectivity in the first six chapters are the concluding comments, which I have chosen to round off each chapter with. The last chapter, which contains my personal analysis is subjective and is marked by a highly normative character. In order to maintain the objectivity, I have as far as possible, tried to use reliable, primary sources such as international conventions, EU directives and regulations as well as judgements from I.C.J. and E.C.J. When the usage of primary sources has been unavailable, I have used secondary sources such as doctrine, articles and internet sources.

1.3 Disposition

The reader of this thesis will initially get a short introduction to the sources of international law, the IMO and parts of three important international maritime conventions. Thereafter, three accidents, which all took place in European waters, will be presented together with the so-called refuge custom. In chapter five, the reader will be introduced to the legal sources of the EU and thereafter the directives and regulations of the ERIKA I & II-Packages are presented. In order to keep the consistency, I have chosen to round-up each chapter with subjective comments. The thesis will end with an analysis that evaluates all the facts presented above.

2 The Sources of International Law

2.1 Introduction

Every legal system must, in order to posses the status of a legal system, have some kind of legal norms. In the field of international law, the rulemaking gets more complicated than it is on national level, since it involves many states with *inter alia* different cultures, sizes and political influence. Nevertheless, there are still rules in the international community and these rules are referred to as international law. The starting point, in identifying or determining international law, is usually article 38 of the Statute of the International Court of Justice.[3] The article prescribes following guiding principles[4]

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply,
>
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognised by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

It is important to point out that the article presented above only is a direction to the International Court of Justice, which means that it does not provide a complete list of the matters that are considerable in international law.[5] The Court also uses many other sources, for example the resolutions of the United Nations General Assembly and diplomatic correspondence.[6] Article 38 of the ICJ Statute is still a correct starting point since the Court has to decide disputes "in accordance with international law" and according to article 93 of the UN Charter, all member states of the UN are *ipso facto* parties to the ICJ Statute.[7]

[3] Dixon, 2007, p. 23 and Shaw, 2003, p. 66
[4] ICJ Statute, art. 38
[5] Dixon, 2007, p. 23 and Shaw, 2003, p. 66-67
[6] Dixon, 2007, p. 24
[7] Shaw, 2003, p. 67

2.2 Conventions

International conventions, or treaties, which can be either bilateral or multilateral, are a very conscious and deliberate method in which states can create international law.[8] Usually they are the result of long negotiations.[9] Conventions are creations of written agreements where the state parties voluntarily bind themselves legally to act in a certain way when it comes to particular questions, but they can also be a way to set up certain relations between the parties.[10] Since conventions require an explicit consent of the contracting parties, many writers consider them being the most important source of international law.[11] It is important to point out that parties that do not sign and ratify a convention are not bound by its terms.[12]

2.3 International Customary Law and General Practice

When conventions reflect customary law, non-parties are bound by the provision, not because of the provision in the convention but because it reaffirms a rule of customary law.[13] Non-parties can also come to accept that some provisions in a convention can generate customary law but it always depends on the nature of the agreement, the number of contracting parties and other factors.[14] International custom, or customary law, are rules and laws that historically has evolved from practice and custom of states.[15] Customary law remains but they may also continue to evolve.[16] Even though customary law is of a very changeable nature and not as explicit as the written conventions are, it is still a dynamic source since a great part of rules governing states and other international persons come from this source.[17] However, some writers mean that customary law is passé because it is too slow-moving to accommodate the evolution of international law today.[18] Others consider customary law being of value not only because of its universal character but also because it is activated by states spontaneous behaviours and concerns.[19] State practice as customary law means that actions or activities by states on the international arena may become binding law.[20] Evidence of what states do to express their state practice can be

[8] Dixon, 2007, p. 26 and Shaw, 2003, p. 88
[9] Dixon, 2007, p. 26
[10] Dixon, 2007, p. 27 and Shaw, 2003, p. 88
[11] Shaw, 2003, p. 89.
[12] Dixon, 2007, p. 27 and Shaw, 2003, p. 90
[13] Shaw, 2003, p. 90
[14] Ibid.
[15] Dixon, 2007, p. 30 and Shaw, 2003, p. 68
[16] Shaw, 2003, p. 69
[17] Dixon, 2007, p. 30 and Shaw, 2003, p. 69
[18] Dixon, 2007, p. 31 and Shaw, 2003, p. 69
[19] Ibid.
[20] Dixon, 2007, p. 31

obtained from numerous sources such as national legislation, documents from governmental departments, courts, diplomatic agents, political leaders, etc.[21] Not only states but also international organisations can be instrumental in the creation of customary law.[22] The International Law Commission has pointed out that "records of the cumulative practice of international organisations may be regarded as evidence of customary international law with reference to states' resolutions to the organisations".[23] In this context, it should be noted that not all elements of state practice are equal in their weight – they all depend upon their nature.[24] The consistency of practice is one of the most important factors in the creation of customary law.[25] The consistence follows by the *Lotus Case*, where the Permanent Court emphasized that state practice must be "constant and uniform".[26] However, total consistency is not always needed; in the *Anglo-Norwegian Fisheries Case*, the Permanent Court made it clear that the degree of consistence depends on the subject matter of the rule in dispute.[27] Not only consistence but also generality of the state practice is important in order for it to become a universal norm of customary law.[28] This means that the practice must be common to a significant number of states.[29] Just like the degree of consistence, the degree of generality required varies with the subject matter. The duration of consistence, general state practice that develops into customary law can vary.[30] In the *North Sea Continental Shelf Case* the ICJ suggested that the length of time will vary from subject to subject.[31] If some state practice appears to be contrary to existing or emerging rule of customary law, it should be presumed to be an action in breach of the rule, if there is not evidence of greater intent.[32] This follows by the *Nicaragua Case*, which was issued by the International Court of Justice.[33]

If state practice shall constitute law, consistency and generality of state practice are not considered enough. States have to recognise a certain state practice as binding upon them as law.[34] The belief that state practice is obligatory rather than convenient or habitual is called *oipnio juris*. The concept of *opinion juris* makes it easier to distinguish state practice that amounts into law from other types of state activity. There are not any clear

[21] Shaw, 2003, p. 78
[22] Shaw, 2003, p. 78
[23] Shaw, 2003, p. 79 and *Yearbook of the ILC*, 1950, vol. II, pp. 368-72
[24] Dixon, 2007, p. 31 and Shaw, 2003, p. 80
[25] Dixon, 2007, p. 31
[26] Ibid.
[27] Dixon, 2007, p. 31. See also: *Fisheries Case*, 1951, I.C.J. Reports 1951, p. 116, at 131
[28] Dixon, 2007, p. 32
[29] Ibid
[30] Dixon, 2007, p. 34
[31] Ibid
[32] Dixon, 2007, p. 32
[33] Ibid
[34] Dixon, 2007, p. 34 and Shaw, 2003, p. 80

rules on how state practice becomes *opinio juris*.[35] The refuge custom that will be presented below in this thesis is not considered *opinio juris,* yet the reader should be familiar with the term since it is part of the sources of international law.

2.4 General Principles of International Law

General principles of international law could be interpreted either in a narrow or in a more broad way. Some legal experts mean that the purpose of article 38 (1)(c) was to incorporate the doctrine of natural law into the corpus of international law.[36] The natural law doctrine or the theory of natural law builds on the concept that there are pre-existing values that make certain actions into "wrongs" and these wrongful actions should be considered wrong, or illegal, regardless of what the positive law (the written law) allows.[37] Fundamental grounds of natural law are *inter alia* that genocide should be prohibited and that protection of human rights should be highly regarded.[38]

The narrower interpretation of article 38 (1)(c) means that general principles of international law are undisputable principles such as for instance the freedom of the high seas or sovereign equality of nations.[39] However, these "principles" are regulated in treaties and could also be a part of the customary law, which is why the general principles of international law can be seen as purely descriptive of general doctrines or bundles of rights that form part of international law, but they have nothing to do with the law creating sources.[40]

The purpose of article 38 (1)(c) could also be to ensure that rules and principles common to all legal systems gets included also on an international level. The general principles would in this context be such as the right of every legal person to go to court to settle disputes, the right to be heard by a court before the judgment is pronounced, the principle of *res judicata*, etc.[41] These principles can be seen as a part of the structure of the law or the concept of every legal system and are therefore important to incorporate in international law.

[35]Ibid
[36] Dixon, 2007, p. 40 and Shaw, 2003, pp. 93-94
[37] Ibid
[38] Dixon, 2007, p. 40 and Shaw, 2003, pp. 93-94
[39] Dixon, 2007, p.p 41-42
[40] Dixon, 2007, p. 41
[41] Dixon, 2007, p. 41 and Shaw, 2003, pp. 95-96

2.5 Judicial Decisions and Doctrine

In theory, judicial decisions do not make law; they are "subsidiary" means for the determination of law, which means that they are law identifying or material sources of law.[42] In article 59 of the ICJ Statute, the subsidiary nature of judicial decisions gets confirmed: "…the decision of the Court has no binding force except between the parties and in respect of that particular case.".[43] Judicial decisions do not only come from the ICJ and its predecessor the PCIJ, there are numerous of other international tribunals. Maritime law has its own forum: the International Tribunal on the Law of the Sea (ITLOS). The ITLOS is a rather new UN organ and it is common that disputing parties use either an arbitral tribunal or a national court to solve their disputes, which is why it will probably take some time for ITLOS to become the major dispute solving forum.[44] The writings of the "most highly qualified publicists" are also mentioned in the article as "subsidiary" means for the determination of rules of law. However, nowadays it is not really possible even for the most respected international jurists to create law trough their writings.[45] This part of the law text is what one might call passé, because during the formative period of international, the writings of jurists such as Grotius, Vattel and Gentil helped to establish the idea that there were rules that could govern relations of sovereign and independent states.[46] Nevertheless, if a rule is very vague or uncertain, the opinions of the most highly regarded jurists might be considered to solve an issue.[47]

2.6 Resolutions

Resolutions of international organizations are not included in the list of materials that the Court may consider when dealing with disputes. Even though they do not usually, by themselves, create binding law, they still fill an important function since they sometimes have a promoting influence on future law.[48] The United Nation's General Assembly is probably *the* resolution making international organ, however, making resolutions is not its essential function.[49] Resolutions of the General Assembly are, according to the primary rule, not binding and states are therefore not obliged to follow them, even though they might have voted in favor of the resolution. Naturally, there are exceptions; however, irrelevant in the context of this thesis. The General Assembly might be an important resolution making

[42] Dixon, 2007, p. 43 and Shaw, 2003, p. 103
[43] ICJ Statute, art. 59
[44] Dixon, 2007, p. 46 and Shaw, 2003, pp. 106-107
[45] Ibid.
[46] Dixon, 2007, p. 47 and Shaw, 2003, pp. 106-107.
[47] Ibid.
[48] Dixon, 2007, pp. 47-48 and Shaw, 2003, pp. 108-110
[49] Dixon, 2007, p. 48 and Shaw, 2003, pp. 108-110

organ, however, they are not the only one. The United Nation's Security Council can make "decisions" under Chapter VII of the UN Charter and these "decisions" are binding upon states.[50] There are also many organizations outside of the UN that are concerned with issues of legal principle and they contribute a lot to the development of international law. Resolutions of international organizations may not be mentioned in article 38 of the ICJ Statute, but their role should not be underestimated. Latter on in this thesis, the reader will be familiar with EU Maritime Law and the impact it has or might have on the international community.

2.7 Comments

In the contexts of this thesis, especially the analysis, it is important to be well informed of the sources of international law. The reader will get familiar with parts of three international conventions, the so-called place of refuge customary law and UN resolutions. In the analysis, the question of whether recent European Union state practice can be seen as a breach against international customary law or not, will *inter alia* be evaluated. In my opinion, it is also important for the reader to understand the differences between international law and European Union law, which also is a legal framework between different states, however, very dissimilar traditional international law.

[50] Dixon, 2007, p. 49. See also: UN Charter, art. 39-51

3 Maritime Law

3.1 Introduction

The law of the sea and maritime law can both be national as well as international. The law of the sea, or public international law of the sea, is a name of those rules and principles that bind states in their international maritime relations and some claim that it is not to be confused with maritime law, or private maritime law, which is the law that concerns such matters as marine insurance and carriage of goods by sea.[51] However, Professor P. K. Mukerjee of the World Maritime University writes that the distinction can be seen as artificial and anomalous since the etymological root of the word "maritime", which in Latin means "of or pertaining to the sea".[52] In this broader sense, the term maritime law would stand for "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation".[53] Even though this thesis mostly will concern matters relating to the law of the sea, I will use the term maritime law in its broader sense.

Below, the reader will find fact about the United Nation's maritime organ; the IMO, as well as a presentation of three of the most important international conventions issued and adopted by the IMO. These international conventions are the United Nations Law of the Sea Convention, the Safety of Life at Sea Convention and the Maritime Pollution Convention.

3.2 International Maritime Organization

When the establishment of a specialized agency of the United Nations dealing with maritime affairs was first proposed, the main concern was to improve safety at sea.[54] At that time, it had been recognized that action to improve safety in maritime operations would be more effective if carried out on international level rather than by individual countries acting unilaterally and without co-ordination with others. After the Second World War, many states believed that there was a need for a permanent body that would be able to co-ordinate and promote measures on a regular basis. In 1948, the UN held a conference that adopted the convention that established what we now call the IMO. From the start until 1982, the IMO was known as IMCO

[51] Churchill & Lowe, 1999, p. 1
[52] P. K. Mukerjee, 2007, p. 1
[53] Ibid.
[54] http://www.imo.org/aboutimo. 2007-09-12

– the Intergovernmental Maritime Consultative Organization.[55] Ten years after the adoption, the convention entered into force. The purpose of the IMO has from the start been to improve maritime safety and to prevent marine pollution. The IMO is probably the organization that has had the most substantial effect upon the law of the sea.[56] The IMO's governing body is the Assembly, which meets once every two years. Currently, the IMO consists of 166 Member Stats and two Associate Members. Between the Assembly's sessions, a Council, consisting of 40 Member Governments elected by the Assembly acts as IMO's governing body. IMO is a technical organization that consists of many committees and subcommittees who all deal with different areas. During the years, the IMO has promoted the adoption of some 40 conventions and protocols.[57] The organization has also adopted well over 800 codes and recommendations concerning maritime safety, the prevention of pollution and other related matters. State parties to a convention adopted by the IMO must implement it. The codes and the recommendations however, are not binding to governments, even though their contents can be just as important as the contents in the conventions. During the first IMO conference, held in 1958, the state parties tried to reach an agreement on a convention on the law of the sea.[58] The result became four different conventions instead of one and these are the 1958 Geneva Conventions of The Territorial Sea and Contiguous Zone, on The Continental Shelf, on The High Seas and on The Fishing and Conservation of Living Resources of the High Seas. On the next conference, in 1960, the parties failed to agree on further international rules regarding the law of the sea. It took another 18 years for the state parties to adopt the current United Nations Law of the Sea Convention. Even though the 1958 Geneva Conventions are still in force, one can say that they have been superseded by the 1982 United Nations Convention on the Law of the Sea. Some stress that it is possible for the principles in the 1958 and the 1982 Conventions to have become part of customary law, not least since recent case law has confirmed that many parts of the 1982 Convention has passed into customary law.[59]

The first alerting accident was the *Torrey Canyon* in 1967. After the disaster, the IMO not only produced a series of conventions and other instruments, they also made further amendments to the 1954 Oil Pollution Convention. In 1973, the IMO held a major conference dealing with marine pollution from ships. It resulted in the International Convention for the Prevention of Pollution from Ships (MARPOL). In 1978, a protocol was adopted to the MARPOL Convention and since then, the Convention has

[55] Curchill & Lowe, 1999, p. 23
[56] Ibid.
[57] http://www.imo.org/aboutimo/whatitdoes 2007-09-12
[58] Dixon, 2007, p. 208
[59] Dixon, 2007, p. 208. See also: *Case Concerning Maritime and Territorial Questions between Qatar and Bahrain*, ICJ Rep 2001; *Eritrea/Yemen Arbitration* 1999

been amended several times. The IMO also adopted a convention dealing with dumping at sea: the London Convention from 1972.

3.3 International Conventions

3.3.1 United Nations Convention on the Law of the Sea

In the 17th Century, a principle of freedom of the seas was put forth and it limited national rights and jurisdiction over the oceans except for a narrow belt of sea surrounding a state's coastline.[60] After the Second World War, there was a change of attitude; many states unilateral claimed extended jurisdiction over their coastlines. Even though some attempts were madeto establish international laws of the sea, the UN conferences in both 1930 and 1958 failed in reaching a compromise on the breadth of the territorial sea (it did lead to the adoption of the four United Nations Geneva Conventions on the law of the sea).[61] In the late 1960s, the ocean was being exploited as never before; tin, nodules, diamonds, offshore oil and, of course, fishing.[62] In New York in 1973, there was a third international conference on the law of the sea and it ended nine years later with the adoption of the United Nations Convention on the Law of the Sea, UNCLOS.[63] The UNCLOS is a comprehensive framework, which *inter alia* divides the sea into different jurisdictional territories and sets up rights and duties of states.[64] The jurisdictional divisions that follow by the UNCLOS set up many rules, however, the rules that are of relevance for this thesis are those that have jurisdictional matter. For example: how to draw baselines[65], what counts as a state's internal water[66], rules regarding the territorial (up to twelve nautical miles from the baseline)[67] sea, the exclusive economic zone (up to 200 nautical miles from the baseline)[68], the continental shelf[69] and the high seas[70]. The convention also sets up rules regarding freedom of navigation, for example, complete freedom of navigation for all states on the high seas[71]

[60] http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm 2008-01-04
[61] Churchill & Lowe, 1999, p.15
[62] http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm 2008-01-04
[63] Ibid.
[64] Churchill & Lowe, 1999, pp. 23-24
[65] United Nations Convention on the Law of the Sea, 1982, art. 5, 7
[66] United Nations Convention on the Law of the Sea, 1982, art. 8
[67] United Nations Convention on the Law of the Sea , 1982, art. 3-4
[68] United Nations Convention on the Law of the Sea, 1982, art. 55-75 (Section V)
[69] United Nations Convention on the Law of the Sea, 1982, art. 76-85 (Section VI)
[70] United Nations Convention on the Law of the Sea, 1982, art. 86
[71] United Nations Convention on the Law of the Sea, 1982, art. 87

(the high seas belongs to no one), the right of innocent passage in the territorial sea and the right to temporarily suspend it[72], the right of innocent passage in straights used for international navigation[73], the right of freedom of navigation in the EEZ[74] and the right for the coastal state to set up rules in the EEZ.[75]

Apart from all the states that are parties to UNCLOS, states that have signed but not ratified the convention are nevertheless obliged not to take actions that could "defeat its object and purpose", unless they explicitly express unwillingness to ratify the convention.[76] In addition, some parts of the UNCLOS reflect the international customary law, which means that states that are not parties to the convention may be bound by its rules, regardless of what they think of the rules.[77] UNCLOS entered into force on 16 November 1994.[78]

In Supplement A of this thesis, a list of the contracting parties to the UNCLOS can be found.

3.3.2 Safety of Life at Sea Convention

Even though the human being is a great species, she is a quite small creature at sea. Therefore, maritime safety always has been a concern; however, the concern and the regulations have accelerated during the centuries. In the wake of the *Titanic* accident in 1912, the thought of an international maritime safety convention was issued.[79] The first version of the Safety of Life at Sea Convention was adopted in 1914, the second in 1929 and the third in 1948. During the first IMO conference, which was held in 1960, gfocus lay on maritime safety and therefore that conference adopted the fourth version of the International Convention of Safety of Life at Sea (SOLAS).[80] That version of the SOLAS entered into force in 1965 replacing the version adopted in 1948. The convention covers a wide range of measures that aim to improve safety of shipping. In 1974, a new SOLAS Convention was adopted and the new treaty included many amendments to the 1960 convention. The 1974 SOLAS Convention entered into force on 25 May 1980. Since then, the convention has been modified a number of times,

[72] United Nations Convention on the Law of the Sea, 1982, art. 17-26
[73] United Nations Convention on the Law of the Sea, 1982, art. 45
[74] United Nations Convention on the Law of the Sea, 1982, art. 58
[75] United Nations Convention on the Law of the Sea, 1982, art. 220
[76] Churchill & Lowe, 1999, p. 23
[77] Ibid.
[78] Chruchill &Lowe, 1999, p.22
[79] Wernhul, 2006, p. 7
[80] http://www.imo.org/about/IMO. 2007-09-12

however, it has kept is name and nowadays it is referred to as the SOLAS Convention 1974 as Amended.[81]

In the 1980s, there was a mounting concern about poor management standards in shipping and investigations of accidents proved major errors on the management part and therefore, the IMO Assembly adopted resolution A.596(15) in 1987.[82] The resolution called upon the Maritime Safety Committee to develop guidelines regarding shipboard and shore-based management to ensure the safe operation of ro-ro passenger ferries. The result became the current ISM Code from 2002, which is a development of the Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention, adopted in 1989 by the IMO Assembly as resolution A.647(16). The ISM Code was adopted in 1993 as resolution A.741(18) and it was amended in December 2000 by resolution MSC.104(73). The resolution was accepted on 1 January 2002, and the amendments entered into force in 1 July 2002. According to the preamble of the ISM Code, the purpose of the code is "…to provide an international standard for the safe management and operation of ships and for pollution preventions."[83] The preamble provides the importance good management from the ship-owners or the shipping companies and the importance of highly trained shipmasters.[84] However, in the preamble it is recognized that not all shipping companies and ship-owners are of the same kind and that different ships operate under a wide range of different conditions, which is why the ISM Code is based on general principles and objectives.[85] The objectives of the ISM Code prescribe that

> **1.2.1** The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.
>
> **1.2.2** Safety management objectives of the Company should, *inter alia*:
>
> **1** provide for safe practices in ship operation and a safe working environment;
> **2** establish safeguards against all identified risks; and
> **3** continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental

[81] Wernhult, 2006, p. 9
[82] International Safety Management Code, 2002, Foreword, p. III
[83] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, Preamble (1), p. 5
[84] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, Preamble (2), (3), p. 5
[85] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, Preamble (4), p. 5

protection.

1.2.3 The safety management system should ensure:

1 compliance with mandatory rules and regulations; and
2 that appliance codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

Further on, the code states that its requirements may be applied to all ships.[86] According to the code, every company is entitled to implement and then maintain a safety management system that includes many functional requirements regarding safety and environmental-protection.[87] Further on, the code *inter alia* prescribes that the company should: establish a safety and environmental-protection policy, report full name and details of the entity to the Administration, designate a person or persons ashore having direct access to the highest level of management, clearly define the master's responsibility, ensure that the master is perfectly qualified for command and conversant with the company's safety management system.[88] The company should not only establish certain procedures for the preparation of plans and instructions concerning safety of the ship and the prevention of pollution, but also establish procedures on how to act in emergency shipboard situations.[89] In part B of the ISM Code, regulations regarding certification and verification are set up. In this part of the code, it is stated that all vessels should be operated by a company that has an interim document of compliance.[90] There are a number of regulations regarding the document of compliance and one of them is the provision of article 13.2, which states that it (the document of compliance)

> …should be issued by the Administration, by an organization recognized by the Administration or, at the request of the Administration, by another Contracting Government to the Convention to any Company complying with the requirements of this Code for a period of specified by the Administration which should not exceed five years.

[86] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, Application (1.3), p. 7
[87] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, p. 7, (1.4)
[88] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, pp. 8-9, (2.1), (3.1), (4), (5.1), (6.1.1-2)
[89] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, p. 10, (7), (8.1-2)
[90] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, p. 12, (13.1)

Other provisions regarding the document of compliance are the annual validity verification, the requirement that there shall be a copy on board the ship and certain rules regarding withdrawal of the compliance document.[91] The code also sets rules regarding an interim safety management certificate which may be issued to new ships, when a ship changes flag or when a company takes on responsibility for a ship which is new to the company.[92] It is clear from the ISM Code that all verifications related to the provisions of the code, should be carried out in accordance with the administration and guidelines developed by the IMO should betaken into account.[93]

3.3.3 Marine Pollution Convention

The Marine Pollution Convention is actually called the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978, but is commonly known as the MARPOL 73/78 Convention.[94] In the first half of the 20th Century, oil pollution of the seas was recognized as a problem. In 1954, an oil pollution convention was issued by the initiative of the United Kingdom and it entered into force in 1958. However, in 1967, when the tanker *Torrey Canyon* ran aground in the English Channel and spilled her entire cargo of 120,000 tons of crude oil into the sea, the question of measures to prevent pollutions from ships arose again. In 1973, an international Conference adopted the International Convention for the Prevention of Pollution from Ships (MARPOL Convention). The MARPOL Convention incorporated much of the 1954 oil pollution convention, but also addresses other forms of pollutions from ships i.e. chemicals, harmful substances carried in packaged form, sewage and garbage. The provisions seemed too hard for the world's states, since only three countries had ratified the convention in 1978. The same year, the IMO held another conference where they lightened up the provisions by giving the future contracting parties more time to implement the provisions regarding the annexes that did not regulate oil pollutions. The Protocol of 1978, which was adopted on the same conference, made a number of changes to Annex 1 (oil pollutions) of the convention. On 2 October in 1983, the MARPOL Convention 73/78 finally entered into force. The Protocol *inter alia* required segregated ballast tanks (SBT) on all new tankers of 20,000 dwt and above (in the 1973 version, SBTs were only required on all new tankers of 70,000 dwt and above). The Protocol also required SBTs to be located in such a way that they will help protect the cargo tanks in the event of a accidents. In 1992,

[91] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, pp. 12-13, (13.4, 13.5, 13.5.1, 13.6)
[92] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, p. 14, (14.2)
[93] *International Safety Management Code and Revised Guidelines on Implementation of the ISM Code*, 2002, p. 15, (15.1)
[94] http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#2. 2008-01-03

an amendment to Annex I made it mandatory for new oil tankers to have double hulls and a phase-in schedule for existing tankers to fit double hulls was brought in. In 2001 and 2003, the phase-in schedule for existing tankers to fit double hulls was changed and stepped up.

3.4 Comments

By presenting some selected parts of these international conventions, I aim to prove the fact that a comprehensive legal framework in the maritime safety and environmental protection field does exist on an international level. The coastal states' rights to set up rules in order to protect their coastlines and waters versus the freedom of navigation will be evaluated in the analysis below. The safety standard provisions for vessels that are set up in the ISM Code are wide-ranging and together with the environmental protective provisions that follows by the MARPOL Convention, it is hard to see international safety standards as insufficient. The amendments to the MARPOL Convention that was made in 2001 and 2003 regarding double hull tankers proves that efforts in favour of the environment are made internationally. Those vessels that are considered to be pre-MARPOL will soon be either rebuilt or unusable.

4 Places of Refuge for Ships

4.1 Introduction

There are different situations when vessels need assistance. Sometimes the crewmembers need help because of illness and sometimes the safety of the ship itself is at stake because of bad weather conditions, *force majeure* or other kinds of urgent necessity.[95] If the vessel in need has received salvage assistance, the salvor is instructed and obligated to take the vessel to a safe place; a save haven, i.e., a place of refuge.[96] Traditionally, the international maritime community has supported an unwritten norm concerning assistance to ships in distress and some refer to this particular norm as the refuge custom.[97] The rule has never been codified in an international convention, still, international customary law could be just as significant.[98] The refuge custom is not only a complementary right to self-preservation for the crew and the vessel, it is also a responsibility of the costal state authorities to assist the sailors and ships in need.[99] The refuge custom is very old and has persisted through both peaceful and hostile times.[100] According to the old custom, damaged vessels were entitled to repair at normal market price and their crews were provided with assistance from the local authorities. The state practice was not only limited to merchant vessels, many cases proves that also warships and fishing vessels were granted assistance. However, in the 1970s, but especially since the beginning of the 21st Century, there have been remarkable changes. In 1978, the *Christos Bitas* was refused refuge by the UK. In 1981, the *Eastern Mariner I* ran aground on a reef off Bermuda and it was ordered to depart while it still took on water and after being towed out to sea by government-chartered tugs, it sank.[101] In the last few years, there have been incidents when tankers have been refused a safe haven within European waters. In 1999, the oil tanker *Castor* was refused refuge by several Mediterranean states.[102] The same year, the oil tanker *Erika* was refused refuge by France and in 2002, the single-hull tanker *Prestige*, did not get assistance either, this time Spain lacked in its responsibility. To grant a ship a place of refuge could be united with many risks. The bulk one carrier *Kowloon Bridge* got shelter in Bantry Bay, but still wrecked in West Cork. The accident led to ensuing spill, which caused damage to fishery industry and tourism in the

[95] Chircop, Linden & Nielsen, 2006, p. 1
[96] Ibid.
[97] Chircop, Linden & Nielsen, 2006, pp. 3-4
[98] Dixon, 2007, p. 30 and Shaw, 2003, p. 69
[99] Chircop, Linden & Nielsen, 2006, p. 4
[100] Ibid.
[101] Chircop, Linden & Nielsen, 2006, p. 5
[102] Ibid.

area.[103] However, some claim that it is better to give shelter to a damaged vessel, because if local authorities can help unloading the ship's cargo, a lot of pollution spills can be avoided.[104] The question on how costal states ought to act in these types of incidents does not have a clear answer and the different approaches will be evaluated in the analysis below. The least controversial part of the refuge custom is the crew's right to self-preservation and the obligation of the costal state to provide humanitarian assistance to when it is needed.[105] A number of conventions support this either explicit or implicit. In both the UNCLOS and the SAR Convention, provisions on assistance to any person in distress at sea are explicit established.[106] The SOLAS Convention prescribes a duty for other ships to assist a vessel in distress and the costal states are required to observe the rescue.[107] This means that there are rules with certain provisions for costal states, even though an explicit law on the refuge custom is deficient.

4.2 European Modification of Status Quo

Below, three accidents, which all took place within European jurisdiction areas quite recently will be chronologically presented. It is important to be familiar with the three accidents, since in the aftermath of the accidents, the European Union established an excessive legal framework that deals with matters traditionally handled by the IMO.

4.2.1 *Erika* – 1999

On 11 December 1999, the Malta registered oil tanker *Erika*, which carried 30,884 tonnes of No 2 heavy oil, got into heavy water in the Bay of Biscay and at the same time, the *Erika* experienced a structural failure.[108] First, the ship started to list more and more and after the list was corrected, several hours later the *Erika* broke in two and sank.[109] When the vessel started to list, the master sent a distress message, which was received via France Telecom by MRCC Etel. The message indicated *Erika's* position (more than 300 kilometres from Brest, 355 kilometres from Corunna and 400 kilometres from Donges).[110] Thirty minutes later, the officer of watch responsible for SAR at the MRCC Etel, called the general staff duty officer

[103] Chircop, Linden & Nielsen, 2006, pp. 5-6

[104] Chircop, Linden & Nielsen, 2006, p. 6
[105] Chircop, Linden & Nielsen, 2006, p. 9
[106] UNCLOS, arts. 18(2), 39(1)(c), the SAR Convention, chap. 2, art. 2.1.1.
[107] SOLAS Convention, chap. V, reg. 33, chap. V, reg. 7(1)
[108] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 7
[109] Ibid.
[110] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, pp. 44-45

at the naval centre of operations in Brest and informed that the vessel no longer needed assistance (the ship did not list anymore and the master had said that he could handle the situation).[111] Another 30 minutes later, the master sent a message changing his distress massage (mayday) into a safety message (securite).[112] One hour later, the master called the "designated person", also known as the owner, saying that the ship had a few cracks and a leakage of fuel oil from No. 3 centre cargo tank into No. 2 starboard ballast tank and that he therefore now was heading for a port of refuge.[113] Approximately two hours later, the master cancelled his safety message and reported to the MRCC that he had changed course and was heading for a place of refuge at Donges, France.[114] However, a few hours later, the harbourmaster of Donges said that the *Erika* could not be allowed to berth at Donges if any of her oil was leaking into the sea, since it was impossible to set up barriers on the Loire due to the bad weather conditions (currents).[115] During the night, the ship's condition got worse and in the morning the following day, 12 December, the ship started to break.[116] The French navy with the CROSSA in Etel acting as MRCC carried out a rescue operation in order to save the crew.[117] The rescue operation succeeded and the entire crew were saved. After the ship had broken in two, she foundered some 30 nautical miles south of the Pointe de Penmarc'h in Brittany.[118] Both parts of the ship sank in approximately 120 meters of water in a position close to where she broke in two pieces. The salvors tried to tow the stern section further out to sea, but did not succeed.

Erika was a single-hull tanker without segregated ballast tanks, built in 1975, and was therefore considered to be "pre-MARPOL".[119] Nevertheless, in the 1990s the *Erika's* tanks were transformed so that they would fit with a crude oil washing system. The tanks were first reconstructed into clean ballast tanks and later into segregated ballast tanks. This was made in accordance with the Marpol Convention, Annex 1, regulation 13.[120] Like other ships, *Erika* had to undertake port state controls and the CPEM noted that the vessel was inspected at least once every year, she was detained

[111] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 46
[112] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 47
[113] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 48
[114] Ibid.
[115] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 50
[116] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 50-52
[117] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 7
[118] Ibid.
[119] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999*, p. 13
[120] Ibid.

twice (once for corrosion).[121] The last inspection she undertook, only one month before she sank, was an examination of the papers and equipment onboard. The *Erika's* target factor, which is set by agents approved for port state controls and takes into account several critical factors such as flag, history, etc., was not alarmingly high but completely normal.[122] During ports state controls, nobody thought of an internal control of the structure of the vessel. In the CPEM report, the reason is said to be that such inspections are conducted when the vessel is in port and carrying out cargo operations and this makes it hard for inspectors to enter the tanks. The latest inspections before *Erika* sank (one made in December 19997 and the other made in May 1998) did not mention the ship's ISM status. The environmental consequences of the *Erika* accident were devastating. Because of severe weather conditions, a large proportion of the hazardous cargo and bunkers spilled into the sea.[123] Several hundred kilometres of coastline from Brittany down to Ile de Ré were stained.[124]

4.2.2 *Castor* – 2000/2001

On 23 December 2000, the Cyprus flagged single-hull oil tanker M.V. *Castor* departed Constanza, Romania for delivery to Lagos, Nigeria.[125] On 26 December, the vessel encountered deteriorating weather conditions and over the following four days, the weather deteriorated to force 10 winds.[126] On 30 December, an officer of the watch reported a smell of gasoline (the single-hull tanker was loaded with 29,470 tonnes of unleaded gasoline) and later on it was confirmed that the *Castor* had suffered "structural damage to the deck planting just forward of midships in way of No. 4 Port, Starboard and Centre tanks."[127] At this time, plumes of cargo were seen escaping from the tanks. Fortunately, the *Castor's* hull did not break in two during the heavy weather on 30 December 2000.[128] On 31 December, an inspection showed that a series of cracks in the deck had spread an estimated 22 meters across the vessel and therefore, the vessel tried to reach a place of refuge as soon as possible. The ABS was notified by the owner as classification society of record of the damage and an ABS surveyor boarded the *Castor*

[121] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999,* p. 20
[122] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999,* p. 21
[123] Permanent Commission of enquiry into accidents at sea (CPEM), *Report of the enquiry into the sinking of the Erika off the coasts off Brittany on 12 December 1999,* p. 7
[124] Ibid.
[125] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000, pp. 2-3, 5*
[126] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000,* p. 5
[127] Ibid.
[128] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000,* p. 25

and thereafter recommended that a discharge of the cargo from the damaged tanks.[129] On 1 January, the *Castor* arrived the port off Nador, Morocco. However, the Moroccan authorities were unwilling to provide *Castor* a place of refuge and therefore, the vessel continued to a position off Caragena, Spain.[130] Just like the Moroccan authorities, the Spanish authorities were unwilling to help Castor, which meant that instead of providing a safe haven, they exercised their sovereign right and denied *Castor* permission to approach the Spanish coast. On 5 January 2001, the Spanish authorities helped with the evacuation of the crew.[131] The salvors, the Government of Cyprus and the ABS continued to make representations to the Spanish authorities and to other coastal states in the area, but they were all unsuccessful – nobody wanted to put their coastline or their ports at risk.[132] Countries that also were contacted were Gibraltar, Malta, Tunisia and Greece. The owner received a notification from the Greek authorities stating that entry into Greek coastal waters would not be allowed. During the same time, the salvors chartered two vessels appropriate for a ship-to-ship transfer. The *Castor* waited for the shuttle tankers approximately 35-40 miles off the Spanish coast near Cartagena throughout the period when the salvors discussed with different authorities. From 3 January to 24 January, the vessel had to endure frequent periods of weather recorded as Force 8 with wave heights in excess of 4 meters. On 22 January 2001, the salvors completed an open water ship-to-ship transfer of the cargo. Yet, to be able to unload and secure all the cargo, the salvors had to tow the vessel into a more sheltered area and in doing so, they the vessel was subjected to very heavy weather (Force 12). On 9 February, all remaining cargo was successfully unloaded and shipped back to its owners.[133]

At the time of the incident, *Castor* had all required and valid statutory certificates and it was issued a Safety Management Certificate as required by the ISM Code.[134] The last certificate was issued by ABS under the delegated authority of the Republic of Cyprus and an internal audit shipboard was completed on 26 June 2000 – only half a year before the accident. On 17 November 2000, the last external audit was completed. The *Castor* had never been detained for failure to meet Port State Control standards.[135]

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[129] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000*, pp. 5-6
[130] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000*, p. 6
[131] Ibid.
[132] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000*, p. 7
[133] Ibid.
[134] American Bureau of Shipping, Technical Report, *Investigation into the Damage Sustained by the M.V. Castor on 30 December 2000*, p. 2
[135] Ibid.

4.2.3 *Prestige* – 2002

On the 19 November 2002, the Bahamas-flagged single-hull tanker *Prestige* sank within the Spanish EEZ about 133 nautical miles off the North West coast of Spain.[136]. The *Prestige*, which was carrying 76,972 tonnes of heavy fuel oil, spilled a huge amount of its very polluting cargo into the ocean.[137] Not only did it cause ecological and economic disaster, it also caused a call for a re-evaluation of the existing international legal framework governing merchant shipping on both international and European level.[138] On 13 November, six days before she sank, the Prestige was hit by a large wave, which led to a 20-degree list to starboard.[139] The main engine and the boiler stopped, which led to a heavy rolling of the vessel.[140] One lifeboat was destroyed, one liferaft was lost overboard and oil had started to escape through the displayed Butterworth filters of a some cargo tanks.[141] Some of the escaped oil was on deck and some of it ran into the ocean, causing local pollution around the vessel. The second officer sent an internal general alarm and an external distress message on the master's order. However, the crewmembers worked hard to straighten her up and some hours later the list had reduced to approximately 5 degrees, but the ship was still rolling.[142] As the list reduced the escape of oil through the open Butterworth openings decreased. Spanish authorities helped rescuing the crew with helicopters right after the mayday signal was sent.[143] The master, chief engineer and first officer remained onboard the *Prestige*. The master contacted the managers of the ship and told them about the situation and they immediately started to look for suitable salvage and towage assistance.[144] A nearby ship called *Ria de Vigo* was asked to assist the *Prestige* with towing and the did.[145] However, seven attempts were made to connect a towline, but neither of them succeeded.[146] Another ship was called in to assist with the towing, but that attempt also failed. Finally, a towing line between *Prestige* and *Ria*

[136] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 11
[137] Ibid.
[138] Frank, 2005, p. 3-5
[139] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 11
[140] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 14
[141] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 17
[142] Ibid.
[143] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* pp. 17-18
[144] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 18
[145] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 21
[146] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002,* p. 22

de Vigo could be set and the latter began the towing away from the coast.[147] The master had nothing to say about the direction of the towing – the Spanish authorities had decided that they wanted the oil leaking tanker away from their coastline.[148] The master asked the Spanish surveyor for a place of refuge, which was refused. Instead, the *Prestige* was towed towards even rougher water in the Bay of Biscay.[149] Not only Spain refused the *Prestige* a place of refuge, the ship was also denied to enter the Portuguese EEZ.[150] On 15 November, the weather conditions got worse, which led to that the remaining persons onboard the ship had to be evacuated by helicopter.[151] When they landed on Spanish territory, the master was immediately arrested by the police and interviewed for four hours. The chief engineer and the chief officer were also interviewed, but they were released and brought to a hotel after the questioning. However, the harbour master of La Corunna had made allegations against the master and therefore he was kept in custody instead of being released and brought home.[152]

4.3 Comments

I have now presented three marine accidents that all had an impact on European Union law, since the aftermath of those incidents led to the establishment of something I have chosen to call "Europeanization of international law in the context of shipping" through an excessive legal framework in the maritime field on regional level. What began with a breach of the refuge custom, made by France, Portugal, Spain, Greece and Malta only, has now led to a regionalization of the law of the sea beyond imagination. The accidents brought with them immense environmental consequences to European waters and coastlines. Some imply that the Europeans have themselves to blame since they did not provide a place of refuge where the cargo could be unloaded and perhaps the vessels could be saved, while others mean that old, single-hull tankers should be banned internationally. Even though these three ships have different stories to tell, they all shared the same destiny: no European country wanted to provide them with a place of refuge when they needed it.

[147] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002*, p. 23
[148] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002*, p. 24
[149] Ibid.
[150] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002*, pp. 21, 71
[151] Bahamas Maritime Authority, *Report of the Investigation into the Loss of the Bahamian Registered Tanker Prestige off the Northwest Coast of Spain on 19th November 2002*, p. 29
[152] Ibid.

5 European Union Law

5.1 Introduction

European Union Law is a very complex subject and unfortunately there will not be enough room in this thesis to present more than just the most necessary parts to help the reader understand the dynamics of the new regional laws including the relationship between the IMO and the EMSA. The EU consists of treaties between the member states and the three original treaties: the European Coal and Steel Community (ECSC, which expired in 2002), the European Economic Community (EEC) and the Atomic Energy Community (Euratom), which all were established in the 1950s and constituted the European Community.[153] In 1993, the Maastricht Treaty or the Treaty on the European Union (TEU) was ratified by all the member states and with that ratification, the European Union was born.[154] The Maastricht Treaty had consequences: the EEC was renamed the European Community, detailed provisions on the European Monetary Union were written down and, the most striking feature of the treaty, the "three-pillar" structure was established.[155] The three-pillar structure consists of the first pillar, which is the three original communities (the EC Treaty), the second pillar, which concerns common foreign and security policy and the third pillar, which concerns co-operation in justice and home Affairs.[156] The first pillar has a supranational decision-making character whilst the other two have an intergovernmental structure.[157] EC shipping law lays within the scope of the first pillar.

5.2 EC Shipping Law

Initially, the EU did not interfere with issues relating to shipping. EC law relating to shipping was primarily the law of the EEC rather than the law of ECSC or Euratom.[158] Shipping, or "sea transport" to be correct, is only mentioned once in the Rome Treaty, namely in article 80.[159] Essentially, there are two sources of EEC shipping law, i.e., the Rome Treaty and the secondary legislation, which is based on article 80 of the same treaty.[160] The article prescribes that

[153] Craig & De Bûrca, 2007, pp. 5-7 and Hobe, 2006, pp. 6-7, 23
[154] Craig & De Bûrca, 2007, pp. 14-15 and Hobe, 2006, pp. 18, 23
[155] Craig & De Bûrca, 2007, p. 15 and Hobe, 2006, p. 23
[156] Craig & De Bûrca, 2007, pp. 15, 17 and Hobe, 2006, p. 24
[157] Ibid.
[158] Power, 1992, p. 10
[159] Ibid. It should be mentioned that article 80 of the Rome Treaty is a reflection of the older article 84 of the same treaty.
[160] Ibid.

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.
2. The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for the sea and air transport.

   The procedural provisions of Article 71 shall apply.

The article allows for provisions to be set up for sea and air transport by the Council acting generally.[161] Originally, the second paragraph was peculiarly drafted and it did not follow the pattern of similar provisions, since they normally provide for the adoption of measures by the Council of Ministers after a *proposal* by the Commission.[162] In addition, the European Parliament as well as the Economic and Social Committee usually give their opinion, but the original 80(2) paragraph spoke only of the Council acting solitary to decide over provisions for the air and sea transport. The unanimous paragraph was criticized as a "notorious paragraph" which opened for "diametrically opposed interpretations" and was therefore amended through article 16 of the Single European Act (SEA).[163]

Prior to 1974, many commentators and member states believed that air and sea transport fell outside the range of the Treaty because of the ambiguous provisions in article 80 of the Rome Treaty, nevertheless, the Commission thought differently.[164] In the E.C.J Case 167/73 *Commission v. France*, article 80 was considered, however, originally, the case dealt with the question whether France broke against the provision of freedom of movement for workers through a domestic law prescribing that the crew of a French vessel had to be French.[165] France argued *inter alia* that the rules of the EEC Treaty regarding freedom of movement for workers were not applicable to maritime transport as long as the Council had not decided otherwise under article 80(2). The key point in the case was whether the rest of the EEC Treaty applied to sea transport or not.[166] In the judgement, the E.C.J. wrote about article 80 as follows and emphasized that sea transport does not fall outside of the EC sphere

> Far from excluding the application of the Treaty to these matters, it provides only that the special provisions of the title relating to transport shall not automatically apply to them.[167] Whilst under Article 84(2), therefore, sea and sir transport, so long as the Council has not decided

[161] Power, 1992, p.110
[162] Ibid.
[163] Ibid.
[164] Power, 1992, p. 111
[165] Power, 1992, p. 111
[166] Ibid.
[167] Case 167/73 *Commission v. France*, section 31

> otherwise, is excluded from the rules of Title IV of part two of the Treaty relating to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty.[168] It thus follows that the application of articles 48 to 51 to the sphere of sea transport is not optional but obligatory for Member States.[169]

Those who in the 1970s thought that the law of the sea would stay either national or international and not fall within the scope of the Rome Treaty, were clearly misinformed.

5.3 Formal Legal Methods

Within the EU, there are a number of institutions with different scales of competence and power: The Council, the Commission, the European Parliament, the Court of Auditors and the European Court of Justice.[170] Just as in national legislation systems, there is a hierarchy among the different EU legislations, or the formal legal methods. However, the hierarchy is not as formal as it usually is on national level.[171] These formal legal methods for developing community policy are regulations, directives and decisions.[172] The different rules are often used in conjunction with each other, for instance; the foundational provision in an area can be a directive and then decisions and regulations can supplement it or the other way around.[173]

5.3.1 Regulations

In the context of this thesis, it is important to know that the European Maritime Safety Agency was established through a regulation, which was issued by the European Parliament and the Council jointly.[174] Regulations are not only binding upon all member states, they are also directly applicable in all member states.[175] The fact that regulations are "directly applicable" follows by article 249, which states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[176] Because of their directly applicable character, there is no need for their terms to be transposed into national law through

[168] Case 167/73 *Commission v. France*, section 32
[169] Case 167/73 *Commission v. France*, section 33
[170] Craig & De Bûrca, 2007, p. 38 and Hobe, 2006, p.
[171] Craig & De Bûrca, 2007, p. 83
[172] Craig & De Bûrca, 2007, p. 82
[173] Craig & De Bûrca, 2007, p. 82
[174] Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing the European Maritime Safety Agency.
[175] Craig and De Bûrca, 2007, p. 83
[176] Treaty of Rome, art. 249

implementing rules of the different member states.[177] As one can tell from the literal meaning in the text in article 249, regulations are supposed to be a powerful legislation instrument. It should be noted that the principle of direct effect has been debated through the years.[178]

5.3.2 Directives

Another formal legal method that will be dealt with in this thesis is directives. Directives are, just as regulations, issued by the European Parliament and the Council jointly, the Council or the Commission.[179] Furthermore, article 249 of the Treaty of Rome prescribes that

> A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

This means that the member states are free to implement the directives in a legislative format that pleases them, as long as the result of the directive will be achieved.[180] Directives are binding on those to whom they are addressed and they are have a so called vertical direct effect, which means that their provisions can be invoked by private individuals or companies against authorities of a member state.[181] However, directives do not have a so-called horizontal direct effect, which means that they can never be invoked against private individuals or companies.[182]

5.4 Relationships between European Union Law, National Law and International Law

5.4.1 The Principle of Subsidiary

Like it or not, the EU is an effective "institution" whose will is reflected in the effective strong formal legal methods. That is a fact. There are however other aspects that are not as clear. How does the EU affect national law and how does the EU law influence its member states relation to international law? What is the European Union? Is it only a supranational cooperation or is it a federal state? A starting point could be the principle of subsidiary, prescribed in article 5 of the Treaty of Rome

[177] Arnull & Dashwood et al., 2006, p. 160
[178] Craig & De Bûrca, 2007, p. 84
[179] Treaty of Rome, art. 249
[180] Arnull & Dashwood, et al., 2006, p. 164
[181] Arnull & Dashwood, et al., 2006, p. 171
[182] Arnull & Dashwood, et al., 2006, p. 175

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiary, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives if this treaty.

5.4.2 Superiority of European Union Law

The relationship between EU law and national law is highly complex and there are many different opinions between both politicians and scholars. Nevertheless, there are some undeniable truths and one of them is the case *Costa v ENEL* that was issued by the European Court of Justice in 1964. In the case, the European Court of Justice emphasised[183]

> It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

Despite the lack of consensus between scholars and politicians, many have interpreted the case as a proof of the superiority of Union law in relation to national law.

5.5 Comments

Initially, I found it important to present the basic structure of the EU to the reader and thereafter present the link between EU and shipping law. Given that the Erika I and II Packages, which both will be presented below, are based on regulations and directives, I wanted to make sure that the reader fully understands the dynamics of these two different legal methods. Finally yet importantly, I found it important for the reader to be familiar with the principle of subsidiary and the disputed superiority of European Union law over national law, since these matters will be evaluated in the analysis.

[183] Case 6/64 *Costa v ENEL*, 1964, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:HTML 2008-01-05

6 The ERIKA-Packages

6.1 Introduction

In the directives and regulations that were issued after the three accidents mentioned above, "the Community's concern" for environment within the boarders of the member states is explicitly expressed.[184] It stands perfectly clear to anyone who reads those directives or regulations that the European Union was dazed over the accidents and that the accidents all seriously harmed the coastlines and the fauna and flora within European boarders. On 20 January 2000, the European Parliament adopted a resolution on the oil slick off the French coast where they welcomed any efforts by the Commission to bring forward a date when oil tankers should be obligated to have a double-hull construction.[185] After the *Erika* accident, which as familiar was the first devastating accident, the European Commission proposed two packages containing stricter legislative measures regarding European maritime rules.[186] The foundered tanker gave its name to these two packages, which were called the Erika I & II-Packages.[187]

6.2 The ERIKA I-Package

The first package was issued 3-4 months after the accident (in March 2000). It contains two directives that entered into force 22 July 2003 and one regulation that entered into force 27 March 2002. One of the directives strengthens port state inspections in the EU,[188] the other strengthens the monitoring of the activities of classification societies[189] and the regulation

[184] See *inter alia:* Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, art. 2

[185] Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, art. 6

[186] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08

[187] Ibid.

[188] Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State control)

[189] 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

proposes an accelerated timetable for the withdrawal of single-hull tankers.[190]

6.2.1 Regulation 417/2002

Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002, which is part of the Erika I Package, is a regulation that proposes double hulled tankers instead of the older single hull oil tankers and it was issued by the Commission in accordance with article 80(2) of the Rome Treaty.[191] Since it is a regulation, it has direct effect and therefore, it had to be implemented into national law immediately.[192] In its preamble, the regulation refers to an IMO suggestion from 1993 "…of the reduction of the safety gap between new and existing ships by upgrading and/or phasing out existing ships"[193] and states that the EU adopted a resolution at that time supporting the IMO suggestion.[194] The regulation also refers to a protocol from 1978 to the 1973 MARPOL Convention adopted by the IMO (MARPOL 73/78), where it is stated that tankers should, after having reach a certain age, change their single-hull construction into double-hull or equivalent standards, since it will provide those tankers with a higher degree of protection in case of emergency.[195] According to the regulation, comparison of statistics regarding tankers' age and accidents shows increasing accidents for older ships.[196] The MARPOL Amendments 73/78 prescribes a "phasing-out scheme" for single-hull oil tankers that were delivered before 1982.[197] They are to comply with double-hull standards no later than 25 or 30 years after their delivery. If they would not comply with these terms, they will not be allowed to operate beyond 2007 or 2012.[198] After the *Castor* and the *Erika* accidents, the IMO adopted

[190] Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94
[191] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble
[192] Treaty of Rome, art. 249
[193] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section . 3
[194] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section 5
[195] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section(s) 7, 9
[196] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section 7
[197] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section 11
[198] Ibid.

an amendment to Regulation 13G of Annex I of MARPOL 73/78 (27 April 2001 by Resolution MEPC 95 (46)) in which a newer and accelerated "phasing-out scheme" for single-hull oil tankers was introduced.[199] In this amendment, the final dates when different tanker have to be reconstructed depend on age and size of the ship.[200] The first article of the Regulation 417/2002 states that the purpose is to establish an accelerated "phasing-in scheme" for the application of double-hull (or equivalent construction) tankers in accordance with the MARPOL 73/78 Convention.[201] The regulation applies to all oil tankers (except naval ships) of 5000 tons or above that enter ports or offshore terminal under the jurisdiction of a member state (regardless of their flags) and all ships that sail under a member state's flag.[202] Article 4 of the Regulation contains a table of different delivery dates of tankers and their expiry dates, after a certain date, the tankers built in a certain year is not allowed to enter any ports or offshore terminals under the jurisdiction of any member state of the EU. This regulation entered into force on 27 March 2002.[203]

6.2.2 Directive 2001/105 EC Amending Directive 94/57 EC

Another part of the Erika I Package is the Directive 2001/105 EC, which is amending Directive 94/57/EC. The directives aim to strengthen the rules regarding inspection and certification procedures of vessels, in order to ensure that vessels are built and maintained according to current safety rules within the EU.[204] Flag-states have the responsibility for vessels under their jurisdiction, but they are allowed to delegate the responsibility to multinational bodies and classification societies to perform the tasks on their behalf.[205] The Classification societies issues many different types of certificates, which either cover compliance with the rules of the flag state or international rules. Worldwide, there are many organisations who issue different certifications of vessels (over 50), but the EU only recognises 12 of these.[206] According to the new provisions following by the amending Directive 2001/105, the recognised classification societies have to maintain

[199] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, Preamble, section 12
[200] Ibid.
[201] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, art. 1
[202] Regulation (EC) No 417/2002 of the European Parliament and the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, art. 2
[203] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08
[204] EMSA, 2006, p. 2-3, ISBN 92-95032-04-7
[205] EMSA, 2006, p. 2, ISBN 92-95032-04-7
[206] Ibid.

their quality standards and to be able to control that, the Commission has delegated the responsibility of making periodical (one every two years) assessment of the multinational bodies to the EMSA.[207] This means that in order to be authorised to operate within the EU, the requirements that follows by the amending directive 2001/105 are compulsory.[208] The performance of classification societies is monitored and if the standards are not followed correctly, it could result in penalties, i.e. temporary or permanent withdrawal of their community authorisation.[209]

At present, it seems generally important to improve ship safety standards. International ship safety standards are both developed and set by the IMO, however, on behalf of the Commission, EMSA experts are now participating in that work.[210]

6.2.3 Directive 2001/106 Amending Directive 95/21 – Port State Control

The EU member states also have an obligation to inspect foreign ships that visit them. This follows by the EU Directive 95/21/EC, which, as a part of the Erika I package, was amended through Directive 2001/106. The Directive emphasizes the importance of a harmonized working plan for the port state control officers.[211] The EMSA shall control that the different member states port states control systems fully comply with EU legislation.[212] Each member state has to inspect at least 25% of the incoming vessels per year.[213] According to the EU, the port state inspections have to take place because of lack of seriousness by some flag states regarding the condition of their ships.[214] The Directive also sets up a so-called banning provision, which means that if a foreign vessel has serious

[207] EMSA, 2006, p. 3, ISBN 92-95032-04-7
[208] http://www.ec.europa.eu/transport/maritime/safety/2000_erika_en.htm 2007-11-28
[209] Ibid.
[210] EMSA, 2006, p. 3, ISBN 92-95032-04-7
[211] Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions, Preamble, sections 16-17
[212] Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions, Preamble, section 16
[213] Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions, art. 4 (1)
[214] EMSA Brochure, 2006, p. 4, ISBN 92-95032-04-7

deficiencies, it has to be repaired and the port states even have the authority to detain vessels until necessary reparations have been completed.[215] If a vessel has been detained repeatedly within a certain period of time, it can be denied access to all EU ports until it has been proved that the vessel is in appropriate condition again.[216]

6.3 The ERIKA II-Package

Erika II consists of one directive that entered into force 5 February 2004 and one regulation that entered into force 24 August 2002.[217] It also contains another regulation that has not been adopted.[218] The directive concerns the establishment of a monitoring and Community information system, which aims to improve the surveillance of traffic in European waters.[219] The regulation that did enter into force was the one that established the EMSA.[220] However, the regulation that did not enter into force aimed to establish a complementary European fund for the indemnity of victims of oil spill.[221]

6.3.1 Directive 2002/59

The directive 2002/59 was issued as a part of the Erika II Package. The purpose of the directive is to establish a vessel traffic monitoring and information system within the EU.[222] It aims to enhance the safety and efficiency of maritime traffic, improve the response of authorities when accidents occur and better prevent and detect pollutions by vessels.[223]

According to article 20 of the directive, member states should draw up plans regarding places of refuge for ships in their ports or other sheltered areas in

[215] Ibid.
[216] EMSA Brochure, 2006, p. 4, ISBN 92-95032-04-7 & Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions, art. 7 (b)
[217] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08
[218] Ibid.
[219] 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
[220] Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency
[221] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08
[222] 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, art. 1
[223] Ibid.

case of accidents.[224] The same section says that these types of ports should "…be able to rely on prompt compensation for any costs and damage involved in this operation.".[225] The directive explicitly prescribes that all member states shall monitor and take all measures to ensure that all vessels entering an area of a mandatory ship reporting system, adopted by the IMO (regulation 11 Chapter V of the SOLAS Convention).[226] The directive entered into force on 5 February 2004.[227]

6.3.2 Regulation 1406/2002 – Establishing the European Maritime Safety Agency

In order to improve maritime safety in the region, one of the key initiatives from the European Union's side was to establish a maritime agency of their own. The European Maritime Safety Agency, EMSA, is responsible for providing technical and scientific assistance to the European Commission and Member States in the proper development and implementation of EU legislation on maritime safety, pollution by ships and security on board ships.[228] In order to complete their tasks, the EMSA tries to improve the cooperation with and between the member states in key areas.[229] In addition, the Agency has operational tasks in oil pollution preparedness, detection and response.[230] Since the Agency is a body of the EU, they are in close cooperation with the European Commission and they collaborate with many industry stakeholders and public bodies. On the EMSA's homepage (http://www.emsa.eu), everyone can get access to a brochure with basic information about the agency, published by the EMSA. In the EMSA brochure, they stress that, since a large amount of hazardous cargo and a large number of passengers are transported by the sea through European waters and even though modern technology is being used, maritime transportation is still dangerous.[231] On the introducing page of the brochure, they write that several EU citizens have died in ferry disasters such as *Estonia, Herald of Free Enterprise* and *Express Samina* and a significant number of seafarers have been injured or even killed in maritime accidents. For many years, European citizens have been suffering the effects of

[224] 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, art. 20
[225] Ibid.
[226] 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, art. 5
[227] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08
[228] http://www.emsa.europa.eu/end179d002.html, 2007-11-09 and Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing the European Maritime Safety Agency, Preamble, section(s) 2-5
[229] http://www.emsa.europa.eu/end179d002.html, 2007-11-09
[230] Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing the European Maritime Safety Agency, Preamble, section(s) 2-3
[231] EMSA, 2006, p. 1, ISBN 92-95032-04-7

pollution in and around their shores, which is a result of oil dumped accidentally or deliberately.[232] The purpose of setting up the EMSA was to have an organization that could act as the technical and operational arm of the EU decision-makers, with the ability to tackle both current and future problems on the maritime area. The overall goal is to improve the safety in the EU waters. The regulation entered into force on 24 August 2002.[233]

6.4 Comments

On 23 November 2005, the third ERIKA-Package was presented. It contains seven pillars, which deals with: Beefed up flag state control requirements; Stricter port state control with new targeting requirements; Amendments to traffic monitoring directive including tightened places of refuge requirements; New financial penalties for poorly performing classification societies; A new EU accident investigation methodology established; Passenger compensation improved with Athens Convention passing into EU law; Civil liability expanded with LLMC implemented across EU.[234] These directives have not yet been adopted and entered into force.

[232] Ibid.
[233] http://www.emsa.europa.eu/end645d002.html#erica12, 2007-11-08
[234] http://www.ec.europa.eu/transport/maritime/safety/2005_package_3_en.htm 2007-11-28

7 Analysis

7.1 Introduction

After having presented the objective facts (with the subjective rounding-up comments at the end of each chapter), it has now become time for the analysis. The overall question that will be evaluated in this analysis is whether maritime law should be dealt with regionally or internationally. In my opinion, it seems paradoxical that, in the 21st Century, the European Union, which initially was an international cooperation between European states, aims to regionalise maritime law instead of waiting for international consensus.

7.2 Globalization

The 21st Century is foremost a time-age characterized by internationalization: Trade, tourism, internet, and emigration/immigration – it is all about crossing boarders and cultural differences to increase international cooperation. There are scholars who claim that we, due to the deepening of the interconnectedness over the world, live in the days of globalization.[235] Some even stress that global forces can undermine the abilities of governments to control the structure of the societies in the states they are ruling.[236] Others reject the idea of a globalization and argue that state sovereignty will continue to determine the world order. The EU has 27 member states who all, despite our different history and cultures, now share an extensive legal framework. Personally, I support the theory of globalization and I think that both the European Union and maritime law in general is an excellent example of it. As a European citizen it makes me satisfied that, our Union works hard to make the European environment cleaner both by putting a pressure on the International community to set up rules and by setting own, regional rules. However, it is hard to deny that out of a global perspective, the unilateralism and the regionalism might be looked upon in a different way. A globalization of maritime safety and environmental standards is likely the winning hand.

7.3 The United States of Europe

The EU started as a peace project but has now developed into something entirely different. At present, it is not certain what the European Union is. Is

[235] McGrew, 2005, p. 20
[236] Ibid.

it a supranational cooperation with the character of an international organization or is it more similar to a federal state? In the *Fedechar* Case, which was issued by the European Court of Justice in 1955, before the European Community had become a Union, Advocate General Lagrange, emphasized that the E.C.J. was not ”an international court but the court of a Community created by six states as a model which is more closely related to a federal than an international organisation”. The European Union has the shape of an international organization, however, with a quite clear federal character.[237] The similarity between the relationship between national and EU law and State and federal law can be evident, especially when one consider the doctrines of direct applicability, or direct effect, and the supremacy of Community law.[238] In the *Simmenthal* case, the E.C.J. emphasized that Community law was competent to “preclude the valid adoption” of contradictory national legislation.[239] Even though the principle of subsidiary is a basic rule in European Union law, it seems as though it has been overruled by the case *Costa v ENEL* in 1969. If EU law is subordinated national law whenever there are conflicts between the two, the EU can barely be subsidiary. In my opinion, the EU has clearly proven itself a very “federal-like” institution through the establishment of common, regional laws of the sea.

The European Union has succeeded with something that would have been considered impossible some 30 years ago: with one article only[240] as legal ground, the EU has been able to establish an excessive legal framework in the maritime field. Alike the United Stated of America, who has their Coastguard[241]; the “United States of Europe” need their EMSA to handle maritime law. Yet, there is one major difference between the two, all member states of the EU have ratified the UNCLOS and are thereby bound to follow the provisions the convention provide, the United States has not.

The EMSA presents itself on their homepage (www.emsa.eu) and at the same website, a brochure with some basic information about the Agency can be found. In the brochure, the EU body points out how important it is to improve the safety in European waters. They write “To achieve this (improvement), the Agency fully acknowledges the importance of effective collaboration with many different interests and, in particular, with the European institutions, Member State authorities, international bodies and the maritime industry.”.[242] An undeniable positive aspect of this statement is that the European Union, a powerful “federal-like” institution with 27 member states, makes an international statement in favour of the

[237] Arnull & Dashwood, et al., 2006, p. 132
[238] Ibid.
[239] Case 106/77, 1978, E.C.R. 629, 643
[240] Article 80 of the Treaty of Rome
[241] http://www.uscg.mil/top/about/, 2008-01-03
[242] EMSA, 2006, p. 1 ISBN 92-95032-04-7

environment. In the regulation establishing the EMSA, the importance of cooperation with the IMO is emphasized. Nevertheless, the question remains: If the European Union points our the importance of international cooperation with the IMO, than why is the Union changing valid international law without waiting for international consensus?

7.4 The Refuge Custom

It has been described above that some member states of the EU acted inconsistently to international customary law when they refused to provide a place of refuge to the three damaged vessels. The old so-called refuge custom, which guaranteed ship in distress a place of refuge, was neglected. However, since some European states refused to provide a safe haven to *Castor*, *Erika* and *Prestige*, a discussion on whether there has been a change in state practice or not has been a hot target lately. As described above, the customary law regarding places of refuge is old and it has lasted throughout both peaceful times and times of war. Can an old customary law change in such a short time and on such loose grounds? Since there are no certain rules of periods of time for overruling customary laws, I tend to say yes, there can be a change of customary law quickly and on loose grounds. However, if customary law would change each time there was a breach against it, there would not 1.) Be any customary law as such, because there would not be anything to follow and 2.) Exist something called a breach against customary law. Besides, in the *Nicaragua Case*, the I.C.J. held that if some state practice appears to be contrary to existing or emerging rule of customary law, it should be presumed to be an action in breach of the rule, if there is not evidence of greater intent.[243] Therefore, I would like to support the theory of those who claim that those states who neglected the refuge custom actually made a breach against international customary law.

Many have claimed that the *Prestige* accident confirmed that there is a lack of clear legal regimes when it comes to dealing with distress situations and the absence of a positive legal duty for the costal state to provide a place of refuge for ships in need for it.[244] Spain has been heavily criticized for refusing the stricken tanker a place of refuge where it could unload its cargo safely and thereby minimize the environmental catastrophe.[245]

It is not easy to decide which interest should be favoured: On one hand stands the necessity of a ship in distress to get access to sheltered waters where the ship can undertake temporary repairs and thereby avoid or

[243] Dixon, 2007, p. 32
[244] Frank, 2006, pp. 10, 51
[245] Frank, 2006, p. 51

minimise serious accidents. On the other hand, stands the community that might take in the damaged vessel and the citizens of the community who may not be interested of having their water exposed to environmental disaster. There is however, a risk in not granting the vessel a place of refuge because, as Europe has seen proof of in the accidents mentioned above, bad weather conditions on rough waters might make the environmental accident even worse and who is to say there will not be yet another accident.

With over 600 important ports within the EU, an external trade rate on approximately 90% and an internal trade rate on approximately 35%,[246] it is clear that the European Union depend on shipping. The question is; can the shipping industry depend on the European Union? What seaman feel safe while navigating through European waters, when he or she knows that the ship is not granted a place of refuge if danger occurs and what ship- or cargo owner would want their property to be transported through territorial seas or EEZs within EU jurisdiction areas? At least the seamen know that their lives will be rescued, but they do not know what will happen to the vessel and the captain and the officers are aware of that they might end up in a European prison just as the master of *Prestige* did. If states of the European Union depend on shipping, they have to grant those who work on board ships safety when danger occurs. The EU need sailors who provide them with gods for the free market, but still the authorities neglect the refuge custom in three accidents at sea.

As I see it, some authorities of member states of the EU broke the old refuge custom. They all knew that they had acted in inconsistency with international law, however, tried to cover their mistakes up by issuing the ERIKA-Packages. Instead of solving the "place of refuge-problem", they focused on banning single-hull tankers and introducing stricter port state controls within the Community. The ERIKA III-Package contains rules regarding future places of refuge in European ports; nevertheless, it has not yet been accepted and entered into force. Unlike international law, the EU does not have to wait making drastic changes; international law has the disadvantage of, since there are so many different states with different wills, being quite slow moving. In my opinion, this leads to the conclusion that the authorities of the European Union are not interested spending money on building permanent places of refuge in European ports, because if they were, a regulation or a directive would already have entered into force.

On 5 December 2003, the IMO Assembly adopted a resolution regarding the IMO Guidelines on Places of Refuge for Ships in Need of Assistance (IMO Guidelines).[247] The increasing incidents when costal states have refused vessels in distress a place of refuge, led to a concern expressed by the

[246] EMSA, 2006, p. 1, ISBN 92-95032-04-7
[247] Chircop, 2006, p. 35

member states of the IMO, which led to the resolution.[248] Both the *Erika* and the *Castor* accidents played a significant role in this regard. The IMO Guidelines were not easy to issue and debates about them raised several sensitive political, management and legal concerns. Initially, it was thought that there was a need for three sets of guidelines for costal states, risk assessment and masters on board ships. The result became a single-document with guidelines that states rights and obligations. The IMO Guidelines recognise "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 costal state to protect its coastline"[249] and they propose a checklist if actions within a common framework not only for the masters of ship and the salvors but also for the coastal state authorities.[250] In this context it is important to point out that the IMO Guidelines do not *per se* create a legal obligation to provide refuge nor does it provide a legal right to refuse refuge.[251] This means that, according to the IMO Guidelines, the judicial situation is ambiguous.

7.5 Freedom of Navigation

According to the UNCLOS, Spain could not have done much to stop a single-hull tanker like *Prestige* from transporting highly polluting oil a short distance from its coastlines and through its EEZ, because the *Prestige* was lawfully exercising its right to freedom of navigation through Spanish water.[252] The mentioned rule has been criticized after the accident and it has been questioned whether a modern society still is prepared to take environmental risks in the name of freedom of navigation or not.[253]

The balance of interests is on one hand the costal state's control over "hazardous" traffic along its shores and on the other hand, the right to freedom of navigation. A discussion on how to strike a better balance between the two conflicting interests is something that has to be solved, because the ambiguous legal situation at present is, in my opinion, not to prefer. An immediate reaction to the *Prestige* accident was that Spain, followed by France, Portugal and Italy, unilaterally banned single-hull tankers carrying heavy grades of oils, regardless of their flags, from entering their ports or internal waters.[254] These unilateral bans could be *per se* consistent with the UNCLOS provisions on port state jurisdiction.

[248] Chircop, 2006, pp. 35-36
[249] IMO Guidlines, *supra* note 1, Preamble
[250] Chircop, 2006, p. 36
[251] Chircop, 2006, p. 37
[252] Frank, 2005, pp. 6-7. See also: UNCLOS, art. 58
[253] Frank, 2005, p.7
[254] Frank, 2005, p. 9 See also: The Malaga Agreement between France, Portugal and Spain from 26/11/2002

Nevertheless, the complementing practice of escorting foreign single hulls out of the EEZ, including ships in transit, which practically means that foreign merchant vessels conforming to IMO standards are denied passage through several European EEZs and some major straits used for international navigation, has been condemned at international level as a restriction of the freedom of navigation, which is inconsistent with the UNCLOS.[255]

In the aftermath of the *Prestige* disaster, the EU also strengthened their safety requirements for single-hull tankers without having consulting the matter with the IMO as they had done in the past. According to the UNCLOS, which only recognises the IMO to adopt measures interfering with shipping and being a forum that balances the interests of the costal state and the flag state, the EU's actions after the accident might be uncertain. Nevertheless, one has to keep in mind that it is commonly agreed upon that regional rules consistent with the UNCLOS may contribute to the implementation of the global regime. This means that there is some room for regional regulations regarding maritime safety and vessel source pollution as long as the regulations are performed in co-ordination with the IMO and are not inconsistent with the UNCLOS.

According to the UNCLOS, ships should have the right of innocent passage through territorial seas and the right of freedom of navigation through the exclusive economic zones.[256] However, the coastal state has the right to, temporarily; suspend the right of innocent passage in the territorial sea and the right to set up certain rules in order to protect the environment in the EEZ.[257]

As the European citizen I am, I would once again like to emphasize my appreciation to the EU for trying to improve environmental protection in the region. Still, the moral aspects of the Union's way of acting have to be discussed. The 27 member states of the European Union depend on the shipping industry to supply them with all types of gods – everything from oil to bananas and because of that dependence, it seems unwise to regionalise banning laws for "unwished" vessels, when these law actually should be issued internationally and thereby also slower. In my opinion, the Union needs to keep its waters open to all vessels and not only those that comply with European, regional standards.

In the *Prestige* case, the damaged tanker was positioned in the Spanish EEZ before Spanish authorities ordered the towing of the ship *away* from the coast. In doing so, the Spanish authorities actually practised enforcement

[255] Frank, 2005, p. 9
[256] UNCLOS, art.17, 58
[257] UNCLOS, art. 21, 25, 220

jurisdiction. To exercise enforcement jurisdiction is a rather complex matter, nevertheless, well regulated in international law. According to article 58 § 2 of the UNCLOS, the EEZ compares to the high seas in all aspects except for some areas. The basic principle of the high seas is exclusive flag-state jurisdiction.[258] This means that, if a valid exception was not for hand, only the flag-state Bahamas was allowed jurisdiction of the *Prestige* who was exercising her legal right to an innocent passage.

The situations when the EEZ is not to be compared with the high seas are when the coastal state is: taking measured within safety zones[259], enforcing fishing regulations[260], taking measures within the contiguous zone for the purpose of preventing and punishing infringements of certain laws and regulations within its territory[261] or enforcing international norms for the prevention, reduction and control of pollution from vessels[262]. Of course, Spain claims that they were preventing pollution from a vessel, which would give them right to enforcement jurisdiction in this case; however, the situation is not crystal clear. Is it fare to push ships in distress away towards rougher water instead of following the customary law that prescribes offering a place of refuge? Is the purpose of the article 220 §§ 3, 5 and 6 to push away damaged vessels who are leaking hazardous cargo into the ocean? In my opinion, it is not. To be absolute certain, I will present the essential parts of the article[263]

> 3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a Sate has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State confirming or giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and next port call and other relevant information required to establish whether violation has occurred.
>
> 5. Where there are clear ground for believing that a vessel navigating in the exclusive economic zone or in the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution if the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is

[258] UNCLOS, art. 92
[259] UNCLOS, art. 60 § 4
[260] UNCLOS, art. 73
[261] UNCLOS, art. 33
[262] UNCLOS, art. 220 §§ 3, 5-6
[263] UNCLOS, art. 220

> manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.
>
> 6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or in the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

After having evaluated the article, it is clear that Spain meant that the *Prestige* would threat the coastline of Spain, however, the vessel did not choose to have an accident out of free will, it merely happened. The purpose of the rule has to be to let the coastal state act in case of vessels who *deliberately* commit "violations of applicable international rules and standards for the prevention, reduction and control of pollution of vessels".

7.6 Were the ERIKA-Packages Motivated?

Due to the investigations I have read, insufficiency with ISM Code standards was not an object for any of the three foundered vessels. This means that the ships were perfectly sailable according to IMO standards. The port state controls made shortly before the last voyages of the ships did not either prove any significant insufficiency. This causes the some questions: Are the international safety rules regarding ships sufficient? If not, what has to be done? According to the EU, the rules were not sufficient, which is a fact that becomes perfectly clear after having read the Erika I & II reports. If the international rules are insufficient, should they not be improved *internationally* instead of regionally? In my opinion, insufficiency of international laws should be improved internationally and not regionally.

In 2003, the European Parliament issued a report on improving safety at sea in response to the *Prestige* accident.[264] The report emphasizes that the two ERIKA-Packages mainly have covered the improvement of safer European shipping and that the EU finds it satisfactory that the "Erika-directives" were implemented on a short notice.[265] The report also stresses that the *Prestige* accident showed that the rules regarding ships in distress are "inadequately regulated" and that the member states therefore should

[264] *Report on improving safety at sea in response to the Prestige* accident (2003/2066(INI)) of 15 July 2003

[265] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, sections 13-14

cooperate with the EMSA to plan "arrangements and the designation of safe havens".[266] The report also states that according to Directive 2002/59, the Commission should investigate and report no later than 5 February 2007 whether financial compensation for safe havens cane be an option or not. This means that a member state that rescues a ship in distress should be able to count on support from other EU countries after the operation.[267] In the report, the EU deplores Spain's acting in the *Prestige* accident – Spain should have listened to the salvage operators who wanted to tow the tanker into calmer waters.[268] The report also calls for the fully enforcement of the polluter pays principle at sea with a criminal-liability scheme that penalises those responsible for an incident and a development of an international compensation fund system based on the polluter pays principle that would help coastal states to finance the cleaning up of the environment.[269] The entire transport chain should be involved in the financing of the fund: flag-states, charterers, the cargo owners and the vessel owners.[270]

7.7 Conclusion

By adopting the IMO Guidelines on Places of Refuge for Ships in Need of Assistance, the IMO evidently show that they are aware of the current problematic situation. In international law, many states are involved and since states are different in many ways and are affected by decisions in different ways, the creation of a practice in not often made overnight. The IMO has considered the problem since 2000, but the resolution was adopted first on 5 December 2003. Furthermore, when there was an international concern for old, single-hulled tankers, even though it took some time, the MARPOL Convention was amended.

For the European Union the time gap between thought and action does not have to be that long, which is a consequence of the effectiveness of the legal methods used in Community law. Article 249, which has been presented above, is significant "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[271] In

[266] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, section 15
[267] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, p. 25
[268] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, p. 37
[269] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, pp. 39-40
[270] *Report on improving safety at sea in response to the Prestige accident*, 2003/2066 (INI), 15 July 2003, p. 40
[271] Treaty of Rome, art. 249

addition, directives are "…binding as to the result to be achieved, upon each Member State to which it is addressed…"[272]

In my opinion, there are both positive and negative aspects not only of the slow moving character of international law but also of the fast moving character of EU law. One negative aspect of the slow moving character of international law is that the international community cannot always succeed in being correctly updated. An empirical example of this problem is the worldwide increasing environmental awareness, which tends to clash with older practice. Those who speak in favour of environmental awareness require fast moving changes – the European Union's "banning provisions" proves my point here. Another negative aspect of the slow moving character of international law is that the result not always becomes as effective as it would be if fewer states were involved. The IMO Guidelines, which lacks both a prohibition of denying ships a place of refuge and an obligation for the coastal state to assist ships in need of refuge, is yet another empirical example of that compromises do not always provide us with a clear answer to a certain problem.

One positive aspect of the slow moving international law is that a long period of time between thought and action almost assures that no too fast conclusions are being drawn and thereby some mistakes might be avoided. A further positive aspect of the slow developing character of international law is, in my opinion, the opposite of the negative aspect of the fast moving character of EU law. Not all decisions can be made overnight, some decisions have to develop through the years and have scientifically approval. For instance; it has been claimed that the EMSA is legislating too fast regarding their requirement of double-hull tankers instead of the old standard single-hull tankers. Nonetheless, there are also positive aspects of the fast moving character of EU law. In some cases it seems absurd to be forced to wait for international approval before a decision, which seems politically correct at that time, to be made. With the Erika and the *Prestige* accidents, the EU showed that the European, maritime environment is so important that it is worth to change an old customary law regarding places of refuge for ships in need.

Regardless of the all the positive aspects of the fast moving character of European Union laws, maritime law (in its broader sense), should due to its exceedingly international character, remain internationally regulated. Europeanization of international law in the context of shipping may be a temporary solution, however, not the winning hand everlastingly.

[272] Ibid

Supplement A

Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at

Last updated:

The United Nations Convention on the Law of the Sea	
155.	Lesotho (31 May 2007)
154.	Morocco (31 May 2007)
153.	Moldova (6 February 2007)
152.	Montenegro (23 October 2006)
151.	Niue (11 October 2006)
150.	Belarus (30 August 2006)
149.	Estonia (26 August 2005)
148.	Burkina Faso (25 January 2005)
147.	Latvia (23 December 2004)
146.	Denmark (16 November 2004)
145.	Lithuania (12 November 2003)
144.	Canada (7 November 2003)
143.	Albania (23 June 2003)
142.	Kiribati (24 February 2003)
141.	Tuvalu (9 December 2002)
140.	Qatar (9 December 2002)
139.	Armenia (9 December 2002)
138.	Hungary (5 February 2002)
137.	Madagascar (22 August 2001)
136.	Bangladesh (27 July 2001)
135.	Serbia (12 March 2001)
134.	Luxembourg (5 October 2000)
133.	Maldives (7 September 2000)
132.	Nicaragua (3 May 2000)
131.	Vanuatu (10 August 1999)
130.	Ukraine (26 July 1999)
129.	Poland (13 November 1998)
128.	Belgium (13 November 1998)
127.	Nepal (2 November 1998)
126.	Suriname (9 July 1998)
125.	Lao People's Democratic Republic (5 June 1998)
124.	European Community (1 April 1998)
123.	Gabon (11 March 1998)
122.	South Africa (23 December 1997)
121.	Portugal (3 November 1997)
120.	Benin (16 October 1997)
119.	Chile (25 August 1997)
118.	United Kingdom of Great Britain and Northern Ireland (25 July 1997)
117.	Equatorial Guinea (21 July 1997)
116.	Solomon Islands (23 June 1997)
115.	Mozambique (13 March 1997)

114.	Russian Federation (12 March 1997)
113.	Pakistan (26 February 1997)
112.	Guatemala (11 February 1997)
111.	Spain (15 January 1997)
110.	Papua New Guinea (14 January 1997)
109.	Romania (17 December 1996)
108.	Brunei Darussalam (5 November 1996)
107.	Malaysia (14 October 1996)
106.	Palau (30 September 1996)
105.	Mongolia (13 August 1996)
104.	Haiti (31 July 1996)
103.	New Zealand (19 July 1996)
102.	Mauritania (17 July 1996)
101.	Panama (1 July 1996)
100.	Netherlands (28 June 1996)
99.	Sweden (25 June 1996)
98.	Norway (24 June 1996)
97.	Ireland (21 June 1996)
96.	Finland (21 June 1996)
95.	Czech Republic (21 June 1996)
94.	Japan (20 June 1996)
93.	Algeria (11 June 1996)
92.	China (7 June 1996)
91.	Myanmar (21 May 1996)
90.	Bulgaria (15 May 1996)
89.	Slovakia (8 May 1996)
88.	Saudi Arabia (24 April 1996)
87.	France (11 April 1996)
86.	Georgia (21 March 1996)
85.	Monaco (20 March 1996)
84.	Republic of Korea (29 January 1996)
83.	Nauru (23 January 1996)
82.	Argentina (1 December 1995)
81.	Jordan (27 November 1995)
80.	Samoa (14 August 1995)
79.	Tonga (2 August 1995)
78.	Greece (21 July 1995)
77.	Austria (14 July 1995)
76.	India (29 June 1995)
75.	Slovenia (16 June 1995)
74.	Bolivia (28 April 1995)
73.	Croatia (5 April 1995)
72.	Cook Islands (15 February 1995)
71.	Italy (13 January 1995)
70.	Lebanon (5 January 1995)
69.	Sierra Leone (12 December 1994)
68.	Singapore (17 November 1994)
67.	Mauritius (4 November 1994)
66.	Germany (14 October 1994)
65.	Australia (5 October 1994)
64.	The former Yugoslav Republic of Macedonia (19 August 1994)
63.	Viet Nam (25 July 1994)
62.	Sri Lanka (19 July 1994)
61.	Comoros (21 June 1994)
60.	Bosnia and Herzegovina (12 January 1994)
59.	Guyana (16 November 1993)
58.	Barbados (12 October 1993)

57.	Honduras (5 October 1993)
56.	Saint Vincent and the Grenadines (1 October 1993)
55.	Malta (20 May 1993)
54.	Zimbabwe (24 February 1993)
53.	Saint Kitts and Nevis (7 January 1993)
52.	Uruguay (10 December 1992)
51.	Costa Rica (21 September 1992)
50.	Dominica (24 October 1991)
49.	Djibouti (8 October 1991)
48.	Seychelles (16 September 1991)
47.	Marshall Islands (9 August 1991)
46.	Micronesia (Federated States of) (29 April 1991)
45.	Grenada (25 April 1991)
44.	Angola (5 December 1990)
43.	Uganda (9 November 1990)
42.	Botswana (2 May 1990)
41.	Oman (17 August 1989)
40.	Somalia (24 July 1989)
39.	Kenya (2 March 1989)
38.	Democratic Republic of the Congo (17 February 1989)
37.	Antigua and Barbuda (2 February 1989)
36.	Brazil (22 December 1988)
35.	Cyprus (12 December 1988)
34.	Sao Tome and Principe (3 November 1987)
33.	Cape Verde (10 August 1987)
32.	Yemen (21 July 1987)
31.	Paraguay (26 September 1986)
30.	Guinea-Bissau (25 August 1986)
29.	Nigeria (14 August 1986)
28.	Kuwait (2 May 1986)
27.	Trinidad and Tobago (25 April 1986)
26.	Indonesia (3 February 1986)
25.	Cameroon (19 November 1985)
24.	United Republic of Tanzania (30 September 1985)
23.	Guinea (6 September 1985)
22.	Iraq (30 July 1985)
21.	Mali (16 July 1985)
20.	Iceland (21 June 1985)
19.	Bahrain (30 May 1985)
18.	Tunisia (24 April 1985)
17.	Togo (16 April 1985)
16.	Saint Lucia (27 March 1985)
15.	Sudan (23 January 1985)
14.	Senegal (25 October 1984)
13.	Cuba (15 August 1984)
12.	Gambia (22 May 1984)
11.	Philippines (8 May 1984)
10.	Côte d'Ivoire (26 March 1984)
9.	Egypt (26 August 1983)
8.	Belize (13 August 1983)
7.	Bahamas (29 July 1983)
6.	Ghana (7 June 1983)
5.	Namibia (18 April 1983)
4.	Jamaica (21 March 1983)
3.	Mexico (18 March 1983)
2.	Zambia (7 March 1983)
1.	Fiji (10 December 1982)

Agreement relating to the implementation of Part XI of the Convention	
131.	Brazil (25 October 2007)
130.	Uruguay (7August 2007)
129.	Lesotho (31 May 2007)
128.	Morocco (31 May 2007)
127.	Moldova (6 February 2007)
126.	Montenegro (23 October 2006)
125.	Niue (11 October 2006)
124.	Belarus (30 August 2006)
123.	Viet Nam (27 April 2006)
122.	Estonia (26 August 2005)
121.	Botswana (31 January 2005)
120.	Burkina Faso (25 January 2005)
119.	Latvia (23 December 2004)
118.	Denmark (16 November 2004)
117.	Lithuania (12 November 2003)
116.	Canada (7 November 2003)
115.	Honduras (28 July 2003)
114.	Albania (23 June 2003)
113.	Mexico (10 April 2003)
112.	Kiribati (24 February 2003)
111.	Tuvalu (9 December 2002)
110.	Qatar (9 December 2002)
109.	Armenia (9 December 2002)
108.	Cuba (17 October 2002)
107.	Cameroon (28 August 2002)
106.	Kuwait (2 August 2002)
105.	Tunisia (24 May 2002)
104.	Hungary (5 February 2002)
103.	Costa Rica (20 September 2001)
102.	Madagascar (22 August 2001)
101.	Bangladesh (27 July 2001)
100.	Luxembourg (5 October 2000)
99.	Maldives (7 September 2000)
98.	Indonesia (2 June 2000)
97.	Nicaragua (3 May 2000)
96.	Vanuatu (10 August 1999)
95.	Ukraine (26 July 1999)
94.	Poland (13 November 1998)
93.	Belgium (13 November 1998)
92.	Nepal (2 November 1998)
91.	Suriname (9 July 1998)
90.	United Republic of Tanzania (25 June 1998)
89.	Lao People's Democratic Republic (5 June 1998)

88.	European Community (1 April 1998)
87.	Gabon (11 March 1998)
86.	South Africa (23 December 1997)
85.	Portugal (3 November 1997)
84.	Benin (16 October 1997)
83.	Chile (25 August 1997)
82.	United Kingdom of Great Britain and Northern Ireland (25 July 1997)
81.	Philippines (23 July 1997)
80.	Equatorial Guinea (21 July 1997)
79.	Solomon Islands (23 June 1997)
78.	Mozambique (13 March 1997)
77.	Russian Federation (12 March 1997)
76.	Pakistan (26 February 1997)
75.	Oman (26 February 1997)
74.	Guatemala (11 February 1997)
73.	Spain (15 January 1997)
72.	Papua New Guinea (14 January 1997)
71.	Romania (17 December 1996)
70.	Brunei Darussalam (5 November 1996)
69.	Malaysia (14 October 1996)
68.	Palau (30 September 1996)
67.	Mongolia (13 August 1996)
66.	Haiti (31 July 1996)
65.	New Zealand (19 July 1996)
64.	Mauritania (17 July 1996)
63.	Panama (1 July 1996)
62.	Netherlands (28 June 1996)
61.	Malta (26 June 1996)
60.	Sweden (25 June 1996)
59.	Norway (24 June 1996)
58.	Ireland (21 June 1996)
57.	Finland (21 June 1996)
56.	Czech Republic (21 June 1996)
55.	Japan (20 June 1996)
54.	Algeria (11 June 1996)
53.	China (7 June 1996)
52.	Myanmar (21 May 1996)
51.	Bulgaria (15 May 1996)
50.	Slovakia (8 May 1996)
49.	Saudi Arabia (24 April 1996)
48.	France (11 April 1996)
47.	Georgia (21 March 1996)
46.	Monaco (20 March 1996)
45.	Republic of Korea (29 January 1996)
44.	Nauru (23 January 1996)
43.	Argentina (1 December 1995)
42.	Jordan (27 November 1995)
41.	Micronesia (Federated States of) (6 September 1995)
40.	Samoa (14 August 1995)
39.	Tonga (2 August 1995)
38.	Zimbabwe (28 July 1995)
37.	Zambia (28 July 1995)
36.	Serbia and Montenegro (28 July 1995)
35.	Uganda (28 July 1995)
34.	Trinidad and Tobago (28 July 1995)
33.	Togo (28 July 1995)
32.	Sri Lanka (28 July 1995)

31.	Nigeria (28 July 1995)
30.	Namibia (28 July 1995)
29.	Jamaica (28 July 1995)
28.	Iceland (28 July 1995)
27.	Guinea (28 July 1995)
26.	Grenada (28 July 1995)
25.	Fiji (28 July 1995)
24.	Côte d'Ivoire (28 July 1995)
23.	Barbados (28 July 1995)
22.	Bahamas (28 July 1995)
21.	Cyprus (27 July 1995)
20.	Senegal (25 July 1995)
19.	Greece (21 July 1995)
18.	Austria (14 July 1995)
17.	Paraguay (10 July 1995)
16.	India (29 June 1995)
15.	Slovenia (16 June 1995)
14.	Bolivia (28 April 1995)
13.	Croatia (5 April 1995)
12.	Cook Islands (15 February 1995)
11.	Italy (13 January 1995)
10.	Lebanon (5 January 1995)
9.	Seychelles (15 December 1994)
8.	Sierra Leone (12 December 1994)
7.	Singapore (17 November 1994)
6.	Mauritius (4 November 1994)
5.	Belize (21 October 1994)
4.	Germany (14 October 1994)
3.	Australia (5 October 1994)
2.	The former Yugoslav Republic of Macedonia (19 August 1994)
1.	Kenya (29 July 1994)

Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks	
67.	Romania (16 July 2007)
66.	Czech Republic (19 March 2007)
65.	Lithuania (1 March 2007)
64.	Latvia (5 February 2007)
63.	Bulgaria (13 December 2006)
62.	Niue (11 October 2006)
61.	Trinidad and Tobago (13 September 2006)
60.	Japan (7 August 2006)
59.	Estonia (7 August 2006)
58.	Slovenia (15 June 2006)
57.	Poland (14 March 2006)
56.	Liberia (16 September 2005)
55.	Guinea (16 September 2005)
54.	Kiribati (15 September 2005)
53.	Belize (14 July 2005)
52.	Kenya (13 July 2004)
51.	Sweden (19 December 2003)
50.	Spain (19 December 2003)
49.	Portugal (19 December 2003)
48.	Netherlands (19 December 2003)
47.	Luxembourg (19 December 2003)

46.	Italy (19 December 2003)
45.	Ireland (19 December 2003)
44.	Greece (19 December 2003)
43.	Germany (19 December 2003)
42.	France (19 December 2003)
41.	Finland (19 December 2003)
40.	Denmark (19 December 2003)
39.	Belgium (19 December 2003)
38.	Austria (19 December 2003)
37.	European Community (19 December 2003)
36.	India (19 August 2003)
35.	South Africa (14 August 2003)
34.	Marshall Islands (19 March 2003)
33.	Ukraine (27 February 2003)
32.	Cyprus (25 September 2002)
31.	United Kingdom of Great Britain and Northern Ireland (10 December 2001); (19 December 2003) For details, refer to UN Treaties.
30.	Malta (11 November 2001)
29.	Costa Rica (18 June 2001)
28.	New Zealand (18 April 2001)
27.	Barbados (22 September 2000)
26.	Brazil (8 March 2000)
25.	Australia (23 December 1999)
24.	Uruguay (10 September 1999)
23.	Canada (3 August 1999)
22.	Monaco (9 June 1999)
21.	Papua New Guinea (4 June 1999)
20.	Cook Islands (1 April 1999)
19.	Maldives (30 December 1998)
18.	Iran (Islamic Republic of) (17 April 1998)
17.	Namibia (8 April 1998)
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13.	Mauritius (25 March 1997)
12.	Iceland (14 February 1997)
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