CHAPTER 6

Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms

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Introduction

The provision of humanitarian assistance to persons in distress at sea is an ancient custom. The custom entails assistance to persons and ships in various force majeure situations in response to requests, including through the provision of a place of refuge for the distressed vessel and those on board. Beneficiaries of the custom in its various manifestations enjoy assistance and particular privileges, including exemption from certain rules. The exemptions effectively create valid defenses for what otherwise constitutes an infringement of treaty and/or national law. The place of refuge is one manifestation of the humanitarian custom and has its foundations in early maritime and trade law. While provision of various types of assistance in different force majeure situations at sea have been codified, the customary right of a vessel in distress and those on board to request refuge and the counterpart duty of the closest jurisdiction to grant a place of refuge and has not been codified, despite a recent call for the adoption of a legal instrument establishing the framework to govern obligations, modalities and procedures.

While the scope of the codified exemptions on humanitarian grounds is clear, the actual content of the custom with regard to places of refuge remains subject to uncertainty. In the contemporary context, place of refuge is defined

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as “a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment” and a ship in need of assistance “is a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard.”

The literature on customary law points to theoretical and practical difficulties in the notion of custom as a source of international law. Customary norms which have not been authoritatively ascertained may be shrouded in uncertainty. State practice may not be uniformly consistent and the custom may be observed in general terms. While there should be a common understanding of the core content of a custom, there may be divergence of opinions regarding application in a particular situation and the import of its full consequences. The customary norm may interact with or even be in competition with other norms of international law. In such situations uncertainty arises with regards to normative hierarchy and prioritization of application. One issue that arises is whether, in the case of conflict between norms whose sources are in treaty and custom respectively, may be resolved by an argument of hierarchy between sources of international law. A second issue arises when the conflict is between substantive rules of the same source (e.g., treaty rules), whether the perceived conflict may be resolved through interpretation or some notion of hierarchy as

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5 “The Court does not consider that, for a rule to be established as customary the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules...” Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ Reports 1986, at para. 186.