

THE RESPONSIBILITY OF COASTAL STATES AGAINST THE SHIP CRASH IN INTERNATIONAL STRAIT (MALACCA STRAIT)

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Abstract

Malacca Strait is globally recognized as a strait for international shipping as mentioned in UNCLOS 1982 and is under the sovereignty of three states; Indonesia, Malaysia, and Singapore. Seeing the position of Malacca Strait that becomes the most crowded lane of international trade and oil, it often raises problems in navigation. In addition, many rocks, corals and strong waves may increase the potential of ship wrecking, sinking, and crashes. In regard to the safety issue of shipping lane in Malacca Strait, it becomes the responsibility of the coastal states and thus, they should organize an integrated safety management among them, particularly in Malacca Strait. They are Indonesia, Malaysia, and Singapore. The safety assurance of shipping in Malacca Strait may increase the global economy as international oil trading and distribution is well-conducted, and finally it may increase the economy of the coastal states in Malacca Strait.

Keywords

coastal state, International strait, state's responsibility, ship crash, ocean, shipping.

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Introduction

In this current globalization era, technology never makes the role of maritime obsolete. The strategic importance of maritime remains the same as its significance for human beings in globalization era is increasingly vital along with the increasing standard of global life. This is not apart from 4 (four) characteristics of maritime itself, including as media of transportation and goods distribution, the media of information and idea dissemination, the natural sources, and the media of defense.

Indonesia is known as a maritime country as its maritime territory is $\frac{2}{3}$ of its land territory. Indonesia is one of the coastal states located in Malacca Strait which becomes the most strategic lane for shipping, both in trading and transportation. Malacca Strait is in three coastal states' sovereignty in Asia; Indonesia, Malaysia, and Singapore. Besides its strategic location that connects some oceans including Indian Ocean, South China Ocean, and Pacific Ocean, the existence of Malacca Strait shortens the trading route from Persian Gulf to East Asian region.

However, the very crowded route of Malacca Strait often raises problems in navigation. The rocks, corals, and strong waves may also increase the ship wrecking, sinking, and crashes. The utilization of science and technology which is growing so fast in the last three decades, including the shipping transportation, seems to not automatically assure the safety of shipping activities. Ship crashes may still happen although they have already been equipped by sophisticated science and technology. The crash of oil tankers may spill out millions barrels of oil into the sea, causing huge loss of assets and destroying the maritime environment.

In recent years, many passenger ship crashes around the globe have lost million people lives. One of those just happened in eastern part of Malacca Strait. It was between *USS John S. McCain* (a U.S military warship) and *Alnic MC* (a Liberian tanker) on Monday, 21st August 2017 at 05.24 am of local hour or 04.24 WIB at the position of navigation: 01°-24'.35"N/104°-24'.25"E.

Due to that crash, the US military warship, *USS John S. McCain*, got major damage and palsy on its communication system. The left side of that ship was ripped and 3-meter hole which caused flood in some decks of the ship including the machine room, communication room, and crews' bedrooms was found. Nevertheless, the Liberian tanker only got minor damage. No oil leakage was found due to the accident. 5 (five) injury crews were found and 10 (ten) US navies were lost. The SAR team, coordinated with the local authority and 3 (three) coastal states -Singapore, Indonesia, and Malaysia- tried to search the victim.

In regard to the crash in Malacca Strait, it is necessary to clearly see which parties that should be responsible to that crash. Is it the coastal states which have sovereignty or the states which ships were sailing? Therefore, some research problems finally reveal. How is the responsibility of the coastal states against the ship crash in International Strait (particularly, Malacca Strait)? And what efforts the coastal states must do to avoid any other crashes in International Strait (particularly, Malacca Strait)?

Research Method

This study used *Statute approach*, *Conceptual approach* and *Case approach*. The case approach was conducted by examining some court-filed cases related to the studied issue which had persistent legal power. In this present study, the author took the case of Corfu Channel as the sample because of its relation to the research problem on state's responsibility.

Result

Coastal States' Responsibility on Ship Crashes in International Strait (Malacca Strait)

Besides its sovereignty over the land territory, inland maritime territory, and archipelagic maritime territory, a coastal state has a bordered sea called territorial sea. As mentioned in Article 2 subsection (1) of UNCLOS 1982, both coastal state and others declaring themselves as archipelagic state are allowed to do their jurisdiction in that territory under the regulation of UNCLOS 1982.

Chapter III of UNCLOS 1982 set the strait for international shipping. Article 37 of UNCLOS 1982 mentioned that the strait for international shipping was the area that connected one part of the open sea or exclusive economic zone to another part of the open sea or exclusive economic zone. The rights of shipping for foreign ships in international strait involve the *right of innocent passage* and *right of transit passage* which each of them has their own characteristics.

The right of innocent passage for foreign ships in international strait is generally set under the Article 45 of UNCLOS 1982, that the provisions of *right of innocent passage* in territorial ocean is also applied to the straits of international shipping. It is a must for each ship having shipping tracks to obey the coastal states' rules in order to implement *the right of innocent passage*. The act sets the regulation of safety, contamination, sea tracks, and traffic scheme for shipping.

However, article 38 of UNCLOS 1982 sets that a shipping regime called *transit passage* is applied for qualified straits. *Transit passage* refers to the implementation of freedom on shipping and flight for continual, direct, and express transit between one part of the open sea or exclusive economic zone and the another part of the open sea or exclusive economic zone. Nevertheless, it is still possible for parties to go through the strait with aims to enter or leave from a country surrounding that strait with one condition; they must obey all the entry requirement of that country. Article 34 of UNCLOS 1982 mentioned that the strait for international shipping was under the sovereignty of coastal states. However, the tracks in that area should still obey the provision of this part.

Rights and Obligations of Coastal States

The coastal states have some rights as follow.

- a. Coastal states may establish a regulation related to *right of innocent passage* that went through their ocean territory, including the issue of shipping, contamination, fishery, etc. (Article 21 of UNCLOS 1982)
- b. Coastal states have rights to do action in their ocean territory to avoid any *right of default passage*. (Article 25 subsection (1) of UNCLOS 1982)

- c. Coastal states have Rights of sovereignty for exploration and exploitation, natural resource conservation and management purposes. (Article 77 of UNCLOS 1982)
- d. Coastal states have jurisdiction on the establishment and utilization of man-made islands, installation and building, naval scientific research, ocean environment protection and conservation. (Article 80 of UNCLOS 1982)
- e. Coastal states have rights to exploit the land beneath the continental substratum through tunnel excavation, without considering the depth of water above the land and/or under that continental substratum. (Article 85 of UNCLOS 1982)

However, they also have some obligations, as follow.

- a. Coastal states are not allowed to block any foreign ships with *right of innocent passage* (Article 24 subsection [1] of UNCLOS 1982)
- b. Coastal states must publish the regulations related to *the right of innocent passage* to inform other countries (Article 22 subsection [3] of UNCLOS 1982)
- c. Coastal states must clearly and publicly inform any dangers that relate to navigation (Article 24 subsection [2] of UNCLOS 1982)
- d. Coastal states must provide any basic needs for shipping such as lighthouses or rescue aids for ships that need help.
- e. Coastal states are not allowed to take charge from foreign ships that went through their territory. (Article 26 subsection [1] of UNCLOS 1982)

The reason behind the states' responsibility on international law is that no state may fully get their rights without considering others' rights. Any state violating others' rights should do 'reparation'. If these international obligations are violated, making others disadvantageous, state responsibility reveals.

Literally, international laws distinguish the term *responsibility* from *liability*. *Responsibility* refers to what was legally charged toward a party, while *liability* is the obligation to compensate or fix any damage that happened. This definition

of *responsibility* is not always leading to the obligation of giving compensation or fixing any damage.

As no international law has clearly set about states responsibility, the United Nation requested to *International Law Commission (ILC)* to set a formulation of regulation about state responsibility. In 2001, ILC established a final *Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DASR) 2001*.

Article 1 of DASR 2001, mentioned, "*Every internationally wrongful act of a State entails the international responsibility of that State*". This asserts that state responsibility was the principle in international law that regulated the emergence of state responsibility to another state. Thus, it notes that state responsibility was a state's obligation to do what it was supposed to do by that state. In addition, state responsibility emerges as the consequence of the principle of state equality and sovereignty in international law. This principle may give right for the violated state to ask for reparation.

Following Malcolm N. Shaw, there were 3 (three) elements a state should consider to get responsibility:

- a. International obligation that charges a state to ask their responsibility must be found.
- b. A violation or negligence that violates an international obligation and causes responsibility for the state; and
- c. The damage or loss due to the violation and/or negligence by the state.

Implicitly, Shaw argued that those three components should be met to sue a state for its responsibility. If one of those three elements failed to meet, the state would be free from any responsibility.

In case of ship crash between a warship *USS John McCain* and tanker *Alnic MC*, none of the three components to charge the coastal states in Malacca Strait for responsibility was not found. In fact, it found that the captain was neglected on

shipping navigation which made the crash happened, causing major damage on the ship and some victims. As the negligence was from the ship itself, and the captain had met the three elements of being charged by responsibility, it was proven that the coastal states in Malacca Strait (Indonesia, Malaysia, and Singapore) were all free from any charge of responsibility.

Some state responsibilities are as follow.

a. *Delictual liability*

This liability was born from any fault or negligence of a state to foreigners in that state or another state. Activities that may make this responsibility emerge involve those across nations. Every state must regulate and monitor any activities in their territory that may cross the borders of the state and cause losses to another state, both public and civil. The principle of responsibility applied for this activity depends on the type of that activity. If the loss is considerably dangerous, the principle of responsibility applied is absolute responsibility. However, if the activity is considerably ordinary, the state responsibility may depend on the negligence or intention of that act.

b. *Contractual liability*

Based on international law, a state must also be responsible due to the violation of agreement. This kind of responsibility may happen to a state when it violated a contract or agreement. The responsible state is charged to do full reparation on both material and moral loss due to its action.

c. *Concessional liability*

Concessional agreement between a state and foreign corporate is known as *Clausula Alvo*. It sets that the recipient of the concession relinquishes its governmental security in the dispute that exists due to the agreement and that dispute should be filed to the national court of the *concessioner* and they must obey the national law of that *concessioner*.

d. *Liability of expropriation*

It is the revocation of personal possession right for public interest along with the provision of compensation.

e. *Liability due to International crime*

International crime refers to all actions against international law. It derives from the violation of an international obligation on fundamental interest protection, and it is considered as crime.

In regard to the type of state responsibility against an international crime, it is known with the term *reparation*. Article 34 of DASR 2001 mentioned that *Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter*. This article sets that three types of *reparation* consist of *restitution, compensation, and satisfaction* which may stand independently or in compound.

a. *Restitution*

Article 35 of DASR 2001 mentioned that a state that was responsible to an international crime was charged to make restitution. It is rebuilding the existing situation before the crime happened. Following Malcolm N Shaw, *restitution* aimed to bring back the situation as like before the international crime happened.

b. *Compensation*

Compensation is paying some money for loss suffered. It includes any loss that has happened, both direct and non-speculative loss. Article 36 of DASR 2001 mentioned that the state that was responsible to an international crime was charged to compensate the loss that happened due to their action, as long as the loss was not repaired through restitution.

c. *Satisfaction*

Satisfaction is repaying losses by other satisfaction but money, such as individual or national prestige. It may be through an official apology, official

admission of guilty, a promise not to do the same thing, and by sentencing the offenders as mentioned in Article 37 of DASR 2001.

Absolving a State from any Liability of International Law

In particular conditions, a violation on an international agreement or obligation may not cause a state responsible to what they did. In general those conditions are as follow.

- a. The action is conducted under the consent of the violated state. The common instance for this issue is distributing armies to another state on behalf of their request.
- b. A violation is put aside when it is considered as a legal attempt based on international law due to another state's international violation.
- c. *Force majeure*. It has long been seen as the reason to absolve a state from having any liability of an international agreement. Article 23 of DASR 2001 mentioned that a state could avoid any fault if it was due to inevitable power or unpredictable incident or, in material aspect, it was impossible for a state to fulfill the international responsibility.
- d. *State of necessity*. Article 33 of DASR 2001 defines this term as the only condition to protect the state's interest from huge danger, as long as it shall not threaten another state's interest due to that condition.
- e. *Self-defense*. A state may be absolved from any illegal liability if the action they did was for self-defense. However, it does not mean that every self-defense was legal, but only those that Charter of the United Nation has considered legal.

The Attempt of Coastal States to Avoid Ship Crashes in International Strait (Malacca Strait)

International law to avoid any crashes in ocean (PIMTL) is one legal instrument by IMO to improve the safety of international shipping, both in ocean territory of a state and the open sea (outside the states' territory). Collision Regulation (later called COLREG) 1972 is a resolution of IMO A. 464 (XII) about the

international regulation that every ship, captain, and crew member should obey to avoid any ship crash.

Human error has been considered as one main factor causing ship crashes since years ago in shipping world. The crew of a ship have actually avoided such crashes if they were responsible of conducting navigation on their ship. Performing their tasks, a captain should thoroughly understand and implement COLREG 1972, as well as the navigation crew as the co-captain whose responsibility was conducting navigation carefully and make sure that the monitoring was efficient in order to avoid any crash. This COLREG 1972 was crucial for every navigator. Navigating a ship may be easy for them as it is their routine. However, it will be very dangerous if they have no idea about the traffic regulation of shipping.

Trilateral Agreement among Indonesia, Malaysia, and Singapore in International Strait

Every coastal state has actually cooperated to each other since the beginning of 1970s through some trilateral consultations. A trilateral agreement of coastal states to regulate Malacca Strait, and the basic formation of crucial cooperation, *Tripartite Technical Experts Group (TTEG)*, was also organized since 1975. The initial form of this coordination shows the government commitment on shipping safety and maritime environment security in Malacca Strait, as well as actively participating in international shipping to realize the *safe, secure and efficient shipping on clean oceans*.

Based on the maritime law UNCLOS 1982, those three coastal states are active to make negotiation on security organizations, in addition to creating TTEG and initialing coordination for navigation and environmental safety in Malacca Strait in the form of companionship that created new committee and agreement such as Cooperative mechanism derived from an exclusive meeting about the security of Malacca Strait, organized in 2005 in Singapore, and was attended by the three coastal states' Ministers of Foreign Affairs

- 1) Tripartite Technical Experts Group (TTEG)

TTEG consists of some experts of maritime administration from the three coastal states having an annual meeting to collaborate and discuss about some crucial issues in order to carry on the navigation security and maritime environmental protection, as well as other traffic issues in Malacca Strait.

In addition to those three coastal states, the annual meeting of TTEG is currently attended by other countries that used Malacca Strait for shipping, IMO, industrial businessmen of shipping, and Asian Shipping Forum (ASF).

2) *Cooperative Mechanism*

It is a cooperative mechanism for coastal states and any users of the strait in order to strengthen the criminal, navigation, and environmental security in Malacca Strait. Cooperative mechanism consists of three pillars, as follow.

a) *Cooperation Forum (CF)*

This forum makes the cooperation more concrete and practical among the coastal states, the users of strait, shipping industry, and other stakeholders to maintain the strait's navigation and environmental security.

b) *Project Coordination Committee (PCC)*

PCC that consists of *littoral states* and project sponsor may monitor the coordination of project implementation in Malacca Strait. PCC leads the project sponsor to contribute to the project planning and implementation in thorough manner. In addition to PCC, the coastal states that give direct contribution and sponsor for several projects have options to make a cooperative project implementation team or a consent mechanism for technical management and project implementation.

c) *Aids to Navigation Fund (ANF)*

In order to make sure the availability of the long-term financing and sustainable facility for navigation maintenance and security in Malacca Strait, it needs an allocated fund called *Aids to Navigation Fund (ANF)*. It provides facilities for all users of the strait to give their financial contribution for aids maintenance.

The Attempt of Coastal States to Avoid Crashes

1) MALSINDO operation and *Eyes in the Sky (EiS)*

MALSINDO is a cooperative operation of the three coastal states involving the maritime patrol coordination from each of the three coastal states. *Eyes in the Sky* is a maritime air patrol by coastal states. This agreement allows the patrol ships of every participant to cross another state's territorial maritime to catch any ships having maritime crime. However, they are not allowed to shoot or do any military action.

2) *Military Training Area (MTA)* and *Defence Cooperation Agreement (DCA)*

These agreements are between Indonesia and Singapore and are a bilateral military cooperation. These allow Singapore military to use the territory of Indonesia as the location for their military training. Similarly, Indonesia has support for their military simulator training, including technical and academic training.

3) Constructing and Establishing *Traffic Separation Scheme (TSS)* for Shipping in Malacca Strait

The application of TSS aims to avoid any shipping crash as the last frequency of crash in Malacca Strait was high. The implementation of TSS in Malacca Strait is necessary to reveal the safety of shipping, avoid any possible accident and protect the maritime environment in Malacca Strait.

4) The development of *Vessel Traffic System (VTS)* in Malacca Strait combines navigation and communication systems into one integrated system that will be available to monitor the VTS automatically and provide warning and broadcasting service. It aims to see/monitor the movement of ships and provide navigation/weather information in particular and restricted shipping areas.

Conclusion

1. The Coastal states with international straits have responsibility to make sure that no crash happens in their strait. When a crash happens in Malacca

Strait, the coastal states around that strait are responsible to that accident. However, it can be absolved if the shipping ships were found guilty as they did not obey the regulation applied in Malacca Strait. In case of crash between military ship *USS John McCain* and tanker *Alnic MC* in Malacca Strait. The criteria of state responsibility were not found in the part of coastal states. Conversely, the international violation was found in the part of the ship captain as they had wrong navigation. Thus, the coastal states were absolved from any international responsibility due to the crash in their territorial maritime. The state responsibility is charged to the state which ships had the negligence and it could be in the form of restitution, compensation, and/or satisfaction.

2. The attempt of coastal states to avoid any shipping crash in Malacca Strait is through trilateral cooperation, committee organization, and routine patrol from the three coastal states, as well as announcing *Traffic Separation Scheme* (TSS) to every ship that crosses Malacca Strait and developing the *Vessel Traffic System* (VTS).

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