

حق اللجوء للسفينة في حالة الطوارئ من منظور قانون البحار

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المستخلص

في هذا البحث حاول الباحث تحليل المشاكل الأساسية حول الأماكن التي يمكن للسفن اللجوء إليها في حالات الطوارئ، وما إذا كانت الدولة الساحلية ملزمة بإيواء السفينة في التي تواجه حالة طارئة في عرض البحر. حيث ان الاتفاقيات الدولية لا تقدم إجابات سليمة وواضحة على التزام الدولة الساحلية بإيواء السفن المعرضة للخطر، وإن كان يمكن تفسير التوصية في بعض الاتفاقيات الدولية بتقديم المساعدة وفقاً لنظام المسؤولية والتعويض الدولي الحالي حيث قد تكون الدولة الساحلية مسؤولة عن قرار الإهمال. وقد يكون للدولة الساحلية الحق في الحصانة لأن قرارها تترتب عليه آثار كبيرة في عمليات الإنقاذ مثل التلوث الناتج عن الاضرار التي تصيب بعض السفن والتي تؤدي الى تلوث المياه الإقليمية.

الكلمات المفتاحية: حقوق اللجوء ، الطوارئ ، قانون البحار.

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RIGHTS OF REFUGE FOR THE SHIP IN AN EMERGENCY FROM THE PERSPECTIVE OF LAW OF THE SEA

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ABSTRACT

In this paper attempts have been made to analyze fundamental problems on places of refuge, whether the coastal state is obliged to accommodate the ship in distress. The international conventions do not give sound answers to the coastal State's obligation to accommodate ships in distress, albeit recommending doing so can be interpreted under some conventions. Under the current international liability and compensation regime, the coastal State may be held liable for their negligent decision. To encourage the entry, the coastal State may be entitled to immunity as its decision has great implications with salvage operations.

Keywords: Rights of Refuge, Emergency , Law of the Sea.

INTRODUCTION

Maritime incidents have been accompanying the shipping industry since its earliest time. The safety of a ship and its crew may be imperiled as the result of the external factors such as the stress of weather, force majeure, or the internal factors such as the occurrence of structure or equipment failure, or more frequently the human errors. There are various reasons that may render a ship in distress. Maritime accidents may occur anywhere at any time. And in such emergent situations, it is imperative for the ship to seek and enter a place of refuge to save the ship and rescue the crew.

THE DEFINITION OF PLACES OF REFUGE

Pursuant to IMO Guidelines on places of refuge for ships in need of assistance, a place of refuge is defined 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” (Bradaric, 2009). This definition may be construed in a very broad perception. A seaport may be one option but not necessarily the most appropriate under particular circumstances. Madden referred a ‘place of refuge’ as “a sheltered area of coastline where a ship in distress may seek shelter from the wind and swell” (Madden D. a., 2003).

Every organizations or individuals may give their various definitions on places of refuge. Despite these concepts may be expressed in different terms, the essence is the same: a place to provide sufficient shelter and protection so that further actions can be taken to mitigate the threat or consequences of a casualty. When a ship is in distress, what it needs is access to relatively sheltered waters so that operations may be performed to make the ship and its cargoes safe with minimum risk to either the ship, the coastal State, the environment or the salvors. There is no absolute need for accommodation in a port. Moreover, sheltered waters may provide much better guarantees to limit overall risks than ports.

THE COASTAL STATE'S OBLIGATION TO ACCOMMODATE SHIPS IN DISTRESS

the severe consequences of pollution damage following these maritime accidents, where the access to the places of refuge is denied by coastal States, awaken and astonish the maritime community. Do the coastal States have the right to refuse the entry of a foreign ship in distress and simply turn it away from their waters? Is there any legal basis to oblige the coastal States to offer a place of refuge to a ship in distress? In this section, the related international conventions are discussed to examine whether the obligation to offer a place of refuge is clearly set up. Then, it is analyzed whether the right of entry of ships in distress can provide the legal basis to oblige the coastal State to accommodate a ship in distress.

THE ANALYSIS ON THE EXISTING INTERNATIONAL CONVENTIONS

United Nations Convention on the Law of the Sea

United Nations Convention on the Law of the Sea (1982) (UNCLOS) is referred to as the constitution of the oceans which sets up the fundamental rights and obligations of States. The analysis of relevant provisions of UNCLOS may be instructive on whether ships in distress have the right of entry into places of refuge.

Geographically places of refuge are usually located in the territorial sea or the internal waters. Access to such places implicates the passage through the territorial sea or internal waters. Subject to UNCLOS, ships enjoy the right of innocent passage through the territorial sea. Article 18 defines "passage" as "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility." and requires such passage to be continuous and expeditious but it does include stopping and anchoring if "incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships in danger or distress". Article 19 states: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Since these indices are highly

subjective, an attempt is made to enhance objectivity by providing a list of activities, the engagement in which would render passage non-innocent. It is arguable that the open-ended formulation suggests that what constitutes innocent passage is at once objective and subjective. And the wilful and serious pollution is not deemed innocent. This provision does not mean that unintentional pollution is innocent under all circumstances. The list of acts in Article 19 is unlimited so that serious pollution which is not willful may be called not innocent as well.

It is debatable that ships in distress have the right of entry on the basis of innocent passage. First, the purpose of the passage is to navigate through the territorial sea more than anything else. And passage should be a not-stop and quick sailing through the territory sea. If places of refuge are in the territorial sea, the entry will stop there and not merely pass through it. Second, stopping and anchoring may be part of the passage if necessary, by force majeure or distress. However, ship masters or salvors usually seek access voluntarily. Murray notes that “the exercise of the right of entry implies that ships are forced into the territorial sea such that not entering the territorial sea is impossible. (Yang, 2006)” Another rationale is that ships seeking places of refuge, particularly vessels carrying large volumes of crude oil or hazardous cargo, may risk coastal environments and threaten the safety of local populations from actual or potential pollution spillage or explosion. Under these circumstances passage may not be construed as innocent.

Moreover the right of innocent passage is not absolute and limited by the coastal State’s right to adopt laws and regulations relating to it under Article 21, in respect of the conservation and preservation of marine environment and its living resources and the prevention, reduction and control of pollution. And foreign ships exercising the right of innocent passage are obliged to comply with the laws and regulations of the coastal state. Article 25 provides that, in case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. This presumably implies that the coastal state may prevent ships that not meet the conditions from passing through the territorial sea, or prohibit the entry of the territorial sea.

Under Article 98, the coastal State has the obligation to establish, operate and maintain an adequate and effective search and rescue service. And both the SOLAS Convention (IMO, 2004) and the SAR Convention (IMO, 1998) further articulate the requirements on the rescue of persons in distress at sea. But beyond the humanitarian duty to assist, none of the Conventions stipulates any provision on what is to be done with the ship in cases of force majeure or distress such as the accommodation of such ships (Tan, 2005).

On the opposite side, States have an obligation to protect and preserve the marine environment in pursuance of Part XII of UNCLOS. Under Article 194, states shall take all necessary measures to prevent, reduce and control pollution of the marine environment from any source. The maritime leper, the disabled laden tankers, will manifestly impose pollution risks or actually have caused pollution damage to the marine environment. Refusal of entry may perceptibly be regarded by some States as the necessary measures to prevent or mitigate the pollution damage. Article 194 also requires States shall ensure that activities under their jurisdiction or control not to cause pollution damage to other states and their environment, and that pollution does not spread beyond the areas where they exercise sovereign rights. Subject to Article 195, in taking these measures, states shall not transfer directly or indirectly damage or hazards from one area to another or transform one type of pollution to another. If the access to places of refuge is denied by coastal state, there is little room to debate that damage or hazards of pollution are transferred from one area to another. Article 199 requires states to develop and promote contingency plans. Article 221 confirms that states have the right to take measures beyond the territorial sea proportionate to the actual or threatened pollution damage to protect their coastline upon a maritime casualty which may reasonably be expected to result in major harmful consequences. It is conceivable that such a measure can be taken in the territorial sea where the coastal State has sovereignty.

The International Convention on Salvage

In the Salvage Convention (IMO, 1989), Article 9 provides that coastal states have the right to take measure to protect its coastline from pollution or the threat of pollution in

event of a maritime casualty, including the right to give directions in relation to salvage operations. The directions may include both the permission and the refusal of a place of refuge. Under certain circumstances, where, for example, there are imminent and severe threats to their marine environment, coastal states may refuse the salvor's request of access. Article 11 requires that states should consider the need for cooperation between salvors, other interested parties and public authorities whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors.

Under these provisions in such a way of wording, it cannot be concluded that the Salvage Convention is intended to confirm the right of access, or to deny it. At most, it can be merely interpreted as a recommendation to grant a place of refuge. 'In any case, an agreement between salvor and salvaged to make for a particular port should not be to the detriment of third parties or the coastal State'(IMO, 2001a). Additionally, during the preparatory works, different stakeholders attempted to include the obligation of coastal states to offer places of refuge in the Convention, but the effort failed. As a private law convention, it was not the proper instrument to public law duties of states. The Convention only contains "a rather empty exhortation" with regard to offering places of refuge (Gold, 1989). 'The result is an uncertain mix of private and public law provisions within the Salvage Convention, and the public law provisions are, unfortunately, vague and equivocal' (Ramos, 2017).

The International Convention on Oil Pollution Preparedness, Response and Cooperation

Parties to this Convention (IMO, 1990) shall undertake, individually or jointly, to take all appropriate measures to prepare for and respond to an oil pollution incident. Article 3, 4, 5 and 6 set up requirements on oil pollution emergency plans, reporting procedures, actions on receiving an oil pollution report and the establishment of a national system for responding promptly and effectively to oil pollution incidents, including a national contingency plan (Chircop, 2002).

This Convention does not explicitly mention the admission of ships in distress to a place of refuge, but it does envisage the development by States of oil pollution

response contingency plans, and some States have such plans which expressly provide for the possibility of admission to their ports or havens of ships in distress which may prove to threaten pollution' (Ramos, "Places of Refuge for Ships in Need of Assistance. Looking for the Best Response.", 2017). But taking into account places of refuge does not necessarily mean that the State has to admit the entry. The entry may be one option of measures on the comprehensive assessment of relevant factors and risks involved.

The International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties

The Convention (IMO, 1969) affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty which may reasonably be expected to result in major harmful consequences. And the measures taken by the coastal state under the Intervention Convention must be proportionate to the actual or threatened damage. When a coastal state orders a damaged ship to be towed or set on fire, the danger imposed by such ship must be exceptionally categorized into the grave and imminent one. Ships seeking entry do not necessarily pose such risk (Michel, 2005).

Summary

From the above analysis, the relevant international conventions do not expressly give any answer to the question of whether coastal states have the duty to allow ships in distress entry to places of refuge. Regarding this question, these conventions are very ambiguous and equivocal to varying degrees, even contradictory and inconsistent by different ways of interpretation. It is irrational to directly conclude neither that coastal states have the duties to allow ships in distress entry, nor that they have the rights to refuse entry. But some conventions such as the Salvage Convention and the OPRC Convention indirectly recommend the accommodation of ships in distress.

THE SEPARATION OF THE RESCUE OF CREW AND THE ASSISTANCE TO SHIPS

Under the customary right of entry, the coastal State is obliged to offer places of refuge. Such a positive obligation needs a greater degree of generality and consistency. However, at least 17 ships in distress have been repeatedly refused entry by many coastal States since the 1970s (Yang H. , 2006). The practise adopted by States in recent years is not in conformity with the customary law. The frequent refusal of entry may at least imply that the general practice of States has changed and the conviction that there is a legal duty to grant entry has been abandoned by States (Dempsey, 1980).

Previously, to rescue the crew, the ship usually had to be granted the place of refuge. The two affairs were entangled with each other. But the capabilities of rescuing crew on board a ship in distress indeed have made a significant progress world widely during recent several decades, especially with the advent of the helicopter. At least it is very likely to rescue the crew quickly and relatively safely by the coastal States, either individually or jointly, without entering a port or sheltered water. The entry into ports of ships is not indispensable for the rescue of the crew. The modern rescue technology makes it possible the separation of the rescue of the crew and the assistance to ships and cargoes. Once the rescue of the crew has been successfully carried out, the obligation of assistance to ship crew is seemingly discharged by the coastal State. This opinion is confirmed by the Toledo case. In 1995, the M.V. Toledo carrying potash was refused refuge, had to be beached in the UK, and eventually towed out and scuttled after the crew were airlifted. And the Irish High Court of Admiralty rejected the claim against its government (Sage-Fuller, 2013).

In effect, the court prioritized the humanitarian dimension of the right of refuge, divorcing self-preservation interests of those on board from the safety of the ship and cargo. By doing so, this led the court to believe that once the public authorities discharged their duty by airlifting the crew, they were able to then further prioritize the perceived interests of the coastal state (i.e., lack of suitable refuge areas, threat to

gas platforms and the possibility of bunker oil pollution) when deciding on whatever other action may be taken in relation to the ship and cargo (Goldsmith, 2005).

CONCLUSION

No matter how the technology will be advanced, and the safety standard and management improved, the maritime accident cannot be totally eliminated. In reality it is likely that as long as there is shipping, then there will be ships in distress, and there will need a safe haven to dock in.

With the unilateral or regional activities taken by some countries and organizations, the international legal framework warrants careful analysis and discussion to clarify and deficiencies.

In this paper attempts have been made to analyze fundamental problem on places of refuge, whether the coastal state is obliged to accommodate the ship in distress. The international conventions do not give sound answers to the coastal State's obligation to accommodate ships in distress, albeit recommending doing so can be interpreted under some conventions.

Under the current international liability and compensation regime, the coastal State may be held liable for their negligent decision. To encourage the entry, the coastal State may be entitled to immunity as its decision has great implications with salvage operation. To establish an ad hoc international convention on places of refuge is the best choice to solve the complex and wide-range problems on places of refuge. It is necessary and feasible to elaborate such a convention on the basis of several reasons. In the convention, the fundamental ingredients should be encompassed.

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