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A “Ticking Bomb” Named FSO Safer: Environmental Impact and Flag State Responsibility under the View of International Law of the Sea

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Abstract

Oil spill is known as one of many common environmental disasters. Many oil spill disasters have cost countries and companies around the world huge losses and most importantly severe environmental damage that is not recoverable. Currently, one of the Yemeni ships named FSO Safer is trapped and stranded around 5 miles from the outer coast of Yemen. The ship is carrying around 1 million barrels of crude oil in its storage. Unfortunately, the ship is currently in poor condition and unstable, which may cause the largest supertanker oil spill disaster in history, even worse than the Exxon Valdez disaster. Countries around the world, including UN Members, are looking for an immediate alternative to mitigate the disaster, as the Yemeni Government is currently in an armed conflict with the Houthi and has a very limited resource. This paper will analyze which country will be affected by this imminent peril, who shall be responsible for the disaster, and whether an exceptional circumstance that surrounds the Yemen Government may discharge them for their responsibility as a state. This paper found that this imminent disaster will affect most of the countries in the Red Sea area. The responsibility to deal with this imminent disaster is attached to all the affected countries under UNCLOS 1982, including Yemen, without any exception. An international movement initiated by the UN and Yemen Government must act immediately to prevent the disaster.

Keywords: State Responsibility, Vessel-source marine pollution, Environmental Impact

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A. INTRODUCTION

Since the occurrence of the first industrial revolution, marked by the creation of the first steam engine by an English technocrat and engineer named James Watt, the utilization of natural resources as a fuel to operate modern machinery has been increasing. Coal and oil (various types of oil, including crude oil, kerosene, etc.) have become primary choices for industries and households in operating their modern equipment and energy source. Therefore, it implicates the use of modern mega transportation, for instance, it increases the use and mobilization of ships which carry those commodities to be distributed to every part of the world.² However, of course, the mobilization of those vehicles, particularly ships, is not without obstacles and incidents, and surely by the time goes by, there are incidents caused by negligence that pollutes the environment, in this context marine environment.

Entering the 19th century, when global society entered the second industrial revolution, engineers and scientists at that time managed to build the first oil supertanker ship named “Nobel’s Zoroaster” Zoroaster was created by Swiss engineers in 1878 to carry and distribute crude oil. It was made by an oil company, “Nobel Brothers Oil Production Corporation,” and became one of the most successful oil tanker ships (crude oil carriers) in its era.³ With the success of Nobel Zoroaster, oil companies around the world, started to follow the path taken by Nobel Brothers Oil Production Corporation, owning their own supertanker ship, by building it or buying it from ships

builder, the primary purpose is to ease their distribution and to cut distribution cost and time.⁴

The operation of oil supertankers in its development is not without “side effects” (in a negative connotation); these ships are mainly using fossil fuel, leaving waste and pollution sediment in the water. Also they also carry crude oil, which if it is intentionally or accidentally spilled to the water will severely pollute the water, which under international law commonly known as “Vessel-Source Marine Pollution.” In the 20th century until the 21st century, there have been several critical and notable supertanker incident, such as the SS Torrey Canyon incident in 1967, the sinking of Amoco Cadiz Ship in 1978, and the most devastating vessel source oil spill incident, of at least until now, the Exxon-Valdez Incident in 1989.⁵ Those incidents that involve the wreckage and sink of the supertanker mentioned above ships that carry tons of gallons of crude oil have caused massive and severe damage to marine ecosystem and environment. These incidents are commonly known as “oil spill” incidents.

The evidence of how sever an oil spill incident can be, may be seen in one of the most well-known incidents, which is the Exxon Valdez incident in 1989. The Exxon-Valdez ship spilled around 250.000 barrels of crude oil and thus, the spilled oil was submerged in the water causing the death of approximately 250.000

² Jaime Rodrigo, “Oil Tankers Safety: Legal Aspects,” Universitat Politècnica de Catalunya, 2010, p. 21

³ Tarana Mirzayeva, “The Role of Azerbaijan Oil in Nobel Brothers Life”, *European Scientific Journal*, Vol.2, 2013, p. 31

⁴ Craig J. Capon, “The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea,” *Washington International Law Journal*, Vol. 7, No. 1, 1998, p. 123

⁵ Peter Tillman, “The Strait of Oil Pollution in the Malacca Strait: Arguing for A Broad Interpretation of the United Nations Convention on the Law of the Sea”, *Pacific Rim Law and Policy Journal*, Vol. 7, No. 1, 1998, p. 133

seabirds, 2.800 sea otters, 300 seals and at least 22 orca whales. Also, this Exxon-Valdez incident has negatively affected the livelihood of the coastal society, the livelihood of Alaskan that lives at the coast of Prince William Sound area are fishing and processing seafood, this oil spill incident has contaminated fishes, crabs, and other harvestable living in that territory and therefore, fishermen cannot go fishing for a long time. Waters around Prince William Sound Area were closed for commercial fishing activity, for several years.⁶ This article aims to review and discuss an undergoing event similar to the abovementioned incidents. Presently, 5 miles from the outer coast of Yemen, there is a stranded and trapped Yemen Flagged supertanker named FSO Safer. This ship is classified as an Ultra Large Crude Carrier, much bigger than Exxon Valdez Ships and, of course able to carry more loads of crude oil in its flank.⁷ Currently, the ship is in an unstable condition and experiences a major hull on its body. This ship is owned by a Yemeni state-owned Yemeni oil and gas company, the Yemen Oil and Gas Corporation. The trapped and stranded ship is currently carrying 1 million barrels of crude oil, which predictably may cause major marine environmental damage when the oil is spilled, and the ship is wrecked.⁸ Currently, Yemen is facing an internal armed conflict, and as the ship is stranded and trapped in the area where the Houthi (Yemen Rebellion Group) is in control, the government and international movement hardly reach it to do evacuation. If the ship is not evacuated as soon as possible,

the oil spill may worsen the humanitarian crisis in Yemen and of course severely damage the marine environment in the territory of the Red sea.⁹

Through this article, the author aims to break down and describe the responsibility of flag state and international society to prevent and mitigate the wreck of FSO Safer before it causes the most critical oil spill incident in the history of humankind by considering relevant rules under international law. Further, whether the Yemeni Government's obligation to deal with this issue can be ruled out in certain emergency situations.

B. CLASSIFYING THE WRECK OF FSO SAFER OIL SUPERTANKER UNDER INTERNATIONAL LAW OF THE SEA

As has been mentioned previously in preserving the sustainability and continuation of living marine resources, the responsibility falls on “the shoulder” of international society and flag states. However, there are obligations that shall entail certain conditions of an object to be triggered, by that context, the high possibility of FSO Safer sunken and shipwrecked. Thus, to identify the role of coastal states, flag states and international society in dealing with the FSO Safer situation, we need to observe whether, currently, FSO Safer, can be considered as a shipwreck or not. For the record, FSO Safer has not been operating or has been inactive for approximately 7 (seven) years, particularly since the Yemen Conflict arose in 2015, crews and ship caretakers were pulled out by the ship owner (Company) just before the Houthi took over the area.¹⁰

By the end of 2015, the maintenance and reparation of FSO Safer which usually be done

⁶ Shamseer Mambra, “The Complete Story of the Exxon Valdez Oil Spill”, *Marine Insight*, 23 November 2020, <https://www.marineinsight.com/maritime-history/the-complete-story-of-the-exxon-valdez-oil-spill/>, Accessed on 6 June 2022

⁷ Marcos A Orellana, “FSO Safer: The Ageing Oil Tanker is A Time Bomb on Yemen’s Coast”, *Al Jazeera Environment News*, 10 May 2022, <https://www.aljazeera.com/opinions/2022/5/10/fso-safer-the-ageing-oil-tanker-is-a-time-bomb-on-yemens-coast>, Accessed on 7 June 2022

⁸ *Ibid.*

⁹ Waseem Ahmad Qureshi, “The Crisis in Yemen: Armed Conflict and International Law”, *North Carolina Journal of International Law*, Vol. 45, No. 1, 2020, p. 248

¹⁰ United Nations, “FSO Safer: Operation Plan”, April 2022, p. 13

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routinely by the appointed personnel was ceased by the Government of Yemen, considering that FSO Safer ship is the asset of Yemen Oil and Gas Corporation, a Yemeni state owned entity. Based on the recent report, the latest condition of FSO Safer is very poor.¹¹ There are many erosions on the ship's body, especially on the ship's hull, where a million of crude oil is stored, also they systems (electrical or mechanical system) inside the ship can no longer work properly, meaning that these factors do increase the risk of vessel source oil spill to happen in near future and the total havoc of FSO Safer.¹²

The above mentioned facts and circumstances have urged international society and states to act immediately and promptly to deal with the FSO Safer situation, however, who should be held liable in the first place? The author has discovered several ways to solve it. First and foremost, it shall be determined whether FSO Safer can be considered a shipwreck or not. To define what shipwreck is under international law of the sea, both UNCLOS 1982 and MARPOL Convention do not contain any single definition. Only the Nairobi Convention on the Removal of Wrecks 2007 ("**Nairobi Convention** ") contains such a definition.¹³

Nairobi Convention defines "shipwrecked" as *a sunken or stranded ship; or any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or any thing= that is lost at sea from a ship and that is*

*stranded, sunken or adrift at sea; or a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.*¹⁴ Such a particular provision or setting under the Nairobi Convention applies for shipwrecks that are located within a coastal state's exclusive economic zone, and in a territory of such a coastal state, by conforming with several designated requirements under article 4 of the convention. Nevertheless, Nairobi Convention does promulgate an absolute requirement for a ship to be considered as wrecked under the convention, which is the existence of maritime casualty. Maritime casualty under this convention shall be understood as the collision of vessels, stranding, or other incident of navigation, or the occurrence on board a vessel or external to it, resulting in material damage or imminent threat of material damage to a vessel or the cargo it carries.¹⁵

This particular provision under the Nairobi Convention, in the author's opinion, has answered the question relating to the current condition of FSO Safer. We may come to the conclusion that the FSO Safer can be classified as wrecked, although the ship has not yet been completely wrecked or submerged, and there is still a small part of the ship that may operate properly. By looking at its critical and deteriorating condition, which has not received any reparation and maintenance since 2015, FSO Safer can be considered as a stranded ship. Moreover the fact that FSO Safer has suffered major erosion to its hull, which increases the potential of the explosion that may happen in the near future, makes the current situation of FSO Safer a serious and imminent threat to the sustainability of the marine environment. Also, the ongoing conflict between the Houthis and

¹¹ Christina Lu, "Yemen is Sitting on a Time Bomb Bigger than the Exxon Valdez", *Foreign Policy Report*, 10 May 2022, <https://foreignpolicy.com/2022/05/10/yemen-oil-tanker-spill-fso-safer-disaster/>, Accessed on 9 June 2022

¹² Ahmed Kulaib, "A Rusting Oil Tanker Off the Coast of Yemen Is an Environmental Catastrophe Waiting to Happen. Can Anyone Prevent It?", *Time Online Magazine*, 14 May 2021, <https://time.com/6048436/fso-safer-yemen-oil-tanker-disaster/>, Accessed on 12 June 2022

¹³ Nairobi International Convention on the Removal of Wrecks, 2007 ("**Nairobi Convention**")

¹⁴ Article 1 (4) Nairobi Convention

¹⁵ Article 1 (3) Nairobi Convention

the Government of Yemen has turned FSO Safer into a maritime casualty and, therefore, may be classified as a shipwreck.

C. YEMEN'S TWOFOLD OBLIGATION AND RESPONSIBILITY UNDER INTERNATIONAL LAW OF THE SEA

In analyzing the current undergoing and critical incidents happening to FSO Safer, the author highlights the issue, particularly on a hypothetical scenario if there is an oil spill because of an unintentional leak or explosion coming from the hull of FSO Safer. What the author means is if there is an oil spill caused by the current critical condition of FSO Safer, we need to bear in mind that such an oil spill shall be considered as vessel-source pollution in the form of accidental discharge (pollution) and not an operational discharge. However, regardless of whether the pollution is discharged accidentally or intentionally, it still has a major impact on the sustainability of the marine environment.

Article 2 of the International Convention for the Prevention of Pollution from Ships (**"MARPOL"**) provides a definition of a harmful substance and discharge.¹⁶ Harmful substance must be understood as containment or substance which if it is released from a ship into the ocean, may jeopardize the health and quality of human, any kind of living organism including harvestable marine resources such as fish, crab, seaweed, and any other kind of living resources which may result in the intrusion of sea or ocean utilization.¹⁷ On the other hand, "discharge", shall be understood as an action taken in relation with such harmful material substance, which includes oil spilling process. Under the MARPOL Convention, there is no single provision that declares oil spilling as an

action is against the applicable law, both generally or in a specific way, because principally, the existence of MARPOL convention is to provide a uniform standard or threshold on controlling pollution in the ocean, not to declare which action is considered as a violation or compliance. But on the other side of the coin, MARPOL does not also provide a sunken ship or shipwrecked incident as an excuse or justification of an oil spilling action.¹⁸ Under the MARPOL Convention regime, any single action, process or incident is measured with a certain threshold or standard, as for discharge, whatever the form is, either oil leak incident, oil disposal or spill, again, under the regime of MARPOL, is sometimes something that is unpredictable.¹⁹

Therefore, if we take a look at Annex I of the MARPOL Convention, a unification of regulation concerning the prevention of oil pollution, including the control of vessel source oil discharge, including oil discharge or disposal in certain special areas, is established.²⁰ Under regulation 13G of the MARPOL Convention, it also regulated a provision regarding the prevention of oil based pollution in the event of a super tanker ship accident, including standard regarding a maximum size of freight or cargo that can be carried by an oil super tanker ship.²¹ Nevertheless, in the author's view, the FSO Safer incident, a ship that is currently trapped and stranded with critical and unstable situation, is not merely a technical negligence, the main reason why this ship is stranded and trapped cannot be separated from the fact that currently in Yemen, there is an undergoing humanitarian

¹⁶ Article 1, International Convention for the Prevention of Pollution from Ships 1973/1978 (**"MARPOL"**)

¹⁷ Article 2, International Convention for the Prevention of Pollution from Ships 1973/1978 (**"MARPOL"**)

¹⁸ Alan Khee – Jin Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge: Cambridge University Press, 2005, p.207.

¹⁹ *Ibid.*

²⁰ *Special Area are certain areas spread around the world, which in accordance with MARPOL 73/78, absolutely, ships are not allowed to discharge any kind of oil or pollution, for whatever reason, including accidental or operational reason.*

²¹ Regulation 13G, Annex I of MARPOL concerning Regulations for the Prevention of Pollution by Oil, 1983.

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crisis and non-international armed conflict, when has become the hardest obstacle, especially for Yemen Government and Yemen Oil and Gas Corporation as the ship owner and flag state authority, to reach and neutralize the condition of FSO Safer. Therefore, there shall be a collective responsibility here and the whole incident cannot be bestowed only to Yemen Oil and Gas Corporation as the ship owner. Yemen, as the coastal state and flag state, must take a role in squaring away the issue of an oil leak or spill possibility.

Therefore, we must first formulate the legal relationship between the FSO Safer incident and Yemen as a responsible state (both as the flag and coastal state) under international law of the sea. FSO Safer, as has been mentioned above, is a Yemeni flagged oil supertanker owned by a Yemeni state-owned enterprise. The Yemen Oil and Gas Corporation is currently trapped in the waters of Yemen. Yemen shall be held responsible in both ways, either as a flag state or a coastal state. Referring to the previous paragraphs and prior discussions, we have included the Nairobi Convention as an instrument to classify whether FSO Safer is a wreck/sunken ship or not, meaning that if FSO Safer is considered as wreck or sunken, there has to be an implication in the form of international obligations that the Yemeni Government must fulfill in taking care of the FSO Safer situation under within its jurisdiction. However, it is unfortunate that Yemen has not yet become a member state of the Nairobi Convention on the Removal of Wrecks 2007.²²

However, fortunately, Yemen, since 1987, has been a member state of the United Nations Convention on the Law of the Sea 1982 (“UNCLOS 1982”), although, at least until now, Yemen has not yet become a member state of

International Convention for the Prevention of Pollution from Ships (“**MARPOL Convention**”), many scholars on their view moderately deplore the fact that Yemen is not a member of both Nairobi and MARPOL convention, as both of these conventions regulate sophisticated, comprehensive and relevant provisions to this particular incident of FSO Safer.²³ Nevertheless, UNCLOS 1982 has regulated more general provisions and is quite interpretable by the parties, and therefore also relevant in identifying Yemen’s responsibility and international obligations as a coastal and flag state in dealing with the FSO Safer Situation. In addition, UNCLOS 1982 also provides provisions regarding international organization and society obligation in dealing with the same matter.

As UNCLOS 1982 is the only relevant and related instrument ratified by Yemen, UNCLOS 1982 is supposed to put Yemen as the “avant-garde” to deal with the FSO Safer situation for its status both as the flag and coastal state. This has been shown under article 194 of the UNCLOS 1982, where it is clearly stated that (i) State Party, either individually or collectively, must take appropriate and necessary steps in accordance with UNCLOS 1982 to prevent and control pollution towards the marine environment from any source, with any means within its capability as a state; and (ii) State Party, must take any appropriate measure to ensure that an activity within its jurisdiction or control, will not cause any harmful pollution to its neighboring states its environment. Based on this article, we may conclude that Yemen, as a flag state, is obliged to take immediate action.

UNCLOS 1982 stipulates explicitly that any necessary actions that must be taken by member states in preventing, reducing, and

²² *Nairobi Convention has been signed or ratified by more than 30 states. However, Yemen is not one of them.*

²³ *MARPOL Convention has been signed or ratified by more than 156 states, however Yemen is not one of them.*

controlling pollution also apply to pollution in the configuration of unintentional discharges, which is relevant to the current situation of FSO Safer, where the supertanker will probably spill millions of barrels of crude oil unintentionally for its unstable physical condition. However, under UNCLOS, the term “states” also covers member states of UNCLOS. Thus it is not only the coastal or flag state but also any other states that may collectively involve the flag state or coastal state in troubleshooting environmental issues.²⁴

The fact that FSO Safer is currently abandoned, stranded, and trapped at the north site of the outermost coast of Yemen means that the oil supertanker is located in the Red Sea area. Quoting a scientific projection made by Stanford University Bio Medic Department, United States of America, within four weeks, if the FSO Safer explodes and spills the crude oil into the sea, the whole area of the Red Sea will be severely contaminated, including states with sea adjacent and bordering to the Red Sea such as Djibouti, Eritrea, and Saudi Arabia.²⁵ Conclusively, it cannot be denied, as Yemen has the closest connection and relationship with FSO Safer, and FSO Safer is currently stranded within its jurisdiction. Yemen shall be the first country to be held responsible for the deliverance of FSO Safer. However, the marine environmental issue is not a regular issue that may be dealt with responsibility by one state. A world is united by a single ocean, it is only a matter of jurisdictions and sovereignty of states that divide it. Thus, a marine environmental disaster in one state may possibly affect another state's environmental sustainability, because all states are stakeholders of a single sea. Yemen, with all of its incapability, may not be able to deal with this situation alone as for the crisis it

currently suffers. However UNCLOS 1982 may have the antidote to the such obstacle.

D. DELIVERANCE OF FSO SAFER: NOTEWORTHY ROLE OF INTERNATIONAL AND REGIONAL COOPERATION

As mentioned by the previous paragraph, where under UNCLOS 1982, states and international organizations are encouraged to move collectively in preventing, reducing, and controlling marine environmental problems, such encouragement may also be applied in dealing with the FSO Safer situation. Currently, as reported by the International Maritime Organization (“IMO”), the main obstacle in neutralizing the FSO Safer situation is the financial incapability of the Yemeni Government. However, the Yemen Government has had several interactions with other states and international organizations to overcome this challenge. This interaction is already corresponding with what is ordered by the UNCLOS 1982, wherein the event one of the member states (a state that faces an environmental crisis), in this case, Yemen, is aware of an imminent marine environmental catastrophe caused by pollution, that particular state must immediately notify a competent international organization, and therefore, IMO and the UN is bound to the obligation, in its capacity and indeed capability, to work together in preventing damage that may occur if there is no deliverance towards the FSO Safer situation.²⁶

In practice, the latest information about the FSO Situation reveals that IMO and UN have collectively conducted a joint operation called “pledging.” In a circular letter issued by the IMO, by conforming to a deliverance plan arranged the UN, IMO has sent an invitation to its member states to join a joint financing scheme set by the United Nations to finance and

²⁴ Article 194 UNCLOS 1982

²⁵ Benjamin Q. Huynh, “Public Health Impacts of an Imminent Red Sea Oil Spill”, *Nature Sustainability Journal*, Vol. 4, No.3, 2021, p. 1086

²⁶ Article 198, UNCLOS 1982

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support the crude oil transfer and removal from the hull of FSO Safer, to several smaller vessels and ship it safer storage. The joint financing scheme is needed as this crude oil removal and transfer action may cost approximately 145 million US dollars.²⁷ A conference discussing this particular plan was held virtually on May 11th, 2022.

On the other side, because of the ongoing internal armed conflict in Yemen, United Nations has been hands-on in negotiation with Mohammed Al-Houthi, the leader of the Houthi rebellion group, to provide access for the authority to neutralize the situation of FSO Safer, which is written in a memorandum of understanding between Houthi and the UN.²⁸ Therefore, if we take a look at those actions and efforts taken by the international society and organizations, the support of the international organization and society does play a major role in assisting Yemen to neutralize the situation of FSO safer, where it has to be admitted, the part of Yemen Government is not that significant compared to the support and effort given by International organizations and society, or at least, Yemen Government did take action however not solving the main problem and obstacles.

However, we also need to consider the current situation in Yemen, and it is understandable that the Government of Yemen is concentrating their focus on the ongoing conflict and humanitarian crisis. Hence it means the Government of Yemen is not necessarily incapable.

In consequence, by looking to the spirit of regional and international cooperation under UNCLOS 1982, the Government of Yemen must notify and negotiate an immediate cooperation

with Red Sea countries governments, especially Saudi Arabia, its political alliance, to take appropriate and immediate action measures. By historically considering an oil spill incident caused by a collision at Malaka Strait in 1971 where Indonesia, Singapore, and Malaysia established cooperation and coordination forum called as “Tripartite Technical Experts Group (TTEG),” with a function and purpose to ensure the safety of navigation and prevent polluting activities in Malaka Strait, this is one of many evidences that regional cooperation is one of the most effective ways in safeguarding the sustainability of the marine environment.²⁹ In a wider scope, in the North Atlantic, they have OSPAR (Oil Spill Response Action Plan) with a function and purpose to control and reduce the risk of an oil spill in the North Atlantic area.³⁰ We also cannot forget about the establishment of GIWACAF (Global Initiative for Central and Southern Africa), where 22 states in Africa establish a cooperation and integration forum to increase the quality of an oil spill response task force of each member state.

Therefore, in the author’s view, although the United Nations and the IMO have been hands on with the situation of FSO Safer so far, a rescue or neutralizing plan arranged by the United Nations is a ‘way making’ plan for states that may possibly affected, if the oil spill incident happen shortly. By opening the access for the authority to enter the Houthi-controlled territory, where FSO safer is currently located, within its capability, the Government of Yemen is expected to at least negotiate a cooperation with the possibly affected states, particularly with Eritrea and Saudi Arabia, as the adjacent state and bordering state with Yemen, to

²⁷ Article 199, UNCLOS 1982

²⁸ International Maritime Organization, Circular Letter No. 4561, dated 18 May 2022

²⁹ Rosnani Ibrahim, “International/Regional Cooperation to Oil Spill Response in the Straits of Malacca: An Overview”, Department of Environment Malaysia, 2009, p.4

³⁰ National University of Singapore, Conference Executive Report on Regional Cooperation for the Protection of the Marine Environment, 2019, p.2

support the crude oil removal and transfer from the hull of FSO Safer, of course with establishing a joint or separate oil spill response task force, by establishing a multilateral agreement among countries in the Red Sea area. By doing so, even though Yemen is still not a safe place to store the remaining crude oil, the other involved states may store it in their territory temporarily. One of them is Eritrea, a state located very near to the current location of FSO Safer, technological and financial constraints may also be supported in the framework of such cooperation, for instance, by requesting technical and financial assistance from Saudi Arabia. Therefore, the deliverance of FSO Safer may be done promptly.³¹

Currently, the “pledging” plan initiated by the UN, IMO, USA and Netherlands is still ongoing, and as for now, the amount of collected funds is still far from the estimated target, which is at least 80 million USD. Saudi Arabia has pledged 10 million US dollars, the USA also pledged 10 Million dollars, and UN Coordinator in Yemen, David Gressly, had only managed to collect around 5 million USD.³² This is pretty unfortunate because the condition of FSO Safer is getting worse and more unstable each day, it is predicted that if the FSO Safer is not neutralized at least until September 2022, the first oil leak will happen. Therefore, a more concrete and straightforward action shall be done promptly by the stakeholders including international organizations. If necessary, the United Nations Security Council may issue a UNSC Resolution to bind UN member states to be involved in this particular deliverance plan.

E. WAIVING STATE RESPONSIBILITY: PRECLUDING WRONGFULNESS IN YEMENI GOVERNMENT OMISSION IN THE DELIVERANCE OF FSO SAFER

As has been described in the previous paragraphs and discussions that currently a ticking bomb called FSO Safer is ready to cause a marine environmental catastrophe in Yemen, on the other hand Yemen is also in an undergoing humanitarian crisis and internal armed conflict which have worsened the state situation in the first place. In the discussion among activists and international organizations, such particular conflict is considered as one of the most influencing factors to Yemen’s incapability to participate in FSO Safer deliverance action.³³ It cannot be denied that the ongoing conflict has majorly drained Yemen’s financial capability and human resource.

It has been acknowledged that Yemen is a party to the United Nations Convention on the Law of the Sea (UNCLOS) 1982 since 1987, and therefore bound to rights and obligation within it. Article 194 of the UNCLOS stipulates that UNCLOS 1982’s member states shall take, either individually or jointly as appropriate, all measure consistent with UNCLOS 1982 that are necessary to prevent, reduce and control pollution of the marine environment, including from vessel-source pollution, using the best practicable means at their disposal and by their capabilities, and shall harmonize their policies in this connection.³⁴ What comes into the author’s thought is, based on the current factual situation that UN and IMO are still gathering fund to implement the FSO Plan and Yemen Government has not done anything significant about the situation, if the decaying oil supertanker is actually leaking or spilling its oil

³¹ Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2030.

³² David Gressly, “Yemen: UN Launches Crowdfunding Campaign to Head Off Decaying Oil Tanker Threat”, *UN News*, 13 June 2022, <https://news.un.org/en/story/2022/06/1120302>, accessed on 15 July 2022.

³³ International Maritime Organization, “FSO Safer Oil Spill Risk: Addressing The Threat.”, <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FSO-SAFER-oil-spill-risk.aspx>, accessed on 18 July 2022.

³⁴ Article 194, UNCLOS 1982

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and contaminate the whole Red Sea Area, can Yemen, for the consideration of the undergoing crisis and internal conflict, be precluded from the obligation under article 194 of UNCLOS? Or maybe the performance of such an obligation might be suspended.

By virtue of such an idea, it is important to first assess what are the conditions that might preclude the wrongfulness of Yemen’s non-compliance to article 194 of UNCLOS 1982 or applying a lower threshold of obligation performance under international law.

1. Yemen’s Current Situation: Preclusion of Wrongfulness?

The war in Yemen is getting more violent each day, according to the United Nations, it is estimated more than 350.000 lives have been casualties of the undergoing conflict.³⁵ Also, for this conflict, Yemen is suffering wider spread hunger, 60% of its citizens are suffering hunger and lack of healthcare and unsafe water.³⁶ This particular civil war has cost approximately 14 billion USD (7 billion USD for damage and economic losses; another 7,3 billion USD for production and service delivery failure).³⁷ The previous facts only include destroyed and damaged buildings and infrastructure, but does not include buildings, ports or other types of infrastructure controlled by the Houthi Rebellion group.

As we know that Yemen is located adjacent and bordering to the Red Sea, as well as Djibouti, Eritrea, Saudi Arabia, and Somalia, if the oil spill actually happens and negatively affects those states, in Author’s view, Red Sea states will collectively ask for reparation to Yemen, for the FSO Safer is in both ways, under their jurisdiction, and of the legal basis that might be used to ask for reparation is that Yemen does not comply with an obligation imposed by article 194 of the UNCLOS 1982.

However, by standing on the side of the Yemeni Government, the most identifiable defense that might be used against such an argument or claim is by applying the basis of wrongfulness, preclusion (justification or excuses) or suspension of obligation. There might be another way such as arguing limited resources or subjective capability; however it will be addressed in further discussion.

Under the ILC Article on Responsibility of States for Internationally Wrongful Acts (“**ARSIWA**”), Internationally Wrongful Acts may also be committed by omission.³⁸ The term “omission” in this context shall be understood as knowing but not acting. For example, according to the *Diplomatic and Consular Staff case* in the ICJ, the inaction of the Iranian government to take appropriate steps is considered an omission.³⁹ Failure to act but knowing the obligation imposed by International Law does entail state responsibility.

However, like other branches of law, international law also acknowledges the

³⁵ BBC, “Yemen: Why is the War Getting More Violent?”, *BBC Yemen Crisis Report*, <https://www.bbc.com/news/world-middle-east-29319423>, 22 March 2022, accessed on 9 August 2022.

³⁶ <https://www.reuters.com/article/us-yemen-security-damages-idUSKCN10R2B7>

³⁷ Yara Bayoumy, “Exclusive: Civil war Costs Yemen \$14 Billion in Damage and Economic Losses – Report”, *Reuters Editor’s Picks*, <https://www.reuters.com/article/us-yemen-security-damages-idUSKCN10R2B7>, 17 August 2016, Accessed on, 18 August 2022.

³⁸ Article 2, International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (“**ARSIWA**”).

³⁹ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment [1980], I.C.J. Reports, Para. 63-67.

concept of justifications and excuses, or the preclusion of wrongfulness. There might be an internationally wrongful act committed by a state; however, in certain circumstances, the wrongfulness of such actions might be precluded.

Under ARSIWA in chapter V, there are several circumstances precluding wrongfulness, which are consent, self-defense, countermeasures in respect of an internationally wrongful act, force majeure, distress, and necessity. However, mirroring the current situation in Yemen, excuses that might be available for the Yemeni Government for their incomppliance with article 194 of the UNCLOS 1982 are between necessity and force majeure.

First, necessity is an exceptional circumstance that, under international law, may be imposed as a fundamental basis to preclude the wrongfulness of an internationally wrongful act. Necessity or state of necessity shall be understood as wrongful action taken by a state to safeguard its essential interest against a grave and imminent peril.⁴⁰ One of many examples of the imposition of necessity as the basis of wrongfulness preclusion can be seen in several landmark cases, such as the *Gabcikovo-Nagymaros Project Case*, where Slovakia terminate a treaty with Hungary based on necessity as Slovakia's vital environmental interest is endangered by project construction.⁴¹ Also, in *Fisheries Jurisdiction Case (Spain v. Canada)*, the government of Canada as the respondent in ICJ proceedings, argued that the enactment of the Coastal Fisheries Protection act 1994 restricted foreign fishermen from fishing in Canadian waters for a certain period based

on necessity principle to prevent the destruction of fish stocks.⁴²

In Yemen's current situation and its relation to the deliverance of FSO Safer, what has been done by the Yemeni Government shall be classified as omission, or in other words, a failure to take action. The concept of imposing necessity as a ground to preclude the wrongfulness of an internationally wrongful act shall be understood simply as why a state commits the such act and what might be the direct negative implication towards the aliens or its counterpart in a treaty.

Presently, the situation in Yemen, which is an armed conflict and humanitarian crisis, might majorly affect the Government's capability both in a financial sense and resource context to participate in the deliverance of the decaying FSO Safer. However, it does not necessarily establish a direct connection between the breach of article 194 of the UNCLOS 1982 and the undergoing catastrophe in Yemen. It is known that the Yemeni government is strangled in both ways, but the concept of necessity is unsuitable for applying in the present situation. Both in *Gabcikovo – Nagymaros Project Case* and *Fisheries Jurisdiction Case*, Slovakia and Canada committed a legal action that violated their obligation under a particular treaty, or simply, the basis of the wrongful act is that particular action is necessary not because of incapability of other certain obligation. Slovakia terminated a treaty because of the project foreseeably will cause a grave and imminent peril towards is essential environmental interest, and Canada enacted Coastal Fisheries Protection Act 1994 on the

⁴⁰ Article 25, ARSIWA

⁴¹ *Gabcikovo – Nagymaros Project (Hungary/Slovakia)*, Judgment [1997] I.C.J. Reports, Para. 51-52.

⁴² *Fisheries Jurisdiction (Spain v. Canada)*, Judgment [1998] I.C.J. Reports, para. 64-65.

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reason of preventing fish stock destruction.

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In the current situation of FSO Safer, an internationally wrongful act committed in a form of omission, this must be underlined by Yemen is because of its incapability of fulfilling a such obligation, because of the internal catastrophe happen in Yemen, they do not have enough resource and capability to carry out its obligation to disembarass the FSO Safer situation. Further, article 194 emphasizes a state's capability to take measures to prevent, reduce, and control pollution. Indeed, the term “capabilities” under this article might be interpreted broadly. However, by circumstance and context, the necessity principle is not quite suitable to be used as a defense towards the omission committed.

As the necessity principle to preclude the wrongfulness of Yemen's omission is not quite suitable and tends to be vague, another form of preclusion is also offered by international law, which is the principle of *force majeure*. Under ARSIWA, *force majeure* is defined as the occurrence of an irresistible force or an unforeseen event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation, in other words, the impossibility of performance because of a certain unforeseeable event.

Hence three elements must be satisfied by the current circumstances for the Yemeni Government to use it as a defense of its wrongful act, which are (i) unforeseen events, (ii) beyond the control of Yemen, and (iii) making it materially impossible in the circumstances to perform the obligation. In the current situation in Yemen, the

prolonged civil war (non-international armed conflict) between the Houthi and the legitimate government is arguably an unforeseen event. As unforeseen shall be understood as something that incidentally appears before the eyes of the government without any preparation to handle it. However, the civil war has been carried out since 2011, so it has been 11 years since this article was written. However, if we circumscribe our view on the civil war, additional obstacles might be considered unforeseen. The reason why the Yemen Government is still unable to reach the location of FSO Safer is because the oil supertanker is stranded and trapped in the territory controlled by the Houthis, which is probably not expected by the Government.⁴⁴ However, by relying to the tribunal in *Rainbow Warrior Arbitration*, *force majeure* sets to high a bar, circumstance rendering difficulties to perform an obligation does not constitute a *force majeure* event, or the words, *force majeure* is strictly concern about no other way a state may fulfill their international obligation. However, this statement is still in the debate between scholars, it is a matter of how a judicial body interprets the circumstances that might support the imposition of *force majeure*.⁴⁵ The second element, such a triggering event, must be beyond the control of the state concerned. The term “beyond the control” meaning after conducting due diligence, such a triggering event is still unexpected and beyond the projection. For example, in a peaceful and investment friendly state,

⁴³ *Ibid.*

⁴⁴ Holm Akhdar, “Yemen: \$33 million pledged to address decaying oil tanker threat”, *Climate and Environment*, <https://news.un.org/en/story/2022/05/1117982>, 11 May 2022, Accessed on 21 August 2022.

⁴⁵ *Rainbow Warrior Case (New Zealand v. France)*, Award [1986], UNRIIA, para. 78-80.

suddenly occur a civil war which has never happened for millenniums, this can be considered as a triggering event beyond the control of the state concerned after conducting deep due diligence, meaning the state has never been ready for such an event.⁴⁶ Again, in the present Yemen situation, the conflict has been carried out for eight years, meaning preventing measures to circumscribe the conflict should have been conducted by the government, and Yemen should have been rethinking another alternative to stay in compliance with its international obligation. FSO Safer has not been stranded that long in Yemen's territorial sea.⁴⁷

Lastly, the impossibility of performance, is something that, by the current circumstance, is believed to happen, as the Yemeni Government has not yet conducted any concrete action, and that is why the current discussion is between the omission and impossibility of performing the obligation under article 194. However, the last element of *force majeure* is the implication of the last 2 key elements, it has to be narrowly connected with the previous two elements. The last 2 elements are doubtfully fulfilled in the present circumstance, as the conflict has been carried out for quite a long time, which is 11 years. However, there are a vital event in the Yemen conflict that might be correlative and significant to be used as a relevant supporting factor to apply *force majeure* as a basis of preclusion of wrongfulness, and

most importantly, it is up to the interpretation of the situation by the judicial body, if the oil spill actually happens and other states are requesting for reparation before the International Court of Justice.

2. Conceding and Lowering the Threshold of Obligation Performance by the Yemeni Government.

Like it or not, based on the latest factual facts released by several prominent media that cover and redact the situation of FSO Safer reveal that no significant effort has been made by the Yemeni Government.⁴⁸ This fact raises questions in the author's thought, whether the Yemeni Government is intentionally pulling themselves back from this situation or they do not have even a small capability to deal with the FSO Safer because of the undergoing internal catastrophe.

As in the previous paragraph, by hypothetically standing as the lawyer of the Yemeni Government in the situation of settling a dispute before the ICJ, none of the situation and principles to preclude the wrongfulness of Yemen's omission is quite suitable and might convince the judge to release them from obligation and responsibility to provide reparation.

However, by looking from a broader perspective not only at the application of the Law of the Sea but rather international law as a whole, there might be a way for the Yemeni Government to be released at least partially for their obligation under Part XII of the UNCLOS 1982.

Article 194 of UNCLOS 1982 strictly highlights the term "in accordance with their capabilities" to prevent, reduce and control marine environment pollution. A

⁴⁶ Federica Paddeu, "Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law, *Cambridge Legal Studies Research Paper Series*, No.18, 2017, p. 9.

⁴⁷ Marcus Montgomery, "A Timeline of the Yemen Crisis, from the 1990s to the Present", *Arab Center Washington DC*, <https://arabcenterdc.org/resource/a-timeline-of-the-yemen-crisis-from-the-1990s-to-the-present/>, 19 February 2021, accessed on 22 August 2022.

⁴⁸ United Nations, FSO Safer: Operation Plan, April 2022, p.4.

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similar term is also accentuated by the provision under Article 199 of UNCLOS 1982, using the term “in accordance with their capabilities to arrange a contingency against pollution.” These particular terms of “in accordance with their capabilities” may be interpreted as implying proportionality between effort and resource of the State concerned.

In international law practice, several arbitral tribunals consider a state's capability and resource in fulfilling certain international obligations in exceptional circumstances. The first case that takes into account the proportionality between capability and resources in fulfilling international obligation is the tribunal in *Pantechniki v. Albania*, where the tribunal provides an implicit explanation by raising the question of whether the poor country in a poor situation be held accountable equally with great and rich country towards the exact character of international obligation.⁴⁹ The sole arbitrator in that case finally concluded that Albanian inability was because they were powerless to fulfill that particular obligation which refers to a lack of resources.

The second case, which is also in line with the award rendered in the *Pantechniki case*, was the case of *Ampal – American Corp v. Egypt*, where the tribunal considered the adequacy or capability of the state to respond to its international obligation must be assessed in light of the scale of the disorder and the extent of its resources.⁵⁰ In *Ampal v. Egypt award*, Egypt as the

respondent, was not held liable for failing to provide physical protection to Ampal's investment and assets. Instead, they were only held liable for expropriating their property.⁵¹ However, it must be kept in mind that to be released from their obligation by arguing the basis mentioned earlier, the State concerned must have tried to provide their best effort to fulfill that particular international obligation. It is up to the court or tribunal to decide whether such best effort is in line with the capability-resource consideration.⁵²

As mentioned earlier, it is recognized that the theorem does not naturally come from International Law of the Sea or even UNCLOS 1982. However, that particular theorem and practice was consistently acknowledged in the field of general international law and, in the author's view, worth to be argued by any legal representative.

What makes it hard in the current situation of FSO Safer, the Yemeni Government stays idle and not providing any significant effort. Therefore, if I were their lawyer, it would be pretty challenging to gather evidence that can relieve them from allegations and claims.

However, in the author's view, at least by relying on the latest factual situation, this basis might be the most suitable theorem to be raised by Yemen's legal representative before the court. Article 194, by its character, does not imply a strict obligation and standard to be complied with by the state concerned. The term “in accordance

⁴⁹ Pantechniki S.A. Contractors & Engineers v Albania, Award, ICSID Case No. ARB/07/21 (30 July 2009) Para.76

⁵⁰ Ampal-American Israel Corp., Egi-Fund Investors LLC, Egi-Series Investments LLC and BSS-EMG Investors LLC v Egypt, Decision on Liability and Heads of Loss, ICSID Case No. ARB/12/11 (21 February 2017) Para.244.

⁵¹ James Crawford, *State Responsibility: The General Part*, Cambridge: University Press, 2013, p.261.

⁵² LESI S.p.A. and ASTALDI S.p.A. v Algeria, Sentence, ICSID Case No. ARB/05/3 (12 November 2008) Para.153.

with their capabilities” means the law admits inequality of capabilities between states and, therefore, also offers an alternative to jointly cooperating in preserving the sustainability of the marine environment. However, in light of this interpretation, the state concerned has a burden of proof to present its limited capability. The easiest way to prove it is by making its best effort to deal with the current situation. According to FSO Safer Operation Plan, a handbook prepared by the UN and IMO, Yemen Government as the stakeholder and the one who should be responsible for squaring away this future catastrophe, was only occur in the discussion without any clarity or clarification of their inability which reinforces the public understanding that the Government of Yemen has not yet done anything significant, compared its neighboring state such as Saudi Arabia, who has pledged millions of dollar to support the operation plan. However, the ship is not stranded in its jurisdiction and might be jeopardizing its marine environment.

F. CONCLUSION AND RECOMMENDATION

Marine environmental issues must be taken seriously by all states in the world, especially for a country that is suffering a humanitarian crisis. Geographically, Yemen owns fish stocks located very close to where the decaying FSO Safer is currently stranded. Therefore, it is very vital to the livelihood of its citizens. Therefore, as one of UNCLOS 1982 member states, Yemen and the surrounding states especially have a primary responsibility to square away the situation immediately, as if the oil leak or spill actually happens in the foreseeable future, the impact might cause a more severe humanitarian crisis, not only in Yemen but also other affected states,

especially those who are located in the Red Sea area.

Therefore, by this article, we encourage Yemen, with the support of the UN, IMO, and its alliance, to take an immediate step to deal with the situation and to support the operation plan prepared by the UN and IMO to be done immediately. Also, specifically for Yemen, to take immediate initiative, in any significant form, to prove their best effort and concern about this issue despite any obstacles and limitations they currently endure, as we cannot know what will happen in the near future, however by providing their best effort to fulfill their international obligation, they might have “cushions” to avoiding heavy claim and order to provide immediate reparation, if they fail to square away and neutralize the situation of FSO Safer in the foreseeable future.

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