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Criminal jurisdiction for ship collision and marine pollution in high seas—Focused on the 2015 judgement on M/V Ernest Hemingway case

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ABSTRACT
On 16 January 2015, about 10 miles east of Busan, South Korea, Liberian container carrier, M/V Ernest Hemingway collided with Korean fishing boat, Geunyang-ho, and Geunyang-ho sank and two Korean nationals perished and about 600 liters of fuel oil on board Geunyang-ho split into the sea. M/V Ernest Hemingway’s crew escaped from the site without carrying out duties of rescue after the collision. The Busan District Prosecutor’s Office arrested and prosecuted M/V Hemingway’s second officer and an able seaman, Philippine nationals, for the criminal facts subject to judgement, violation of the Act on Aggravated Punishment, etc., of Specific Crimes, Professional Negligence resulting in ship sinking, and violation of the Marine Environment Management Act. Busan District Court pleaded guilty and sentenced fine for the violation of the Marine Environment Management Act, on the other hand, sentenced dismissal of public prosecution for the violation of the Act on Aggravated Punishment, etc., of Specific Crimes and professional negligence resulting in ship sinking due to lack of jurisdiction based on UNCLOS Article 97(1). Looking at the rulings and the annotations on this case, the main issues were whether South Korea has jurisdiction on ship collision incidents on the high seas as the state of the alleged victim’s nationality, and whether South Korea may exercise criminal jurisdiction over marine pollution caused by a ship collision on the high seas. This paper examines the decisions by the Courts and the main issues related with the case. Here is a summary of what has been reviewed in this paper: First, UNCLOS Article 97(1) is applicable for all criminal penalties of the captain and crew members concerning ship collision and other navigational accidents, without consideration on the intention, and can also be applied to intentions or attempts of illegal activities. Therefore, it can be applied to the events causing loss of life or serious injury (professional negligence resulting in deaths, running away after professional negligence resulting in deaths, etc.) and physical damage (professional negligence resulting in ship sinking, or ship damage, etc.) that were caused by ship collision, allowing priority over criminal jurisdiction exercised by the flag state and the state of the alleged offender’s nationality. Second, it is appropriate to interpret that the exclusive jurisdiction of the flag state on high seas as having a superior position against the jurisdiction of other states, not as having jurisdiction that excludes all other states. Therefore, in the M/V Hemingway’s case, it would be reasonable for our country to exercise complementary jurisdiction if the flag state and the state of the alleged offender’s nationality did not exercise criminal jurisdiction.

Third, marine pollution accidents occurring in the high seas (EEZ of South Korea) should apply the relevant provisions of UNCLOS Part 12 regardless of the cause. The coastal state can institute proceedings when there are cases of marine pollution occurring in territorial seas or EEZ of the state and occurring outside of its EEZ but causing or being likely to cause damages to the state. For the lawsuit regarding the pollution accidents that occurred outside of national territories shall be suspended if the flag state institute proceedings on the same allegation within six months of the commencement of the lawsuit, and when the flag state ends the lawsuit, the suspended lawsuit is also automatically terminated. South Korea is eligible to file a lawsuit on the M/V Hemingway’s case, and because the flag state did not file a suit within six months, the judgement of the South Korean Court is considered to be valid. Fourth, while the Marine Environment Management Act of South Korea prescribes its jurisdiction based on the flag state of the violated vessel and location of the spills, UNCLOS prescribes coastal state’s jurisdiction based on the severity of pollution damage and compliance on procedures. Therefore, some supplements on related laws need to be made.

Introduction
On 16 January 2015, about 10 miles east of Busan, South Korea, Liberian container carrier, M/V Ernest Hemingway (54,271 G/T, hereafter M/V Hemingway) headed toward the N-5 Cemetery in Busan at 14 knots speed. In the direction of about 8 miles at 2 o’clock, a Korean fishing boat, Geunyang-ho (4.97 tons) was operating while sailing at a speed of approximately 8 knots to 14 knots. The M/V Hemingway’s second officer and an able seaman, Philippine nationals, misunderstood that the Geunyang-ho was staying still and continued sailing. Leading to a collision between M/V Hemingway and Geunyang-ho around 03:31 the same day. Due to this
accident, the captain and a fisherman of the Geunyang-ho, Korean nationals, fell into the sea and died. Geunyang-ho was sunk at sea, and about 600 liters of fuel oil (diesel oil) on board were split into the sea. After the crash, M/V Hemingway sailed to and cast anchor at N-5 Cemetery in Busan, South Korea around 04:54 and departed toward Qingdao port, China, at around 11. However, M/V Hemingway sailed back to the Busan port Cemetery anchorage site in accordance with the order of the Korean Coast Guard.

In response to this incident, the Busan District Prosecutor’s Office prosecuted M/V Hemingway’s second officer and an able seaman under the Busan District Court for three criminal facts subject to judgement of M/V Hemingway not meeting the obligations of changing the sailing direction or decelerating to prevent the ship collision; not using sound signals, light emission signals and communication devices as warning signs when approaching Geunyang-ho. This lead to the collision, causing Geunyang-ho to sink into the sea (Professional negligence resulting in ship sinking). Also, M/V Hemingway escaped from the site after the collision without compromising the duty of rescue (Violation of the Act on Aggravated Punishment, etc., of Specific Crimes, hereafter “the Specific Crimes Act”). Furthermore, the collision resulted in contaminating the sea due to oil spills (Violation of Marine Environment Management Act). In response, the Busan District Court issued a decision to impose a fine of two million won for each of the defendants for marine pollution on 12 June 2015. On the other charges, the ruling was dismissed due to the lack of jurisdiction.

Looking at the rulings and the annotations on this case, the main issues were whether South Korea has jurisdiction on ship collision accidents that took place on the high seas with plaintiffs who had South Korean national, and whether South Korea gains jurisdiction over the high sea pollution accidents caused by ship collision. This paper first examines the decisions made by the Busan District Court and Busan High Court, and then examines the main issues related to the jurisdiction of criminal trials on the collision that took place on high seas.

**Keystone about court ruling on M/V Hemingway’s case**

In response to the M/V Hemingway’s incident, the Busan Prosecutor’s Office prosecuted M/V Hemingway’s second officer and an able seaman, Philippine nationals, on three charges for violation of Specific Crimes Act, professional negligence resulting in ship sinking, and violation of the Marine Environment Management Law. The most controversial issue about this case was the question on whether South Korean courts had jurisdiction over the act of escaping after ship collision on high seas without compromising the duty of rescue. The rulings of the Busan District Court and the Busan High Court are as follows:

First, it concerns the jurisdiction of the domestic criminal court regarding ship collisions on the high seas. The court mentioned that Article 97(1) of the UN Convention on the Law of the Sea (hereafter “UNCLOS”) has been reached through the 1952 “International Convention for the Unification of certain rules relating to penal Jurisdiction in matters of collision or other incidents of navigation” (hereafter ‘Brussel Convention’), which took exclusive flag state principle, and ‘Convention on High Seas’ in 1956 (hereafter ‘High Seas Convention’), which prescribed that only flag state or the state of which the responsible crewmember is a national can institute penal proceedings. Brussel Convention and High Seas Convention were developed with the case of French mail steamer, Lotus, colliding with Turkish collier, Bozkourt, which caused the death of 8 Turkish nationals, leading to adjudication of jurisdiction by the Permanent Court of International Justice (PCIJ) on the basis of objective territorial principle to Turkey, the flag state of the damaged ship. This received strong criticism for it was against exclusive flag state principle which had been generally accepted until the case. The alleged offenders were claimed to be under retaliatory trial in the victims’ country. On the basis of this, the Court concluded that “if the above complaint falls under criminal responsibility for any ship collision or other incident of navigation on the high seas, which was prescribed at UNCLOS Article 97(1), South Korea has no jurisdiction over this incident. Even if the judicial cooperation with Liberia and the Philippines is regarded as a separate issue.”

The second part is about whether the act of escaping from the incident of ship collision on high seas without committing measures of rescue is subject to the application of UNCLOS Article 97(1). The court saw the case as South Korea having no rights on exercising criminal justice because the defendant’s practice of occupational errors and fugitive acts was included in “the event of a collision or any other incident of navigation concerning a ship on the high seas” specified at UNCLOS Article 97(1). A supporting legislation, Article

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1. Busan District Court ruling ‘2015pohap 52’ decided on 12 June 2015 and “Busan High Court ruling ‘2015Sno 384’ decided on 16 December 2015
3. ibid.
4. The original name of the Convention may refer to the “International Convention for the Unification of certain Rules relating to Penal Jurisdiction in matters of Collision or Other Incidents of Navigation,” sometimes referred to as the “International Convention on the Unification of Rules Concerning Criminal Jurisdiction of Conflicts or Other Navigational Accidents.”
5–12 of the Specific Crimes Act, states that “if the captain or any of the crew of a vessel who commits the crime specified in Article 268 of the Criminal Act due to the traffic of a vessel runs away without taking appropriate steps as specified in relevant Acts, the person shall be subject to the following aggravated punishments,” which reveals from the wording itself that this article deals with a criminal offense related to vessel traffic, such as ship collision or navigational incident. This also means that it is difficult to say that the intentional criminal offense is entirely excluded from the issue of the criminal jurisdiction over criminal penalties caused by ship collisions. Furthermore, prior to the UNCLOS, there were no cases of punishment regarding the violation of the duty of relief even though there had been legal regulations to punish such offenses such as in the Sailor Law. Article 5–3 of the Specific Crimes Act, which has a similar structure to Article 5–12 of the same act, classifies provisions that impose aggravated punishment on drivers who do not take measures under the Road Traffic Act after a car accident as “guilty for road traffic.” Therefore, the ruling was based on the judgement that punishment under the same law regarding violations of the duty of relief after a collision was considered to be a criminal responsibility for maritime traffic.

From the reasons described, the Busan District Court judged that this case would be applicable of no jurisdiction in South Korea according to UNCLOS Article 97(1), because it is appropriate to view that the facts subject to judgement concerning the collision and the following rescue measures taken after it are subject to the penal responsibility in matters of collision or any other incident of navigation.

The third is concerned with the violation of the Marine Environment Management Act related with marine pollution. The court sentenced the two defendants to fines of two million won each for violating the Marine Environmental Management Act. The court supported the sentence with the fact that “there is need for a corresponding punishment because the defendants contaminated the nearby sea by leaking about 600 liters of fuel oil (diesel oil) that had been loaded on the Geunyang-ho, causing accidents that resulted from inadvertent failure to meet the duties of the crews of the ship, and just leaving the site with no follow-up actions after the collision.” However, the Busan District Court does not address jurisdiction over the violation of Marine Environment Management Act. Regarding this matter, the claims are different in the three reviews, and we would take a closer look at them later in the paper.

The fourth is about the problems regarding the Flag of Convenience (FOC). Answering to the claim of the prosecutor that M/V Hemingway’s flag state, Liberia is a representative FOC nation and has no genuine relationship with M/V Hemingway, therefore making it difficult to find the ship and crew having substantial criminal justice rights even under UNCLOS, the Busan High Court judge concluded that the issue of FOC not to affect the judicial jurisdiction, saying “Although the world’s indiscriminate operation of FOC ships is pointed out as a problem, manipulating into interpreting UNCLOS in a restrictive manner and recognizing the jurisdiction of our country with the concern of making blank in the trial due to FOC ships, is not only contrary to global flows, but also has the potential to bring about diplomatic disputes.”

As shown above, our court concluded that South Korea, the state of alleged victim’s nationality, does not have jurisdiction to the criminal facts subject to the judgement of a collision on high seas and escape from the incident site without carrying out the duty of rescue measures in accordance with UNCLOS Article 97(1). On the other hand, our court exercised jurisdiction on the violation of the Marine Environment Management Act. In the following, we will consider international legal review on the findings on the process of the above court and on the legal issues raised by the related annotations.

Review on major legal issues

(1) Review of UNCLOS Article 97(1) on the application of running away after professional negligence resulting in death and professional negligence resulting in ship sinking, related to a ship collision in high seas

The South Korean Court concluded that the country does not have penal jurisdiction to the facts about the defendants’ running away after professional negligence resulting in death and professional negligence resulting in ship sinking, as these facts subject to judgement conform to “a collision or any other incident of navigation on the high seas” referred to in UNCLOS Article 97(1).

The main issues are in two ways: the scope of a ship collision or any other incidents of navigation and the application of the intentional offenders.

Scope of UNCLOS article 97(1)

UNCLOS Article 97(1) sets out the penal jurisdiction in matters of collision or any other incident of navigation on the high seas, and this can be interpreted separately between ship collisions and any other incident of navigation. It is reasonable to think of any other incident of navigation as a separate act from the ship collision as written in the paper. This interpretation is also supported as International Law Counsel (ILC) noted that “incidents that caused damage on submarine cables, wires, high-pressure cables and pipelines” are regarded as the same accident.5

5Youngkil Park, the previous paper, 42 page
In the M/V Hemingway’s case, when deciding the application of UNCLOS Article 97 to the professional negligence resulting in ship sinking and violation of Specific Crime Act, it is more reasonable to consider the “ship collision or any other incident of navigation that caused penal offense of the captain or the crew members” rather than considering “ship collision or any other incident of navigation.” In other words, UNCLOS Article 97 is interpreted as prescribing the criminal jurisdiction against personal injury (due to professional negligence, etc.) or physical damage (for example, professional negligence resulting in ship sinking, professional negligence resulting in ship damage, etc.) caused by ship collision on the high seas. The demands of the UNCLOS Article 94(7), an implementing clause of UNCLOS Article 97, “each state shall cause an inquiry into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment,” also support the above interpretation.

**Application of UNCLOS article 97(1) on intentional offenses**

In the M/V Hemingway’s case, both prosecutors and judges admit that prosecution is a criminal offense, but have different opinions on the application of UNCLOS Article 97(1). It is appropriate to look into UNCLOS Article 113 which prescribe the provisions concerning breaking or injury of submarine cables or pipelines regarding “any other incident of navigation” of UNCLOS Article 97, and review the background and history of the legislation process regarding the application of UNCLOS Article 97(1) to intentional offenders.

(1) Legislative History of UNCLOS Article 97

First, as mentioned in the ruling of the court and in the commentaries, the reason for the legislation of UNCLOS Article 97(1) is from the decision of the Permanent Court of International Justice (PCIJ) in the case of the S.S Lotus. The incident was the collision of the French mail steamer, Lotus, proceeding to Constantinople, and the Turkish collier, Boz-Kourt in the Mediterranean high seas, sinking the Turkish ship causing 8 Turkish nationals dead and 10 crews rescued by the Lotus on 2 August 1926. The Turkish authorities investigated the Lotus, which entered the port of Constantinople, and accused charges of manslaughter to lieutenant Demon, a French citizen, the officer of the watch at the time of collision, and the first officer of the ship. The Turkish court sentenced lieutenant Demon for 80 days of imprisonment and 22 pounds of fines. France then filed a complaint to PCIJ for reasons of violating its jurisdiction. Answering to this complaint, PCIJ ruled that Turkey, the flag state of the Boz-Kourt, the victim ship, had jurisdiction under what is so-called the objective territorial principle. PCIJ stated that the ships on the high seas are the same as the territory of their respective flag states, and if the illegal behavior of one ship affects any other ship, the affected ship’s flag state may exercise its jurisdiction, which is also not prohibited on any of the international laws. PCIJ also said that the conclusions could only be reversed by demonstrating the existence of customary international law, which establishes the exclusive jurisdiction of the flag state. This issue was sharply divided among judges, as determined by the judge’s casting chair of the Chief Justice in the middle of the six to six opinions.

However, after the PCIJ’s ruling on the Lotus incident, concerns of receiving retaliatory trials from the damaged ship’s flag state and criticism that it could limit the freedom of navigation which had been established through time. In response to these criticisms, the Brussel Convention was adopted by the Brussel Foreign Church in 1952, and Article 1 of the Convention prescribes that only the flag state can proceed with criminal or disciplinary procedures related to ship collisions or other navigational accidents. In 1958, the High Seas Convention revised the Brussel Convention and prescribed on Article 11, combining the flag state principle and the state of the alleged offenders, which was directly accepted to the UNCLOS Article 97(1).

In the M/V Hemingway’s case, if the intentional offenses are interpreted not to be applicable to UNCLOS Article 97(1), the flag state and the alleged offenders will not only be subject to a retaliatory trial from the flag state of the victim ship, but also could severely damage the national jurisdiction over the ships on high seas, which have core principle that guarantees freedom of navigation on high seas.

(2) Application of an Intentional Offense Against “any other incident of navigation” Under UNCLOS Article 97(1)

As we have seen earlier, UNCLOS Article 97(1) can be divided into “ship collision” and “any other incident of navigation concerning a ship” on the high seas, and “any other incident of navigation” can be seen as “incidents that caused damage to submarine cables, wired lines, high voltage cables, and pipelines.”

UNCLOS Article 113 prescribes the flag state’s legislative obligation on the “breaking or injury of a submarine cable or pipeline.” This article calls on all states to enact legislation which punishes ships that have raised their flag or criminals committing crimes that willfully or through culpable negligence destroy or damage the submarine cables.° This provision

°refer to Article 113 of UNCLOS (Breaking or injury of a submarine cable or pipeline):
contains not only submarine cables and pipelines, but also high voltage cables, which prescribe the details of the “any other incident of navigation” under UNCLOS Article 97(1). The provision punishes without discrimination, “willfully or through culpable negligence” in respect of any criminal offense related to any other navigational accident, and furthermore demands application to actions that “conduct calculated or likely to result in.” In other words, it extends the scope of intentional or negligent actions that cause damage to submarine cables or pipelines, thereby prescribing the intentions or attempts to destroy or damage them as punishable crimes. However, it excludes from punishable crimes, the cases of the involved individual who caused irresistible and forceful destruction or damages while making the best efforts to save his or her life or the ship.

The UNCLOS Article 97(1) does not address specifically on “criminal liability that arise from ship collisions,” but have prescriptions on Article 113 that includes not only intentional and negligence, but also intentions and attempts to destroy or damage related with the “criminal liability that arise from other navigational accidents.” In such a case, it would not be logically appropriate to separate “criminal liability that arise from ship collision” and arbitrarily exclude the intentional offender. Therefore, it is appropriate to interpret that UNCLOS Article 97(1) gives priority to the flag state and the state concerned for all criminal offenses involving ship collision and other navigational accidents, including intentions and attempts without consideration.

**Issues on exercising complementary jurisdiction in South Korean court**

UNCLOS Article 92(1) prescribes that ships shall be subject to its exclusive jurisdiction on the high seas, save in exceptional cases expressly provided for in international treaties or in this Convention, stipulating the exclusivity of national sovereignty. UNCLOS Article 97(1) specifies the exclusive jurisdiction of the flag state and the state of alleged offender’s nationality. It is necessary to examine whether this exclusive jurisdiction means that any other states other than those cannot completely exercise their jurisdiction, except for explicit exception and completely blocking other state’s jurisdictions.

Following the claims on the two papers that discussed on this issue it is reasonable to assume that the application of jurisdiction in which it contends within the scope of, “exclusivity” having meaning of “superiority” of flag state’s jurisdiction instead of meaning absolute exclusion. This superiority has not only the flag state but also the state of the alleged offender’s nationality under UNCLOS Article 97. Therefore, when a country with such superior jurisdiction does not exercise its jurisdiction, it is possible for a country with a so-called inferior jurisdiction to exercise jurisdiction. This also complies with the justice of the International Criminal Justice, as it prevents the alleged offender’s unpunished status. However, states that exercise supplemental jurisdictions need to go through the process of acknowledging the opinion of the country with the superior jurisdiction prior to proceeding legal institutes.

This claim is based on the case about the Panama container ship, Kasuga-1, colliding with the Taiwanese ship on high seas, leaving 28 Taiwanese nationals missing, which was concluded with the background of passive nationality by the Taiwanese court. This case supports the interpretation on the flag state’s exclusivity not being an absolute right, but being superiority over any other jurisdictions.

**Annotations on judgements of Busan district court and Busan high court about running away after professional negligence resulting in deaths and professional negligence resulting in ship sinking**

UNCLOS Article 97 is applicable for both cases that causing loss of life or serious injury (professional negligence resulting in death or injury, running away after professional negligence resulting in death, etc.) and physical damage (professional negligence resulting in ship sinking or ship damage, etc.). In these cases South Korea, the state of the alleged victim’s nationality, gets the right to commit supplementary jurisdiction when the flag state or the state of the alleged offender’s nationality gives up their right to commit superior jurisdiction.

Therefore, in the M/V Hemingway’s case, it is reasonable of South Korea dismissing the case during the appeal process, as the state of the offender’s nationality, Philippines, expressed their intention to exercise criminal jurisdiction in around November 2015.

However, the Busan District Court misrepresented the fact that it was a criminal offense for committing ‘a murder’ for the Lotus’s case, which was ‘manslaughter’ in fact. It is not logically appropriate that this incident was cited as a basis for the absence of South Korean court’s jurisdiction in the M/V Hemingway’s case, even though Turkey, the state of the alleged victim’s nationality, has exercised jurisdiction. Additionally, it is wrong for South Korea to judge that Liberia, the flag state of the ship, or the Philippines, the

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2Sukyoon Choi, et al., the previous paper, p.151, Youngkil Park, the previous paper, p.37–38, p.50.
state of the alleged offender’s nationality, do not have jurisdiction over the case, when they did not show their intent to act on their rights to gain jurisdiction even though they could if they wanted to while South Korea has the right to have supplementary jurisdiction when the other countries do not exercise their jurisdiction, also in this case UNCLOS Article 97 prescribes the flag state or the state of the alleged offender’s nationality has superior jurisdiction. In other words, the ruling of the Busan District Court has a defect that does not take to account the case where either the flag state or the state of the alleged offender’s nationality abandons the exercise of jurisdiction.

2. Review of Jurisdiction Over Marine Pollution Caused by Ship Collision in High Seas

The Busan District Court imposed a penalty of 2 million won for each defendant of the M/V Hemingway’s case on the basis of Article 127(2) and Article 22(1) of the Maritime Environment Management Act, considering that they did not meet the duty of professional caution causing the ship collision, spilling about 600 liters of fuel oil (diesel oil) that have been loaded on Geunyang-ho which contaminated the nearby sea, escaping from the scene of ship collision on high seas without compromising the duties of rescue and stated the needs of appropriate punishment for this. For this judgement, the attorney’s side did not appeal, therefore the Busan High Court imposed the same penalty to the defendants.9

However, the Busan District Court and the Busan High Court assumed the natural application of jurisdiction for this case without specific discussion, so it is hard to know where the base of the jurisdiction comes from. The three papers that commented on this case argued differently against the criminal jurisdiction of marine pollution caused by ship collisions on the high seas. Professor Sukyoon Choi claimed that:

UNCLOS Article 97(1) is applied only to unintentional crimes, it is reasonable to exercise jurisdiction only on the Specific Crime Act and dismiss the facts subject to judgement about professional negligence resulting in ship sinking and the violation of Marine Environment Management Act if the flag state or the state of the alleged offender’s nationality exercises jurisdiction. However, because Liberia and the Philippines have virtually gave up their jurisdiction over this case, it is reasonable to exercise the jurisdiction of South Korea against all three charges.

Professor Taewoon Kim, who had another commentary for this case, claimed that “Because the M/V Hemingway’s case which was related to the UNCLOS was not a crime under universal jurisdiction, and was simply started from a ship collision on the high seas, one of marine traffic accidents, with the fact that the professional negligence resulting in ship sinking and the violation of Marine Environment Management Act were committed on high seas at the time of collision, resulting in South Korea having no right to prosecute because UNCLOS should be applied without precedent over domestic law.”

Youngkil Park, an expert researcher who wrote another commentary claimed that “This case is regarded as an event happening on the high seas, when it comes to navigation at sea, but at the same time, it can be said that this case happened in South Korea’s EEZ, where the provisions related to preservation and protection of the marine environment of UNCLOS can apply.”

The claims of the three commentaries differ from one another. The main two issues are the application of the UNCLOS Article 97(1) on the pollution accidents that occurred in the high seas (South Korea’s exclusive economic zone, hereafter “EEZ”), and the priority on whether or not to exercise criminal jurisdiction.

(1) Application Provisions of UNCLOS on Marine Pollution Caused by Ship Collisions in Exclusive Economic Zones

The commentary on this case states that it is logically irrational to claim criminal jurisdiction only on marine pollution damages separately and that all kinds of results of ship collision, human, or property damages including marine pollution should be judged on whether they are applied to the UNCLOS Article 97(1). When discussing this, it is necessary to first review the scope of marine pollution covered in Part 12 of UNCLOS, the “Conservation and Protection of the Marine Environment.”

UNCLOS Article 1 defines the marine environmental pollution as follows:

“pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

In summary, the introduction of substances into the sea that would cause harmful consequences to humans is called marine pollution. Under this definition, marine pollution is caused by humans without regards to its cause and is sufficient if it results or is likely to result in harmful consequences. In other words, it can be classified as marine pollution if it is

based on human behavior, whether it is caused by a ship collision or by deliberate discharge. Therefore, marine pollution caused by ship collisions in EEZ in the M/V Hemingway’s case is not subject to UNCLOS Article 97(1), and it is appropriate to apply the relevant provisions of Part 12 of the UNCLOS.

This interpretation is also supported by UNCLOS Article 221 (measures to avoid pollution arising from marine casualties) and Article 194 (measures to prevent, reduce, and control pollution of the marine environment), which prescribes the measures against emergencies such as pollution and ship accidents caused by collision and stranding.

(2) Criminal Jurisdiction on Marine Pollution

The freedom of navigation in high seas and its founding base, flag state principle, which were accepted universally without question, were partially damaged after the major oil spills by large oil tankers, such as the 1967 Torry Canyon incident and the 1978 Amoco Cadiz incident, while the powers of the coastal states were strengthened. These results were also reflected in UNCLOS creating a separate Part 12 which regulates pollution of the marine environment.

In the field of marine pollution, the principle that prioritizes flag state remains intact, enabling jurisdiction regardless of the ship’s location. However, in the cases of marine pollution occurring in territorial sea or EEZ of a coastal state, or occurring outside of EEZ of the coastal state but causing or being likely to cause damages on the state, the coastal state may exercise its jurisdiction on the marine pollution. Also, even in cases that a ship causes marine pollution outside of a coastal state and the pollution is not likely to cause any damage to the state, the coastal state may proceed legal proceedings when the ship voluntarily enters a port or coastal installations with the request of the damaged or states.

Regarding marine pollution, there are cases where criminal jurisdiction of the flag state, coastal states, and port states are in conflict. And also for this, the UNCLOS Part 12 prescribes specifically. If a state has instituted proceedings, no other country can institute proceedings. However, proceedings to impose penalties in respect of marine pollution committed by a foreign vessel beyond the territorial sea of the state instituting the proceedings shall be suspended upon the taking of proceedings by the flag state within six months of the date on which proceedings were first instituted. This shall not be the case, however, if the litigation has caused major damage to the coastal state, or if the flag state repeatedly disregarded its obligations to enforce international rules and standards.

(3) Criminal Jurisdiction on Marine Pollution on the M/V Hemingway’s case

Since marine pollution caused by the M/V Hemingway’s collision accident occurred in the EEZ of South Korea, it is possible for the state to exercise criminal jurisdiction in accordance with UNCLOS Article 220 (1) or (5), “Enforcement by coastal States.” However, it should be reviewed whether the conditions on exercising the state’s jurisdiction meet. First, UNCLOS Article 220(1) prescribes that marine pollution occurring on a state’s territorial sea or EEZ and caused by a vessel voluntarily entering into the state’s port or off-shore terminal should be the case, and Article 220 (5) prescribes clear grounds believing that a vessel commits a violation resulting in a substantial discharge causing or threatening significant pollution of the marine environment.

If the marine pollution caused by M/V Hemingway did not cause significant damage to South Korea, and the lawsuit was filed within six months for the alleged violation in the flag state, Liberia, the lawsuit will be suspended. The suspended lawsuit will be terminated with the end of the lawsuit that was filed by Liberia.

Even though it might be difficult to say that South Korea has suffered from significant marine pollution damage caused by about 600 liters of oil spill by the M/V Hemingway collision incident, because the flag state, Liberia, did not institute any proceedings on this case, so it is possible to conclude that the judgement made by the South Korean court was reasonable.

However, there is need for supplementation in some areas because South Korea’s Marine Environment Management Act is based on flag state and territorial principle, which covers marine pollution caused by ships of South Korea, and marine pollution caused on territorial seas or EEZ regardless of the vessel’s flag state, on the other hand, UNCLOS is limited only to the cases caused by a vessel voluntarily entering into ports or causing a significant pollution damage to the coastal state regarding marine pollution caused by foreign ships on EEZ. Also, in terms of procedures followed in case of alleged marine pollution, UNCLOS stipulates that requests for information comes first, then, physical investigations and finally instituting legal proceedings should be followed, on the other hand, South Korea’s Marine Environment Management Act does not specify any procedures, but just prescribes its jurisdiction based on nationality of the violated vessel and location of the incident.

Conclusion

So far, this paper has reviewed the rulings of the Busan District Court and Busan High Court, and the issues that come from three annotations, regarding the collision of the Liberian container, M/V Hemingway and South Korean fishing boat, Geunyang-ho, which occurred in the near high seas of Busan in January 2015. Here is a summary of what has been reviewed in this paper:
First, UNCLOS Article 97(1) is applicable for all criminal penalties of the captain and crew members concerning ship collision and other navigational accidents, without consideration on the intention, and can also be applied to intentions or attempts of illegal activities. Therefore, it can be applied to the events causing loss of life or serious injury (professional negligence resulting in deaths, running away after professional negligence resulting in deaths, etc.) and physical damage (professional negligence resulting in ship sinking, or ship damage, etc.) that were caused by ship collision, allowing priority over criminal jurisdiction exercised by the flag state and the state of the alleged offender’s nationality.

Second, it is appropriate to interpret that the exclusive jurisdiction of the flag state on high seas as having a superior position against the jurisdiction of other states, not as having jurisdiction that excludes all other states. Therefore, in the M/V Hemingway’s case, it would be reasonable for our country to exercise complementary jurisdiction if the flag state and the state of the alleged offender’s nationality did not exercise criminal jurisdiction.

Third, marine pollution accidents occurring in the high seas (EEZ of South Korea) should apply the relevant provisions of UNCLOS Part 12 regardless of the cause. The coastal state can institute proceedings when there are cases of marine pollution occurring in territorial seas or EEZ of the state and occurring outside of its EEZ but causing or being likely to cause damages to the state. For the lawsuit regarding the pollution accidents that occurred outside of national territories shall be suspended if the flag state institute proceedings on the same allegation within six months of the commencement of the lawsuit, and when the flag state ends the lawsuit, the suspended lawsuit is also automatically terminated. South Korea is eligible to file a lawsuit on the M/V Hemingway’s case, and because the flag state did not file a suit within six months, the judgement of the South Korean Court is considered to be valid.

Fourth, while the Marine Environment Management Act of South Korea prescribes its jurisdiction based on the flag state of the violated vessel and location of the spills, UNCLOS prescribes coastal state’s jurisdiction based on the severity of pollution damage and compliance on procedures. Therefore, some supplements on related laws need to be made.

**Disclosure statement**

No potential conflict of interest was reported by the author.

**References**

Busan District Court ruling ’2015gohap 52’ decided on 12 June 2015.
Busan High Court ruling ’2015no 384’ decided on 16 December 2015.