SOCIAL SCIENCE REVIEW ARCHIVES
ISSN Online: 3006-4708
ISSN Print: 3006-4694
https://policyjournalofms.com

Legal Implications of Flag State in Perspective to Doctrine of State Responsibility in Cases of Ship Source Marine Pollution under International Maritime Law

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DOI: https://doi.org/10.70670/sra.v3i1.498

Abstract
This article examines the international law doctrine of state responsibility in the context of flag state of a polluting ship, the state under whose laws a ship is registered. Central to the discussion is the theory of extending a flag state's territory to encompass its registered vessels, a theory which posits that a ship's actions could implicate the responsibilities of a flag state. The article explores how a ship's nationality and the flag state's responsibilities intersect in international maritime law, particularly regarding the prevention and handling of ship-source marine pollution. The primary question is the applicability and extent of the flag state territory extension theory in cases where ship source marine pollution causes harm to persons or property of other states in reference to Article 235 of the United Nations Convention on the Law of the Sea (UNCLOS).The conclusion suggests that, while the theory of extension of territory to its ships has limitations and faces scholarly criticism, it offers potential advantages to affected parties and states, especially in scenarios where other relief mechanisms may not effectively work. The theory could thus serve as an additional pathway for remedy in cases of ship source marine pollution.

Key Words: State Responsibility, Ship Source Marine Pollution, flag state, UNCLOS, Marine Environmental Protection

Introduction
State responsibility is a fundamental principle in public international law, as evidenced by case law. However, achieving a clear and precise understanding of it has proven challenging, despite extensive discussion over the decades within the global community. Since the end of World War II, the International Law Commission (ILC), a subsidiary body of the United Nations, has endeavored to create a convention that codifies customary international law on state responsibility. Despite these efforts, a finalized codified instrument has not yet been produced, due to reasons beyond the scope of this article. In the following sections, I will take the liberty of addressing these reasons in the first person. One initial concern I have with the term "state responsibility" is its linguistic implications. In legal English, "responsibility" and "liability" have distinct meanings, though they are closely related. In simple terms, responsibility is more of a moral or ethical idea, while liability refers to legal accountability. Failing to meet a responsibility doesn't automatically lead to legal consequences; when it does, responsibility shifts into liability, which is a purely legal concept. However, this distinction isn't always clear in international law. In languages like Spanish and Italian, there is no direct equivalent to the English word "liability"; instead, terms like "responsibility" are used, which can blur the line between responsibility and legal accountability."[1]

[1] Proshanto K. Mukherjee and Huiru Liu, "Safety and Security in Shipping: International, Common Law and Chinese Liability Perspectives", in Albert Tavidze (Ed.) *Progress in Economics Research*, Vol. 33, New York: Nova Science Publishers Inc., 2015, 37.

In international law, the doctrine of state responsibility is invoked when a state's actions or omissions cause loss, damage, harm, or injury to individuals or property of another state, frequently in cases involving pollution. This article examines the legal status of a polluting vessel and the responsibility and liability of its flag state when pollution impacts another state, its citizens, or its property. According to this doctrine, state responsibility is not simply indirect; it is direct. When one state brings a claim against another, there is usually no predetermined standard of liability. However, it is generally accepted that in cases involving ultra-hazardous activities, no-fault liability—such as strict or absolute liability—should apply as a legal principle. This approach is often influenced by common law precedent, particularly the House of Lords' ruling in *Rylands v. Fletcher*[23]In certain cases involving the tort of nuisance, it is important to recognize that the distinction between strict and absolute liability lies in the degree to which the law permits a party to be excused from liability.[4] For instance, the 1962 Convention on the Liability of Operators of Nuclear Ships explicitly states that the operator of a nuclear ship shall be absolutely liable for any nuclear damage…"[5] Also, in domestic law, the Arctic Waters Pollution Prevention Act, 1971 of Canada[6] establishes absolute liability for pollution damage occurring north of the 60th parallel, while imposing strict liability for pollution damage occurring south of that latitude.

This article takes a structured approach: it begins with an overview of the doctrine of state responsibility, followed by an examination of ship nationality in international maritime law. The discussion then delves into the state's responsibility and liability in relation to marine environmental protection under the law of the sea. The article proceeds to explore the application of state responsibility to ships, specifically focusing on the relevance of the "floating island" doctrine in relation to the flag state's liability when one of its ships causes pollution damage to another state's people or property. While some argue that this doctrine has become obsolete, I respectfully disagree. I aim to distinguish between its practical applicability and legal validity, acknowledging its role within legal fiction and metaphor. Prominent case law, which often characterizes this doctrine as an extension of the flag state's territory, is thoroughly examined. The article concludes by addressing the issue of flag state responsibility for ship-source pollution and offers reflections based on both my perspective and those of others.'

As mentioned by a prominent author, in certain cases, a flag state in international law "will bear responsibility for failing to exercise its jurisdiction over a private vessel flying its flag in a reasonable and diligent manner" to prevent pollution.[7] Arguably therefore, and in that sense, my view is that the vessel is like an *alter ego* of its flag state and pollution damage caused by it to another state, its person or property, should be attributable to that state.

State Responsibility and International Law

When one state takes an action that harms or undermines the dignity or prestige of another state, the concept of state responsibility is activated. International law establishes rules and principles to ensure that the affected state receives reparation or redress for the damage incurred.[8] The ILC began addressing the topic of state responsibility in 1955, and its work from 1973 to 1980 is detailed in a report covering that period.[9] In essence, the term "state responsibility" refers to a

[2] Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment*, Fourth Edition, Oxford University Press, 2021, p. 224.
[3] (1868), LR 3 HL 330.
[4] ibid 443.
[5] 57 *AJIL* 268, Article II, paragraph 1.
[6] R.S.C. 1985, Vol. II c. A-12.
[7] Brian Smith, *State Responsibility and the Marine Environment: The Rules of Decision*, Oxford: Clarendon Press, 1988, 160-161.
[8] J.G. Starke, *Introduction to International Law*, Third Edition, London: Butterworths, 1989, 293.
[9] See *The Work of the International Law Commission*, 3rd Edition, 1980, 85-88.

state's accountability for actions that qualify as internationally wrongful acts.[10] The wrongdoing may arise from a breach of duty, which can be either an act or an omission by the state, and may have criminal consequences, such as in cases of sea pollution or the state's involvement in ultra-hazardous activities.[11]The environmental aspect of state responsibility is well exemplified in the landmark Trail Smelter Arbitration[12] albeit in relation to air pollution. The Trail Smelter Arbitration case is widely regarded as a cornerstone for establishing a universally applicable legal framework for state responsibility, a view shared by nearly all scholars on the subject. In this case, a smelter in Trail, British Columbia, located near the U.S. border, emitted large amounts of toxic pollutants over an extended period, causing significant harm to people and property in the U.S. In response to calls for reparations from the affected parties, the United States brought the matter to arbitration against Canada. The tribunal ruled in favour of the U.S., awarding damages, and set forth guidelines to regulate future emissions from the Canadian smelter.

Given the current state of international law in this field and the limited progress made by the ILC, it is fair to say that the doctrine of state responsibility, along with its associated legal frameworks, is still a work in progress.[13] In the context of marine environmental issues, particularly pollution damage caused by ships to another state's people or property, the responsibility of a ship's flag state remains an area with unresolved complexities. This article aims to explore the legal position of the flag state when pollution damage results from a ship's actions. The analysis is based on applying the doctrine of state responsibility within the framework of international law. Before proceeding, it is important to first clarify the relationship between the flag state and the existing laws governing ship nationality, which will be addressed in the next section.

Nationality, Flag and Registration of Ship

As highlighted in the previous discussion, the term "flag state" originates from the maritime concept of a ship's flag, which is closely linked to the practice of ship registration. While the terms nationality, flag, and registration are often used interchangeably, this can be misleading. There are significant legal distinctions between "nationality" and "registration," each with its own legal consequences. In addition to examining the relationship between these two concepts, it is also crucial to explore their connection to ship ownership, a topic that demands careful consideration and clarity.[14]

The concept of ship nationality arises from the need to regulate a vessel as it navigates beyond the territorial and jurisdictional limits of any one state, into the high seas, where no specific state jurisdiction applies. This principle is rooted in the requirement for an operational legal framework on board. A ship functions similarly to a small society, with its own social and professional interactions taking place among its crew. As a self-contained community where people live, work, and interact, a ship must adhere to a governing legal system at all times. While a ship may be partially subject to local laws in the waters of coastal states, it would exist in a legal vacuum on the high seas without the designation of a flag or nationality. This need for legal governance is what underpins ship nationality, making the law of the ship's flag state the primary authority on board, although dual or concurrent jurisdiction may apply when the vessel is within the waters of another state.[15]

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[10] *Report of the International Law Commission on the Work of its 27th Session*, (1975), 6, paragraph 33.

[11] See Starke (n 10) 294-295.

[12] (1939), 33 *AJIL*182; (1941), 35 *AJIL* 684.

[13] Starke (n 10) 294.

[14] See Reshmi Mukherjee, "Ship Nationality, Flag State and the Eradication of Sub-standard Ships: A Critical Analysis", in Proshanto K. Mukherjee, Maximo Q. Mejia, Jingjing Xu (Eds), Maritime Law in Motion, Springer Nature Switzerland AG, 2020, 583.

[15] Proshanto K. Mukherjee, "The Changing Face of the Flag State: Experience with Alternative Registries", *Proceedings, Seminar on Strategies for Canadian Shipping Forging a New Paradigm*, Toronto Ont., October 2000.

The term "flag" as a symbol of a ship's nationality functions as a metaphor. It serves as the visible indication of the ship's nationality, allowing it to sail in foreign waters and enter foreign ports. As noted earlier, the law of the flag state governs the ship and applies to everyone on board at any given time. Crimes committed aboard the vessel are prosecuted under the criminal laws of the flag state, and similarly, births and deaths that occur on the ship fall under the jurisdiction of the flag state in such matters.[16] A ship flying a national flag and holding nationality is often referred to metaphorically as a "floating island." In the *S.S. Lotus* case, it was established that "a ship on the high seas is regarded as an extension of the territory of the State whose flag it flies; just as that State exercises authority over the vessel within its own borders, no other State has the right to intervene."[17] Additionally, the flag state's law applies not only within its own territorial waters and on the high seas but also extends to the territorial seas of other states visited by the ship in question.[18]

In accordance with public international law, as outlined in Article 91 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS),[19] States are required to establish criteria for granting nationality to ships. Article 91 of the United Nations Convention on the Law of the Sea highlights this principle, stating that "there must be a genuine link between the state and the ship." This requirement for a genuine link in ship nationality law is derived from the principles set out in the *Nottebohm* case.[20] which involved the nationality of an individual. In maritime law, the exact meaning of a "genuine link" remains ambiguous, particularly regarding whether it encompasses political or sociological connections. One commentator has even described it as an elusive concept.[21]

In the absence of clear jurisprudential guidance on the term "genuine link," flag states often interpret it in ways that reflect their own national interests and priorities. An indication of what could constitute a genuine link is provided in Article 1 of the United Nations Convention on Conditions for Registration of Ships, 1986 (UNCCROS), which highlights the flag state's jurisdiction and control over ships in relation to "administrative, technical, economic, and social matters".[22] Interestingly, Article 94, paragraph 1, of UNCLOS outlines the flag state's duties, stating, "Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag." While this provision notably omits the term "economic," as mentioned in the UNCCROS above, it clearly and comprehensively defines the flag state's responsibilities regarding its ships, along with its powers of jurisdiction and control. This point is particularly relevant in discussions on the responsibility and liability of the flag state for pollution damage within the framework of state responsibility, which I will explore in more detail below.

While nationality is a matter of substantive law, registration acts as the procedural mechanism that grants nationality to a ship, serving as prima facie evidence of that nationality. The requirement for ship registration is outlined in UNCLOS Article 94, paragraph 2. Essentially, registration entails "the recording of a matter in the public records".[23] Ship registration serves two key purposes: the public law function deals with administrative matters tied to national interests, while

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[16] N.J.J. Gaskell, C. Debattista and R.J. Swatton *Chorley and Giles' Shipping Law,* 8th Edition. Great Britain: Financial Times Pitman Publishing, 1994, 19.

[17] *The Steamship Lotus* (1927) P.C.I.J. Series A, No. I0; 2 Hudson, W.C.R. 23.

[18] Gaskell, *et al* (n18) 20.

[19] 1833 *UNTS* 3

[20] *Liechtenstein* v. *Guatemala* (1955), I.C.J. Rep. 4.

[21] Moira McConnell, "Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships" 18 *J. Mar Law & Comm* 435 (Jul 1987). See also N.P. Ready, *Ship Registration* (2nd Ed.), LLP 1994, 13-15.

[22] Mukherjee, (n 17).

[23] Ready, (n 23) 6.

the private law function provides prima facie evidence of ownership and any mortgages on the ship, reflecting proprietary interests. Importantly, there is no standardized procedure for ship registration, as it differs across national laws and practices. Nonetheless, registration universally enables public notice and access to records for ships eligible to claim nationality and fly a flag under international maritime law.

More recently, Article 97 of UNCLOS, which largely codifies customary international law of the sea, affirms that in cases of collisions or other navigational incidents on the high seas, only the jurisdiction of the flag state applies to penal or disciplinary matters, highlighting the primary importance of the flag state's authority.

UNCLOS Art. 235: Responsibility and Liability

Under this heading, the starting point of the discussion must of necessity be Article 235, paragraph 1 of UNCLOS which reads as follows:

Article 235

Responsibility and Liability

States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

The linguistic challenge surrounding the English word "responsibility" was introduced earlier in the text. To follow up, it's important to note that the concepts of responsibility and liability are closely linked in the context of this discussion. The relationship between them is explored in detail in the sections that follow. In this regard, it is useful to refer to an early and influential explanation of the concept, where Clyde Eagleton, the esteemed American scholar, defined responsibility as "the principle that establishes an obligation to rectify any violation of international law that causes injury, committed by the respondent state".[24] Incidentally, there is a vast amount of legal literature addressing the issue of responsibility in the particular context of state responsibility in international law which in essence is the breach of an international obligation by a state. Its content is reflected in doctrine and jurisprudence.[25]

In this discussion, we are focused on the relationship between responsibility and the legal concept of liability. Specifically, we are exploring the connection between these two terms in the context of the first paragraph of Article 235 of UNCLOS, as mentioned earlier. To put it simply, a breach of the obligation that defines state responsibility results in liability under the law. In other words, liability is the consequence of violating a responsibility imposed on a state by international law. Brian Smith argues that responsibility has multiple facets, with liability being just one consequence of a breach. He views liability as the obligation to compensate the affected party following a wrongful act, and, in line with the ILC's perspective, he suggests that liability is the "only appropriate consequence when the injury is not serious enough to warrant the obligation to cease the violative conduct." On the other hand, Louis F.E. Goldie, another prominent scholar in this field, seems to believe that liability encompasses all the consequences of responsibility.[26]. It is further posited by Smith that pollution damage inflicted by a state or its agent to the territorial resources of another is a breach of an international obligation which may lead to liability of the violating state.[27] A question of importance in this context is whether the liability that arises should be based on fault.

[24] Clyde Eagleton, *The Responsibility of States in International Law* (1928), 22 *Am J. Intl L.*

[25] See among others, F.V. Garcia-Amador, "State Responsibility: Some New Problems" (1958), ii *Recuil des Cours,* 369.

[26] See Smith (n 9) 111, footnote 3 at that page where he mentions Goldie.

[27] ibid where the author discusses "composite" acts respecting violation of obligations.

Interestingly, in this context, Krylov J. stated in his disagreeing opinion in the *Corfu Channel (Merits)* case[28] that a state cannot be held responsible for any unlawful acts committed by its agents unless they were committed wilfully and maliciously or with culpable negligence.[29] In my view, "agent" in this regard could well include a ship managed by its master under his/her command. According to Starke, the fault theory, as expressed in such strict terms, should only be applied in certain cases where the specific circumstances warrant it. He points out that in the 1921 *Jessie* case, the British-American Claims Tribunal held the United States responsible to Great Britain for the actions of its officers, but did not require malice or culpable negligence as a prerequisite for state responsibility to be established.[30]

The concept of fault in a subjective sense, also known as *culpa*, originated in Roman law and was later incorporated into international law to assess state conduct. Its widespread application is often credited to Hugo Grotius, the Dutch jurist and scholar of the 1600s. As Smith notes, *culpa* is central to the traditional jurisprudence of state responsibility. He further explains that state responsibility arises when there is malicious intent, referred to as *dolus*, or when there is culpable negligence, or *culpa*, though the latter term can describe both forms of misconduct. From the perspective of a breach of obligation, fault is essentially the same as the objective element of state responsibility.[31] Indeed, in the absence of fault there can be no basis for a complaint of breach of responsibility.[32] In other words, *culpa* may well be considered a prerequisite for state responsibility. If so, then within a breach evidenced by the conduct of the state, *culpa* is subsumed.[33] However, Starke argues that there is no general, overarching requirement of malice or culpable negligence as a precondition for state responsibility. He believes that the objective doctrine is sufficient and logically sound for imposing the doctrine of state responsibility.[34]

As noted by a group of three prominent authors, fault in the context of state responsibility can be either subjective or objective, depending on the actions of the state or its agents. In the subjective sense, fault is rarely a basis for state responsibility in environmental disputes. However, in objective terms, state responsibility arises from an internationally wrongful act.[35] In an objective sense, fault is defined as a failure to exercise due care or diligence, a breach of a treaty, or the commission of a prohibited act. It does not require subjective elements such as intention, malice, or recklessness on the part of the state. In environmental law, state responsibility entails liability for trans-boundary damage resulting from a state's failure to exercise due diligence in regulating and controlling potentially harmful activities. This interpretation aligns with the law of state responsibility as codified by the ILC, which addresses breaches of international obligations.[36] Conversely, the question of establishing a strict liability regime remains unresolved. While the issue was raised in the Trail Smelter Arbitration, it did not lead to a definitive conclusion. Since that ruling, no clear judicial or arbitral decision has addressed liability for trans-boundary harm, leaving the nature of such liability whether fault-based or strict undetermined. Legal scholars and publicists continue to hold differing opinions on the matter.[37]

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[28] ICJ Rep 1949, p.4

[29] See Starke (n 10) 312, in particular, footnote 10 at that page.

[30] ibid 312-313.

[31] Smith (n 9) 13; see footnote 32 at that page in particular and p.15.

[32] *United Kingdom* v. *United States (The Jamaica Case)* of 1798 reported in Moore, (1931), iv *International Adjudications* 489, 499.

[33] Smith (n 9) 18.

[34] J.G. Starke, "Imputability in International Delinquencies", (1938), 19 *British Yearbook of International Law*, 104, 114-115

[35] See Report of the ILC on the Work of its 25th Session, (1973), paragraph 58.

[36] Boyle and Redgwell, (n 2) 224-225.

[37] ibid 226.

Closely linked to state liability is the issue of remedies. In environmental cases, reparation through restitution or environmental restoration is a non-monetary approach that appears to have evolved. However, since such restoration incurs costs, it is not fundamentally different from compensating the affected state or its entities for pollution damage. The suitability of a remedy depends on the specific circumstances of each case. The ILC acknowledges the need for full satisfaction of the interests of the state that has suffered harm. In this regard, paragraph 2 of Article 235 of UNCLOS provides relevant guidance. It provides as follows:

States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdictions.

As a follow-up to paragraph 2, the provision in paragraph 3 of that Article reads as follows:

With the object of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes , as well as, where appropriate , development of criteria and procedures for payment of adequate compensation , such as compulsory insurance or compensation funds.

Needless to say, the above-noted elements all relate unequivocally to the joint concept of responsibility and liability of the state in respect of protection and preservation of the marine environment regardless of the roles played out by state and non-state actors in the process. However, the focus is unmistakably on payment of monetary compensation.

Application of the State Responsibility Doctrine to Ships

The foregoing discussion provides the launching pad for the proposition that in respect of ship-source pollution, where the ship is the agent or instrumentality through which pollution occurs and damage is suffered by persons or property of a victim state, the flag state of the ship is subject to the doctrine of state responsibility. The proposition is premised on variations of expressions that are metaphorical in character and often condemned as legal fiction variously by scholars and commentators some of whom are learned in the law, and others who are not.

The Floating Island Theory

The so-called "floating island doctrine" otherwise known as the "extension of territory" theory, are metaphoric expressions associated with the legal notions of ship nationality and the maritime flag. In my view, as metaphoric as it may sound, the application of flag state law on board a ship holding the nationality of that state is a clear manifestation of the proposition that the ship is an extension of the flag state's territory. In other words, there is an umbilical cord connecting the ship to its state of nationality. This principle of "territoriality" has also been described by the metaphorism that a ship is a "detached part" of the flag state's territory.[38]. As elaborated below, Brian Smith refers to territoriality as "a most apt metaphor" for describing the character of flag state jurisdiction.[39] This argument is reinforced by the legal principle that flag state law applies not only when a ship is on the high seas but also when it is within the waters of another state, including its territorial sea or maritime zones. However, in certain cases, the ship may be subject to dual or concurrent jurisdiction by both the flag state and the coastal state. As previously mentioned, nearly all activities that take place on land can also occur aboard a ship, which functions as a self-contained communal unit.[40] This verity is the rationale for the necessity of a

[38] Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition. Cambridge: Cambridge University Press, 2019, 190.

[39] See Smith (n 9), 151.

[40] Mukherjee, (n 17) 3 and Proshanto K. Mukherjee, "Flagging Options: Legal and Other Considerations" in *Mariner*, Jan -Mar 1993, 31.

legal regime on board fictionalized through the expression and form of ship nationality and its procedural counterpart, registration.

The metaphorism has been judicially recognized and confirmed as such in a few cases of distinction. In *R.* v. *Anderson,*[41] Byles J. referred to a ship being

like a floating island, and when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to the British law as if he had stood on the Isle of Wight and committed the crime.

In the same case, the distinguished jurist Blackburn J. held that -

… a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory.

In more precise terms he stated –

There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms a part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation.

The strongest expression of the concept made by Blackburn J. is "It has been decided that a ship which bears a nation's flag is to be treated as part of the territory of that nation. A ship is a kind of floating island".

The case concerned an American citizen serving as a crew member on a British ship who committed a criminal offense while the vessel was in French territorial waters. Bovill C.J. ruled that, "in point of law, the offence was also committed within British territory," implying that the ship was an extension of Britain, its flag state. As a result, the accused was subject to British law, despite also being potentially liable under French and/or American law. Notably, the Anderson case was referenced in the American decision *Patterson v. The Eudora*.[42] An older case which exemplified the doctrine in positive light was the *Costa Rica Packet Arbitration Award* (*Great Britain* v. *Netherlands*)[43] involving British protection given to the master of an Australian whaling barque arrested in waters of the then East Indies by Dutch colonial authorities by virtue of the ship being considered an extension of the flag state.

Earlier, in the United States case *People* v. *Tyler* [44]Justice Christiancy described vessels on the high seas as "extensions of the territory of the nation under whose flag they sail." He emphasized that the oceans cannot be claimed as property or territory by any single state, as they are fundamentally a shared domain for all humankind. Consequently, each state holds "a common right and a common jurisdiction" over its own vessels.

On the international front, in the celebrated *Lotus* case[45] the Permanent Court of International Justice (PCIJ) held that-

A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for just as in its own territory, that state, exercises its authority upon it, and no other state may do so.

The PCIJ stated that "a ship on the high seas is assimilated to the territory of the State whose flag it flies, for, just as in its own territory, that State exercises its authority over it, and no other State may do so." Accordingly, "a ship is placed in the same position as national territory," meaning that events occurring on board a vessel on the high seas are considered as taking place within the territory of the flag state. Consequently, if a ship's actions cause harm to foreign territory, the same

[41] (1868), II Cox Crim. Cas. 198.
[42] (1903), 190 US 169. See Smith, (n 9) 151, footnote 26 at that page.
[43] (1897), 5 *Moore's International Arbitration* 4948; 184 C.T.S. 240.
[44] (1859), 7 Mich. 160.
[45] *Turkey* v. *France* (1927), P.C.I.J. Series A, No. 10 at 25.

principle applies—since the act was committed within its jurisdiction, the injured state may seek legal action against the flag state of the offending vessel. While the *Lotus* case decision faced significant criticism within maritime circles, this primarily concerned the issue of high-seas collisions. The dominant view upheld flag state supremacy and Turkey's assertion of jurisdiction after the *Lotus* entered its waters—leading to the prosecution and sanctioning of the French navigation officer—was widely opposed.

The PCIJ decision engendered widespread dissatisfaction from the world maritime community which was predominated by the western colonial powers. The antipathy led to the adoption of the 1952 convention which stipulated that in collision cases involving criminal prosecution of the master or navigating officer, only the law of that individual's nationality or that of the flag state of the ship on which he served at the time of the collision, could apply.[46] To reinforce flag state jurisdiction over collisions on the high seas, convention law was adopted. This principle was later incorporated into the 1958 United Nations High Seas Convention and eventually enshrined in Article 97 of UNCLOS. The application of flag state law is, in my view, entirely justifiable when prosecuting an individual responsible for a ship's navigation at the time of a collision. While these provisions specifically address criminal prosecution, a complementary instrument was introduced in 1952 alongside the convention on penal jurisdiction to address the civil jurisdictional aspects of high-seas collisions.[47] Interestingly, Article 1 of that convention states that in the event of a collision involving two sea-going ships or a sea-going ship and an inland navigation craft, legal proceedings may be initiated in a court where the defendant has their habitual residence or place of business, where the defendant ship has been arrested, or where the collision occurred within the limits of a port or in inland waters, allowing the court of that location to assume jurisdiction. The last option aligns with the principle of *lex loci delicti commissi* in tort cases.[48] The introduction and development of convention law in this field as referred to above, in my considered opinion, actually strengthens the metaphoric perception of the floating island doctrine rather than the opposite as some would argue.

In *Saint Vincent and The Grenadines* v. *Guinea* (*The m.v. Saiga (No. 2),* the International Tribunal for the Law of the Sea (ITLOS) held in reference to UNCLOS that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State".[49] In my view, the phrase "linked to" in the above quotation clearly reinforces the idea that a ship is an extension of its flag state. This, in turn, supports the validity of the floating island doctrine, despite its inherently metaphorical nature.

There are several propositions, *pro* and *con* in respect of the floating island doctrine in case law and otherwise, whether critiqued as metaphoric or as legal fiction. In *R.* v. *Gordon-Finlayson, ex p An Officer,*[50] the court treated the expression "floating island" as a metaphor and stated that a ship was not a part of the flag state's territory. It pointed out, however, that the flag state could at any rate exercise jurisdiction over the ship in the same manner as it would over its own territory. It is notable that commentaries on this decision appear in other cases such as *Oteri* v. *The Queen.* [51] and the American case *Cunard SS Co*. v. *Mellon* [52] Be that as it may, it was also held in *R.* v.

[46] International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, Brussels, 1952, 439 *UNTS* 217.

[47] International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, 1952, 439 *UNTS* 217.

[48] See Proshanto K. Mukherjee, "Maritime Conflict of Laws: Zonal and Jurisdictional Issues in Perspective" in Jason Chuah (Ed), *Research Handbook on Maritime Law and Regulation*, Cheltenham; Edward Elgar Publishing, 2019, 327-328.

[49] ITLOS Reports, 1999, Judgement of 1 July, 1999, paragraph 106.

[50] [1941] 1 KB 171.

[51] [1976] 1 WLR 1272 (PC).

[52] [1923] 262 US100 at p. 123. See Starke, (n 10) 273, footnote 7 at that page.

Governor of Brixton Prison, ex p Minervini[53] that in the event of a criminal offence being committed on board a ship, for extradition purposes, the crime was deemed to have been committed in the flag state's territory, where the state in question was a party to the relevant extradition treaty. Notably, the territorial status accorded to ships on the high seas remained conceptually intact until the advent of UNCLOS. Another example of the recognition and application of flag state territoriality is found in the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. Article 23 of the convention stipulates that, for its purposes, ships and aircraft on the high seas are to be regarded as part of the territory of the state in which they are registered, namely, the flag state.[54]

Legal Fiction

The floating island theory has been criticized as merely a metaphor, while the concepts of ship nationality and flag state jurisdiction have been dismissed as legal fictions. Judicial rulings have affirmed that the determination of criteria for granting or revoking a ship's nationality, along with related procedures, is solely within the authority of the flag state.[55] Given that pronouncement by ITLOS, it may be worthwhile to examine the phenomenon of legal fiction more closely. In the ensuing discussion, opinions of learned scholars are perused.

One distinguished author informs us that legal fiction, along with equity and legislation, in that historical order, played a major role in the evolution of law. Originally, these were the three instrumentalities by means of which law was brought into harmony with society.[56] He defines "legal fiction" as "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[57] In this context, it is argued that the doctrine of *stare decisis*, a fundamental principle of the English legal system and its jurisprudence, is itself based on legal fiction. This doctrine asserts that the decision of a higher court rendered earlier in time is binding on the present case. Arguably, this rule suggests that the law remains unchanged, which is, in reality, a fiction, as the law is inherently dynamic and constantly evolving.[58] Thus, while legal fiction purports to conceal change in the law, equity, which is another dimension of the evolutionary process, interferes with law committedly and without pretension.[59] Adherents of Jeremy Bentham's views would agree that legal fiction, equity, and legislation all play a role in law-making, though through different methods and processes. However, all three can be broadly classified as forms of legislation.[60]

It is argued that the concept of "ship nationality," central to this discussion, is itself a legal fiction. The esteemed author G. John Columbus observed, "On the high sea, the territorial character impressed by a ship on its flag is a fiction as accurate for the purposes of jurisdiction as a fiction can ever be." A ship can be regarded as an extension of its flag state's territory—an extraordinary legal fiction.[61] Brian D. Smith refers to the floating island theory as a "the fictional assimilation of vessels to the regime of state territory", and refers to that assimilation as "the theoretical basis for jurisdiction over conduct on board flag vessels" and that it rests on consensus among states in the interest of maintaining public order. Even if it is not the basis for application of flag state jurisdiction, territoriality as a metaphor aptly describes the character of that jurisdiction given that

[53] [1959] 1QB 155; [1958] 1 All ER 318

[54] See Starke (n 10). 274, in particular, footnote 9 at that page.

[55] *Saint Vincent and The Grenadines* v. *Guinea* (*The m.v. Saiga (No. 2),* p.1340. paragraph 65.

[56] Sir Henry Maine, *Ancient Law*, Oxford University Press; London: Humphrey Milford, 1939, "The World's Classics", 20.

[57] ibid 21-22.

[58] Proshanto K. Mukherjee, *Mukherjee on Maritime Legislation*, Malmo: WMU Publications, 2021, 8.

[59] Maine (n 60) 22-23.

[60] ibid 24-25.

[61] See Mukherjee, "Flagging Options: Legal and Other Considerations" (n 43) 32.

the legal authority of the flag state over persons and property on board is no less than it is on land within its territory.[62]

Others have opined that legal fiction pervades the law, and perhaps the floatability of the floating island doctrine has outlived its tenure and should be jettisoned.[63] The cited author concedes, however, that in relation to the territoriality proposition, there is at least an element of quasi-extension of the flag state's territory when a ship is navigating on the high seas.[64] In this regard, he argues that the floating island fiction has limited value and serves only a symbolic role in reflecting flag state jurisdiction. It treats a ship as an extension of national territory, but only concerning criminal acts on the high seas and for regulatory purposes. Citing Yushifumi Tanaka, he contends that a ship cannot be granted full territorial status under flag state jurisdiction.[65] Indeed, Tanaka himself considers the theory of territoriality in relation to a ship as obsolete for practical reasons but does not explain what they are. Yet, he acknowledges the principle of flag state jurisdiction inherent in maritime law by linking it to the *juridicité* of the high seas.[66] Like Tanaka, those who acknowledge flag state jurisdiction—whether exclusively on the high seas or concurrently with the coastal state within its territory or territorial sea—must, to some extent, recognize the extension of territory or floating island doctrine, even as a legal fiction. Ultimately, this doctrine plays a role in the broader law-making process, which Maine holistically describes as legislation.

It is true that the floating island doctrine has been viewed negatively both in case law and by authors. In certain innocuous circumstances, it has been unreasonably pleaded and rejected. For example, in an Indian case, *Caltex (India) Ltd*. v. *State of Kerala* [67] it was contended that supplies made to foreign ships in the port of Cochin in India were not liable to pay sales tax on the ground that those ships were floating islands of the flag state. The court pointed out by reference to the American case *Cunard Steamship Co., Ltd.* v. *Mellon*,[68] that the concept of the floating island could not be invoked for the avoidance of taxation under any domestic enactment. Menon J. ruled that there was obviously no merit in that far-fetched contention. In another Indian case, *Chung Chi Cheng* v. *The King*[69] the court cited the doctrine of exterritoriality expressed in *Oppenheim's International Law* (9th Edition) as "a floating portion of the flag State" but rejected it as legal fiction. The court observed that "legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts." It noted that proponents of the floating island doctrine failed to consider its potential impracticalities when measured against the realities of shipboard life and life on land. However, as a former seafarer with sixteen years of practical experience at sea, I disagree. I have already highlighted how life on board closely parallels or finds its counterpart in nearly all aspects of terrestrial communities. Some authors have dismissed the floating island doctrine, as referenced by the PCIJ in the *Lotus* decision, as "erroneous," arguing that it has been superseded by the 1958 Convention on Penal Jurisdiction in collision cases. With respect, I must disagree. In my view, that convention addresses a specific issue—collisions on the high seas—whereas the floating island theory may still be relevant for other purposes, such as

[62] Smith (n 9), 151 citing *Cunard Steamship Co., Ltd.* v. *Mellon*, (1922) 262 US 100, 123.
[63] See Gotthard M. Gauci, "The Ship as an Extension of Flag State Territory and an Entity with Human Attributes – is it Time to Jettison these Legal Fictions?" *ICLR*, 2021, Vol. 21, No. 2.
[64] ibid 11.
[65] ibid 26.
[66] Tanaka, (n 41) 153.
[67] AIR 1962 Ker 49, 1961 12 STC 655 Ker.
[68] (1922) 262 US 100
[69] (1939) 108 LJPC 17; (AIR 1939 PC 69).

cases involving pollution damage caused by a ship to individuals or property in a state other than its flag state.[70]

State Responsibility of Flag State in Respect of Ship-Source Pollution

It is interesting that in relation to the issue of territoriality in connection with a ship at sea which has been discussed above at length, Brian Smith refers to Lucius Calfleish, a well-known author who mentions ship-source oil pollution in one his writings.[71] While Smith does not peruse the most authoritative convention provision on the subject, that is, Article 235 of UNCLOS, in referring to the whole of that Article, one current author of prominence in the field, Chie Kojima, categorically states as follows:

Accordingly, the flag state whose vessel caused marine pollution may be held liable, under international law, if there is a probable cause between the pollution and the failure to fulfil its international obligations concerning the prevention, reduction and control of vessel-source pollution under UNCLOS.[72]

As pointed out by that author, the Grand Chamber of the European Court of Justice had this to say in respect of the matter:

It is the flag state which, under the Convention (UNCLOS), must take such measures as are necessary to ensure safety at sea and, therefore, to protect the interests of other States. The flag state may thus also be held liable, vis a vis, other States, for harm caused by a ship flying its flag to marine areas placed under those States' sovereignty, where that harm results from a failure of the flag state to fulfil its obligations.[73]

The aforementioned judgment clearly establishes the responsibility and resulting liability of a ship's flag state when it causes pollution damage to another state. I fully support this conclusion, regardless of the arguments put forth by theorists and commentators concerning the validity of the floating island doctrine. Notably, none of the referenced writings, judgments, or awards specifically addressed the issue of pollution damage caused by a ship.

Regarding state responsibility and the flag state's consequential liability for pollution damage caused by its ship, Kojima references an Advisory Opinion issued by the International Tribunal for the Law of the Sea (ITLOS) and draws an analogy to ship-source pollution on the high seas. However, this analogy does not extend to pollution damage suffered by another state. The author further suggests that in cases of interstate disputes arising from ship-source pollution, international tribunals, including ITLOS and the International Court of Justice (ICJ), may be approached for advisory opinions.[74] She states that-

The role of advisory opinions that by international courts and tribunals in the prevention, reduction and control of marine pollution is that such opinions can provide the concerned members of the international community with authoritative interpretations of international agreements before conflicts escalate.[75]

She observes, however, that advisory opinions may not ensure compliance when opinions within the maritime community are divided. As I note in this article, this is particularly true regarding the

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[70] Boyle and Redgwell (n 2) 546

[71] L. Calfleish "Some Aspects of Oil Pollution from Merchant Ships" 4 *Annals of International Studies*, 213, 219 cited in Smith (n 9) 151, footnote 29 at that page.

[72] Chie Kojima, "Ship-Source Pollution and International Law" in Maximo Q. Mejia Jr. (Ed) *Selected Issues in Maritime Law and Policy Liber Amicorum Proshanto K. Mukherjee*, New York: Nova Publishers, Laws and Legislation, 2013, 93.

[73] *International Association of Independent Tanker Owners (INTERTANKO)* v. *Secretary of State for Transport* (Case C-308/06 of 3 June, 2008).

[74] See Kojima (n 76) 93-94.

[75] ibid 95.

acceptance of the floating island doctrine in relation to state responsibility and the liability of the offending flag state for pollution damage caused by a ship, where the victims are persons or property of another state.

The relatively recent *Wakashio* incident which occurred in the waters of Mauritius exemplifies the possibility of application of flag state responsibility in the case of ship-source pollution damage suffered by another state. The Japanese-owned bulk carrier registered in Panama ran aground on the reef of Point D'Esny off the Mauritian coast and spilt approximately 4,000 tons of fuel oil from its bunkers.[76] Although criminal proceedings against the master and second officer were instituted in the Mauritius courts, there has been no full and complete resolution of the civil liability side of the equation.[77] In terms of civil liability and compensation payable, the Bunkers Convention is applicable,[78] and in that regard, the Japanese P&I Club of the ship should bear the compensation burden up to the relevant limit of liability.

Notably, the Bunkers Convention does not include a specific limitation provision, and the limits set by the LLMC 1996 would apply. Interestingly, both Mauritius and Panama are parties to the Bunkers Convention. As recently as July/August 2022, victims of the oil spill reportedly filed class action liability lawsuits in the Supreme Court of Mauritius.[79]

Japanese commentators have pointed out that Panama as the flag state is the main entity responsible in international law and it should be questioned in this regard but this has not happened.[80] Given that under UNCLOS Article 235 Panama is the state responsible for this incident, questions have been raised as to what is its role in this matter and why it has not "leapt into action" in this regard.[81]

Conclusion

In my view, the "floating island" doctrine should not be dismissed as mere metaphor, legal fiction, or otherwise, simply based on the opinions of various authors or academics some well-versed in law and others not. Some, in their attempt to find a private law solution within the relevant IMO oil spill conventions, have questioned what should happen if the flag state in question is a poor country unable to provide compensation. My response would be that in international law, when addressing interstate claims and reparations for pollution damage, the applicable legal principle is paramount and applies equally to all states, regardless of their wealth, development status, or economic standing. There have been numerous instances where private law solutions have failed because the polluting entity either went bankrupt, became insolvent, or simply vanished. A striking example is the infamous *Torrey Canyon* disaster the worst oil spill incident until 1967 where attempts to hold the ship owner accountable led to nothing more than a document sitting in an office drawer in Monrovia, the capital of Liberia, where the tanker was registered.

Contrary to the assertions of some authors and jurists, I firmly believe that the floating island doctrine has merit when applied in its proper context. I therefore respectfully disagree with their

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[76] reliefweb.int/disaster/ac-2020-000180-mus.

[77] See https://gcaptain.com/mauritians-take-wakashio-oil-spill-battle-to-court/ and https://en.wikipedia.org/wiki/MV_Wakashio_oil_spill.

[78] International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, 40 *ILM* 1493.

[79] africanarguments.org/2022/08/mauritius-a-class-action-lawsuit-bubbles-two-years-after-the-oil-spill; https://www.tradewindsnews.com/casualties/wakashio-claimants-line-up-class-action-in-mauritius/2-1-1268023

[80] Mai Fujii, Research Fellow, Ocean Policy Research Institute of the Sasakawa Peace Foundation & Eka Higuchi, Lecturer, Department of Community Service and Science, Koeki University (Tohoku University of Community Service and Science), "Legal Aspects of the Cargo Ship Oil Spill Incident in Mauritius" See https://www.spf.org/opri-intl/global-data/report/perspectives/20201124225654440.pdf

[81] https://www.forbes.com/sites/nishandegnarain/2020/08/23/international-cover-up-fear-as-panama-drawn-into-wakashio-oil-spill-ship-controversy-in-mauritius/?sh=4df8f5213155; see also https://www.nautilusint.org/en/news-insight/news/union-urges-panama-to-step-up-after-mauritius-oil-spill/

entirely negative stance. As demonstrated in the preceding discussions, the doctrine is rooted in Anglo-American common law. Notably, the judicial rulings from common law courts that have advanced the floating island or extension of territory theories in relation to ships have not, to my knowledge, been overturned by any higher courts in those jurisdictions. In my view, this means that, at least within the common law tradition, these decisions remain valid legal precedents. The *Lotus* decision, on the other hand, was issued by an international tribunal. Its central issue determining which state has jurisdiction in a criminal case arising from a collision on the high seas was resolved by the 1958 convention referenced earlier. However, no convention that I am aware of explicitly addresses the metaphorical or legal fiction of whether a ship at sea constitutes an extension of its flag state.

This leaves open the question of whether the flag state of a ship that causes damage to another state's persons or property particularly marine pollution damage, as relevant to this discussion bears liability under the international law doctrine of state responsibility. My considered opinion is that it should.