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

Dr. Saira Bashir Dar[1], Kamran Khan[2]
[1] Assistant Professor, Law School, Bahria University Islamabad, Ex-Principal Muslim Law College Rawalpindi, Ph. D International Maritime Law, Dalian Maritime University, China.
[1] Lecturer, Law School, Bahria University Islamabad, Email: kamrankhan.buic@bahria.edu.pk

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Abstract
The international law theory of state responsibility is investigated in this paper in relation to flag state of a polluting ship, the state under whose laws a ship is registered. The main focus of the conversation is the theory of expanding the area of a flag state to include its registered vessels, which holds that the activities of a ship could bind the flag state to obligations. Particularly with relation to the prevention and treatment of ship-source marine pollution, the paper investigates how the nationality of a ship and the obligations of the flag state interact in international marine law. Regarding Article 235 of the United Nations Convention on the Law of the Sea (UNCLOS), the main issue is the applicability and scope of the flag state territorial extension theory in circumstances when ship source marine pollution damages person or property of other nations. 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 "responsabilité" are used, which can blur the line between responsibility and legal accountability."[1]

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. Generally speaking, nonetheless, it is agreed that in circumstances involving ultra-hazardous activity, no-fault liability, that is, strict or absolute liability—should apply as a legal principle. Common law precedent often shapes this approach, especially the House of Lords' decision in Rylands v. Fletcher.[23] In some situations involving the tort of nuisance, it is crucial to understand that the degree to which the law lets a person be released from responsibility distinguishes stringent from absolute culpability.[4] For example, the 1962 Convention on the Liability of Operators of Nuclear Ships clearly specifies that the operator of a nuclear ship will be totally accountable for any radioactive harm…"[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 paper uses a methodical approach: it starts with a review of the idea of state responsibility then looks at ship nationality in international marine law. The topic then explores the state's obligation and responsibility in respect to marine environmental protection under the law of the sea. The paper then looks at how state responsibility should be applied to ships, with particular attention to the applicability of the "floating island" theory in respect to the accountability of the flag state when one of its ships poll another state's people or property. We respectfully disagree even if some contend this theory is no longer relevant. We want to separate its legal legitimacy from practical usefulness, therefore honoring its place in legal fiction and metaphor. Examined closely is a notable case law that occasionally describes this idea as an enlargement of the territory of the flag state. The paper ends with discussing flag state accountability for ship-source pollution and provides comments based on both my viewpoint 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

[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.

[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.

State accountability is triggered when one state acts that compromises or damages the dignity or reputation of another state. International law establishes rules and principles to ensure that the affected state receives reparation or redress for the damage incurred.[8] Beginning in 1955, the ILC started tackling state responsibility; its activities between 1973 and 1980 are reported in a paper covering that time frame.[9] In essence, the term "state responsibility" refers to a state's accountability for actions that qualify as internationally wrongful acts.[10] The wrongdoing could result from a violation of duty, which can be either an act or an omission by the state, and might have criminal repercussions, as in cases of maritime pollution or governmental participation in highly dangerous operations.[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.

It is reasonable to claim that the theory of state responsibility, together with its related legal frameworks, is still under development given the present situation of international law in this sector and the meagre development accomplished by the ILC.[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. Applying the theory of state responsibility inside the context of international law forms the foundation of the study. First of all, let us define the link between the flag state and the current rules controlling ship nationality, which will be covered in the next part.

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 intimately related to ship registration process. Though the terms flag, nationality, and registration are used synonymously most of the time, 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 results from the need to govern a vessel outside the borders of any one state into the high seas, where no specific state law applies. This notion from below is inspired by the requirement of an operational legal framework on board. Running like a little town, a ship carries its own social and professional ties among its crew. Being a self-contained community

[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.
[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.

where people live, work, and hang out, a ship must always operate within legal guidelines. Though it would be partly subject to local laws in the waters of coastal states, a ship would live in legal void on the high seas without a flag or nationality. Since ship nationality is founded on this need for legal governance, the law of the ship's flag state is the principal authority on board even if multiple or concurrent jurisdiction may apply when the vessel travels through another state's seas.[15] The phrase "flags" metaphorically refers to a ship's nationality. Acting as the clear indicator of her nationality, it permits the ship pass in foreign waters and reach foreign ports. As noted previously, the legislation of the flag state regulates the ship and encompasses all people on board at any one moment. Crimes committed on the ship are tried under the criminal laws of the flag state; similarly, births and deaths on the ship are governed in such respects by the flag state.[16] Often metaphorically defined as a "floating island," a ship flying a national flag and displaying nationality is "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; none other State has the right to intervene;," the S.S. Lotus case said.[17] Additionally, the law of the flag state encompasses the territorial seas of other states visited by the vessel in question, as well as its own territorial waters and the high seas.[18]

According to Article 91 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), States are required to establish criteria for the nationality of ships.[19] Article 91 of the United Nations Convention on the Law of the Sea underscores that "there must be a genuine link between the state and the ship."[20] The concepts articulated in the Nottebohm case necessitate a genuine connection in maritime nationality law, pertaining to an individual's nationality. In maritime law, the precise definition of a "genuine link" remains unclear, especially concerning the inclusion of political or sociological affiliations. A commentator has characterized it as an elusive idea.[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. The requirements for a valid connection are laid forth in Article 1 of the 1986 United Nations Convention on Conditions for Ship Registration (UNCCROS), which highlights the authority and supervision of the flag state over ships in relation to "administrative, technical, economic, and social matters.[22] Unexpectedly, the first paragraph of Article 94 of the United Nations Convention on the Law of the Sea declares, "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.

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[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.

[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).

Nationality is a matter of substantive law, but registration is the method by which a ship gets its nationality and is the main proof of that nationality. Article 94, line 2 of UNCLOS spells out the rules for registering a ship.[23] The main thing that registration means is "putting something in the public records." The private law provides basic proof of who owns the ship and any debts on it, which protects proprietary interests. The public law role, on the other hand, handles administrative issues that affect national interests. It is important to note that there is no standard way to register a ship because it depends on the rules and customs of each country. Still, registration makes sure that everyone knows about and can see the records of ships that are allowed by international maritime law to claim the country and fly a flag.
More recently, Article 97 of UNCLOS, which mainly codifies customary international law of the sea, says that only the state's flag authority can be used to punish or discipline people involved in accidents or other navigational issues that happen on the high seas. This shows how important the flag state's authority is.

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 oversee fulfilling their international commitments on the preservation and safeguarding of the marine environment. They will be accountable per 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

[23] Ready, (n 23) 6.
[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.

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.

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 perspective of the responsibility of the state 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 the

[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.
[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.

responsibility of states as codified by 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]

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 must guarantee that legal recourse is accessible within their legal frameworks for timely and sufficient compensation or alternative remedies for damage inflicted on the marine environment by natural or legal entities under their jurisdiction."

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

"The goal of states' cooperation in implementing and further developing international law pertaining to responsibility and liability, damage assessment, compensation, and the settlement of related disputes is to ensure that all damages caused by pollution of the marine environment are promptly and adequately compensated. When necessary, states should also work on developing criteria and procedures for paying adequate compensation, such as compensation funds or mandatory insurance".

Obviously, the above-mentioned factors all clearly pertain to the joint idea of responsibility and liability of the state in regard to conservation and preservation of the maritime environment independent of the roles performed by state and non-state actors in the process. Still, the emphasis is clearly on getting paid money.

Application of the State Responsibility Doctrine to Ships

Based on what we've covered so far, we can argue that the doctrine of state responsibility applies to cases of ship-source pollution, where the ship itself is the cause of pollution and the victim state's citizens or property suffer harm as a result.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

Otherwise known as the "extension of territory" hypothesis, the so-called "floating island doctrine" is a metaphorical language connected with the ideas in law of ship nationality and the maritime flag. As symbolic as it sounds, the clear manifestation of the concept that the ship is an extension of the territory of the flag state is the application of flag state law on board a ship carrying the nationality of that state. Stated differently, the ship is connected to its state of nationality via an umbilical connection. The metaphorism that a ship is a "detached part" of the land of the flag state also helps to explain this "territoriality" idea.[38] As elaborated below, Brian Smith refers to

[36] Boyle and Redgwell, (n 2) 224-225.
[37] ibid 226.
[38] Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition. Cambridge: Cambridge University Press, 2019, 190.

territoriality as "a most apt metaphor" for describing the character of flag state jurisdiction.[39] The legal concept that flag state law covers not just 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 strengthens this case. Nonetheless, under particular conditions the ship may be subject to dual or concurrent jurisdiction under both the coastal state and the flag state. As was already noted, almost all land-based activities can also take place on a ship, which serves as a self-contained community unit.[40] This verity justifies the need of a legal system on board fictionalized through 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 an island in the middle of the ocean, any criminal act committed aboard a British vessel is subject to the same British legislation that would apply if the perpetrator were standing on the Isle of Wight: the Admiralty Court."

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

> "… Any vessel at sea flying a national flag is effectively part of the territory of the country whose flag she flies. Anyone on board is thus subject to the laws of that country just as much as anyone on land within that country's territory.

In more precise terms he stated:

> "According to a number of precedents, any person or persons on board a ship that is flying the flag of a certain country are effectively subject to the laws of that country just as if they were physically present on land."

Blackburn J. expresses the strongest idea when he says, "It has been decided that a ship bearing a nation's flag is to be treated as part of the territory of that nation." A ship is sort 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. "In point of law," Bovill C.J. decided, "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 US case *People* v. *Tyler* [44] "Extensions of the territory of the nation under whose flag they said," Justice Christiancy said of ships travelling on the high seas. Since the oceans are really a shared realm for all humans, he stressed, no state can legitimately claim them as its own. Thus, all states have "a common right and a common jurisdiction" over their own ships.

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

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[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.

[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.

> "No state has the authority to control a vessel that flies the flag of another state; this is an inevitable consequence of the freedom of the seas principle, which states that the jurisdiction of the land on which a ship is physically located is equivalent to that of the state whose flag the ship flies over international waters."

The PCIJ states 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." For this reason, "a ship is placed in the same position as national territory," meaning that events occurring on board a ship while at sea are deemed to be occurring under the jurisdiction of the flag state. Therefore, the same logic holds true in cases when a ship's activities do damage to foreign land. The victim state can pursue legal action against the flag state of the vessel in question since the act in question was carried out inside its authority. The Lotus case ruling was heavily criticized in the maritime community, but that was mostly because of the problem of collisions at sea. The prevailing opinion supported the supremacy of flag states, and many people were against Turkey's claim of jurisdiction following the Lotus's entry into its seas, which resulted in the French navigation officer's trial and sanctions.

Many members of the international maritime community, mainly by former Western colonial powers, were unhappy with the PCIJ judgement. As a result of the animosity, the 1952 convention was adopted, which stated that no law other than the law of the master's or navigating officer's country or the flag state of the ship he was serving on at the moment of the collision could be applied in cases involving criminal prosecution.[46] The adoption of convention law strengthened flag state jurisdiction over maritime collisions. Ultimately, Article 97 of UNCLOS codified this principle, which had already been put into the 1958 UN High Seas Convention. I think it's quite reasonable to prosecute the person in charge of a ship's navigation at the moment of a collision under the laws of the flag state. 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] Curiously, according to Article 1 of that convention, if a collision happens between two or more sea-going ships or between a sea-going ship and an inland navigation craft, or if the defendant's habitual residence or place of business is in a port or inland waters, the court of that location can assume jurisdiction and legal proceedings can be initiated. The third choice is consistent with the tort law premise of *lex locus delicti commissi*.[48] The introduction and development of conventional 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 International Tribunal for the Law of the Sea (ITLOS) reiterated that "the ship, everything on board, and every person involved or interested in its operations are treated as an entity linked with the flag State," citing UNCLOS.[49] In our view, the phrase "linked" 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.

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[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.

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. *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 that obscures, or pretends to obscure, the reality that a rule of law has been altered, although its wording remains unchanged and its application is 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,

[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.
[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.

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 struck by a ship on its flag is fiction as accurate for the purposes of jurisdiction as any fiction can ever be. One could consider a ship as an amazing legal fiction, a stretch of territory from its flag state.[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 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*

[60] ibid 24-25.
[61] See Mukherjee, "Flagging Options: Legal and Other Considerations" (n 43) 32.
[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

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. Legal fiction, the court said, tend to slip outside their designated limits and to harden into dangerous truths. It pointed out that when weighed against the reality of shipboard life and life on land, supporters of the floating island theory neglected its possible impracticalities. 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, We must disagree. In our view, that convention addresses a specific issue—collisions on the high seas— while the floating island idea might still be pertinent for other uses, such those involving pollution damage inflicted by a ship to people or property in a nation 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 that author notes, the European Court of Justice's Grand Chamber has something to say regarding the issue:

> "Under the Convention (UNCLOS), The responsibility for ensuring maritime safety and, by extension, the protection of other states' interests, falls on this flag state. So, the flag state can be sued by other states for damages done to their controlled maritime areas by ships flying their flag, if those damages are the result of the flag state's failure to fulfil its responsibilities.[73]

The above cited ruling unequivocally shows the obligation and resulting liabilities of a ship's flag state when it damages another state by pollution. We 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.

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[69] (1939) 108 LJPC 17; (AIR 1939 PC 69).

[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).

Kojima uses an analogy to ship-source pollution on the high seas and cites an Advisory Opinion published by the International Tribunal for the Law of the Sea (ITLOS) while discussing state responsibility and the flag state's consequential liability for pollution damaged by its ship. 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-

> "International courts and tribunals provide authoritative interpretations of international agreements to the appropriate members of the international community in the form of advisory opinions, which aid in the prevention, reduction, and control of marine pollution".[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 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.

Recent events, like as the Wakashio incident off the coast of Mauritius, show how flag states may be held liable for damages caused by pollution from ships that affect other states. 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 damages payable, the Bunkers Convention is applicable,[78] and in that regard, the Japanese P&I Club of the ship should bear the compensation burden ahead to the related limit of liability.

Because the Bunkers Convention is silent on the subject of limitations, the LLMC 1996's provisions would govern. 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 highlighted 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

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[74] See Kojima (n 76) 93-94.
[75] ibid 95.
[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/

In our 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 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 our 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. The 1958 accord that was mentioned before answered the essential problem of which state had jurisdiction in criminal cases involving collisions on the high seas. Nevertheless, to the best of my knowledge, no convention has ever dealt with the hypothetical or literal question of whether a ship at sea an extension of its flag state is.

The question of whether the flag state of a ship is liable for harming another state's people or property, especially in cases of maritime pollution, remains unanswered in this context, as it relates to the idea of state accountability in international law. It ought to, based on our knowledge.