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ENVIRONMENTAL CATASTROPHES AND FLAGS OF CONVENIENCE—DOES THE PRESENT LAW POSE SPECIAL LIABILITY ISSUES?

L.F.E. Goldie†

INTRODUCTION

Maritime flags are a symbol of nationality.¹ As such, they are generally thought to be important in determining when a relationship exists between a state and a ship and, thus when a vessel is subject to the law of that state.² The flag of a vessel serves two different functions: it is a symbol of the nationality of the ship, which consequently designates the national law governing the affairs of the vessel, and it identifies the location of those responsible for the vessel.³

For at least the last thirty years, the practice of some ship-owners of registering their ships under the flags of states with less stringent manning and safety requirements than states which traditionally have set the standards of safety, has led to controversies. Some states offer vessel registration under conditions that impose fewer financial and administrative burdens than those which are imposed by other states. Economic rather than political considerations usually account for an owner's decision to flag or to re-flag a vessel.⁴ These practices have waxed and waned over time. During the nineteen fifties, for example, the United States' maritime unions waged a complex campaign

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¹ Comment, *The Nationality of Ships and International Responsibility: The Re-Flagging of the Kuwaiti Oil Tankers*, 17 DEN. J. INT'L L. & POL. 207 (1988).

² *Id.*

³ Wachenfeld, *Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf*, 1988 DUKE L.J. 174, 177 (1988).

⁴ *Id.*

against flags-of-convenience⁵ shipping. Relying on favorable in-

⁵ The phrase "flags-of-convenience" has been defined in the following terms: The term "Flags-of-Convenience" is commonly used— and is used in this Report—to describe the flags of such countries as Panama, Liberia, Honduras, and Costa Rica, whose laws allow—and indeed make it easy—for ships, owned by foreign nationals or companies to fly these flags. This is in contrast to the practice in the maritime countries (and in many others) where the right to fly the national flag is subject to stringent conditions and involves far reaching obligations.

Maritime Transport Committee, Organization for European Economic Cooperation, Study on the Expansion of the Flags of Convenience Fleets and on Various Aspects Thereof, Jan. 31, 1958, at 2 (mimeographed material).

This phrase has been used in the pejorative, commendatory, and neutral contexts. An example of the first may be found in the statement of Hoyt S. Haddock, Executive Secretary of the AFL-CIO Maritime Committee, *Hearings on Study of Vessel Transfer, Trade-in, and Reserve Fleet Policies Before the Sub-Committee on the Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 85th Cong., 1st Sess., ser. 12, pt. 2, p. 694 (1957). See also Omar Becu, *Fighting the Pirate Flags*, 124 FREE LABOR WORLD 59 (1959). Examples of the commendatory may be found in, *Liberia's Merchant Fleet*, 8 LIBERIA TODAY 12 (1959), and in, BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* (1962) [hereinafter BOCZEK]. Neutral uses of the term can be found in *West India Fruit and Steamship Co.*, 113 NLRB 343, 364 (1961); National Academy of Sciences, National Research Council, *The Role of the U.S. Merchant Marine in National Security* (1959) ("Project Walrus" Report by the Panel on Wartime Use of the U.S. Merchant Marine of the Maritime Research Advisory Committee) National Academy of Sciences Publication 749 [hereinafter "Project Walrus"]; and *Chasing the Runaways*, THE ECONOMIST, Feb. 24, 1962, at 709.

It may be noted that, although the definition quoted at the outset of this footnote names Panama, Liberia, Honduras, and Costa Rica as flags-of-convenience states, this list is not exhaustive nor necessarily up-to-date. Thus, the Venezuelan flag flies from the sterns of a small American-owned fleet. On the other hand, Costa Rica has repealed her flags-of-convenience legislation. See N.Y. Times, Oct. 31, 1958, at 57, col. 4.

At about the same time as Costa Rica's repeal two nations decided to join the group of states offering easy terms for the registration of ships. These are Lebanon, See N.Y. Times, May 27, 1958, at 62, col. 6 and Tunisia, See N.Y. Times, Oct. 30, 1958, at 61, col. 4. It is perhaps likely that more states will be added to the list for prestige or revenue purposes from time to time, especially if the original members should increase their taxes or improve their standards of seaworthiness. In this regard, coincidences in the history of Panamanian registration are illuminating. See Mender, *Nationality of Ships: Politics and Law*, 5 ARKIV FOR SJORETT 126, 279-80 (1961) (especially notes 19, 20 and accompanying text).

For connotations of the phrase "PanLibHon" with reference to shipping (formerly "PanLibHonCo" when Costa Rica's law offered that nation's flag-of-convenience to foreign shipowners, see the definition given by the National Labor Relations Board in *West India Fruit and Steamship Co.*, 130 NLRB 343, 364 and n. 82 (1961): "'PanLibHon' is the term usually employed in referring to 'flag-of-convenience' ships of Panamanian, Liberian and Honduran registry.") See also, Comment, *The Effect of the United States Labor Legislation on the Flag of Convenience Fleet*, 69 YALE L. J. 498 (1960); *The "Effect of the Genuine Link" Principle of the 1958 Geneva Convention on the National Character of a Ship*, 35 N.Y.U.L. REV. 1049 (1960); Comment, *PanLibHon Policy and the Problems of the Courts*, 60 COLUM. L. REV. 711, 722 (1960). On the importance of the

interpretations of the Norris-LaGuardia Act⁶ (which, in brief, prohibits the federal courts from issuing labor injunctions) they have pressed the advantages of direct action on the docks.⁷ Not only were the unions favored on the waterfront, they could also expect to receive a sympathetic hearing before the National Labor Relations Board (NLRB).⁸ Prior to the Supreme Court's de-

flag in this sense, see, e.g., Case of the S.S. "Lotus", 1927 P.C.I.J. (Ser.A) No. 10, at 25; *The Creole* (United States v. Great Britain), 2 MOORE, PRINCIPLES OF INTERNATIONAL LAW 258, 361; *R. v. Keyn*, 2 Ex. D. 63 (1876); *Marshall v. Murgatroyd*, 6 L.R.- Q.B. 31 (1870); *R. v. Anderson*, 11 Cox. Crim. Cas. 269 (1860). See also *United States v. Flores*, 289 U.S. 137 (1933). Cf. the predicament of a ship without a lawful flag, *Molvan v. Attorney-General for Palestine*, 1948 A.C. 351 (P.C.). For a critical comment on the general acceptance of "the flag" as synonymous with a ship's nationality, see RIENOW, *THE TEST OF NATIONALITY OF A MERCHANT SHIP* (1937) 140-53, especially 146-51 and n. 54; and compare with the broad general use of the phrase, his statement (at 152): "It is the authorization behind the flag which is significant."

A final point of definition may be made regarding the reference to the term "flag." It is taken as the indicator of a ship's nationality and as a short form of the more technically accurate phrase "colours and pass", see *The Vrouw Elizabeth*, 5 C. Rob. 3, 5, 165 Eng. Rep. 676, 677 (Adm. 1803) (a more modern rendering of Lord Stowell's phrase would be "flag and documents of registration"). See also RIENOW, *supra* at 140-41 ("The significance of the flag is internationally recognized. It symbolizes nationality in actual practice as well as in the terminology of international engagements," (footnotes omitted)). The term "flag" is taken in many modern writings as a shortened term for referring to, and as the outward symbol of, a ship's nationality.

⁶ 29 U.S.C. § 101 (1988), also known as the Anti-Racketeering Act of 1947.

⁷ The degree of the United States maritime trade unions' interest in this campaign may be illustrated by the following statement (from "Brief for the United States as *amicus curiae*", p. 20, *McLeod v. Empresa Hondurena de Vapores* 372 U.S. 10, 8 S.Ct. 1553 (1962)): "As a result of . . . foreign registrations, employment on American-flag vessels has dropped sharply — from 158,860 positions in 1945 to 84,300 in 1951, to 57,507 in 1955, and to 49,281 in 1960." See also *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 YALE L.J. 498, 499-50, 502-03 (1960).

⁸ *West India Fruit and Steamship Co.*, 130 NLRB 343 (1961), was the first leading decision of the Board exhibiting an application of the "balancing contacts" theory to the jurisdictions of the Labor Acts. (It had originally been enunciated by the Supreme Court in *Lauritzen v. Larsen* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), as providing jurisdictional criteria for cases under the Jones Act, 46 U.S.C. § 688 (1958).) See also *Romero v. International Terminal Operating Co.* (1959), 358 U.S. 354, and *Benz v. Compania Noviera Hidalgo* 353 U.S. 138, 79 S.Ct. 468, 3 L.Ed.2d 368 (1957). The "balancing contacts" theory of the *West India* case was applied to assert jurisdiction over foreign-flag ships by the Board in *Peninsular & Occidental Co.*, 132 NLRB 10 (1961); *Eastern Shipping Corp.*, 132 NLRB 930 (1961); *Hamilton Bros. and Sindicato Maritimo Nacional de Honduras 'Sindimar'*, 133 NLRB 868 (1961); *United Fruit Co.*, 134 NLRB 287 (1961). In all these cases the Board utilized *Lauritzen v. Larsen* tests to extend its jurisdiction and to lend its support to the claims of American maritime labor against flags-of-convenience vessels. It should, perhaps, be noted that in *Lauritzen v. Larsen* these tests had been formulated to read down the phrase "any seaman" in the Jones Act.

cisions in the *Empresa* cases⁹ and the *Inces Steamship Co., Ltd. v. International Maritime Workers Union*¹⁰ case, the NLRB had given an extended meaning to the jurisdictional provisions of its enabling act¹¹ and favorably heard the claims of American maritime labor against some categories of foreign-flag shipping. The extended operation given to the National Labor Relations Act¹² not only provided the unions with a forum for asserting their claims, but further excluded action in the State courts by the shipping companies through the application of the *Garmon* doctrine.¹³

After the reversal of the Board's decisions by the Supreme Court in the *Empresa* and *Inces* cases for lack of jurisdiction, the unions' strategies suffered a major setback. Subsequently, the union's interest in the manning and safety controversy languished. In part, this has been due to the unions' defeat in the Court which led to having the doors of NLRB closed to them in regard to manning and safety claims. It has also been due to the chronic failure of the United States to remain competitive in the shipping industry since the 1950's.

States have two responsibilities in the flagging of ships. The first responsibility arises in the decision whether or not to flag the vessel. Since international law places so few restrictions on the right to grant nationality to ships, this responsibility is fulfilled easily. Thereafter, other states are obliged to recognize the ship's nationality as being that of the flag granting state.

The second responsibility arises when the flagged vessel sails. The flag state has a general obligation to insure that it's

⁹ *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 U.S. 10 (1963); [hereinafter cited as *Empresa* cases on account of the names of the two cases argued, decided and reported with it, namely *McLeod v. Empresa Hondurena de Vapores* and *National Maritime Union v. Empresa Hondurena de Vapores*].

¹⁰ *Inces Steamship Co. v. International Maritime Workers' Union*, 372 U.S. 24 (1963).

¹¹ 28 U.S.C. §151 (1988).

¹² 29 U.S.C. §151 (1988).

¹³ *San Diego Building Trades Council v. Garmon* 359 U.S. 236 (1959). In this case the Supreme Court held that jurisdiction was pre-empted from the State courts in any case which was "arguably subject" to the Board and the National Labor Relations Act, 29 U.S.C. §151 (1988), until the Board has refused to act in the dispute. See the application of this doctrine by the New York Court of Appeals in the *Inces* case, 10 N.Y.2d 218, 176 N.E. 2d 719, 219 N.Y.S.2d 21 (1961). This was later reversed by the Supreme Court in *Inces*, 372 U.S. 24 (1961).

flagged vessels neither impede nor endanger other states in their use of international waters.¹⁴

More recently, the antagonism to the practice of using flags-of-convenience to avoid stringent controls of shipping has increased. Environmental and conservation groups, which, in the context of domestic industrial activities, have not been known to have interests sympathetic with those of the maritime trade unions, are the new opponents.

Over the years, transnationally operating agreements and international agencies have developed, at least in part, to restrain pollution damage to the oceans, enhance the rational use of resources, and to protect the mammal life of the sea. As a result, the arbitrary and individualistic interests which resort to flags-of-convenience may be seen as increasingly anachronistic. These interests resist the circumambient development of a legal consciousness by remaining a legal device for circumventing the law. This paradox is still possible because there remains in this modern world, where state sovereignty survives, the constantly eroding ancient principle of the exclusivity of the sovereignty of the flag state, regardless of the flag or the state's actual relation to the ship or the relevancy of its laws to the rational use of the oceans from the point of view of international community values.

This article will review the problem of flags-of-convenience in terms of the growing consciousness of the need for international maritime environmental and conservationist regulations. It will, of course, be confronted by a paradox: states which follow flags-of-convenience policies may lawfully and appropriately call upon countries opposing flags-of-convenience practices to recognize and respect those flags. On the other hand, these flags-of-convenience states may become increasingly subject to pressures to amend their domestic laws to limit the permissiveness of their ship registration criteria and procedures. Indeed, some states may eventually insist upon their right to refuse to recognize such flags-of-convenience registration on the grounds that to accord this recognition would give effect to the rights and classifications contrary to their local policies and laws. This view

¹⁴ INTERNATIONAL WATERS, also known as the high seas, is the area beyond the territorial sea. Convention on the High Seas, *supra* note 24, art. 1.

contrasts with the traditional view taken by scholars such as Dr. Boleslaw Boczek in his book *Flags-of-Convenience: An International Legal Study*.¹⁵ The categorical position taken in this book asserts that states have the unequivocal right to admit ships to their registries and that other states are obliged to recognise the unilateral exercise of this right. According to Dr. Boczek, states themselves are authorised to decide under what conditions they will grant nationality to merchant vessels. Once granted, this registration must be recognised by other states¹⁶ since "[T]he authority given by a State for a ship to fly its flag ought to be construed as constituting a grant of its nationality by the State to the ship. . . ."¹⁷

Boczek presents the thesis that while permissive norms of apparently unlimited extent confer upon all states an absolute right to grant their nationality to ships "for all purposes,"¹⁸ international rules of obligation exist which bind all other states to recognize and receive into their legal systems the granting states' creations of rights and classifications. Such a juxtaposition of norms of obligation and permission is extremely arbitrary. Inevitably this thesis gives rise either to the unresolvable opposition,¹⁹ in the field of international action, of equally valid but conflicting classifications under the domestic laws of different States, or to the elevation of the PanLibHon²⁰ states to the sovereign positions so aptly depicted in Lord Ellenborough's rhetorical question: "Can the Island of Tobago pass a law to bind the

¹⁵ BOCZEK, *supra* note 5 at 94, 102-03, 106, 288.

¹⁶ *Id.*

¹⁷ *Id.* at 102. See also Goldie, *Book Review*, 12 INT'L & COMP. L.Q. 989.

¹⁸ BOCZEK, *supra* note 5, at 289.

¹⁹ For a discussion of this conception of opposition or "opposability", see Rundstein, *Rechtgrundsätze des Völkerrechts und Fragen der Staatsangehörigkeit* (1931) ZEITSCHRIFT FÜR VOLKERRECHT 14, 44-65. Rundstein, at 50, defined "opposability", in the field of nationality law, as follows:

[I]f a State has in decisions concerning nationality scrupulously followed domestic law principles and regulations, a second defendant or claimant State or a third interested State would recognize the correctness of the procedure and the State's right to do as it did, while opposing or challenging the effectiveness of such procedure on the grounds that it is in contravention of an equally tenable position (on the basis of principles and regulations of their own State) regarding nationality.

Id.

²⁰ See *supra* note 6, for definition of PanLibHon.

rights of the whole world?"²¹

I. JURISDICTIONAL ISSUES

The reflagging of tankers must be justifiable on its own merits as a reflagging under the international and domestic standards that govern vessel registration.²² The international standard is embodied in the concept of the "genuine link" doctrine that was addressed in three specific conventions: (1) the Convention on the High Seas of 1958;²³ (2) the United Nations Convention on the Law of the Sea of 1982 (UNCLOS III);²⁴ and (3) the Convention on Conditions for the Registration of Ships (UNCTAD).²⁵

A. Treaty Formulations

Articles 5 and 6 of the Convention on the High Seas provide:

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.²⁶
2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.²⁷

²¹ *Buchanan v. Rucker*, 9 East 192, 194, 103 E.R. 546, 547 (K.B.) (1808).

²² See, e.g., *Wachenfeld*, *supra* note 3, at 177-83.

²³ CONVENTION ON THE HIGH SEAS, *done* at Geneva, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. See art. 5.

²⁴ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, *done* at Montego Bay, Dec. 10, 1982, U.N. Doc.A/CONF.62/122(1982), U.N. Sales No. E.83. V. 5 (1983)[hereinafter UNCLOS III]. See art. 91 and art. 92.

²⁵ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, CONVENTION ON CONDITIONS FOR REGISTRATION OF SHIPS, U.N. Doc. TD/RS/CONF./23, *adopted* by the United Nations Conference on Conditions for the Registration of Ships, Feb. 7, 1986 [hereinafter UNCTAD].

²⁶ CONVENTION ON THE HIGH SEAS, *supra* note 23, at art. 5.

²⁷ *Id.*

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.²⁸

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.²⁹ These provisions are substantially, rather than exactly, reiterated in articles 91 and 92 of the 1982 United Nations Convention on the Law of the Sea.³⁰

Article 97 of UNCLOS III, which reiterates article 11 of the Convention on the High Seas,³¹ provides as follows:

Article 97

Penal Jurisdiction in Matters of Collision

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service or the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.³²

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or license shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.³³

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.³⁴

²⁸ *Id.* at art. 6.

²⁹ *Id.*

³⁰ UNCLOS III, *supra* note 24, at art. 91 and art. 92.

³¹ Convention on the High Seas, *supra* note 23, at art. 11.

³² UNCLOS III, *supra* note 24, at art. 97.

³³ *Id.*

³⁴ *Id.*

As the International Law Commission pointed out in its commentary to draft article 35 Concerning the Law of the Sea, this article is limited in scope.³⁵ It is a penal provision directed to allaying the disquiet of "international maritime circles"³⁶ to which the Permanent Court of International Justice gave occasion by its decision in the *Case of the S.S. "Lotus"* (Fr. v. Turk.).³⁷ Article 97, like article 11 of the Convention on the High Seas, restates and adds to the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions and Other Incidents of Navigation (Brussels Convention).³⁸ It was the product of a diplomatic conference held in Brussels in 1952 to deal with the specific issue which the *Lotus* case precipitated — namely the recognition that a state, other than that of the ship which inflicted the injury, may try the responsible officers. In that case, the *S.S. "Lotus"*, a French steamer, collided with a Turkish flag vessel on the high seas, resulting in the sinking of the Turkish flagged vessel and the death of Turkish citizens. The Permanent Court of International Justice upheld the right of the non-flag state (Turkey) to arrest and try for manslaughter the officer during whose watch the collision took place. The after-shocks of this decision led to the Brussels Convention.³⁹ This agreement effectively reversed the holding for most major maritime cases and restored what had previously been viewed as the customary international law of the sea. As such, this was incorporated into the article 97 of UNCLOS III⁴⁰ and 11 of the Convention on the High Seas.⁴¹

The International Law Commission also pointed out that its

³⁵ *Id.*

³⁶ REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, 8 U.N. GAOR Supp. (No. 9) at 1, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 281, U.N. Doc. 4/SER.A/1956/Add. 1, Sales No. 1956.V3, Vol. II (1956) [hereinafter COMMISSION REPORT].

³⁷ The Case of the *S.S. "Lotus"* (Fr. v. Turk.) 1927 P.C.I.J. (Ser. A.) No. 10.

³⁸ INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO PENAL JURISDICTION IN MATTERS OF COLLISION OR OTHER INCIDENTS OF NAVIGATION, done at Brussels, May 10, 1952 [hereinafter BRUSSELS CONVENTION]. For a history of the circumstances leading to the Brussels Convention see Jessup, *The Growth of the Laws*, 29 AM. J. INT'L L. 495 (1935).

³⁹ BRUSSELS CONVENTION, *supra* note 38.

⁴⁰ UNCLOS III, *supra* note 24, at art. 97.

⁴¹ CONVENTION ON THE HIGH SEAS, *supra* note 23, at art. 11.

1956 draft of what became article 11 of the 1958 Convention⁴² was not intended to have effect on "private international law issues arising out of the question of collision".⁴³ On the other hand, the limitation on non-flag states' competence with regard to visiting penal consequences on the negligent navigation of ships on the high seas might be of considerable significance for a coastal state whose shores may be badly polluted by a maritime collision or stranding.

In May 1967, the Liberian flagged supertanker, the *Torrey Canyon*, spilled 100,000 tons of crude oil into the English Channel, causing extensive damage to both the English and French coastlines. The inadequacy of existing domestic and international legal principles relating to marine oil pollution casualties was exposed by the ensuing difficulties in resolving the numerous compensation claims and liability issues raised by the various claimants in that case. While the civil claims arising from the *Torrey Canyon* disaster, for example, remained unaffected by the Brussels Convention and the Convention on the High Seas, Liberia took exclusive charge of the penal aspects. As a result, a Liberian Board of Investigation sitting in Genoa penalized Captain Rugiati, the master of the *Torrey Canyon*, by removing his master's certificate. It is regrettable that the Board was apparently suspected of refusing to inquire into the issue of the ship's seaworthiness.⁴⁴ It would seem the Brussels Conven-

⁴² *Id.*

⁴³ CONVENTION ON THE HIGH SEAS, *supra* note 23.

⁴⁴ Goldie, *Book Review*, (PETROW, IN THE WAKE OF THE TORREY CANYON (1968); COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); J. SMITH, TORREY CANYON POLLUTION AND MARINE LIFE (1968) and GRILL, BOOKER AND SOFER, THE WRECK OF THE TORREY CANYON (1967)) 1 J. MAR. L. & COM. 155, 159 (1969). This author expressed his disquiet with the Liberian Board of Investigation and the outcome of its hearings in the following paragraph:

This reviewer regrets most emphatically that the United Kingdom, even if motivated by a traditionalist's respect for the jurisdiction of the flag state (whatever the flag), felt herself to be precluded from holding her own Maritime Board of Investigation. She could still have established a House of Commons Committee of Inquiry, or a Royal Commission, and taken the evidence of the British and French eyewitnesses whose testimony the Liberian Board, so Cowan and Petrow aver, never even sought. If such an inquiry had been held, could the Union Oil Company, the Barracuda Corporation, and the *Torrey Canyon*'s officers at the time of the casualty, including Captain Rugiati, have afforded to withhold their testimony? Could the members of the Liberian Board themselves have disregarded the pressure for the truth, the quest for the "fundamental why", which such an in-

tion and its progeny, cast a fig-leaf of respectability over the question of the ship's seaworthiness, or lack of it. Had the vessel been found unseaworthy, the owners would not have been able to limit liability nor would the captain's masters certificate have been revoked.⁴⁵

While the basis of maritime jurisdiction in coastal waters tends to be in terms of the categories of the exclusive claims which states assert offshore, the authority that states claim on the high seas has traditionally been seen as stemming from the exclusive jurisdiction that states assert based on the flags the ships fly. While the *Lotus* Case denies this proposition,⁴⁶ it is upheld by the Brussels Convention. Apart from some recent and tentative treaty developments, and the customary international law privilege arising from a state of emergency of abating a nuisance on the high seas, the basis for controlling pollution on the high seas is still through the flag state's laws. These laws may bind its own shipping to respect the integrity of the environment. But that is a matter of unilateral decision and is the policy choice of each individual state. In matters of the world community interest in protecting the environment from the pollution of the oceans, it is a most haphazard approach, made all the more risky by the current practices of many international oil corporations⁴⁷ (and other extractive enterprises) of registering their giant, sometimes poorly maintained and negligently navigated, fragile tankers under the so-called flags-of-convenience.⁴⁸

quiry would have generated?

Id.

⁴⁵ See, e.g., *Owners Off the Hook*, THE ECONOMIST, May 6, 1967 at 59.

⁴⁶ Case of the S.S. "Lotus" (Fr. v. Turk.) 1927 P.C.I.J. (Ser. A.) No. 10.

⁴⁷ According to the EXXON Oil Corporation, a tanker with a 28 man crew costs \$560,000 dollars a year to run if registered in the Phillipines but 2.5 million dollars if it is registered in the United States. Heneghan, *Shipping Guidelines*, Reuters North European Service, April 12, 1982, (Reuters Ltd.).

⁴⁸ See, e.g., BOCZEK, *supra* note 5.

B. *The International Court of Justice's "Genuine Link" Doctrine: An Unruly Metaphor for Ships*⁴⁹

Responding to a comment by Professor van Panhuys, Professors McDougal and Burke pointed out the central difficulty in applying the "genuine link" doctrine to the nationality of ships. They stated:

Our reference to Professor van Panhuys' views was in the context of a demonstration that no one has as yet suggested an empirical meaning for "genuine link" as applied to ships, in terms of the common interests of states. Professor van Panhuys does not in his present note suggest any such meaning. We remain of the opinion that it is an impossible task for anyone — third party decision-maker or other — to identify such meaning.⁵⁰

In this brief passage, the authors criticise the extension of the "genuine link" doctrine from the law of nationality (where the International Court of Justice enshrined it, not without considerable criticism, in the *Nottebohm Case*⁵¹) to the international law of shipping. Professors McDougal and Burke's brief comment is more than a "Footnote."⁵² It is a challenge. However, their animadversions have not deterred the International Law Commission, the 1958 United Nations Conference on the Law of the Sea (UNCLOS I),⁵³ UNCLOS III,⁵⁴ and, most recently, the United Nations Conference on Trade and Development (UNCTAD),⁵⁵ that the "Footnote" deem indeterminate. Once those indeterminacies have been identified, we need not despair of reformulating them in a less indeterminate language. Indeed, UNCTAD has already begun the process.

In article 29 of the International Law Commission's 1956 Articles Concerning the Law of the Sea,⁵⁶ which resembles arti-

⁴⁹ van Panhuys, *The "Genuine Link Doctrine" and Flags of Convenience*, 62 AM. J. INT'L L. 942 (1967).

⁵⁰ McDougal & Burke, *A Footnote*, 62 AM. J. INT'L L. 943 (1968).

⁵¹ *Nottebohm Case (Second Phase)*, 1955 I.C.J. 4.

⁵² *Supra* note 50.

⁵³ UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (24TH MTG.), SECOND COMMITTEE (HIGH SEAS GENERAL REGIME) 64, U.N. Doc. A/Conf.13/40, U.N. Sales No. 58. V.4, Vol. IV (1958) [hereinafter UNCLOS I].

⁵⁴ UNCLOS III, *supra* note 24.

⁵⁵ UNCTAD, *supra* note 25.

⁵⁶ COMMISSION REPORT, *supra* note 36, at 259-60.

cle 5 of the Convention on the High Seas, the Commission formulated the requirement of the "genuine link" and permitted states to sanction other states by refusing to recognise their flags. The Commission's formulation was as follows:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.
2. A merchant ship's right to fly the flag of a State is evidenced by documents issued by the authorities of the State of the flag.⁵⁷

The issue of recognition that the International Law Commission identified as providing a sanction behind the "genuine link" doctrine reflects the International Court of Justice's holding in the *Nottebohm Case*.⁵⁸ In this case, the Court did not question the domestic law validating Liechtenstein's grant of nationality to Friedrich Nottebohm.⁵⁹ It did, however, find that under international law it was not opposable to Guatemala who was not obliged to recognise the grant through the lack of a "genuine link."⁶⁰ The Court stated that:

Guatemala had not recognised Liechtenstein's title to exercise protection in respect of Nottebohm. It then considered whether or no[t] the granting of nationality by Liechtenstein directly entailed an obligation on the part of Guatemala in regard to the exercise of protection.⁶¹

In the Commission's commentary on its formulation of the "genuine link" proposal, it observed (in harmony with the McDougal and Burke "Footnote") that it did not "consider it possible to state in any greater detail what form this link should take."⁶² However, the Commission stressed that a State's grant of the right to fly its flag "cannot be a mere administrative for-

⁵⁷ *Id.*

⁵⁸ *Nottebohm Case (Liecht. v. Guat.) (Second Phase) 1955 I.C.J. at 78.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* See also text accompanying notes 83 to 97.

⁶² COMMISSION REPORT, *supra* note 36, at 279.

mality,"⁶³ and in this context it emphasised the need for an effective control of the ship. Regretfully, while the Commission accepted the fact that the formulation of regulations could "not prevent abuse,"⁶⁴ the Commission added that it:

[T]hought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission preferred a vague criterion to no criterion at all. While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new State.⁶⁵

At its 348th meeting, the Commission's members discussed the question of recognition and, although they did not mention the *Nottebohm Case* by name, they were clearly guided by its principle when they accepted Professor Scelle's observation that:

It would be for third States to decide whether a genuine link existed between the ship and the State of new registration and consequently whether the ship was entitled to fly its flag. The situation was analogous to a disagreement between two States over the nationality of an individual.⁶⁶

C. *The Nottebohm Case's Relevance to Flags-of-Convenience: Ocean Pollution Issues*

The *Nottebohm Case* turned on the issue of whether Friedrich Nottebohm's speedy naturalization as a national of Liechtenstein was "opposable to," and so entitled to recognition by, Guatemala. The Liechtensteinian law of naturalization required

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Summary Records of the 348th Meeting*, [1956] 1 Y.B. INT'L L. COMM'N 70, 71, U.N. Doc. A/CN.4/SER. A/1956/Add.1, U.N. Sales No. 1956 V. 3, Vol. II (1956) [hereinafter *Commission's Survey*].

that a qualifying individual had to be accepted into a "Home Corporation" (a Liechtenstein commune) and was required to produce documents showing a continued residence in the Home Corporation for upward of three years.⁶⁷ Nottebohm arrived in the country of his adoption (Liechtenstein) in the beginning of October.⁶⁸ He applied for admission as a national of Liechtenstein on October 9, 1939 and was accepted into the Commune of Mauren which conferred its citizenship on him on October 15, 1939.⁶⁹ Furthermore, a document signed on behalf of the Principality, dated October 20, 1939, testified to the fact that Nottebohm had been naturalized on October 13 of that year.⁷⁰ Upon the grant of Liechtensteinian nationality, Nottebohm promptly applied for and obtained a Liechtenstein passport. This was visaed by the Guatemala Consul General in Zurich on December 1, 1939.⁷¹ He was thus able to enter Guatemala as a Liechtenstein national in 1939. Prior to receiving his naturalization certificate, Nottebohm paid 25,000 Swiss francs to the Commune of Mauren and 12,500 Swiss francs to Liechtenstein.⁷² He paid an additional 1,000 Swiss francs as an amount owing for an "annual naturalization tax,"⁷³ and further deposited 30,000 Swiss francs as security for his further obligations with respect to that tax.⁷⁴

The International Court of Justice did not question the authority of Liechtenstein, as a sovereign state, to legislate its own rules regarding the conferral of its nationality. The Court stated this was a matter falling entirely within the state's domestic jurisdiction.⁷⁵ However, the Court did hold that a state's claim to exercise protection of its citizens in the international arena (specifically, on whether Nottebohm's naturalization could be successfully invoked against Guatemala) depends on international criteria.⁷⁶ In finding that the naturalization in this case could not be so invoked, the Court said:

⁶⁷ Nottebohm Case (Liecht. v. Guat.) (Second Phase) 1955 I.C.J. 76, 77.

⁶⁸ *Id.*

⁶⁹ *Id.* at 77-78.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 78.

⁷⁴ *Id.*

⁷⁵ *Id.* at 78-79.

⁷⁶ *Id.*

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. This was so, failing any general agreement on the rules relating to nationality. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State.⁷⁷

In subsequent paragraphs, the Court amplified this criterion of the concordance between the legal bond of nationality and the social reality of the individual's nexus with the community by uttering emphatic phrases stressing the need for the individual's genuine linkage, in terms of reciprocal rights and duties, with the state of his nationality.⁷⁸ The nationality conferred should appear as real and effective as the exact judicial expression of a social fact of a connection.⁷⁹ The Court concluded with the observation that Nottebohm had not so much sought Liechtensteinian nationality to obtain "a legal recognition of [his] membership in fact in the population of Lichtenstein"⁸⁰ as to become enabled to:

[S]ubstitute for his status as a national of a belligerent State that of the subject of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations . . . and exercising the rights pertaining to the status thus acquired.⁸¹

D. *The Nottebohm Case and Subsequent Developments in the Law of the Sea Deliberations*

At UNCLOS I, the implicit grant of a right to refuse recognition to the nationality of a ship, when a state determined an absence of a "genuine link," came under considerable criticism. Mr. Colclough (United States) observed that:

The third sentence of article 29, paragraph 1, raised many ques-

⁷⁷ *Nottebohm Case* (Second Phase) 1955 I.C.J. 4 at 23.

⁷⁸ *Id.*

⁷⁹ *Id.* at 24.

⁸⁰ *Id.* at 80.

⁸¹ *Id.*

tions. Did it merely mean that, if a particular State decided that a ship sailing under the flag of another State had no genuine link with the flag State, the first State was not required to allow the flag State to afford diplomatic protection to its ship? Or, did it mean that such a ship would become stateless, with all the attendant disadvantages?⁸²

He added that "in addition to producing direct consequences in public international law, non-recognition would also produce consequences in private international law,"⁸³ leading to insecurity in transactions. He pointed out that, among the practical difficulties which would result, were the adverse effects on property rights, "the validity of contracts executed under the laws of the flag State, and maritime insurance."⁸⁴ A majority of the Second Committee concurred with Mr. Colclough's criticisms. Those critics of UNCLOS I pointed out that any analogy between the nationality of individuals and ships was highly misleading⁸⁵ and the reliance on such a metaphor would lead to "disputes between States."⁸⁶ The Second Committee, however, retained its requirement of the "genuine link" but deleted the clause conditioning a ship's nationality on its recognition by other states. This deletion of the central key role of recognition by other states in determining the relationship of the ship to its state of registry was potentially disruptive.⁸⁷ This formulation was approved in the Tenth Plenary meeting⁸⁸ and became incorporated into article 5 of the Convention on the High Seas.⁸⁹ Article 5, with only some minor changes (but retaining the reference to the requirement of the "genuine link" between the flag state and the ship), was incorporated into article 91 of UNCLOS

⁸² 4 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, SECOND COMMITTEE (HIGH SEAS GENERAL REGIME) at 64, 123 U.N. Doc. A/CONF. 13/40, U.N. Sales No. 58. V.4 Vol. IV (1958).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 65-67.

⁸⁶ See comment by Mr. Bulhoes Pedreira (Brazil), *id.* at 66.

⁸⁷ *Id.* at 75. See also the Italian Proposal, U.N. Doc. A/CONF.13/C.2/L.28 (Mar. 21, 1958) at 123. This proposal, as amended was adopted by 34 votes to 4, with 17 abstentions. *Id.*

⁸⁸ 2 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, PLENARY MEETINGS at 20, U.N. Doc. A/Conf.13/38, U.N. Sales No. 58. V. 4, Vol II (1958).

⁸⁹ CONVENTION ON THE HIGH SEAS, *supra* note 23.

III.⁹⁰ The final draft of the article followed the requirement of the "genuine link" in article 5 of the Convention, namely: "in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying it's flag."⁹¹ This obligation was, however, spelled out in article 94 under the rubric, "Duties of the Flag States."⁹²

Subsequently UNCTAD had proposed a new convention in 1986.⁹³ This spells out, in much greater detail than did article 94 of UNCLOS III, the duties of the flag state with regard to its legal and administrative control of the ship in compliance with the "genuine link" metaphor. But this latest convention, like the Convention on the High Seas and UNCLOS III, does not raise the issue of giving other states a discretion as to recognizing the nationality of a ship based on the existence, or imputed absence, of a "genuine link." The traditional, customary international law duty to recognize the ship's flag remains in place as a consequence of the conferral of the flag and papers by the state of registry. In fact, in UNCTAD's preamble,⁹⁴ this new attempt to tackle the problem of effective control reaffirms in identical words the opening sentence of article 5 of the Convention on the High Seas. Far from raising the issue of recognition, the preamble provides that the Convention has been "prompted by the desire among sovereign states to resolve in a spirit of mutual understanding and cooperation all issues relating to the conditions for the grant of nationality to, and for the registration of, ships."⁹⁵ The implication to be drawn from this assertion is that the duty to recognise the conferral of nationality upon a ship remains unchanged and that a state may not look behind the flag. All that it purports to achieve is the imposition of a sanctionless duty on states when conferring the privilege of flying their flags. In the language of the *Nottebohm Case*, any grant of nationality to a ship by a state, and the consequential right of a ship to fly that country's flag,⁹⁶ is appealable to every state and

⁹⁰ UNCLOS III, *supra* note 24, at art. 91.

⁹¹ *Id.*

⁹² *Id.* at art. 94.

⁹³ UNCTAD, *supra* note 25.

⁹⁴ *Id.* at 1.

⁹⁵ *Id.*

⁹⁶ *See, supra* text accompanying note 58.

to all the world.

II. FLAGS OF CONVENIENCE AS RESPONSIBILITY-AVOIDING DEVICES⁹⁷

The great weakness of the present international law governing jurisdiction over ships and shipping stems from its present naive invitation to engage in legal fictions and responsibility-avoiding devices. Indeed, international law clearly encourages the avoidance of its own values, rules, policies and prescriptions as embodied in the concept of "genuine link" while it evades the obligation of making those rules and presumptions effective. For as long as shipowners find certain laws objectionable, they will feel encouraged to seek legal devices to evade the laws to which they object provided that no disagreeable consequences will result.⁹⁸

⁹⁷ These brief observations are based on two previous articles by the author. See Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L L. 283, 319-25 (1970); Goldie, *Recognition and Dual Nationality—A Problem of Flags of Convenience*, 39 BRIT. Y.B. INT'L L. 220, 254-61 (1963) [hereinafter *Flags*].

⁹⁸ The famous case of *Mortensen v. Peters*, 43 Scot. L. Rep. 872 (1906) arose because a British trawler owner resorted to use of the Norwegian flag in an attempt to bypass legislation aimed at protecting Scottish herring fisheries. The facts were as follows: Section 7 of the Herring Fishery (Scotland) Act of 1889, 52 & 53 Vict. c. 23, and By-Law No. 10 made in 1892 by the Fishery Board for Scotland, when read together, brought about the outlawing of otter and beam trawling in the whole sea area of Moray Firth between Duncansby Head and Rattray Point. Taking the view that this legislation could be effective only against British trawlers outside territorial waters, a number of British trawler owners proceeded to register their ships under the Norwegian flag and the flags of other Scandinavian countries, and continued trawling as before. Their ships were arrested. As a result *Mortensen v. Peters* went to the High Court of Justiciary of Scotland as a test case. The Court held that the Act and the by-law extended to acts done by aliens outside the three mile limit but within the proclaimed sea area. It may be noted that the non-British flags in this case were denied their effectiveness as protectors of a law-abiding activity, not by piercing the veil of the foreign registration and finding British ownership and control, but by an assumption of jurisdiction over the waters where the operation took place. *Mortensen v. Peters* was followed by a number of prosecutions leading, however, to diplomatic protests by the flag states of the arrested trawlers, namely Norway, Sweden and Denmark. (This technique of extending the area of territorial waters to the place of infringement, which otherwise would be on the high seas, rather than piercing the camouflage of the flag of convenience, also was adopted in 1954 by Peru to justify the arrest of the *Onassis* whalers.) Later, when international diplomatic pressure called for the British government's repudiation of *Mortensen v. Peters*, Norway and the other Scandinavian countries amended their shipping laws and excluded British-owned trawlers from their register books — so the use of their flags as flags of convenience was no longer permissible. The jurisdiction claimed in *Mortensen v.*

When a law-avoidance practice becomes widespread, it generally comes to be supported by its own evolving morality which develops as an alternative to the traditional one embodied in the existing rule of law⁹⁹ e.g., the relation between flags-of-convenience shipping and the fleets of "traditional maritime states."¹⁰⁰ While American business theorists would argue that American seamen are entitled to the best wages and conditions of labor they can bargain for with American shipping companies, the defenders of flags-of-convenience would argue that American shipowners are entitled to register their vessels under foreign flags in order to avoid paying the wages for which American seamen have bargained. The fictional and law-avoiding character of the flags-of-convenience device creates this further anomaly: The United States has entered into agreements with owners of flags-of-convenience shipping for the purpose of providing for

Peters was thereupon limited by the Trawling in Prohibited Areas Prevention Act of 1909, 9 Edw. 7, c. 8. See also 169 PARL. DEB., H. L. (4th ser) 985, 988-9 (1907), and 170 PARL. DEB., H.L. (4th ser.) 1379 (1907). The effect of the act was to prohibit the landing or selling, in British ports, of fish caught by otter or beam trawling in the prohibited areas, and to create the presumption that any fish landed by a ship which had, within the previous two months, trawled by the prohibited methods in the prohibited areas, were fish so caught.

⁹⁹ A familiar example is provided by the history of divorce in the United States. For dramatic instance of the clash of the traditional matrimonial public policy and social ethics and their "Nevada" alternative ethics, see *The Trial of Earl Russell*, 1901 App.Cas. 446. See also *Williams v. North Carolina*, 325 U.S. 226 (1945) (the "second Williams case"). The notion of an "alternative ethic" is offered here as distinguishable from the notions of both amorality and immorality. At times, however, these may be linked as, for example, honor among thieves. *Id.*

¹⁰⁰ BOCZEK, *supra* note 5, at 2, classifies the "flag-of-convenience states" and the "traditional maritime states" into two distinct and opposed categories the basis of which is outlined in the following extract:

[W]ith regard to the grant of nationality to merchant vessels, just as in the matter of the delimitation of the boundaries between the high seas and the territorial waters of any particular country, or as in the issue of nuclear tests conducted at sea, the general principle of the freedom of the seas is interpreted very differently by different nations. Some countries consider that they have the right to grant their flag as an unlimited prerogative; others, using the argument that every freedom must be limited in the interest of all, feel that they have the right to grant their flag to vessels only if they are owned by their nationals and that all other countries should adhere to this principle. Such differing positions reflect the conflicting economic interests of the nations concerned. For one group, under certain circumstances, a liberal interpretation is convenient; for another group, a restrictive interpretation better serves its interests.

Id.

“effective United States control” of such vessels in times of a United States emergency. In a book defending this policy, denominated “Project Walrus”¹⁰¹, the National Academy of the Sciences offers the following explanation:

In the event of war it will be necessary to augment U.S. flag shipping. The Maritime Administration and the Navy Department have determined jointly that it will be practicable to bring a portion of the U.S.-owned foreign-flag shipping under direct U.S. control on the event of a national emergency. This effective U.S. control concept is a matter of expediency, rather than choice, and applies essentially to designated shipping under the “flags of convenience.”

Determinations regarding effective control are not founded on governmental treaties. Assurances that specific ships will revert to U.S. control are given by the U.S. owners of the ships, not by the country of registry. Former U.S. flag vessels that were transferred to PANLIBHON registry are under effective control as a result of stipulations in the transfer contract approvals granted by the Maritime Administration. Less formal agreements apply to foreign-built shipping.

U.S. owners can register foreign-built shipping under any friendly flag of their own choice, or transfer from one flag to another at will. In the case of foreign-built PANLIBHON-flag ships, the Maritime Administration normally negotiates agreements with the U.S. parent companies that the ships will be made available to the United States in the event of a national emergency.¹⁰²

This inherently self-contradictory assertion provides fruitful soil for the growth of a number of anomalous situations. On the one hand, the traditional international law doctrine of the freedom of the high seas can be invoked to justify the exercise of discretion (except insofar as this may be limited by some states’ domestic law restrictions on the privilege of registering under their flags) by ships’ owners in their selection of an appropriate nation of registry. Yet, on the other hand, permitting the United States to take over such ships, as if they were United States flag-

¹⁰¹ “Project Walrus,” *supra* note 5.

¹⁰² “Project Walrus,” *supra* note 5. See also Report by Leo A. Hoegh, Director of the Office of Defense Mobilization, Dec. 29, 1960 at 16 (mimeographed material); and Brief for the United States as Amicus Curiae at 20-21, *West India Fruit and Steamship Co.*, 130 NLRB 343 (1961).

ged vessels, ignores the accepted international rule of law that a ship's nationality is that of her flag and that she may not lawfully have a dual or multiple nationality.¹⁰³ The policy embodied in "Project Walrus" is clearly intended to subordinate a ship's flag nationality to her "effective control" nationality. Accordingly, it appears to contradict the traditional rule and ignores the interests and obligations of the state of the ship's flag nationality.

Furthermore, the issue of "United States ownership and control" of ships has gone beyond merely the issues of national defense and logistics. The question of whether the United States may exercise jurisdiction over foreign flag ships has since shifted to seamen's claims in federal courts.¹⁰⁴ This development has

¹⁰³ See McDougal, Burke & Vlasic, *The Maintenance of the Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25, 57 (1960) that states: "The one necessary limit upon the discretion of states, and a limit which appears universally accepted, is that, once a state has conferred its national character upon a vessel, other states may not confer their national character as long as the original national character remains unchanged."

See also McDougal & Burke, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 1058 (1962). See also the categorical statement in 1 OPPENHEIM, *INTERNATIONAL LAW* 595 (8th ed. Lauterpacht, 1955) which reads: "But no state may allow a vessel to sail under its flag which already sails under the flag of another State." *Id.* See also the Geneva Convention on the High Seas, Article 6, sec. 1, in text accompanying footnote 27.

¹⁰⁴ See, e.g., *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Grammenos v. Lemos*, 457 F.2d 1067 (2d Cir. 1972); *Tsakonites v. Transpacific Carrier Corp.* 322 F. Supp. 722 (S.D.N.Y. 1970); *Pzndazopoulos v. Universal Cruise Line*, 365 F. Supp. 208 (S.D.N.Y. 1973); In this last case, the common theme of all these cases was enunciated without evasion or equivocation by District Judge Cannella:

The practice in this type of case of looking through the facade of foreign registration and incorporation to the American ownership behind it is now well established. . . Complicating the mechanics of evasive schemes cannot serve to make them more effective. (quoting Circuit Judge Medina in *Bartholomew v. Universal Tankships*, 263 F.2d 437, 442 (2nd Cir. 1959).

Id. at 213.

Judge Cannella concluded:

For the reasons set out above, it is the conclusion of this court that the foreign incorporation of these defendants and the foreign registration of the vessel are a facade designed to disguise American beneficial ownership, operation and control and to avoid the consequences of the American shipping laws. The beneficial ownership of the defendants by American interests and the location of the defendants' base of operations in New York are substantial contacts with the United States and are the "heavy counterweight" necessary to overcome the law of the flag which is, on the facts of this case, a mere flag of convenience.

Id. at 214.

given rise to a number of bizarre possibilities. The following provide instructive anomalies:

1. Contrary to international law, the ship may, in domestic courts, come to be recognized as having dual or multiple nationalities; or
2. Despite the flag the ship flies, her single nationality is her purportedly dominant one, namely that of her "effective control." If this is to be the outcome, then articles 5 and 6 of the Convention on the High Seas (and articles 91 and 92 of UNCLOS III) are rendered ineffective in such cases; or
3. The "effective United States control" agreements entered into between the United States government and the owners of the flags-of-convenience ships should, necessarily, be regarded as ineffective, leaving the flags-of-convenience state in sole legal and validly effective control of the ship and leaving the United States without the authority over the ship stipulated for or the jurisdiction claimed; or
4. The flag-of-convenience state and owners of ships choosing such flags are entitled, by virtue of the ship's flag, to refuse to recognize or choose to be bound by, the "effective United States control" agreements, or to reject them as derogations from the flag state's sovereign authority under international law; or
5. States with which flags-of-convenience states may be in political contention, and which may have declared a blockade or "quarantine" against such states and their shipping, could choose to disregard the "effective United States control" agreements, arguing that such agreements do not bind third parties. They could then treat the vessels as belonging to the flag state and hence may, for example, seize the ships as lawful objects of high seas blockade and even prize in time of belligerent situations and relations. This "enemy character" of the ships in question would make a mockery of such factual considerations that they are engaged in the foreign trade of the United States (a neutral) and not that of the belligerent state which is being subjected to the quarantine or blockade by its enemy.

Additionally, all five of these variables are relevant because they show how flawed the international and transnational accountability of states and enterprises for the catastrophes caused by the management of flags-of-convenience to the proposition, (that provides the supporters of flags convenience practice with its only juridically serious supportive argument) that a ship may only have one nationality: namely that of its flag.

Flags-of-convenience vessels have dual or multiple nationalities. These flaws and contradictions, moreover, provide a handsome return to the states of flags-of-convenience registry and to the owners of such ships, but they constitute an environmental danger to the world community.

III. FLAGS-OF-CONVENIENCE AND THE IMO¹⁰⁵ CIVIL LIABILITY CONVENTION¹⁰⁶

A number of coastal countries have become signatories to the International Convention on Civil Liability for Oil Pollution Damage (CLC). The treaty was an outgrowth of a 1969 International Conference which addressed oil pollution damage from any escape or discharge from a "seagoing vessel" or any "seaborne craft. . . actually carrying oil in bulk cargo."¹⁰⁷ The CLC was designed to "adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation for vessel source oil pollution."¹⁰⁸ Note should be taken of the CLC's selection of the owner of a ship as the party to be made liable under article 3.¹⁰⁹ The owner has been defined as "the person or persons registered as the owner of a ship, or in the absence of registration, the person or persons owning the ship."¹¹⁰ This represents a departure from the concept of the party liable in the Brussels Convention on the Liability of Operators of Nuclear Ships,¹¹¹ and the other three conventions on the liability for nuclear harms which have been developed in the last decade.¹¹² All of these look to the "opera-

¹⁰⁵ IMO is the International Maritime Organization.

¹⁰⁶ INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, done Nov. 28, 1969, reprinted in 9 I.L.M. 45 (1970) [hereinafter CLC].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Convention on the Liability of Nuclear Ships, 57 AM. J. INT'L L. 268 (1963). Article XXIV, para. 1 provides, "This Convention shall come into force three months after the deposit of an instrument of ratification by at least one licensing State and one other State." It has not yet come into force because it has not been ratified by either of the "licensing state[s]" (i.e., the United States or the Soviet Union).

¹¹² The other three conventions on liability are:

(1) CONVENTION ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY, done July 29, 1960, OEEC Doc. No. C(60) 93 (1961), 8 EUR. Y. B. 202 (1960);

(2) VIENNA CONVENTION ON CIVIL LIABILITY FOR NUCLEAR DAMAGE, opened for signature

tor", rather than to the "owner", as the accountable party. In the conduct of ships and shipping enterprises one frequently finds that the charterer (the "operator" of a ship) is more in control of her than is her owner. (There are various kinds of charter parties¹¹³ or agreements between the owner and the charterer of a ship.) Under bareboat or demise¹¹⁴ charters, for example, the manning, operation, provisioning and navigation of a ship are in the hands of the charterers — who are thus the parties who exercise control over the ship. The owner has effectively passed the control to them. The restriction of liability to the "owner" may look suspiciously like the creation of a straw man to answer for major maritime pollution catastrophes in light of the practice of owners of flags-of-convenience ships.

In general flags-of-convenience practice, owners are often conduits and therefore, amount to little more than the name of a company which exists in a file drawer and on a brass plate. Their practice frequently has been, prior even to the ordering of the ship, to give long-term demise charters (fixed term leases, as contrasted with "voyage charters"¹¹⁵ or leases for a simple voyage and not fixed by a period of time) to the enterprises for whose benefit the ships were built in the first place. This contract provides the security for the bank loans needed to finance the cost of building the ship. The installments of the charter party (rent) are used to pay off the financial obligation incurred. The *Torrey Canyon*¹¹⁶ provided an example of this practice. She was owned by the Barracuda Corporation which demised the ship to the Union Oil Company (charterer). The charterer's pay-

May 21, 1963, IAEA Doc. CN.12/46, 2 I.L.M. 727 (1963); and

(3) CONVENTION OF THE 31ST JANUARY 1963 SUPPLEMENTARY TO THE PARIS CONVENTION OF 29TH JULY, 1960, ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY, Jan. 31, 1963, 2 I.L.M. 685 (1963). There is a fifth embryonic agreement in a draft sponsored by the Inter-American Nuclear Energy Commission.

¹¹³ The term "charter party" designates the document in which is set forth the arrangements and contractual engagements entered into when one person, the charterer takes over the use of the whole of a ship belonging to another, the owner. GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, 2d ed. (1975) at 193 [hereinafter GILMORE].

¹¹⁴ In a "demise" or "bareboat charter", the charterer takes over the ship lock, stock and barrel and mans her with his own people. He becomes, in effect, the owner pro hac vice, just as does the lessee of a house. *Id.* at 194

¹¹⁵ In a "voyage charter" the ship is engaged to carry a full cargo on a single voyage. The vessel is manned and navigated by the owner. *Id.* at 193.

¹¹⁶ *Torrey Canyon*, 281 F. Supp. 228 (S.D.N.Y. 1968).

ments were intended to defray the Barracuda Corporation's loan plus bank interest as well as provide a profit for the participants in the incorporation of Barracuda.

Although, in a flags-of-convenience situation, the owner may be a judgment-proof straw man, the CLC's limitation of the party to be made liable to the "owner" may be salvaged by another provision. The Convention requires that the parties to it should issue a certificate to each tanker it registers, which indicates that she carries a form of insurance or guarantee adequate to compensate persons harmed by oil pollution casualties. The Convention also provides for a right of direct action against the insurer or other guarantor.¹¹⁷

States should, however, be aware of the problem of the financial capability of the insurers or guarantors named in certificates issued by foreign countries to meet the obligations imposed by the Convention. May not some countries with flags-of-convenience facilities be prepared to grant certificates of financial capability on the basis of more flimsy credit and assets than would the "traditional maritime States," and may not the "Gresham's law"¹¹⁸ of maritime insurance come into being through flag-of-convenience temptations? Article 7, paragraph 7, of the CLC provides for consultation on this important point at the initiative of a contracting state.¹¹⁹ But what should be that country's next step if the consultations, in its view, should turn out unsatisfactorily? Should that country bar vessels from its ports that it regards as potentially unable to meet the scale of compensation provided for in the Convention? Could it refuse to honor the certificate of financial capacity?

If such an amelioration of the law on the books as presented by the Convention were accompanied by such a deterioration of legal responsibility on the high seas by virtue of giant tankers remaining outside that Convention's regime of responsibility, then indeed, we all would have to "build swimming pools"¹²⁰ — if we could get enough clean water to fill them.

¹¹⁷ CLC, *supra* note 68 at 49-50.

¹¹⁸ See *Flags*, *supra* note 97 at 221, n. 1, for a discussion of "Gresham's law" of shipping in the flag-of-convenience context.

¹¹⁹ CLC, *supra* note 68 at 53

¹²⁰ See Gill, *Book Review*, THE ECONOMIST, Sept. 2, 1967, at 794 citing an unnamed "Greek tanker owner" as the author of this twentieth century Marie Antoinette-type

CONCLUSION

The use of flags-of-convenience could render the owners of giant tankers (of ever-increasing tonnage and risk to the environment) effectively judgment proof, as a matter of fact, from liability for harms they cause. Also, as the world's giant tanker fleet continues to age, more and more ships become less and less safe. This development is an inevitable consequence of tanker economics. As ships age they tend to become the property of less scrupulous owners, who, in order to glean their profits, make cuts in their ship's maintenance and so in their environmental protection costs. Thus, in order to earn a precarious living, these vessels will increasingly become menaces on the high seas, creating disasters afloat and on the shoreline. Hence, the privilege of registering ships under permissive flags-of-convenience will increasingly create more severe problems, in the context of the environment and of liability, than that practice has done in the past in terms of United States labor-management issues on the waterfront and in the maritime industry. As *The Economist* has pointed out, it is doubtful whether Liberia, for example, has the means, even if it had the will, to prosecute breachers of the CLC regulating (and eventually prohibiting) the pumping out of oily ballast onto the common high seas of mankind.¹²¹ This juxtaposition of the flags-of-convenience issue with the "tragedy of the commons" points to the need for new controls as well as new standards.¹²²

Usually the participants in the common right welcome the development of a regulatory system for the utilization of their common resource which effectively restrains each from inexorably working against both the good of all the other users and against their own long-term advantage. But where even the most insignificant party who stays outside the proposals for the rational regulation and protection of the commons has the capacity of destroying the regulatory system, there remains a threat to

aphorism.

¹²¹ *The Channel: Playing Canute with Pollution*, *ECONOMIST* Apr. 10, 1971 at 77; but see *Plugging Some Leaks*, *ECONOMIST*, May 8, 1971, at 80.

¹²² A response to this need has been started by the World Community to extend that its intentions have been embodied in articles 22, 23, 41, 61, 117-19 and 145 and Part XII of UNCLOS III, *supra* note 25.

the integrity of the commons. Furthermore, the gains by the party who holds out against the system will supply the incentive for others to quit and join the free-for-all. At the very least, non-participation permits the non-participant to reap advantages from the regulatory system's restrictions and imposition, inevitably, of increased operating costs on all the other participants. It is on these grounds that flags-of-convenience have increasingly proved attractive to some ship owners.

The owners of such shipping operate on the joint assumptions of: (1) the existence of a regulatory system (for example an anti-dumping or an anti-pollution convention) that ties the hands of the maritime nations that honor it; and (2) the effectiveness of the anomalies inherent in the flags-of-convenience system to permit the flags-of-convenience owners to be loosened from the restriction of such a regulatory system. They can thus directly profit from that system's restraints on others. (In such a context, of course, a flags-of-convenience state can become a party to violation of an anti-pollution convention. It is merely anticipated to fail, conspicuously and consistently, if not conscientiously, in performing its treaty obligation to police effectively the contaminating proclivities of ships privileged to fly its flag.) In this way, the anomalies created by resort to flags-of-convenience can undermine the effectiveness of international conventions directed to preventing, or at least greatly reducing, the incidents of the pollution of the sea by ships. Resort to flags-of-convenience thus exacerbates the tragedy of the already polluted common high seas and creates the condition for undermining any regulatory attempts to rationalize the use of that common resource. This is, surely, a classic example in the context of maritime environmental protection as "Gresham's law" was in precious metal currencies, that bad practices tend to drive out good when external restraints either do not exist or are ineffective.¹²³

¹²³ See *supra* note 57 and the citation therein for a reference to a decision of a "Gresham's Law" of shipping in *Flags*, *supra* note 97, at 221, note 1.